

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA10-1103

FIRST HORIZON HOME LOAN
CORPORATION

APPELLANT

V.

BANK OF FAYETTEVILLE and
CATHERINE L. BRUMLEY
EVANCHO

APPELLEES

Opinion Delivered March 30, 2011

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CV-09-3084-6]

HONORABLE MARK LINDSAY,
JUDGE

DISMISSED WITHOUT PREJUDICE

LARRY D. VAUGHT, Chief Judge

Appellant First Horizon Home Loan Corporation (First Horizon) brings this interlocutory appeal contending that the circuit court of Washington County erred in entering an order of summary judgment—dismissing its foreclosure complaint based on res judicata—in favor of separate appellee Bank of Fayetteville (BOF). We cannot reach the merits of the appeal because it must be dismissed for lack of a final order.

These parties have a history together, which includes three separate lower-court actions and one journey to the court of appeals. On August 20, 2004, Catherine Brumley (now Catherine Brumley Evancho) executed a promissory note and mortgage in favor of First Horizon in the amount of \$129,200. The mortgage was filed August 27, 2004. Thereafter,

on May 10, 2005, Brumley executed a promissory note and mortgage in favor of BOF, which was filed May 17, 2005. There is no dispute that BOF's mortgage was subordinate to First Horizon's mortgage.

When Brumley defaulted on her mortgage payments, BOF filed an action in circuit court to foreclose its second mortgage. First Horizon was a party to this foreclosure action. On February 19, 2008, a decree of foreclosure was entered granting BOF's foreclosure petition. The decree also dismissed First Horizon from the action to give it another opportunity to pursue its first lien on the property. Lastly, the decree reflected that BOF's lien was secondary to First Horizon's lien. Following the entry of the foreclosure decree, BOF pursued a commissioner's sale of the property. At the sale, on March 14, 2008, BOF purchased the property for \$25,000. A commissioner's deed was filed of record on March 20, 2008, naming BOF as the owner.

Thereafter, First Horizon initiated a nonjudicial foreclosure proceeding to claim its first lien on the property. On May 1, 2008, BOF filed an action in the circuit court of Washington County, CV 2008-1519-6, seeking to convert First Horizon's nonjudicial foreclosure into a judicial foreclosure, which was subsequently granted. This foreclosure hearing was held on October 23, 2008, and the trial court found that First Horizon failed to meet its burden of proof to foreclose its mortgage. In an order dated November 26, 2008, the trial court dismissed First Horizon's foreclosure action with prejudice. An amended order was later entered December 2, 2008. First Horizon did not appeal from either of these orders.

On September 18, 2009, First Horizon filed a complaint, which gives rise to the present appeal, against BOF and Brumley in the circuit court of Washington County, CV 2009-3084-6. First Horizon's complaint alleged that it held the first mortgage on the property now owned by BOF and sought to foreclose on its lien. First Horizon acknowledged the previous litigation in CV 2008-1519-6 and that an order of dismissal with prejudice was entered against it in that cause, but First Horizon claimed that this new action was proper because additional monthly payments were due and owed on its mortgage and that current issues were not fully and completely litigated in the previous action.

BOF moved to dismiss First Horizon's complaint pursuant to Arkansas Rule of Civil Procedure 12(b)(6) and the doctrine of res judicata. BOF also filed a counterclaim and an amended counterclaim against First Horizon, alleging abuse of process, lack of a justiciable issue, and misrepresentation. BOF's amended counterclaim also sought a declaratory judgment that the previously entered dismissal with prejudice against First Horizon nullified its first lien.

On March 29, 2010, the trial court entered an order of summary judgment dismissing First Horizon's complaint with prejudice. The trial court found that First Horizon's lien did not exist and struck it from the public record. The order also dismissed the complaint against Brumley Evancho for failure to perfect service. The order made no mention of either counterclaim filed by BOF.

First Horizon filed a timely appeal. BOF moved to dismiss the appeal, arguing that there was a lack of a final order and no appellate jurisdiction. On September 1, 2010, this

court agreed, handing down a per curiam decision dismissing First Horizon's appeal without prejudice. We held that because the order from which First Horizon appealed did not dispose of BOF's amended counterclaim and there was no Rule 54(b) certificate included, there was no final, appealable order, and we lacked jurisdiction.

Later in the afternoon of September 1, 2010, the trial court entered a supplemental order purporting to include a Rule 54(b) certificate. This supplemental order incorporated the March 29, 2010 order and quoted a statement of the trial court that "[o]f course [First Horizon] can appeal from the entry of this Order. My ruling today is appealable." The supplemental order then provided,

2. Through inadvertence the Rule 54(b) certificate was not included on a page subsequent to the signature of this Court as required by Ark. R. Civ. P. Rule 54[.]

3. That in order to supplement the Order of March 29, 2010, the Court finds as follows:

Rule 54(b) Certificate

With respect to the issues determined by the Judgment entered on March 29, 2010, the Court finds that this is a final appealable Order as relates to the parties and the foreclosing of a Mortgage which is the subject of this action. All other issues raised by the pleadings remain pending before this Court.

Upon the basis of the foregoing factual findings, the Court hereby certifies, in accordance with Rule 54(b)(1) Ark. R. Civ. P. that it has determined that there is not just reason for delay for the entry of a final judgment and that the Court has and does hereby direct that the Judgment shall be a final judgment for all purposes.

On September 29, 2010, First Horizon filed an appeal from the supplemental order. However, because the certificate does not comply with Rule 54(b), the order is not final and appealable.

An order that adjudicates fewer than all of the claims in a case is not a final judgment. *Swift Transp. Co. v. Turner*, 2009 Ark. App. 562, at 2. Nevertheless, Rule 54(b) of the Arkansas Rules of Civil Procedure permits entry of a final judgment in some instances where the court has disposed of fewer than all of the parties' claims, but the court must execute a proper Rule 54(b) certificate to do so. The rule requires an express determination, "supported by specific factual findings," that there is no just reason for delay, and the certificate must contain "the factual findings upon which the determination to enter the judgment as final is based." Ark. R. Civ. P. 54(b)(1). The factual findings must demonstrate that a likelihood of hardship or injustice will occur unless there is an immediate appeal, and the trial court must set forth facts to support its conclusion. *Swift*, 2009 Ark. App. 562, at 2–3.

Here, the Rule 54(b) certificate contains no specific factual findings explaining why a hardship or injustice would result if an immediate appeal were not permitted. This lack of factual specificity in the certificate does not meet the requirements of Rule 54(b) and is not sufficient to certify the appeal. *Follett v. Fitzsimmons*, 100 Ark. App. 347, 268 S.W.3d 902 (2007); *Rutledge v. Christ Is The Answer Fellowship, Inc.*, 82 Ark. App. 221, 105 S.W.3d 816 (2003); *Stouffer v. Kralicek Realty Co.*, 81 Ark. App. 89, 98 S.W.3d 475 (2003). Accordingly, we must dismiss the appeal for lack of finality. The dismissal is without prejudice. *Swift*, 2009 Ark. App. 562, at 3; *Follett*, 100 Ark. App. at 350, 268 S.W.3d at 905.¹

¹In the future, should First Horizon seek review of a final, appealable order, we take this opportunity to remind First Horizon of Arkansas Supreme Court Rule 4-2(a)(8), which provides that an addendum should contain all documents "that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal." We note that First Horizon's addendum is deficient in this regard in several areas, including

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Dismissed without prejudice.

GRUBER and BROWN, JJ., agree.

but not limited to failing to include copies of its April 21, 2010 notice of appeal, BOF's August 3, 2010 second amended counterclaim and third-party complaint against First Horizon, and our court's per curiam decision, *First Horizon Home Loan Corp. v. Brumley Evancho*, 2010 Ark. App. 573.