

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA09-870

PETER DANIELS JR.,

APPELLANT

V.

DARYL DAVIS,

APPELLEE

Opinion Delivered 17 MARCH 2010

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CV-2008-601-5]

THE HONORABLE JODI RAINES
DENNIS, JUDGE

DISMISSED

D.P. MARSHALL JR., Judge

This premature appeal is about a forfeiture under a real estate contract. We discuss the facts and the procedural history in some detail because both were extraordinary.

I.

Daryl Davis agreed to sell Peter Daniels Jr. a house and lot. Daniels agreed to pay Davis either \$40,000.00 or \$42,000.00*—\$2,000.00 up-front with a \$1,000.00 monthly payment. This was an executory contract. Daniels was not entitled to title

* The parties disputed the total in the their pleadings. The contract is ambiguous on this point. The circuit court made no explicit finding about the total price, but the judgment assumes the higher number.

until he had performed various covenants (such as handling taxes and insurance) and finished paying. For every late payment he owed a \$25.00 fee. If any monthly payment was thirty days late, then Daniels's equity under the contract could become liquidated damages "as a reasonable rental for the property." Davis could also recover "all of the expenses incurred . . . in connection with the prosecution of any remedies . . . including, without limitation, the reasonable attorney's fees . . ." Daniels made at least seventeen payments right on time. He apparently made another \$19,000.00 in payments—some split, some late, some after returned checks—which Davis accepted. The property, according to his lawyer, was Daniels's home.

With a few payments remaining, Davis sued for unlawful detainer and sought a writ of possession. He claimed that Daniels violated the contract by not paying—thus converting the sales agreement into a lease—and would not leave the property. Daniels responded that he had paid and had stood ready to make the last payments. Daniels risked losing possession of his home and the \$38,000.00 he had paid Davis toward the \$42,000.00 purchase price.

The case languished while Davis was between attorneys. Eight months after his first filing, Davis amended his complaint to seek damages and again sought possession. Daniels's response was the same: he had performed the contract and tendered the final payments. He also included a counterclaim.

[Davis], whose present action is merely an attempt to renege upon his obligations under the subject real property purchase contract herein, after the same has been performed by [Daniels] in every material way, seeks to repudiate the contract for further profit, and has refused in bad faith to accept [Daniels's] final payments due upon same.

[] That [Davis] should be directed to accept [Daniels's] tendered payments and other final specific performance under the contract herein, and to convey legal title to the property to [Daniels], as [Davis] expressly contracted to do.

. . . .

WHEREFORE, [Daniels] prays that [Davis's] amended complaint and request for writ of possession herein be denied and dismissed; for judgment on [Daniels's] counterclaim in the sums of \$25,000.00 compensatory and \$25,000.00 punitive damages

Four times this case was set for trial. The first was continued by mutual agreement. The third was continued on Daniels's motion. On the second trial date, Davis (who lives in Georgia) failed to appear. His mother was present, and she tried to proceed as his attorney-in-fact. Daniels moved to dismiss. But the court continued the case, suggesting to Davis's mother that her son needed to get a lawyer or appear in person or both. Almost two weeks before the fourth and final date, Davis again sought a writ of possession. Daniels did not respond. More importantly, Daniels failed to appear on the fourth trial date. The circuit court did not call the halls or telephone Daniels's lawyer; it proceeded to try the case without Daniels. Davis and his mother testified about their expenses—including installation costs for central heat and air, storm

doors, a roof repair, and Davis's airfare to the trial. They also testified that Daniels made some late payments and did not make his final payments. And their lawyer highlighted Daniels's failure to pay rent into the court's registry after the case began.

The court gave Davis almost everything he asked for. It issued the writ of possession. It awarded damages: \$4,000.00 of unpaid principal and interest; \$5,355.00 in lost rent; \$457.39 of accrued interest; \$485.00 in late fees and returned-check fees; \$1,200.00 in contractor's expenses for the doors, roof, and air conditioner installation; \$315.00 for travel expenses; \$247.00 in court costs; and a \$1,000.00 attorney's fee. The court also retained jurisdiction to award more damages: "[J]urisdiction of this matter is continued and reserved by the Court, and in the event . . . the subject premises have been damaged . . . [Davis] shall be entitled to petition the Court for a judgment for additional damages at that time." Under the resulting order, Daniels owes substantial damages while Davis gets the property through a last-minute forfeiture. See Glenn E. Pasvogel, Jr., *Mortgage Substitutes—The Law in Arkansas*, 9 U. ARK. LITTLE ROCK. L. REV. 433, 451–54 (1987). Neither the writ nor the order adjudicated Daniels's counterclaim.

A few days later, when his lawyer learned of these orders, Daniels sought relief from the circuit court. He claimed again that Davis would not accept the final payments. Though Daniels had been "prepared to try this matter on the merits at all

times[,]” his lawyer had miscalendared the fourth trial date. Daniels asked the court to overlook this mistake. To his post-trial motion, Daniels attached a pre-litigation letter from Davis saying that the contract had become unprofitable to him because of a problem with Davis’s bank notes and seeking concessions from Daniels. The court considered Daniels’s motion as a request for a new trial under Arkansas Rule of Civil Procedure 59. After a hearing, the court denied his motion. Daniels appeals.

II.

The theory of Daniels’s case was that Davis sued near the end of the contract because it was unprofitable. Daniels presses that it was unjust to grant the writ and damages after his lawyer’s calendar error—especially when Davis failed to appear at an earlier trial date but suffered no adverse ruling. Daniels says that, for various reasons, he was entitled to specific performance. And he argues that, in any event, the contract did not contemplate such extensive damages for breach. Davis responds in support of the court’s writ and orders. He stands on the court’s discretion to go forward with the fourth trial date. He also points out that Daniels made no payments into the court’s registry during the pendency of the case, which the unlawful-detainer statute requires. Ark. Code Ann. § 18-60-307(c)(2)–(3) (Supp. 2009).

We cannot reach the merits. We must dismiss because the case contains unresolved issues. Daniels appealed from the writ of possession and the damages order.

Neither order adjudicated Daniels's compulsory counterclaim; and the record shows that this counterclaim remains unresolved. *Bevans v. Deutsche Bank National Trust Co.*, 373 Ark. 105, 107, 281 S.W.3d 740, 742 (2008). There is no finality on damages, moreover, because the circuit court retained jurisdiction to award Davis other damages. *Fisher v. Chavers*, 351 Ark. 318, 320–21, 92 S.W.3d 30, 31–32 (2002). And the circuit court did not certify either the writ or the damages order pursuant to Rule of Civil Procedure 54(b). *Pro Transp., Inc. v. Volvo Trucks North America, Inc.*, 96 Ark. App. 166, 167–68, 239 S.W.3d 537, 539 (2006). Daniels's appeal is thus premature.

Dismissed without prejudice.

ROBBINS and GLOVER, JJ., agree.