

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-997

TIM KILLIAN and TIM KILLIAN
GENERAL CONTRACTORS
APPELLANTS

V.

R.A. "REGGIE" GIBSON, SHEILA
GIBSON, R.A. GIBSON, INC., and
FIESTA BAY, LLC

APPELLEES

Opinion Delivered MARCH 30, 2011

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CV-2009-190-111]

HONORABLE THOMAS LYNN
WILLIAMS, JUDGE

DISMISSED

CLIFF HOOFFMAN, Judge

Appellant Tim Killian appeals the trial court's decision granting partial summary judgment to appellees, R.A. "Reggie" Gibson, R.A. Gibson, Inc., Sheila Gibson, and Fiesta Bay, LLC ("Gibson"), on Killian's complaint for breach of an oral contract between the parties and awarding Gibson \$206,192.02. Gibson's remaining counterclaims against Killian for breach of contract, fraud, and misrepresentation were dismissed without prejudice by the trial court. On appeal, Killian argues that (1) summary judgment was inappropriate when there were genuine issues of material fact sufficient to present those claims to a jury; (2) the trial court erred in finding that he did not meet "proof with proof"; and (3) summary judgment was an abuse of discretion where there was a pending motion for forensic

accounting that had yet to be decided by the trial court. We decline to address the merits, however, and must dismiss the appeal without prejudice due to the lack of a final, appealable order.

Killian filed a complaint against Gibson on February 11, 2009, alleging that Gibson breached their oral contract, under which Killian was to act as general contractor in building condominium projects on land owned by Gibson. According to the undisputed terms of this oral agreement, which began in 2004, Killian was to be paid for labor and materials on a cost-plus percentage basis (either 5% or 10% depending on the particular project), by submitting periodic draw requests. Killian alleged that Gibson eventually defaulted on these payments and requested that Killian obtain a loan to cover expenditures, which he did. Attached to the complaint is an agreement dated November 28, 2007, and signed by Gibson, stating that he was responsible for the \$351,840.37 loan and that he would make payments to Killian in the amount of \$15,000 per month, beginning in January 2008 until the debt was repaid. According to Killian, Gibson made only five payments on this loan, although Killian stated that these payments were mainly for interest due on the loan and that the full amount of the loan was still owed to the bank. Killian alleged in the complaint that Gibson owed this sum, plus \$875,000 representing the cost-plus fees owed for three condominium projects. After giving credit for \$149,000 in profit from the sale of land given by Gibson to Killian as partial payment, Killian alleged that the total amount owed by Gibson was \$1,077,840.37.

In his answer, Gibson moved to dismiss the complaint, denied Killian's allegations that he owed any additional money for the projects, and counterclaimed for breach of contract,

fraud and misrepresentation, declaratory judgment, and an accounting of all payments received and expended by Killian under the contract. Gibson claimed that Killian had falsified invoices and that Gibson had transferred two pieces of property to Killian for which he was not given credit, and that as a result, he had overpaid Killian.

On October 5, 2009, Gibson filed a motion for partial summary judgment, seeking to have Killian's complaint dismissed and for entry of a partial judgment in the amount of \$206,192.02 for overpayments made to Killian. Gibson attached his affidavit to the motion and listed all check payments made by him to Killian, which totaled \$14,948,837.12. Gibson also attached as an exhibit Killian's discovery response wherein he listed all payments made to him by Gibson, totaling \$14,026,601.32. Gibson further alleged that he was entitled to credit in the amount of \$200,000 for a real-estate lot ("Lot 1") deeded to Killian, as well as \$161,796.64 for another lot ("Lot 2"). Although Killian had claimed that he received only \$149,000 after paying fees associated with selling Lot 2, Gibson attached a settlement statement provided by Killian during discovery that listed the amount received as \$161,796.64. According to Gibson, the total amount that Killian had failed to credit him was \$1,284,032.44. Because the complaint sought judgment against Gibson in the amount of \$1,077,840.37, Gibson argued that he was thus entitled to a judgment of \$206,192.02 against Killian. The motion for partial summary judgment specifically stated that Gibson was not seeking a final judgment for his causes of action for fraud and misrepresentation and breach of contract.

After several responsive pleadings by both parties, the trial court held a hearing on the summary judgment motion on April 15, 2010. Following the hearing, the trial court found that Killian had failed to meet “proof with proof” and that there were no genuine issues of fact remaining. In an order entered on June 15, 2010, the trial court granted summary judgment in favor of Gibson, dismissed Killian’s complaint with prejudice, and awarded Gibson \$206,192.02. After Gibson filed a motion to nonsuit his remaining counterclaims, the trial court entered an order on July 2, 2010, dismissing the remaining claims without prejudice and stating that the order granting partial summary judgment was a final judgment between the parties. There was no Rule 54(b) certificate in the order. Killian then filed a timely notice of appeal from the June 15, 2010 and July 2, 2010 orders.

Although the parties do not raise it, a preliminary issue that must be addressed is whether the partial grant of summary judgment is a final, appealable order in this case. It is well settled that, absent a certificate from the trial court that directs that the judgment is final and that conforms with the requirements of Ark. R. Civ. P. 54(b), an order or judgment is not considered final if it does not dispose of all of the parties and of all of the claims. Ark. R. Civ. P. 54 (2010). The issue of whether an order is final is a jurisdictional matter, and it is one that this court must consider even if the parties do not raise it. *May Constr. Co. v. Town Creek Constr. & Dev., LLC*, 2010 Ark. App. 711.

According to Ark. R. Civ. P. 41(a)(1) (2010), a claim may be dismissed without prejudice at any time before final submission of the case to a jury. This also applies to the dismissal of counterclaims, cross-claims, or third-party claims under Rule 41(c). Because

counterclaims that have been voluntarily dismissed pursuant to Rule 41(a) have an absolute right to be refiled one time within the time period provided by the savings statute, Ark. Code Ann. § 16-56-126 (Repl. 2005), our supreme court has held that an order or judgment providing for the nonsuit of compulsory counterclaims while entering a judgment on the plaintiff's claims is not a final, appealable order under Rule 54(b). *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008); *Haile v. Ark. Power and Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995). The court in *Bevans* explained that "if a party is free to refile his or her compulsory counterclaims that arise out of the same transaction or occurrence as claims that are decided by the circuit court, the possibility for piecemeal litigation exists." 373 Ark. at 109, 281 S.W.3d at 744.

In this case, Gibson's counterclaims for breach of contract, fraud, and misrepresentation alleged that Killian had performed negligently under the contract and that he had committed fraud and misrepresentation by falsifying invoices for work performed and materials purchased. These counterclaims arose out of the same transaction or occurrence as Killian's breach-of-contract claim against Gibson and were compulsory counterclaims as discussed in *Bevans*. Although both *Bevans* and *Haile* involved appellants who had nonsuited their counterclaims and then appealed the adverse judgment against them, in *Crockett v. C.A.G. Investments, Inc.*, 2010 Ark. 90, 361 S.W.3d 262, our supreme court dismissed an appeal for lack of a final order where the appellee had nonsuited a compulsory counterclaim, which is also the case here.

Cite as 2011 Ark. App. 245

Therefore, because the partial-summary-judgment order in this case is not a final, appealable order, we must dismiss the appeal without prejudice.

Dismissed.

HART and ROBBINS, JJ., agree.