

NO. 12-25-00279-CV
IN THE COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS

UDO BIRNBAUM,
APPELLANT

§ ***APPEAL FROM THE 294TH***

V.

§ ***JUDICIAL DISTRICT COURT***

CSD VAN ZANDT, LLC,
APPELLEE

§ ***VAN ZANDT COUNTY, TEXAS***

OPINION

Udo Birnbaum, appearing pro se, appeals the trial court’s grant of summary judgment in favor of CSD Van Zandt, LLC. In three issues, he challenges the trial court’s jurisdiction to enter an order, contests the award of attorney’s fees, and alleges that summary judgment was improper due to evidence of extrinsic fraud. We reverse and remand.

BACKGROUND

This appeal represents the second time this court addresses the parties’ dispute regarding the proper ownership of a parcel of land located in Van Zandt County, Texas. See ***Birnbaum v. CSD Van Zandt, LLC***, No. 12-23-00282-CV, 2024 WL 2798849, at *1 (Tex. App.—Tyler May 31, 2024, pet. denied) (mem. op.). Addressing the factual and procedural history of this dispute in ***Birnbaum I***, we explained:

In 1981, T.C. and Carolyn Ann Travis deeded Birnbaum 150 acres in Van Zandt County. In 2002, Birnbaum sold the property to Gwendolyn Wright Thibodeaux. Gwendolyn died intestate in 2006. After a Van Zandt County court determined her heirs and their respective shares, Louis Thibodeaux, Patricia Moore Barclay, and James T. Moore, III owned the 150 acres. Louis owned fifty percent interest; Barclay owned twenty-five percent interest; and Moore owned twenty-five

percent interest. When Louis died in 2019, his will conveyed his interest in the property to Lisa Girot. Therefore, Girot owned a fifty percent interest in the property. On June 24, 2022, CSD purchased the property from Girot, Barclay, and Moore via warranty deed with vendor's lien.

Prior to purchasing the property, CSD learned Birnbaum was living on a portion of the property. Girot also informed CSD that Louis previously attempted to convey the property to Birnbaum in March 2017, but Birnbaum refused. On June 30, 2022, CSD sent Birnbaum a letter requesting he vacate the property. Birnbaum responded by filing a warranty deed in the county records, which purportedly conveyed the property to him in March 2017.

Thereafter, CSD filed suit against Birnbaum asserting actions for declaratory judgment, trespass to try title, and a suit to quiet title. Birnbaum filed an answer and asserted various counterclaims. CSD filed a traditional motion for summary judgment on its claims, which the trial court heard by submission and granted. The trial court then entered a final judgment granting CSD's claims.

Id. In *Birnbaum I*, this Court disposed of the appeal by affirming the trial court's grant of summary judgment in favor of CSD in trial court cause number 22-00105. The Texas Supreme Court denied Birnbaum's subsequent petition for review.

On or about February 6, 2025, Birnbaum filed an original petition for equitable bill of review (assigned trial court cause number 25-00024), in which he alleged that the summary judgment in cause number 22-00105 resulted from fraud and was granted without affording him due process. On August 12, CSD moved for summary judgment on Birnbaum's bill of review claim on both traditional and no-evidence grounds. The motion for summary judgment was set for hearing by submission on September 17 at 1:00 p.m.

Birnbaum filed his written response to CSD's motion for summary judgment on September 11. However, on September 22, at approximately 3:53 p.m., Birnbaum attempted to file an incorrectly captioned Notice of Nonsuit in cause number 25-00024. Birnbaum's second Notice of Nonsuit, including the correct caption, was filed at approximately 4:17 p.m. Also on September 22, at approximately 4:45 p.m., the trial court entered an order granting CSD's motion for summary judgment. The order awarded CSD attorney's fees:

It is further ORDERED, ADJUDGED, and DECREED that Defendant have and recover of Plaintiff the sum of \$36,010.00 to account for the total of reasonable and necessary attorneys' fees related to the Motion through any subsequent appeals of this ruling.

Later that evening, Birnbaum filed a motion to "Vacate and Set Aside Striking of Amended Petition and Grant of Summary Judgment to Defendant CSD Van Zandt," which the trial court denied. This appeal followed.

NONSUIT

In his first issue, Birnbaum asserts that the trial court erred in rendering judgment after Birnbaum nonsuited his claim. Because this issue is dispositive, we do not reach Birnbaum's second and third issues.

Applicable Law

Texas Rule of Civil Procedure 162 provides that “[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes.”¹ TEX. R. CIV. P. 162. A nonsuit extinguishes a case or controversy from “the moment it is filed ... with the clerk of the [trial] court.” *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam). The subsequent entry of an order in conformity with the nonsuit is ministerial. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Hous. Sys.*, 255 S.W.3d 619, 632-33 (Tex. 2008). “If a claim is timely nonsuited, the controversy as to that claim is extinguished, the merits become moot, and jurisdiction as to the claim is lost.” *City of Dallas v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011).

“There is, however, a notable exception to this rule. Although a plaintiff decides which of its claims to pursue or abandon, that decision does not control the fate of a non-moving party's independent claims for affirmative relief.” *Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008); see TEX. R. CIV. P. 162 (plaintiff's right to nonsuit “shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief”). If a defendant has a pending claim for affirmative relief when the plaintiff files notice of a nonsuit, the plaintiff's nonsuit is effective for its own claims, but not for those of the defendant. *Cricket Communications, Inc. v. Trillium Indus., Inc.*, 235 S.W.3d 298, 311 (Tex. App.—Dallas 2007, no pet.). Stated differently:

In a case where no other party has a claim for affirmative relief pending, the nonsuit of a plaintiff's claims effects a dismissal of the entire lawsuit and thus requires the filing of either a motion to reinstate the action or an entirely new lawsuit in order to provide a proceeding in which the claims can be reasserted. However, where another party has a claim pending for affirmative relief, a nonsuit does not bring about a dismissal of the entire case.

¹ Rule 162 is construed liberally in favor of the right to nonsuit. *Benit v. Primalend Capital Partners, LP.*, No. 05-21-00024-CV, 2022 WL 1438944, at *3 (Tex. App.—Dallas May 6, 2022, no pet.) (mem. op.) (citing *Progressive Ins. Companies v. Hartman*, 788 S.W.2d 424, 426 (Tex. App.—Dallas 1990, no writ)).

Lentino v. Frost Nat. Bank, 159 S.W.3d 651, 654 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Additionally, Rule 162 provides that a dismissal of a suit thereunder “shall have no effect on any motion for sanctions, attorney’s fees or other costs, pending at the time of dismissal.” TEX. R. CIV. P. 162.

In the context of a summary judgment proceeding, a plaintiff may take a nonsuit at any time prior to the time the court renders judgment. *Cricket Communications, Inc.*, 235 S.W.3d at 311; see *Cook v. Nacogdoches Anesthesia Group, L.L.P.*, 167 S.W.3d 476, 482 (Tex. App.—Tyler 2005, no pet.).

Analysis

CSD concedes that Birnbaum nonsuited his bill of review claim before the trial court filed its order granting CSD’s summary judgment. But CSD argues that “the trial court was still correct to consider the nonsuit ineffective ... because Birnbaum only filed the nonsuit to attempt to avoid an unfavorable judgment against him.” CSD does not cite, and we do not find, any authority permitting a trial court to wholly disregard a plaintiff’s nonsuit on the basis that it was taken to avoid an unfavorable judgment. Although the Supreme Court of Texas holds that “a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines ... that the nonsuit was taken to avoid an unfavorable ruling on the merits,” this ruling specifically addresses a circumstance under which, following a plaintiff’s nonsuit without prejudice, a defendant may recover attorney’s fees as the “prevailing party.” *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011).

Regardless of his motivation, Birnbaum’s nonsuit was effective as to his own pending bill of review claim the moment of filing. *Albert*, 354 S.W.3d at 375. The merits of that claim were therefore moot, and the trial court lacked jurisdiction as to same, prior to the time the trial court issued its order granting the motion for summary judgment.

CSD further argues that the trial court “was also proper to render Birnbaum’s nonsuit ineffective” because it had pending claims for affirmative relief at the time of the nonsuit, namely its request for sanctions against Birnbaum as well as separate requests for an award of attorney’s fees and costs. First, we note that not all requests for attorney’s fees or motions for sanctions are necessarily claims for affirmative relief that survive nonsuit. See *Villafani*, 251 S.W.3d at 470 (noting that a claim for attorney’s fees based solely on defending against the other party’s claims is not a request for affirmative relief, but if the fees claim is based on an

independent ground or sanction, it is a request for affirmative relief); *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300 (Tex. 2013) (holding that “[a] motion for sanctions is a claim for affirmative relief that survives nonsuit if the nonsuit would defeat the purpose of sanctions”). Second, the mere existence of a defendant’s pending claim for affirmative relief at the time a plaintiff files a notice of nonsuit does not remove the plaintiff’s ability to nonsuit its *own* claims. See *Cricket Communications, Inc.*, 235 S.W.3d at 311. Instead, the nonsuit is effective *only* as to the plaintiff’s claims (but does not extinguish the defendant’s outstanding claims for affirmative relief). See *Villafani*, 251 S.W.3d at 469; *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 38 (Tex. 2008) (emphasis added) (holding that “[w]hile the plaintiffs were entitled to nonsuit their own affirmative claims, they were not entitled to dismissal from the case” while other parties’ claims for affirmative relief remained pending). Birnbaum’s nonsuit was, at minimum, effective as to his claim seeking an equitable bill of review at the moment it was filed, and summary judgment on the merits of that claim was still improper. See *Benit v. Primalend Capital Partners, LP.*, No. 05-21-00024-CV, 2022 WL 1438944, at *4 (Tex. App.—Dallas May 6, 2022, no pet.) (mem. op.) (reversing trial court’s judgment, dismissing nonsuited claims without prejudice, and noting that “[a]lthough we understand the trial court’s suspicion regarding the nonsuit filed on the evening before a summary judgment hearing, Tahl had the right to take a nonsuit up to the time the trial court rendered a decision”).

Importantly, Rule 162 permits the trial court to hold hearings and enter orders affecting costs, attorney’s fees, and sanctions, even after a notice of nonsuit is filed and the plaintiff’s claims are dismissed, while the court retains plenary power. *Estate of Blackmon*, 195 S.W.3d at 101 (citing *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997)). Additionally, the trial court has discretion to defer signing an order of dismissal so that it can “allow a reasonable amount of time” for holding hearings on these matters which are “collateral to the merits of the underlying case.” *Id.*; see also *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862–63 (Tex. 2010) (noting that “[a]lthough Rule 162 permits motions for costs, attorney’s fees, and sanctions to remain viable in the trial court even after a notice of nonsuit is filed, it does not forestall the nonsuit’s effect of rendering the merits of the case moot”). Here, in its answer to Birnbaum’s petition, CSD requested sanctions against Birnbaum for filing a lawsuit that is “frivolous and without merit,” pursuant to Rule 13 of the Texas Rules of Civil Procedure and asked that the trial court

award it “a reasonable attorney fee and the costs of court.” Additionally, in its summary-judgment motion, CSD requested an award of attorney’s fees based on Section 37.009 of the Texas Civil Practices and Remedies Code, asserting that a party who successfully defends a bill of review is entitled to recover attorney’s fees if such fees are authorized for the underlying case (here, a declaratory judgment action). *See John A. Broderick, Inc. v. Kaye Bassman Intern. Corp.*, 333 S.W.3d 895, 906 (Tex. App.—Dallas 2011, no pet.). These matters are unaffected by Birnbaum’s nonsuit and remain viable before the trial court.² TEX. R. CIV. P. 162.

We sustain Birnbaum’s first issue.

DISPOSITION

Having sustained Birnbaum’s first issue, we **reverse** the trial court’s order of September 22, 2025, granting summary judgment in favor of CSD, and **remand** this case to the trial court for further proceedings consistent with this opinion.

JAMES T. WORTHEN
Chief Justice

Opinion April 15, 2026.

Panel consisted of Worthen, C.J., Hoyle, J., and Davis, J.

(PUBLISH)

² We note that for purposes of an attorney’s fee award, “[g]enerally, a defendant is not considered a prevailing party when the plaintiff nonsuits a claim without prejudice.” *Moore v. Amarillo-Panhandle Humane Soc’y, Inc.*, 541 S.W.3d 403, 405 (Tex. App.—Amarillo 2018, pet. denied); *Doolin’s Harley-Davidson, Inc. v. Young*, No. 06-05-00101-CV, 2006 WL 27983, at *3 (Tex. App.—Texarkana Jan. 6, 2006, no pet.) (mem. op.) (determining that a party did not prevail in a bill of review action when “[d]ue to the nonsuit, the merits of the bill of review were never reached by the trial court”). However, the Texas Supreme Court has recognized an exception: a defendant may be a prevailing party when a plaintiff takes a nonsuit without prejudice, if, on the defendant’s motion, the trial court determines the nonsuit was taken to avoid an unfavorable ruling on the merits. *Kontoh v. Safo*, No. 05-17-00448-CV, 2018 WL 3215881, at *2 (Tex. App.—Dallas July 2, 2018, no pet.) (mem. op.) (citing *Epps v. Fowler*, 351 S.W.3d 862, 869 (Tex. 2011)).



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 15, 2026

NO. 12-25-00279-CV

UDO BIRNBAUM,
Appellant
V.
CSD VAN ZANDT, LLC,
Appellee

Appeal from the 294th District Court
of Van Zandt County, Texas (Tr.Ct.No. 25-00024)

THIS CAUSE came to be heard on the appellate record, and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the order of the court below, it is ORDERED, ADJUDGED, and DECREED by this court that the trial court's order of September 22, 2025, granting summary judgment in favor of CSD, be **reversed** and the cause **remanded** to the trial court **for further proceedings** consistent with the opinion of this court, and that all costs of this appeal are hereby adjudged against the Appellee, CSD

Van Zandt, LLC for which execution may issue; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Davis, J.