

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 16, 2023 Session

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Appellate Courts

INFINITY HOMES, INC. ET AL. v. HORIZON LAND TITLE, INC. ET AL.

**Appeal from the Chancery Court for Wilson County
No. 2020-CV-314 Charles K. Smith, Chancellor**

No. M2022-00829-COA-R3-CV

Appellants, purchasers of several unimproved lots, filed suit against Appellee title company.¹ Appellants asserted five counts against Appellee based on Appellee’s alleged failure to disclose the existence of a *lien lis pendens* on the lots. The trial court dismissed all but one of the counts against Appellee and certified its orders of partial dismissal as final pursuant to Tennessee Rule of Civil Procedure 54.02. We conclude that the trial court improvidently certified its orders as final and dismiss the appeal for lack of subject-matter jurisdiction.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Reid D. Leitner and Michael Andrew Caskey, Nashville, Tennessee, for the appellants, Infinity Homes, Inc., Raymond Timothy Stephens, and Ryan Stephens Custom Homes, Inc.

Gary K. Grooms, Nashville, Tennessee, for the appellee, Fidelity National Title Insurance Company.

OPINION

I. Background

On April 5, 2018, Infinity Homes, Inc., Raymond Timothy Stephens, and Ryan Stephens Custom Homes, Inc. (together, “Appellants”) purchased three, lake-front, subdivision lots (*i.e.*, lots 52, 54, and 57). Appellants intended to build on the lots and then

¹ Appellants also filed suit against the seller, and the title insurance company’s attorney and underwriter. As the instant appeal involves only the dismissal of claims against the title insurance company, none of the other named defendants are participating.

re-sell them. Title insurance policies for the three lots (the “policies”) were underwritten by Fidelity National Title Insurance Co. (“Fidelity”). At the time of purchase, Appellants were unaware that there was a pending lawsuit involving the lots, *i.e.*, *Tracy L. Pickard v. Corbitt Developing & General Contracting, LLC, Kelly Corbitt, Sean Corbitt, George Atwood, and Andy Atwood*. The lawsuit was filed by a subcontractor against the developer of the subdivision; the subcontractor claimed that, under his contract with the developer, he was to receive a lake-front lot for some of his work. The subcontractor sued for specific performance of the contract and filed a *lien lis pendens* giving notice of his claim. Appellants maintain that, prior to the sale, Fidelity and the other named defendants had actual knowledge of the *lien lis pendens* but failed to disclose the encumbrance to Appellants. Appellants claim that they would not have purchased the lots had they known about the lien.

On discovering the lien, Appellants made claims under the policies. Because the policies did not except the *lien lis pendens* from coverage, Fidelity accepted coverage and intervened in the subcontractor’s case to defend Appellants’ title. Fidelity succeeded in defending the challenge to title because the court, in the *Pickard* action, held that the *lien lis pendens* was “null and void” because it was not properly certified by the clerk and master as required by Tennessee Code Annotated section 20-3-101. Fidelity claims that, under the plain and unambiguous terms of the policies, its liability ended when it successfully defended Appellants’ title. Appellants contend, *inter alia*, that Fidelity’s delay in clearing the titles resulted in damages to them due to the fact that they were unable to proceed with improvements and/or re-sell of the lots.

On December 30, 2020, Appellants filed suit; two amended complaints were filed on January 15, 2021, and October 21, 2021, respectively. In their second amended complaint, Appellants asserted seventeen counts against the named defendants. As is relevant to the instant appeal, Appellants asserted the following counts against Fidelity: (1) Count V(A) vicarious liability for wrongful acts of agent and its approved attorney; (2) Count V(B) vicarious liability for breach of extra-contractual duty assumed by agent; (3) Count VI coverage for attorney fees; (4) Count VII negligence per se; (5) Count VIII breach of contract; and (6) Count XIV egregious breach of contract.

On February 8, 2021, Appellants filed a motion for partial summary judgment on Count VI against Fidelity. On June 16, 2021, Fidelity filed a cross-motion for summary judgment for dismissal of all claims against Fidelity. By order of July 21, 2021, the trial court granted the partial summary judgment motion as to the fees claimed in Appellants’ Count VI. The trial court certified its July 21, 2021 order as final under Tennessee Rule of Civil Procedure 54.02 but continued the hearing on Fidelity’s cross-motion.

By order of May 19, 2022, the trial court dismissed all counts against Fidelity with the exception of Count VII (negligence per se) and Count XIV (egregious breach of contract). The trial court certified its dismissal of the claims against Fidelity as partial final

judgments under Rule 54.02. On June 16, 2022, Appellants filed a notice of appeal with this Court as to the claims against Fidelity that had been dismissed and certified as partial final judgments.

On June 17, 2022, Fidelity filed a motion to alter or amend the May 19, 2022 order, seeking dismissal of the remaining Counts VII and XIV. Before the trial court ruled on the motion, Fidelity filed a second motion for summary judgment as to the remaining counts. By order of October 4, 2022, the trial court denied Fidelity's motion to alter or amend. However, by order of September 26, 2022, the trial court granted Fidelity's second motion for summary judgment as to Count XIV but denied Fidelity's motion as to Count VII. The trial court certified its dismissal of Count XIV as a partial final judgment under Rule 54.02, but the trial court did not adjudicate Count VII, *i.e.*, negligence per se.

On October 7, 2022, Fidelity filed a notice of appeal with this Court as to the partial final judgment contained in the September 26, 2022 order. On October 10, 2022, Appellants filed a motion in this Court to consolidate the two appeals. By order of October 11, 2022, this Court granted consolidation.

II. Issues

Appellants raise the following issues for review as stated in their brief:

1. Whether the three (3) orders of final judgment in the Order entered on May 19, 2022, as well as the order of final judgment entered on September 26, 2022, are appropriate for certification under Tenn. R. Civ. P. 54.02 because they are based on different statements of operative facts in Plaintiffs' Second Amended Complaint, and seek different "Claims for Relief" arising separately under Contract Law, Tort Law, and Agency Law.
2. Whether dismissal of Count V(A) regarding Fidelity's vicarious liability for the negligence and/or fraudulent acts/omissions of its title insurance agent and the agent's approved attorney was appropriate in view of genuine issues of material fact regarding actual fraud and Fidelity's ratification of the acts/omissions of its title insurance agent and the agent's approved attorney, especially in light of Fidelity's intrinsically fiduciary relationship with Plaintiffs.
3. Whether dismissal of Count V(B) regarding Fidelity's vicarious liability for breach of extra-contractual duty assumed by Fidelity through its title insurance agent and the agent's approved attorney was appropriate in view of genuine issues of material fact regarding assumption of extra-contractual duties by the title insurance agent and approved attorney.
4. Whether dismissal of Counts V(A), V(B), VIII, and XIV based on Conditions 9 and 15(b) of the relevant title insurance policies was appropriate where said provisions were unenforceable as unconscionable provisions in

contracts of adhesion, and in view of the fraudulent concealment by Fidelity's agent and the fact that Plaintiffs would not have purchased the lots or the insurance policies if Fidelity's agent had disclosed to Plaintiffs the lien *lis pendens* and underlying lawsuit against the relevant lots.

5. Whether the Trial Court appropriately determined that the limitation on liability in Condition 15(b) of the relevant title insurance policies applies to the claims in Counts V(A) and V(B) where Plaintiffs' claims do not arise out of "status of title."

6. Whether dismissal of Counts VIII and XIV for breach of contract for failure to pursue curative litigation in a reasonably diligent manner was appropriate in view of genuine issues of material fact, especially after the Trial Court previously entered a partial final judgment which held that Fidelity unreasonably delayed in retaining counsel to pursue curative litigation.

7. Whether dismissal of Count XIV regarding egregious breach of insurance contract by failure to settle the underlying claims was appropriate in view of genuine issues of material fact which show Fidelity's actual knowledge that its title insurance agent failed to disclose a *lien lis pendens* to Plaintiffs, Fidelity's knowledge that it failed to obtain a reasonable title search and examination as required under Tenn. Code Ann. § 56-35-129, and Plaintiffs' notice to Fidelity that time was of the essence to resolve the underlying claims and avoid ongoing damages to Plaintiffs.

III. Discussion

Although review on appeal generally extends only to those issues presented for review, appellate courts must also consider "whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13(b). "Lack of appellate jurisdiction cannot be waived." *Ingram v. Wasson*, 379 S.W.3d 227, 237 (Tenn. Ct. App. 2011). Pursuant to the mandates of Rule 13(b), we have reviewed the appellate record and conclude that this Court lacks subject-matter jurisdiction over the appeal.

We begin by examining the "'avenue' by which the appeal is being pursued before this Court." *Town of Collierville v. Norfolk S. Ry. Co.*, 1 S.W.3d 68, 69-70 (Tenn. Ct. App. 1998). "Unless an appeal from an interlocutory order is provided by the rules or by statute, appellate courts have jurisdiction over final judgments only." *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990). Here, appeal is taken under Tennessee Rule of Appellate Procedure 3, which provides:

Except as otherwise permitted in [R]ule 9 and in Rule 54.02 [of the] Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for

relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

As noted above, the trial court did not adjudicate Count VII, *i.e.*, negligence per se against Fidelity. Rather, the trial court purported to certify the case as final under Tennessee Rule of Civil Procedure 54.02, which provides:

When more than one claim for relief is present in an action, . . . or when multiple parties are involved, the Court, whether at law or in equity, 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 that there is no just reason for delay and upon an express direction for the entry of judgment.

This Court has held that Rule 54.02 “is an exception to Rule 3 that permits the trial court, without permission from the appellate court, to certify an order as final and appealable, even if parts of the overall litigation remain pending in the trial court.” *Johnson v. Nunis*, 383 S.W.3d 122, 130 (Tenn. Ct. App. 2012). Rule 54.02 allows a “trial court to convert an interlocutory ruling into an appealable order.” *Mann v. Alpha Tau Omega Fraternity*, 380 S.W.3d 42, 49 (Tenn. 2012). However, “the trial court’s authority to direct the entry of a final judgment is not absolute.” *Brentwood Chase Cmty. Ass’n v. Truong*, No. M2014-01294-COA-R3-CV, 2014 WL 5502393, at *2 (Tenn. Ct. App. Oct. 30, 2014) (citing *Crane v. Sullivan*, No. 01A01-9207-CH-00287, 1993 WL 15154, at *1-2 (Tenn. Ct. App. Jan. 27, 1993)). “Rule 54.02 does not apply to all orders that are interlocutory in nature.” *Konvalinka v. Am. Int’l Grp., Inc.*, No. E2011-00896-COA-R3-CV, 2012 WL 1080820, at *3 (Tenn. Ct. App. Mar. 30, 2012). In fact, an order can only be certified as final in limited circumstances. *Johnson*, 383 S.W.3d at 130. Because Rule 54.02 provides that a trial court may “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties,” the order certified as final must be dispositive of an entire claim or party. *Bayberry*, 783 S.W.2d at 558.

“The determination of whether Rule 54.02 certification is proper is not always easy.” *Ingram*, 379 S.W.3d at 238. However, this Court has set out two requirements for the proper certification of a final judgment under Rule 54.02: (1) the order must eliminate one or more but fewer than all of the claims or parties, and (2) the order must expressly direct the entry of final judgment upon an express finding of “no just reason for delay.” *FSG Bank, N.A. v. Anand*, No. E2011-00168-COA-R3-CV, 2012 WL 554449, at *4 (Tenn. Ct. App. Feb. 21, 2012) (quoting *Carr v. Valinezhad*, M2009-00634-COA-R3-CV, 2010 WL 1633467 at *2 (Tenn. Ct. App. Apr. 22, 2010)).

On appeal, this Court reviews a trial court’s Rule 54.02 certification of a judgment as final using a dual standard of review. *King v. Kelly*, No. M2015-02376-COA-R3-CV,

2016 WL 3632761, at *3 (Tenn. Ct. App. June 28, 2016); **Brown v. John Roebuck & Assocs., Inc.**, No. M2008-02619-COA-R3-CV, 2009 WL 4878621, at *5 (Tenn. Ct. App. Dec. 16, 2009). The initial determination of whether a particular order disposes of a distinct and separable “claim” that is subject to Rule 54.02 certification is a question of law, which we review *de novo*. **Ingram**, 379 S.W.3d at 238; **Brown**, 2009 WL 4878621, at *5. If the order properly disposes of an entire claim or party, this Court must then determine whether “there is no just reason for delay” within the meaning of Rule 54.02. The trial court’s determination as to this issue is reviewed under an abuse of discretion standard. **King**, 2016 WL 3632761, at *3; **Ingram**, 379 S.W.3d at 238.

Turning to the question of whether the trial court’s orders disposed of one or more of the claims or parties, we first note that if the trial court’s order purports to certify a judgment as final, but the order is not conclusive as to an entire claim or party, an appeal from the order will not lie even though the trial court attempted to treat the order as final. **FSG Bank**, 2012 WL 554449, at *4. In other words, in the absence of a final adjudication of at least one claim or party, Rule 54.02 is not applicable. **King**, 2016 WL 3632761, at *4. For purposes of Rule 54.02, a “claim” is defined as the “aggregate of operative facts which give rise to a right enforceable in the courts.” **Carr**, 2010 WL 1633467, at *3 (quoting **Brown**, 2009 WL 4878621, at *6). For example, in **Christus Gardens, Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.**, No. M2007-01104-COA-R3-CV, 2008 WL 3833613, at *1 (Tenn. Ct. App. Aug. 15, 2008), the plaintiff alleged three instances of legal malpractice against the defendant law firm. The trial court entered an order dismissing “two claims” for legal malpractice based on the statute of limitations, but one “claim” for legal malpractice remained pending. *Id.* at *3. Despite the pending claim, the trial court certified the order as final under Rule 54.02. *Id.* In so doing, the trial court reasoned that the plaintiff should not be required to try its case on the third claim without first determining whether its first two claims were correctly dismissed. *Id.* The defendant argued that the plaintiff’s various theories of legal malpractice did not constitute more than one “claim” for relief for purposes of Rule 54.02. *Id.* at *4. In response, the plaintiff argued that each of the three claims was a separate and distinct theory of recovery that would support a judgment if proven. *Id.* Noting that Tennessee’s version of Rule 54.02 is identical to Federal Rule of Civil Procedure 54(b), the **Christus Gardens** Court considered as persuasive federal caselaw providing that “a claim is a set of facts giving rise to one or more legal rights,” and Rule 54 “cannot be used to appeal a part of a single claim or . . . to test a single legal theory of recovery.” *Id.* at *5 (quoting **Schwartz v. Eaton**, 264 F.2d 195, 196 (2d Cir. 1959)). Accordingly, “a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.” *Id.* (quoting **Liberty Mut. Ins. Co. v. Wetzel**, 424 U.S. 737, 744 (1976)). Applying these principles, the Court concluded that the plaintiff’s three “causes of action” in the complaint actually presented three different theories of legal malpractice, all arising from an aggregate set of operative facts and closely related series of occurrences. *Id.* at *5. Because these three causes of action were “alternative theories in pursuit of one recovery,” they did not state multiple claims for the purposes of Rule 54.02, and the trial court was

without authority to certify its order resolving only two of the theories as final under Rule 54.02. *Id.* On its determination that the trial court’s order was improvidently certified as final, the *Christus Gardens* Court dismissed the appeal for lack of subject-matter jurisdiction. *Id.*

Turning to the orders at issue in this appeal, we again note that certification of an order as final pursuant to Rule 54.02 is not appropriate unless the order “disposes of an entire claim or is dispositive with respect to a party.” *Konvalinka*, 2012 WL 1080820, at *3. Here, the trial court’s orders do not fully adjudicate the claims against Fidelity, so they are not “dispositive with respect to a party.” *Id.* The question, then, is whether the orders “dispose[] of an entire claim.” *Id.* We turn to that question.

Here, Appellants assert various theories of liability, *see* specific counts *supra*. Despite the assertion of different theories of liability, the concept of a “claim” denotes the aggregate of operative facts that give rise to a right enforceable in the courts. *Brown*, 2009 WL 4878621, at *6. The trial court’s order of partial dismissal disposed of all claims against Fidelity except count VII. However, all of the “counts” set out in Appellants’ amended complaint involve a single aggregate of operative facts—*i.e.*, the respective duties of the defendants in regard to the *lien lis pendens* in effect at the time of Appellants’ purchase of the subject lots—and therefore constituted a single claim for purposes of Rule 54.02. Although Appellants pursue relief under different theories, all of their claims arise out of the same transaction, *i.e.*, the purchase of the lots.

As *Christus Gardens* demonstrates, “trial courts may not certify as final a decision that adjudicates only some of the legal theories upon which a plaintiff bases his or her case.” *Paul v. Watson*, No. W2011-00687-COA-R3-CV, 2012 WL 344705, at *4 (Tenn. Ct. App. Feb. 2, 2012). “[A] complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.” *Christus Gardens*, 2008 WL 3833613, at *5 (quoting *Liberty Mut.*, 424 U.S. at 743). “[S]eparate causes of action or counts in a complaint that arise out of the same series of closely related factual occurrences constitute one claim for the purposes of Rule 54.02.” *Carr*, 2010 WL 1633467, at *3. Here, Appellants’ claims for relief are based on the same aggregate of operative facts and constituted a single claim for purposes of Rule 54.02. Accordingly, we conclude that Rule 54.02 is ineffective to permit an appeal of some of Appellants’ theories without disposing of all of them. *Christus Gardens*, 2008 WL 3833613, at *5. “This Court may conclude that Rule 54.02 certification was improvidently granted where ‘the issue which the trial court declared final and appealable is inextricably linked with the remaining issues not yet decided.’” *Ingram*, 379 S.W.3d at 238 (quoting *Crane*, 1993 WL 15154, at *2). Accordingly, we dismiss the appeal for lack of subject-matter jurisdiction. *See FSG Bank*, 2012 WL 554449, at *4 (“If the Trial Court has improperly certified the [order] as final the appeal must be dismissed for lack of subject-matter jurisdiction.”).

IV. Conclusion

The appeal is dismissed. Costs of the appeal are assessed one-half to the Appellants, Infinity Homes, Inc., Raymond Timothy Stephens, and Ryan Stephens Custom Homes, Inc., and one-half to the Appellee, Fidelity National Title Insurance Company, for all of which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE