Supreme Court of Texas

No. 22-1175

In re Urban 8 LLC and Urban 8 Management LLC,
Relators

On Petition for Writ of Mandamus

PER CURIAM

In this mandamus petition concerning a default judgment, the defendant contends that the trial court retroactively declared an order of default that did not dispose of all claims to be a final judgment after the time to appeal that order had expired. Although we agree that a trial court cannot effectively backdate a judgment and deprive the losing party of an opportunity to appeal, we conclude the trial court did not do so here. Instead, the trial court modified its order to dispose of the remaining request for exemplary damages, resulting in a final judgment appealable from the date of modification. Thus, the defendant had an adequate remedy by appealing that judgment, and indeed it has done so. We therefore deny the petition for writ of mandamus and write to make clear that the court of appeals has jurisdiction over the defendant's pending appeal.

I

Real Party in Interest Susan Barclay alleges that she tripped on the edge of an outdoor mat while entering a food court owned and managed by Relators Urban 8 LLC and Urban 8 Management LLC (Urban 8). She alleges that she suffered a fractured elbow, which required surgery. The parties dispute why she was entering the food court. Barclay alleges that she was entering for her first day of work and therefore was a business invitee. Urban 8 claims, however, that Barclay was never hired, no one noticed her fall, and she appeared to leave uninjured. Barclay wrote to Stanley Rose, managing member and registered agent for Urban 8, regarding the matter. Although Rose received the letter, he never responded.

Barclay sued Urban 8 for negligence on July 9, 2021, seeking several types of damages, including exemplary damages. Barclay made multiple attempts to serve Rose, who failed to receive service because he had moved offices without updating his address with the Secretary of State. Barclay subsequently served process on the Secretary of State,[1] provided a courtesy copy to Urban 8's insurer, and continued to update the insurer on significant developments.

After Urban 8 failed to answer, Barclay moved for default judgment. On September 29, the trial court signed an "Order Granting Default Judgment Against Defendants Urban 8 LLC and Urban 8 Management LLC." The order granted Barclay's motion for default judgment, ordered that Barclay recover from the defendants jointly and

[1] *See* TEX. BUS. ORGS. CODE § 5.251(1).

severally, and set the matter for a hearing to prove damages. Following the hearing, the trial court signed a "Final Order of Default" on November 18, 2021 (November 2021 order). This order awarded all of Barclay's requested types of damages except exemplary damages, which the order did not mention.

Urban 8 filed an answer on April 21, 2022. On May 25, Urban 8 filed a "Motion to Set Aside Interlocutory Judgment and Motion for New Trial," attaching an affidavit from Rose explaining that he had only recently received notice of the case. Barclay responded, arguing that Urban 8's failure to update its address with the Secretary of State amounted to conscious indifference. Barclay further argued that portions of Rose's affidavit should be struck as hearsay and—regardless of the parties' dispute over Barclay's invitee status—that Urban 8 failed to establish a meritorious defense under *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. [Comm'n Op.] 1939). Barclay also filed a plea to the jurisdiction, arguing that the trial court lost plenary power thirty days after the November 2021 order.[2]

The trial court conducted a hearing and signed an order on August 25 denying Urban 8's motion for new trial and sustaining Barclay's objections to Rose's affidavit (August 2022 order). The trial court did not expressly rule on Barclay's plea to the jurisdiction. Significantly, the August 2022 order contained the following language:

> IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Final Order of Default is the Final Judgment in this cause; the Final Order of Default fully and finally disposes of all parties and claims and is appealable; all

[2] Barclay does not advance that position in this Court.

> claims have been adjudicated; no claims or parties remain; and the Final Order by Default is the final determination as to all parties, issues and claims in this case and is an appealable order in all respects.

On September 22, Urban 8 filed a notice of appeal from the August 2022 order. In this pending appeal,[3] Urban 8 argues that the August 2022 order was a final, appealable order. The court of appeals requested briefing regarding its jurisdiction to hear the appeal of the August 2022 order on October 24, noting that a denial of a motion for new trial is not a final judgment or independently appealable. The court of appeals ultimately abated this appeal pending resolution of Urban 8's petition for writ of mandamus, which we discuss next.

Urban 8 filed its petition for writ of mandamus in the court of appeals on September 30, arguing in the alternative that the trial court's August 2022 order had "retroactively" deemed the November 2021 order a final judgment, thereby depriving Urban 8 of the opportunity to appeal. The court of appeals denied Urban 8's mandamus petition without substantive discussion and later denied Urban 8's motion for en banc reconsideration over a dissenting opinion. The dissenting justice argued that the lack of *Lehmann* finality language in the November 2021 order could not be corrected retroactively, the trial court precluded Urban 8 from ever seeking appellate review, and the issue was recurring enough to warrant en banc review. ___ S.W.3d ___, 2022 WL 17351910, at *2 (Tex. App.—Dallas Dec. 1, 2022) (Schenck, J., dissenting from

[3] Docketed as No. 05-22-00952-CV in the Fifth Court of Appeals.

denial of en banc reconsideration) (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001)).

Urban 8 then filed this petition for writ of mandamus in our Court. Urban 8 also filed an emergency motion to stay the trial court proceedings as the trial court had granted Barclay's motion to compel Urban 8's responses to post-judgment discovery.[4] We granted that motion and now address the merits of the petition.

II

As the party seeking mandamus relief, Urban 8 must show that the trial court clearly abused its discretion and Urban 8 has no adequate remedy by appeal. *In re Allstate Indem. Co.*, 622 S.W.3d 870, 875 (Tex. 2021). We conclude that Urban 8 has an adequate remedy by appeal.

Generally, "[t]here are two paths for an order to become a final judgment without a trial: the order can (1) dispose of all remaining parties and claims then before the court, regardless of its language; or (2) include unequivocal finality language that expressly disposes of all claims and parties." *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Mgrs. of Am., L.L.C.*, 685 S.W.3d 816, 820 (Tex. 2024) (citing *Lehmann*, 39 S.W.3d at 200). But in the particular context of default judgments, we hold today in *Lakeside Resort* that if the face of a default judgment affirmatively undermines or contradicts finality, it is nonfinal even if examining the record would reveal that the judgment disposed of all remaining parties and claims. *In re Lakeside Resort JV, LLC*, ___ S.W.3d ___, slip op. at 9-10 (Tex. May 10, 2024).

[4] The record does not indicate that Urban 8 filed a supersedeas bond.

Here, the November 2021 order does not expressly include clear finality language. To be sure, the order is entitled "Final Order of Default" and provides "let execution issue." But we have held that, "[o]n its own, merely stating that the order is 'final' is not enough" to express an unequivocal intent to finally dispose of the case. *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151, 155 (Tex. 2023). And we have refused to "conclude that language permitting execution 'unequivocally express[es]' finality in the absence of a judgment that actually disposes of all parties and all claims." *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 830 (Tex. 2005). The order contains no other statements that, when considered together, could "form a clear indication of finality." *Patel*, 661 S.W.3d at 155. Nor does it contain any language that affirmatively undermines or contradicts finality. Thus, the posture of this case is different from that of *Lakeside Resort*.

Turning to the record, we conclude that the November 2021 order is not final because it does not actually dispose of all remaining parties and claims.[5] Specifically, the order does not dispose of Barclay's claim of gross negligence as a basis for awarding exemplary damages. We have long held that a default judgment awarding actual damages is not final if it fails to dispose of the plaintiff's request for exemplary damages based on gross negligence. *See, e.g.*, *Burlington*, 167 S.W.3d at 830

[5] Because neither the face of the judgment nor the record demonstrates finality here, "we need not now consider, much less adopt, a broader rule applicable to all default judgments in which the judgment is not final at all—regardless of what the record shows—unless it is unequivocally final on its face under the standards articulated in *Lehmann* and our many other cases." *Lakeside Resort*, ___ S.W.3d at ___, slip op. at 11 n.7.

(citing *Hous. Health Clubs, Inc. v. First Ct. of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986)). For these reasons, the trial court retained plenary power after signing the November 2021 order.[6]

It is true that a judgment cannot be "backdated" or "retroactively" made final as doing so could indeed deprive a party of an adequate remedy by appeal. But we do not read the August 2022 order to have that effect. Although the August 2022 order observes that the November 2021 order "is the Final Judgment," it also modifies the November 2021 order by providing that it "fully and finally disposes of all parties and claims and is appealable." Under *Lehmann*, this added language expresses an unequivocal intent to finally dispose of the case (including Barclay's outstanding claim of gross negligence and request for exemplary damages), resulting in a final judgment.

Importantly, the August 2022 order's modification of the November 2021 order makes the thirty-day timeline for appealing this judgment run from the date of the August 2022 order. *See, e.g.*, *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988) ("[A]ny change, whether or not material or substantial, made in a judgment while the trial court

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[6] Urban 8's argument that it has been deprived of an adequate remedy by appeal is based largely on its mistaken assertion that the trial court "held" in the August 2022 order that it lacked jurisdiction. The trial court made no such holding. Indeed, nothing in the order suggests that the trial court determined it lacked jurisdiction. The order is entitled "ORDER ON MOTION FOR NEW TRIAL" and recites that the trial court "considered the Court's file, arguments of the parties, Plaintiff's Objections to the affidavit attached to Plaintiff's Motion for New Trial, and evidence." The court then found that Barclay's objections were "well-taken" and denied Urban 8's motion for new trial. If the trial court had believed it was without jurisdiction, then it would not (and could not) have ruled on objections or made findings.

retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed."); *see also* TEX. R. CIV. P. 329b(h) ("If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed . . . ."). Accordingly, Urban 8 has an adequate remedy by appeal. Indeed, Urban 8 exercised that remedy by timely appealing the August 2022 order to the Fifth Court of Appeals.

Urban 8's petition for writ of mandamus is therefore denied. The stay of trial court proceedings issued by this Court on January 6, 2023, is lifted.

OPINION DELIVERED: May 10, 2024