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SUPREME COURT OF ARKANSAS

No. 09-1011

GRAND VALLEY RIDGE, LLC; THOMAS "TOM" A. TERMINELLA; MYRON T. MORTER; TOM and ANNA MORTER LIVING TRUST; MILTON T. MORTER, III; MILTON T. MORTER, III LIVING TRUST,

APPELLANTS,

VS.

METROPOLITAN NATIONAL BANK,

APPELLEES,

Opinion Delivered October 28, 2010

AN APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS, NO. CV-07-1347-2, HONORABLE KIM MARTIN SMITH, CIRCUIT JUDGE,

APPEAL DISMISSED WITHOUT PREJUDICE.

ELANA CUNNINGHAM WILLS, Associate Justice

Appellants Grand Valley Ridge, LLC ("Grand Valley"), Tom A. Terminella ("Terminella"), and others appeal from several orders of the Washington County Circuit Court, including the court's orders: sustaining the objection of appellee Metropolitan National Bank ("MNB") to Terminella's request for a jury trial; granting summary judgment to MNB on the question of Terminella's standing; finding that the promissory note in question in this case was a demand note; and finding that Arkansas does not recognize a cause of action for breach of the covenant of good faith. Because Grand Valley and Terminella raise issues regarding the right to a jury trial pursuant to the Arkansas Constitution, our jurisdiction is proper pursuant to Arkansas Supreme Court Rule 1-2(a)(1). Because we

conclude that there is a counterclaim that has not been resolved, however, we dismiss this appeal without prejudice under Arkansas Rule of Civil Procedure 54(b).

In August 2005, Terminella presented a request for financing to MNB, seeking to fund the completion of the Grand Valley Ridge subdivision in Washington County. MNB agreed to loan Grand Valley $9,630,000.00, and on September 13, 2005, Grand Valley executed, among other documents, a promissory note, a construction loan agreement, and a construction mortgage. Separately, Terminella executed a commercial guaranty.

According to an August 22, 2005 Commercial Credit Memorandum, the loan had a one-year "interest carry." Grand Valley and MNB budgeted $572 thousand of the project for this interest carry. Commencing in October 2005, Grand Valley authorized MNB to draft each month's interest payments. By September 2006, Grand Valley had drawn $453 thousand in interest carry. In October 2006, Terminella made an out-of-pocket payment on the interest, and he indicated to MNB that Grand Valley would not be able to carry the monthly interest. Grand Valley subsequently asked MNB whether it would consider changing the terms of the loan from interest due monthly to interest due annually in order to allow Grand Valley to complete the first phase of its subdivision and market the lots. MNB denied the request, but elected to allow Grand Valley to utilize the remaining interest carry that had been in the original budget, or approximately $94,000.

Grand Valley failed to make its interest payments from January 2007 through April 2007. In April and May 2007, MNB sent several memoranda to Terminella attempting to

work out an arrangement on the loan. The parties were apparently unable to reach an agreement, however, and MNB filed a petition for foreclosure on May 30, 2007.

Terminella and Grand Valley filed an answer that denied the loan was in default. In addition, they filed a counterclaim alleging that MNB had breached the contract. The counterclaim also raised counts of constructive fraud, promissory and equitable estoppel, conversion, negligence, and breach of the covenant of good faith and fair dealing. In an amended counterclaim, Terminella and Grand Valley raised claims of breach of contract and tortious interference with a business expectancy. A second amended counterclaim reasserted the claims of breach of contract, negligence, and interference with contract, and included a demand for a jury trial.

MNB filed a motion objecting to Terminella and Grand Valley's demand for a jury trial, arguing that, because the lawsuit was fundamentally an equitable action for foreclosure, there was no right to a jury trial. The circuit court entered an order on October 13, 2008, sustaining MNB's objection to the jury-trial demand and setting the case for a bench trial. MNB also filed a motion for summary judgment in which it contended, among other things, that Terminella, as guarantor, lacked standing to assert any individual action against the bank. The trial court agreed and granted MNB's summary-judgment motion on that issue.

The case proceeded to a bench trial in October of 2008. During the course of the trial, Terminella and Grand Valley moved to take a voluntary nonsuit of their claims of negligence and tortious interference with contract. The circuit court entered an order

granting the motion pursuant to Ark. R. Civ. P. 41(a)(1) on October 30, 2008, dismissing Counts II and III without prejudice.[1]

The circuit court ultimately issued a letter opinion on February 3, 2009, in which it found that MNB had not breached the contract with Grand Valley. The court further found that the note between Grand Valley and MNB was a demand note and that Grand Valley failed to pay the balance due thereon. In addition, the court rejected Grand Valley's claims that MNB had breached the implied covenant of good faith and fair dealing, finding that Arkansas does not recognize such a cause of action. The court concluded that MNB was entitled to judgment on its decree of foreclosure and to a dismissal of the second amended counterclaim. A foreclosure decree, which adopted and incorporated the letter opinion, was entered on February 27, 2009, and Terminella and Grand Valley have taken this appeal therefrom. Neither the letter opinion nor the foreclosure decree, however, contained a certificate authorizing an appeal pursuant to Rule 54(b).

This lack of a Rule 54(b) certification creates a jurisdictional situation that this court must address prior to considering the merits of the arguments raised on appeal. Although neither party raises this issue, it is axiomatic that the question of whether an order is final and

[1]Although the order states at one point that it is dismissing Terminella and Grand Valley's "causes of action for breach of contract and interference with a contract," the court explicitly ruled from the bench that it was dismissing the negligence and tortious interference claims, and the order itself also states that it is dismissing "Counts II and III of [the] Second Amended Counterclaim." Counts II and III were the claims of negligence and interference with a contract. Therefore, the court's statement in the order that it was dismissing the "breach of contract" cause of action appears to be a scrivener's error.

subject to appeal is a jurisdictional question that this court will raise sua sponte. *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432; *McKinney v. Bishop*, 369 Ark. 191, 252 S.W.3d 123 (2007). Rule 54(b) of the Arkansas Rules of Civil Procedure deals with the finality of orders in connection with judgments upon multiple claims or involving multiple parties. *See Hanners v. Giant Oil Co. of Ark., Inc.*, 369 Ark. 226, 253 S.W.3d 424 (2007). The rule provides, in pertinent part, as follows:

> (1) *Certification of final judgment*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment.

In the present case, as noted above, Grand Valley and Terminella filed a counterclaim against MNB that raised three causes of action: breach of contract, negligence, and interference with business expectancies. Grand Valley and Terminella asked for a voluntary nonsuit as to two of these three claims—negligence and interference with business expectancies—and the circuit court granted that motion and dismissed those claims *without prejudice*. Thus, there remains "a dangling issue that has yet to be decided." *Crockett v. C.A.G. Investments, Inc.*, 2010 Ark. 90, 361 S.W.3d 262.

In *Crockett*, *supra*, appellant Crockett filed a complaint in circuit court seeking to reform a deed as well as a *lis pendens*. Appellee C.A.G. Investments answered the complaint, moved to quash the *lis pendens*, and subsequently filed a counterclaim for tortious interference

with a business expectancy against Crockett. Crockett then amended her complaint to add a claim for breach of contract, and C.A.G. moved for summary judgment on several issues. A few weeks later, Crockett moved for a voluntary nonsuit of her reformation claim. The court granted that motion, but her breach-of-contract claim remained pending. *Crockett*, 2010 Ark. 90, 4–5. The trial court then granted C.A.G.'s motion for summary judgment but did not address C.A.G.'s outstanding counterclaim. Crockett appealed that decision to the court of appeals but moved to dismiss that appeal once it was discovered that the counterclaim was still pending. The court of appeals granted her motion. *Id*. at 5–6.

After the appeal was dismissed, C.A.G. moved for a voluntary nonsuit of its counterclaim in circuit court. The court granted C.A.G's motion and dismissed the counterclaim without prejudice. When C.A.G. moved to certify the order as a final judgment, the circuit court entered an order that stated that, because "this Order and Judgment finally and fully concludes all issues pending herein . . . , there is therefore no need for a separate Ark. Rule of Civil Procedure 54(b) certificate." *Id*. at 6. Crockett appealed, but this court dismissed the appeal without prejudice.

In so doing, this court noted that the dismissal of C.A.G.'s compulsory counterclaim was without prejudice, which meant that it was subject to being refiled. *Id*. at 8. Accordingly, the order from which the appeal was taken was not a final, appealable order under Rule 54(b). *Id*. at 10. *See also Bevans v. Deutche Bank Nat'l Trust Co*., 373 Ark. 105, 281 S.W.3d 740 (2008) (where defendant nonsuited compulsory counterclaims, and trial court's order

addressed only the plaintiff's claims, the defendant was not barred from later refiling counterclaims against plaintiff, and order was therefore not final and appealable); *Haile v. Ark. Power & Light*, 322 Ark. 29, 907 S.W.2d 122 (1995) (a plaintiff may not take a voluntary nonsuit as to some of its claims and then appeal from the circuit court's order disposing of other claims, because a voluntary nonsuit without prejudice leaves the plaintiff free to refile the claim; therefore, the order is not final).

In the present case, as discussed above, the circuit court granted Grand Valley and Terminella's motion for voluntary nonsuit without prejudice. Under *Crockett*, *supra*, and *Bevans*, *supra*, the voluntary nonsuit of the negligence and interference-with-business-expectancies claims did not operate to make the February 3, 2009 order final and appealable because the counterclaims can be refiled. Accordingly, as there is no final and appealable order, this court lacks jurisdiction, and the appeal must be dismissed without prejudice.

Special Justice MISSY MCJUNKINS DUKE joins.

BROWN, J., not participating.