

Cite as 2023 Ark. App. 431
ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-136

KENMARK OPTICAL, INC.

APPELLANT

V.

CHARLES FORD

APPELLEE

Opinion Delivered October 4, 2023

APPEAL FROM THE CARROLL
COUNTY CIRCUIT COURT,
WESTERN DISTRICT
[NO. 08WCV-19-24]

HONORABLE SCOTT JACKSON,
JUDGE

DISMISSED WITHOUT PREJUDICE

ROBERT J. GLADWIN, Judge

This is an appeal of the Carroll County Circuit Court’s denial in part of a motion for partial summary judgment filed by appellant, Kenmark Optical, Inc. (Kenmark). As a preliminary matter, Kenmark contends that the order of the court is an appealable order—pursuant to Arkansas Rule of Appellate Procedure—Civil 2(a)(4)—because the ruling of the court effectively ruled on an affirmative defense preventing presentation of the defense at trial. Regarding the merits, Kenmark argues (1) that the court erred by including factual findings and conclusions of law in the summary-judgment order, which effectively ruled on its unconstitutionality defense; and (2) that the circuit court erred by amending Arkansas Code Annotated sections 4-70-301 et seq. (Repl. 2011) instead of declaring them in violation

of the United States Constitution's Commerce Clause and Equal Protection Clause. We dismiss for lack of a final, appealable order.

I. *Background Facts*

Kenmark is a corporation registered in Kentucky that does not have a physical place of business in Arkansas. The appellee, Charles Ford (Ford), was a sales representative of Kenmark and resides in Eureka Springs, Arkansas. Since 1988, Ford has solicited orders for Kenmark's optical products from opticians and other businesses on behalf of Kenmark in Arkansas. Ford's employment was terminated on February 1, 2019.

On April 23, Ford filed a complaint against Kenmark for its alleged willful failure to pay commissions in violation of Ark. Code Ann. §§ 4-70-301 et seq. and unjust enrichment. Specifically, Ford alleges that as of the date of termination, he sold products and received orders that were to be delivered in the future, and Kenmark has withheld those commissions, despite demand. Furthermore, he contends that he is entitled to commissions from all gross sales shipped post-termination that were developed and sold by him and that continue to generate orders for Kenmark. Because no written contract detailing the commission schedule exists, Ford maintains that statutory law requires Kenmark to pay the requested commission and that Kenmark is liable for treble damages pursuant to Ark. Code Ann. § 4-70-303.

On June 6, Kenmark filed its answer denying Ford's allegations and asserted several affirmative defenses, including that Ark. Code Ann. §§ 4-70-301 et seq. are unconstitutional and in violation of the Commerce Clause and Equal Protection Clause of the United States Constitution. On April 28, 2020, Kenmark moved for partial summary judgment regarding

its alleged willful failure to pay commissions in violation of statutory law, arguing that the statutes in question are unconstitutional; thus, it is entitled to a declaration from the circuit court that Ark. Code Ann. §§ 4-70-301 et seq. violate the Commerce Clause and Equal Protection Clause of the Constitution.

Ford filed his response and argued that Kenmark's motion was improper because it was not based on any underlying counterclaim (or justiciable controversy) but, rather, an affirmative defense for which Ford has no ability to answer; therefore, the motion is not ripe and should be denied. Regarding the merits of the motion, Ford maintained (1) that dismissal of count one is not appropriate when a provision—if deemed unconstitutional by the court—can simply be severed from the remainder of the act when doing so does not defeat its purpose; and (2) the motion should be denied because Kenmark failed to set forth any competent evidence in support of its proposition that the statutes are unconstitutional.

On April 13, 2021, the circuit court held a hearing on the motion and took it under advisement. On November 3, the circuit court issued its order granting Kenmark's partial-summary-judgment motion in part and denying it in part. Specifically, the court held:

Plaintiff's count one is similarly actionable as to out-of-state vendors as well as in-state vendors for failure to pay commissions to their sales representatives, but the two sets of defendants are treated differently when measuring damages.

Based upon the foregoing, defendant's motion for summary judgment is granted in part and denied in part. Defendant's motion for partial summary judgment is denied as it pertains to the claim stated in paragraph 32 of the plaintiff's complaint. Defendant's motion for summary judgment is granted as it pertains to the measure of damages as stated in paragraphs numbered 31 and 33 of plaintiff's complaint.

Paragraph 32 of Ford’s complaint relates to Kenmark’s alleged failure and refusal to pay the commissions due to Ford pursuant to a written commission schedule, and paragraphs 31 and 33 relate to an award of treble damages pursuant to Ark. Code Ann. § 4-70-306. Essentially, the circuit court’s order left Ford’s claim for failure to pay commission in place but barred Ford from seeking statutory treble damages. Afterward, Kenmark sought an Arkansas Rule of Civil Procedure 54(b) certificate from the circuit court; however, no certificate was issued. Kenmark filed a timely notice of appeal; this appeal followed.

II. *Standard of Review*

The question whether an order is final and appealable is jurisdictional, and this court is obligated to consider the issue on its own even if the parties do not raise it. *Price v. Carver*, 2017 Ark. App. 75, at 2, 513 S.W.3d 877, 879. The requirement that an order must be final and appealable is observed to avoid piecemeal litigation. *Id.* An order is final if it dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *Id.* at 3, 513 S.W.3d at 879. An order is *not* final, therefore, when it adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties. *Id.*

III. *Discussion*

Kenmark contends that the circuit court’s denial of partial summary judgment is an appealable order pursuant to Rule 2(a)(4) of the Arkansas Rules of Appellate Procedure—Civil. Specifically, Kenmark characterizes the court’s refusal to declare Ark. Code Ann. §§ 4-70-301 et seq. unconstitutional—on their face—an “effective ruling” on its affirmative defense of unconstitutionality such that prevents presentation of the defense at trial. In

response, Ford argues that the order on appeal did not strike any part of Kenmark's answer; thus, this court lacks jurisdiction, and the appeal must be dismissed for lack of a final order. We agree.

The rule is well-established that a denial of summary judgment is deemed an interlocutory order and not a final order from which appeal may be taken. See Ark. R. App. P.–Civ. 2. However, our supreme court has allowed the appeal of a denial of a motion for summary judgment when the circuit court in so ruling engages in fact finding that effectively rules on a party's defense. See *BPS, Inc. v. Parker*, 345 Ark. 381, 47 S.W.3d 858 (2001). Here, Kenmark relies heavily on *Parker* to establish appellate jurisdiction.

In *Parker*, the circuit court's order on appeal consisted of eighteen pages—titled “Joint Findings of Fact and Conclusions of Law”—wherein the circuit court actually ruled on the defendant's affirmative defense of the Firemen's Rule. Specifically, the circuit court made factual finding such as “BPS acted with willful and wanton misconduct in concealing a hidden danger,” *id.* at 386, 345 S.W.3d at 862, and concluded that “the pleadings and evidence just do not lend themselves to the conclusion that this drastic remedy of the Firemen's Rule should be invoked by this Court.” *Id.* at 388, 345 S.W.3d at 863. In conclusion, our supreme court held that the portion of the order wherein findings of fact and conclusions of law were made effectively ruled on the affirmative defense; thus, it was a final disposition and appealable.

This appeal, however, is distinguishable from *Parker*. First, we find nothing in the circuit court's order that serves as a final disposition regarding the constitutionality of Ark.

Code Ann. §§ 4-70-301 et seq. Second, the circuit court's order does not prevent Kenmark's presentation of any defense at trial. For this court to have jurisdiction under Ark. R. App. P.-Civ. 2(a)(4), the appeal must be from "[a]n order which strikes out an answer, or any part of an answer, or any pleading in an action. . . ." Further, Kenmark requested an Ark. R. Civ. P. 54(b) certification of final judgment from the circuit court, which was not granted; therefore, appellate jurisdiction under Ark. R. App. P.-Civ. 2(a)(11) is also not established. Accordingly, Kenmark has appealed from a nonfinal order.

IV. *Conclusion*

For the above-stated reasons, the order appealed from lacks finality; therefore, we dismiss the appeal without prejudice.

Dismissed without prejudice.

GRUBER and MURPHY, JJ., agree.

Clark Law Firm PLLC, by: *Suzanne G. Clark* and *Payton C. Bentley*, for appellant.

Miller, Butler, Schneider, Pawlik & Rozzell, PLLC, by: *Goerge M. Rozzell IV*, for appellee.