UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40399
Summary Calendar

BRENT SCHAUBERT,

Plaintiff-Appellant,

VERSUS

MARC G, INC., ET AL.,

Defendants,

ELF AQUITAINE, INC.,

Defendant-Appellee,

VERSUS

INSURANCE CO. of NORTH AMERICA,

Intervenor-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(6:91-CV-695)

(October 21, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Brent Schaubert and Insurance Company of North America (INA) appeal a summary judgment which held that, at the time of his injuries, Schaubert was a borrowed employee of Elf Aquitaine

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Operating, Inc. (Elf). We **DISMISS** the interlocutory appeal for lack of jurisdiction.

I.

Omega Services, Inc., employed Schaubert; and, pursuant to its agreement with Elf, Omega supplied laborers to Elf in support of Elf's offshore operations. Schaubert was assigned to work on an Elf platform in the Gulf of Mexico; and, while working on an Elf platform, he injured his thumb on a waste disposal tank, resulting in it being amputated.

Schaubert brought suit against, *inter alia*, the owner and manufacturer of the disposal tank, as well as Elf, the owner of the platform where the disposal tank was located. In September 1993, the district court granted Elf's summary judgment motion, holding that Schaubert was its "borrowed employee", and thus foreclosing, under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, his ability to pursue an action in tort against Elf.

In December 1993, INA intervened, asserting subrogation rights. As the workers' compensation insurer for Omega, it had paid benefits to, or on behalf of, Schaubert in excess of $53,000.

Upon being informed that the case had been settled, the district court entered a 60-day order of dismissal on January 5, 1994.[2] Three weeks later, Elf submitted a proposed Rule 54(b)

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[2] The district court's order of dismissal stated, in part:

> The court having been advised by counsel for the parties that the above action has been settled,

final judgment. Pursuant to the district judge's instructions, this proposed judgment was placed in the record unsigned.

On March 28, 1994, upon the motion of all parties (except Elf), the district court entered an order dismissing most of the claims. The court specifically reserved both Schaubert's and INA's rights against Elf.[3] Subsequently, on April 12, 1994, Elf asked the district court to reconsider the earlier proposed Rule 54(b) final judgment. The district court took no action on this second request.

On April 25, 1994, Schaubert appealed the summary judgment of September 1993 and the March 28, 1994 order. Similarly, INA appealed three days later.

II.

This court has a duty to examine the basis for its jurisdiction, *sua sponte* if necessary. *E.g.*, ***Pemberton v. State Farm Mut. Auto. Ins. Co.***, 996 F.2d 789, 791 (5th Cir. 1993); ***Mosley v. Cozby***, 813 F.2d 659, 660 (5th Cir. 1987).

> It is ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within sixty (60) days, to reopen the action if settlement is not consummated and seek summary judgment enforcing the compromise.
>
> It is further ORDERED that the parties be directed to file an appropriate order of dismissal as soon as the settlement documents are executed.

[3] The March 28, 1994 order left unclear the status of INA's claims against Schaubert. In its intervenor complaint, INA asserts "a lien on any and all settlement funds paid to Brent Schaubert in the amount of any medical or compensation benefits paid to or on behalf of Brent Schaubert ...."

> Federal appellate jurisdiction is predicated on federal subject matter jurisdiction over the matter in dispute and the existence of a final judgment or otherwise appealable order under 28 U.S.C. § 1291, 28 U.S.C. § 1292, or Federal Rule of Civil Procedure 54(b).

Pemberton, 996 F.2d at 791 (footnote omitted). The parties posit that the district court entered a final judgment, thus empowering this court with appellate jurisdiction pursuant to 28 U.S.C. § 1291.[4]

A.

A final judgment under § 1291 must be a final decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." ***Budinich v. Becton Dickinson and Co.***, 486 U.S. 196, 199 (1988) (quoting ***Catlin v. United States***, 324 U.S. 229, 233 (1945)). This finality requirement mandates that for the judgment to be appealable, it must be final not only as to all the parties, but also as to the whole subject matter and all the causes of action involved. ***Andrews v. United States***, 373 U.S. 334

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[4] Our court directed the parties to include among the issues briefed the following:

> Whether the orders from which appeal is taken, are appealable based on the termination of the litigation, or whether there exists some other basis of appellate jurisdiction.

Despite these instructions, no party briefed the issue.

In examining our jurisdiction, we confine the scope of our analysis to 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b). It is evident that 28 U.S.C. § 1292 does not apply. The issue contested does not concern an injunction, 28 U.S.C. § 1292(a)(1), a receivership, 28 U.S.C. § 1292(a)(2), nor is it an admiralty case, 28 U.S.C. § 1292(a)(3). Additionally, the district court has not certified, nor has this court granted permission to appeal, a controlling question of law. 28 U.S.C. § 1292(b).

(1963). We recognize, however, "that there is some flexibility built into the final judgment rule, and that practical, not technical considerations are to govern the principles of finality." ***Incas and Monterey Printing and Packaging, Ltd. v. M/V Sang Jin***, 747 F.2d 958, 962 (5th Cir. 1984) (citing ***Cohen v. Beneficial Indus. Loan Corp.***, 337 U.S. 541, 546 (1949) and ***Oswalt v. Scripto, Inc.***, 616 F.2d 191, 194 (5th Cir. 1980)).

The September 1993 summary judgment and the March 1994 order are not final, appealable orders. They do not conclude the case with respect to all the parties nor to the whole subject matter and the causes of action involved. Notwithstanding the wording of the March 1994 order, INA's intervention complaint against Elf and Schaubert appears to remain.[5] In fact, following the notices of appeal, INA sought to amend its intervenor complaint against Elf and Schaubert. A hearing on INA's motion to amend was scheduled at the request of Elf and Schaubert.

Furthermore, the record fails to indicate clearly that Schaubert's claim against Elf had reached finality. The record is unclear whether the district court intended to simply preserve Schaubert's right to appeal the summary judgment determination when it "reserved" his rights against Elf in its March 28 order. In any event, the intervention complaint against Elf and Schaubert

[5] The March 1994 order dismissed with prejudice Schaubert's and INA's claims against most parties. The order, however, specifically decreed that Schaubert's and INA's "rights as against [Elf] be and they are hereby reserved."

precludes us from finding that a final, appealable judgment has been entered.

B.

Despite the lack of a § 1291 final judgment, we may still exercise appellate jurisdiction under Fed. R. Civ. P. 54(b). That Rule provides, in pertinent part, that:

> [w]hen more than one claim for relief is presented in an action ... or when multiple parties are involved, the court 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.

Fed. R. Civ. P. 54(b). The district court did not make an express determination of "no just reason for delay" with respect to its summary judgment in September 1993, or its March 1994 order. However, our court does not require district courts to use this precise language.

> If the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words "no just reason for delay."

Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc).

A review of the record fails to show the district court's "unmistakable intent" to enter a Rule 54(b) judgment. To the contrary, it suggests clearly the district court intended to not do so. On two occasions, Elf requested entry of a Rule 54(b)

judgment. As noted, in January 1994, the district court received a proposed Rule 54(b) judgment. Pursuant to the district judge's direction, this proposed judgment was filed in the record *unsigned*. Again, in April 1994, Elf sought entry of a Rule 54(b) judgment; the district court took no action on this second request. Thus, in addition to the lack of an "unmistakable intent" that the orders should be considered a partial final judgment, the district court's action, when confronted with the requests by Elf, lead unmistakably to the conclusion that the court did not intend the order to be considered final and appealable.

III.

For the foregoing reasons, the appeal is

DISMISSED.