

IN THE SUPREME COURT OF THE STATE OF NEVADA

CATELLO TILE & MARBLE CONTRACTORS,
INC.,

Appellant,

vs.

LAWRENCE WARD,

Respondent.

No. 36796

FILED

JAN 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. D. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment in an action for breach of a construction agreement. Respondent has filed a motion to dismiss this appeal on jurisdictional grounds, contending that the claim for breach of contract in the third-party complaint was not resolved by the judgment. Appellant opposes the motion, and respondent has submitted a reply.¹

This matter arose from a dispute over a construction agreement between appellant Catello Tile & Marble Contractors, Inc. (Catello Tile), and respondent Lawrence Ward (Ward). Catello Tile agreed to furnish and install marble in Ward's residence at a reduced rate, and in exchange for the reduced rate, Ward agreed to lease a car to Catello Tile at cost. A dispute between the parties over the cost and completion of the work led Catello Tile to file a mechanic's lien against Ward's property for the unpaid balance. Catello Tile also filed a complaint in the district court against Ward, alleging

¹We direct the clerk of this court to file appellant's opposition provisionally received on December 13, 2000. Also, we grant respondent's motion to file a reply to the opposition. The clerk of this court shall file the reply provisionally received on January 2, 2001.

breach of contract, foreclosure on the mechanic's lien, and related claims. Ward asserted counterclaims for breach of contract and slander of title. In particular, Ward's counterclaim for breach of contract included three allegations: (1) Catello Tile breached the contract by improperly increasing the contract price; (2) Catello Tile's work did not comply with the agreement and resulted in Ward having to pay another company to complete the work; and (3) Catello Tile failed to pay for the leased car. Significantly, Ward also asserted a third-party claim against Joseph Catello, individually, who is the owner of Catello Tile, alleging breach of contract. This breach of contract claim against Joseph Catello essentially included the identical three allegations as the breach of contract claim against Catello Tile.

Prior to trial, the parties entered a stipulation and order that \$13,223.00 was the amount Catello Tile owed on the car, and this amount would be offset against any money found due to Catello Tile. After a two-day bench trial, the district court entered a judgment in favor of Ward. The district court first found that the allegations in Catello Tile's complaint were not supported by credible evidence. As for Ward's counterclaims, the district court found that Catello Tile did not complete the work in a timely manner, and that the mechanic's lien was not appropriate; the court therefore expunged the lien. The court concluded that the value of the job was \$60,000 owed by Ward to Catello Tile, but that Ward was entitled to the following offsets: (1) \$23,000 for money Ward already paid; (2) \$13,000 for the stipulated

cost of the leased car; (3) \$11,000 for the amount Ward paid to another company to complete the job; and (4) \$5,000 of interest on Ward's construction loan. The court also awarded Ward costs and attorney's fees. Thus, the total judgment in favor of Ward was \$27,999.85. Catello Tile appealed the judgment.

Ward filed the instant motion to dismiss. Ward contends that the judgment is not final because it did not resolve the third-party claim asserted by Ward against Joseph Catello; the judgment does not mention Joseph individually. We agree.

An appeal may be taken from a final judgment in an action or proceeding. NRAP 3A(b)(1). A final judgment "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." Lee v. GNLV Corp., 116 Nev. __, __, 996 P.2d 416, 417 (2000). Further, an order is not final and appealable when it does not formally resolve a pending counterclaim. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 342-43, 810 P.2d 1217, 1219 (1991). In KDI, this court held that a counterclaim was not rendered moot by a partial summary judgment for the defendant, and that a defendant's intention not to pursue his counterclaim does not render the counterclaim moot or operate as a formal dismissal of the claim. See id.

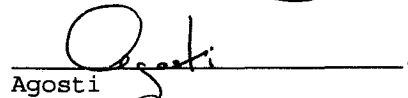
Here, the district court's judgment did not resolve Ward's third-party claim against Joseph Catello for breach of contract. The judgment does not even specifically refer to the third-party claim. Further, we have considered Catello

Tile's arguments that the third-party claim was resolved before trial in the stipulation and order relating to the cost of the leased car, or that the claim was necessarily resolved by the judgment. We reject these arguments because neither the stipulation and order nor the judgment specifically resolves, let alone mentions, the third-party claim. Thus, the district court has not yet entered a final written judgment adjudicating all the rights and liabilities of all the parties, and this court lacks jurisdiction to entertain this appeal. See NRAP 3A(b)(1). Accordingly, we grant Ward's motion, and we dismiss this appeal. Finally, we note that Catello Tile can appeal from a final judgment once the district court resolves the third-party claim asserted by Ward against Joseph Catello.

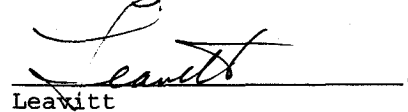
It is so ORDERED.



Shearing J.



Agosti J.



Leavitt J.

cc: Hon. Nancy M. Saitta, District Judge
Eva Garcia-Mendoza, Settlement Judge
Haney, Woloson & Mullins
Cook & Kelesis
Clark County Clerk

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DEC 11 2000

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BY 
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O R D E R

Pursuant to NRAP 16(g), the settlement judge has filed a report with this court indicating that the parties were unable to agree to a settlement of this matter. Upon the filing of the docketing statement, this court shall conduct a preliminary jurisdictional review of this appeal.¹ The time deadlines for requesting and preparing transcripts and briefing shall remain suspended pending further order of this court.

It is so ORDERED.

 , C.J.

cc: Eva Garcia-Mendoza, Settlement Judge
Haney, Woloson & Mullins
Cook & Kelesis

¹ We defer ruling on respondent's motion to dismiss this appeal pending completion of our jurisdictional review.