

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA09-1238

MAY CONSTRUCTION COMPANY
APPELLANT

V.

TOWN CREEK CONSTRUCTION &
DEVELOPMENT, LLC; CHAMBERS
BANK OF NORTH ARKANSAS; and
OHIO CASUALTY INSURANCE
COMPANY

APPELLEES

Opinion Delivered October 27, 2010

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CIV-06-2438-4]

HONORABLE MARY ANN GUNN,
JUDGE

REMANDED

RITA W. GRUBER, Judge

May Construction Company appeals from an order declaring its lien on real property owned by Town Creek Construction & Development Company subordinate to a mortgage filed by Chambers Bank of Northwest Arkansas and unenforceable against a lien bond issued by appellee Ohio Casualty Insurance Company. Town Creek cross-appeals, arguing that May did not have a valid lien. For the reasons explained below, we remand the case to the circuit court.

In a written contract, May agreed to perform site work on Town Creek's residential development, Aspen Ridge. To finance the project, Town Creek obtained a loan from Chambers Bank, secured by a mortgage filed on July 20, 2005. May conducted some activity on the property prior to July 20, 2005, the extent of which is greatly disputed. Then, over

the next year, May did significant work on the project primarily through its subcontractor, Vernaci Construction. In August 2006, Town Creek terminated its contract with May based on various disputes. Vernaci filed suit in Washington County Circuit Court against May, Town Creek, Chambers Bank, and several other contractors and suppliers, which led to a number of cross-claims, counterclaims, and third-party claims. Among them, May sought money due from Town Creek under the construction contract and filed a mechanic's and materialman's lien against Town Creek's property. Later, Town Creek would default on its loan to Chambers Bank, leading Chambers to seek foreclosure of the same property.

May's contract claim against Town Creek went to arbitration, and the circuit court stayed the remainder of the lawsuit pending that outcome. In September 2007, the arbitrator awarded May \$393,995.56 plus attorney fees, and May returned to circuit court seeking confirmation of the award, foreclosure on its lien, and a declaration that its lien was superior to all others. Because Town Creek would later give Chambers Bank a deed to the Aspen Ridge property in lieu of foreclosure and had secured a lien bond to stand in place of the property, May also joined Ohio Casualty Insurance Company, which issued the bond. Thereafter, the court confirmed the arbitration award but found that May's lien was inferior to Chambers Bank's and could not be enforced against the Ohio Casualty bond. The instant appeal and cross-appeal come from those rulings.

We cannot reach the merits of the parties' arguments at this time because we are unable to determine from the abbreviated record whether the order appealed from is final.

The question of whether an order is final and appealable is a jurisdictional question that this court will raise on its own. *Century Indus., Inc. v. Reach-Assocs., LLC*, 2010 Ark. App. 455. Absent a certificate from the circuit court executed in accordance with Ark. R. Civ. P. 54(b)(2) (2010), an order that fails to adjudicate all claims as to all parties is not final for purposes of appeal. *Century Indus., supra*.

The record before us contains orders dismissing some of the claims in circuit court and indicating that other claims no longer remain, but we find no orders resolving those other claims, such as Vernaci's original plaintiff's complaint and May's third-party complaint against Vernaci. The circuit judge did state in her remarks from the bench that the other parties in this case had resolved their differences, and the order appealed from recites that it is a "final order"; that other claims asserted in the case were "separately dismissed or withdrawn prior to trial"; and that "the record reflects the state of all claims raised by all parties at various states in the litigation." But, the order does not contain a certificate pursuant to Ark. R. Civ. P. 54(b) (2010) that would allow for an immediate appeal despite the unresolved claims; nor does the order, or any other written order of record, reflect the court's disposition of all outstanding claims. *See Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008). Under these circumstances, we cannot say that we have a final order. *Id.*

We therefore remand to settle the finality issue. Appellant must, within fifteen days from this date, file a certified, supplemental record containing the orders that disposed of all outstanding claims of all parties. If such orders do not yet exist, appellant may, without regard

to the fifteen-day limit, either 1) obtain a final order disposing of all claims in the lawsuit, file a new notice of appeal from the order, and file a supplemental record accordingly; or 2) obtain an amended order with a proper Rule 54(b) certificate, from which a new notice of appeal must be filed, and file a supplemental record accordingly. If appellant files a new notice of appeal, appellee Town Creek must file a new notice of cross-appeal, which should also appear in the supplemental record.¹

After filing the supplemental record with this court, appellants must file, within fifteen days thereafter, a substituted abstract, brief, and addendum that includes the additional order or orders and notices of appeal and cross-appeal, sufficient to confirm that we have jurisdiction to hear the appeal. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i) (2010). Appellees may then file substituted briefs within the time prescribed by our supreme court clerk or may elect to stand on their current briefs.

Remanded.

HART and ROBBINS, JJ., agree.

¹If the parties file new notices of appeal, we direct them to revised Rule 3(e) of the Arkansas Rules of Appellate Procedure—Civil, which contains new requirements for the contents of a notice of appeal or cross-appeal. The revised rule was effective July 1, 2010. See *In Re: Arkansas Rules of the Supreme Court and Court of Appeals; Rules of Appellate Procedure—Civil; and Rules of Civil Procedure*, 2010 Ark. 288 (per curiam).