Not Reported in S.W.3d, 2009 WL 638253 (Tex.App.-Dallas)
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SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Dallas.
In re METROPOLITAN LLOYDS INSURANCE COMPANY OF TEXAS, Relator.

No. 05-08-01712-CV.
March 13, 2009.
Rehearing Overruled May 6, 2009.

West KeySummary**Declaratory Judgment 118A 327.1**

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak327 Motion to Strike or Dismiss Complaint, Petition or Bill
118Ak327.1 k. In General. Most Cited Cases

Mandamus 250 31

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k31 k. Entertaining and Proceeding with Cause. Most Cited Cases

An insurer was entitled to mandamus relief as the judge abused his discretion by continuing to exercise jurisdiction after a non-suit had been filed when there were no valid counterclaims pending. The insurer originally sought a declaratory judgment that it was not obligated to afford coverage for property damage or expenses that arose from mold. The trial court granted summary judgment in favor of the insurer, but on appeal the judgment was reversed and remanded. On remand the insurer filed a non-suit which was granted. The insured then filed a "supplemental counterclaim" that included new claims and attorney's fees on those new claims. The insurer filed a motion to dismiss and asked the trial court to clarify that all claims and all parties were disposed of on the filing of the non-suit, and the motion was denied.

Original Proceeding from the 116th Judicial District Court, Dallas County, Texas, Trial Court Cause No. 05-06608, Bruce Priddy, J.
Brad K. Westmoreland, Dennis Conder, Pamela J. Touchstone, Stacy & Conder, L.L.P., Dallas, TX, for Relator.

Robert W. Loree, Loree, Hernandez & Lipscomb, PLLC, Christopher Dean Below, San Antonio, TX, for real parties in interest.

Before Justices MOSELEY, BRIDGES, and FRANCIS.

MEMORANDUM OPINION
Opinion by Justice FRANCIS.

***1** The issue before the Court in this original mandamus proceeding is whether, at the time relator Metropolitan Lloyds Insurance Company of Texas filed its non-suit, real party Resha Ellis Timberlake had a valid counterclaim pending that survived the non-suit. Because we conclude there was no valid counterclaim pending at the time Metropolitan non-suited its claims, we agree the trial judge abused his discretion by continuing to exercise jurisdiction over the case after his plenary jurisdiction expired. Accordingly, we conditionally grant mandamus relief.

On July 12, 2005, Metropolitan filed a declaratory judgment action seeking a declaration of its rights and obligations under an insurance policy issued to Timberlake. Specifically, Metropolitan sought a declaratory judgment that it was not obligated to afford coverage for property damage or other enumerated expenses caused by or arising from mold. On August 29, 2005, Timberlake filed "Defendant's Original Answer and Original Counterclaim," which stated the following:

I.

ORIGINAL ANSWER

A. *General Denial*

Defendant denies each and every, all and singular, the allegations contained in Plaintiff's Original Petition, and demand [sic] strict proof thereof by a preponderance of the evidence.

II.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that upon a final hearing or trial of this case that a take [sic] judgment be entered for Defendant on Plaintiff's claims, that a judgment be entered against Plaintiff on Defendant's Insurance counterclaim, including Defendant's actual damages, attorney's fees, interest and costs of court and that Defendant receive such other relief to which it is justly entitled.

The trial court granted summary judgment in favor of Metropolitan, which Timberlake appealed. *See* *Timberlake v. Metropolitan Lloyds Ins. Co. of Tex.*, 230 S.W.3d 798 (Tex.App.-Dallas 2007, no pet.). Concluding issues of fact existed as to the cause of the property damage, this Court reversed the trial court's judgment and remanded the case for further proceedings. *Id.* at 800.

After remand, on May 12, 2008, Metropolitan filed a non-suit without prejudice of "all claims asserted in the ... suit against [Timberlake]." On May 28, 2008, the trial judge signed an order of non-suit without prejudice and ordered each party to pay its own court costs; the order was silent as to attorney's fees. On June 2, 2008, Timberlake filed a "supplemental counterclaim," which included new claims and sought damages for breach of contract, violation of chapter 542 of the Texas Insurance Code, violations of the Deceptive Trade Practices Act, unfair insurance practices, and breach of duty of good faith and fair dealing, as well as attorney's fees on the new claims. On June 13, 2008, Metropolitan filed a motion for entry of a dismissal order, asking the trial court to enter a final order clarifying that all claims and all parties were disposed of on the filing of Metropolitan's non-suit on May 12, 2008. On July 11, 2008, the trial judge denied Metropolitan's motion for entry of a dismissal order, and on September 24, 2008, the judge denied Metropolitan's motion to reconsider or, alternatively, to stay the proceedings. This original mandamus proceeding followed.

***2** Mandamus relief is available when the trial judge abuses his authority or violates a legal duty and there is no adequate remedy at law. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex.2004) (orig.proceeding). A trial judge abuses his discretion if he reaches a decision that is arbitrary and unreasonable so as to amount to a clear and prejudicial error of law or if the judge fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex.2005) (orig.proceeding) (per curiam). A trial judge has no discretion in determining what the law is or in applying the law to the facts, and a clear failure by the court to correctly analyze or apply the law will constitute an abuse of discretion. *See* *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (orig.proceeding).

Metropolitan asserts the trial judge abused his discretion by continuing to exercise jurisdiction over this case because Metropolitan's non-suit disposed of all parties and claims pending before the trial court and no valid counterclaim was pending that would survive the non-suit. Timberlake responds that mandamus relief is not proper because Metropolitan has an adequate remedy at law by appeal if Timberlake ultimately prevails in the trial court. Timberlake also asserts that the law of the case doctrine precludes mandamus relief because this Court previously denied mandamus relief concluding Metropolitan did not show the trial judge clearly abused his discretion. *See In re Metropolitan Lloyds Ins. Co.*, No. 05-08-01359-CV (Tex.App.-Dallas Oct.9, 2008, orig. proceeding) (mem.op.).[FN1] Finally, Timberlake asserts the trial judge did not abuse his discretion because Metropolitan's non-suit did not affect Timberlake's counterclaim because Timberlake sought affirmative relief for attorney's fees.

FN1. Timberlake correctly points out that a previous mandamus petition was denied by this Court; however, that petition was denied "based on the record before us" and does not preclude this Court from considering a subsequent mandamus on the merits of the petition.

"[A] plaintiff has an absolute, unqualified right to take a non-suit upon timely motion as long as a defendant has not made a claim for affirmative relief." *Gen. Land Office of State of Tex. v. OXY*

U.S.A., Inc., 789 S.W.2d 569, 570 (Tex.1990). Rule 162 allows a plaintiff to take a non-suit and provides that "any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief," and a dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of the dismissal." TEX.R. CIV. P. 162. To qualify as a claim for affirmative relief, a defensive pleading must allege the defendant has a cause of action, independent of the plaintiff's claims, on which the defendant could recover benefits, compensation, or relief, even though the plaintiff may abandon its cause of action or fail to establish it. *See* *OXY U.S.A., Inc.*, 789 S.W.2d at 570. If the defendant does nothing more than resist the plaintiff's right to recover, the plaintiff has an absolute right to the non-suit. *Id.*

"Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex.2000). Fair notice requires that the pleader allege every element of the cause of action so the opposing party is able to prepare a defense. *Schoellkopf v. Pledger*, 778 S.W.2d 897, 899 (Tex.App.-Dallas 1989, writ denied) (op. on remand). To sufficiently allege the elements of a cause of action, the court must be able to identify each element in the pleadings. *See* *Auld*, 34 S.W.3d at 897; *Schoellkopf*, 778 S.W.2d at 899. In determining the sufficiency of the pleading, we look to the substance of the pleading, not merely at its title. *See* *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex.1980) (orig.proceeding).

***3** Although the term "counterclaim" was contained in the title, Timberlake's August 29, 2005 answer did nothing more than generally resist Metropolitan's claims for relief. Nothing in the pleading put Metropolitan on notice of the elements of the causes of action Timberlake was asserting against Metropolitan. Moreover, it would stretch "liberal construction" of the pleadings beyond the bounds of the rule to say that all of the elements and facts upon which Timberlake was basing her counterclaims could be supplied by the elements and facts alleged in Metropolitan's original petition. To the extent Timberlake argues that its request for attorney's fees in the "Defendant's Original Answer and Original Counterclaim" is a request for affirmative relief that survives the non-suit, we disagree. At no time has Timberlake asserted an actual claim for attorney's fees in conjunction with the original declaratory judgment action. The trial court assessed costs of court against each party, but was silent as to attorney's fees. Thus, the general, unpursued plea for attorney's fees contained in Timberlake's original answer to the now non-suited action does not keep alive the original case or open the door for the filing of new claims. *Cf.* *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 101 (Tex.2006) (per curiam) ("Although Rule [162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot.").

We conclude Timberlake did not have a valid counterclaim pending at the time Metropolitan non-suited its claims. Therefore, Metropolitan's non-suit of its claims disposed of all parties and claims then pending before the trial court. *See* *OXY U.S.A., Inc.*, 789 S.W.2d at 570.

We further conclude that even if the motions Metropolitan filed after the trial court rendered the order on the non-suit extended the trial court's plenary jurisdiction beyond thirty days after the non-suit order, neither the motions, nor the trial court's ruling on the motions, altered the effect of the non-suit order. Metropolitan's motions did not seek to set aside the non-suit. To the contrary, the motions sought entry of a dismissal order based on the non-suit. Further, the trial court's orders denying Metropolitan's motion for a dismissal order neither explicitly set aside the non-suit order nor had the effect of setting aside that order. *Cf. generally* *In re Lovito-Nelson*, 2009 WL 490067, at ---- 2-3 (Tex.2009) (per curiam) (orders scheduling hearings after judgments rendered do not have effect of setting aside judgments).

A non-suit extinguishes a case or controversy from the moment it is filed. *Univ. of Tex. Med. Branch at Galveston*, 195 S.W.3d at 100. The date on which the trial court signs an order dismissing the suit is the starting point for determining when the trial court's plenary power expires, but the non-suit is effective when it is filed. *See id.* "The trial court generally has no discretion to refuse to dismiss the suit and its order doing so is ministerial." *Id.; see also*

Am.'s *Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 878 (Tex.App.-San Antonio 1995, writ denied).

***4** Because Metropolitan's non-suit disposed of the then-pending claims and parties and did not have a valid counterclaim that survived the non-suit, we conclude the trial judge abused his discretion by denying Metropolitan's motion for entry of a dismissal order.

We further conclude Metropolitan has no adequate remedy at law. Because no valid counterclaim survived the non-suit, there is no longer a case pending in the trial court. The order denying the motion to enter judgment of dismissal is not an appealable interlocutory order. *See generally* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014 (Vernon 2008). Therefore, before Metropolitan could appeal, it would have to proceed to trial to defend against counterclaims that are not validly before the court, leaving Metropolitan without an adequate remedy at law. *See* *In re S.W. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623-24 (Tex.2007) (orig.proceeding). Accordingly, we **CONDITIONALLY GRANT** Metropolitan's petition for writ of mandamus.

The Court **ORDERS** the Honorable Bruce Priddy, Presiding Judge of the 116th Judicial District Court, to vacate the: (1) July 11, 2008 “Order on Plaintiff's Motion for Entry of Dismissal Order;” and (2) September 24, 2008 “Order on Plaintiff's Motion to Reconsider and Alternative Motion to Stay Proceedings.” We further **ORDER** the Honorable Bruce Priddy to sign an order dismissing the case in its entirety.

We **ORDER** the Honorable Bruce Priddy to file with this Court, within **TWENTY DAYS** of the date of this order, a certified copy of his order showing compliance with this Court's order. The writ of mandamus will issue only if the Honorable Bruce Priddy, Presiding Judge of the 116th Judicial District Court, fails to comply with this Court's opinion and order.

Tex.App.-Dallas,2009.
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