



Henna Chevrolet

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MEMORANDUM OPINION

Appellee GEICO General Insurance Company (GEICO) has filed a motion to dismiss this appeal for want of jurisdiction. See Tex. R. App. P. 42.3(a). GEICO contends that appellant Henna's notice of appeal, filed June 16, 2004, was late. Whether Henna's notice of appeal was late depends on whether the summary judgment of March 24, 2004 was final. We conclude the judgment was final and therefore the notice of appeal was late. Accordingly, we grant GEICO's motion to dismiss and dismiss the appeal for want of jurisdiction. See *id.*

Amended Pleadings

Henna contends that the summary judgment was not final because it did not dispose of all parties--specifically, Star-Rite Towing. GEICO answers that it had amended its pleadings so that Star-Rite was no longer a party at the time of the summary judgment. Therefore, the judgment disposed of all parties before the court.

A plaintiff can dismiss a party or cause of action by amending its pleadings to omit that party or cause of action. The amended petition or pleading supersedes all prior petitions. See Tex. R. Civ. P. 62, 63. When a party's name is omitted from an amended pleading, that party is as effectively dismissed as when a formal order of dismissal has been entered. See *Randolph v. Jackson Walker, LLP*, 29 S.W.3d 271, 274-75 (Tex. App.--Houston [14th Dist.] 2000, writ denied); *Hanmore Dev. Corp. v. JBK Enters.*, 776 S.W.2d 738, 740 (Tex. App.--Corpus Christi 1989, writ denied); *Mercure Co., N.V. v. Rowland*, 715 S.W.2d 677, 679 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). That a party's name remains in the style of a case does not override an amendment that removes them from the case. See *Green v. Vidlak*, 76 S.W.3d 117, 120 (Tex. App.--Amarillo 2002, no writ); *Radelow-Gittens Real Prop. Mgmt. v. Pamex Foods*, 735 S.W.2d 558 (Tex. App.--Dallas 1987, writ ref'd n.r.e.).

Plaintiff GEICO first named as defendants Henna Chevrolet, L.P. and Star-Rite Towing in a suit arising out of property damages alleged to have been sustained by its insured's automobile while in their possession. GEICO, in its third amended petition, omitted Star-Rite as a defendant. This amendment left Henna as the only named defendant. However, Henna argues that the third amended petition was ambiguous. A review of the third amended petition shows that only one defendant, Henna, was listed in the paragraph enumerating the defendants, as compared to the second amended petition naming both Henna and Star-Rite as defendants. Star-Rite is mentioned only once in the third amended petition: "On or about July 16-27, 2001, Plaintiff's insured, Monty Morrow's 1999



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Chevrolet Corvette was delivered by, MDSCJH STAR RITE TOWING to Defendant, HENNA CHEVROLET, L.P. D/B/A HENNA LEASING'S care" The third amended petition is not ambiguous and effectively dismissed Star-Rite from the cause as a party. See *Mercure*, 715 S.W.2d at 679.

Nevertheless, Henna contends that the amendment to the pleadings was not effective to remove Star-Rite from the litigation because the trial court did not sign an order dismissing Star-Rite. Henna relies on *In re Bennett*, 960 S.W.2d 35 (Tex. 1997) and *Park Place Hospital v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995). These cases are inapposite because both involved pending motions for non-suit.¹ A motion is an application for action by the court. See *Crain v. San Jacinto Sav. Ass'n* (Tex. App.--Houston [14th Dist.] 1989, writ dismissed w.o.j.); *Lindley v. Flores*, 672 S.W.2d 612, 614 (Tex. App.--Corpus Christi 1984, no writ). Pleadings, if they sufficiently pre-date the trial, may be submitted and amended freely by the parties without the necessity of court action. See *Crain*, 781 S.W.2d at 639 (citing Tex. R. Civ. P. 63). Therefore, no court order of dismissal was necessary; after the amendment to the pleadings, Star-Rite was no longer a named defendant. Accordingly, at the time of the summary judgment, there was only one defendant remaining, Henna, who was disposed of by the judgment.

Sanctions

Henna also contends that its motion for sanctions prevented the judgment from being final, as it did not dispose of all pending issues. However, Henna's motion for sanctions is not a claim for affirmative relief whose pendency would have prevented the summary judgment from being final.

A motion for sanctions is not a pleading nor a claim for affirmative relief. See *In re Velte*, 140 S.W.3d 709, 711 (Tex. App.--Austin 2004, orig. proc.); *Jobe v. Lapidus*, 874 S.W.2d 764, 766 (Tex. App.--Dallas 1994, writ denied); *Crain v. San Jacinto Savings Ass'n*, 781 S.W.2d 638, 639 (Tex. App.--1989, writ dismissed). To be a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action independent of the plaintiff's claim on which he could recover benefits even if the plaintiff were to abandon his cause of action or fail to establish it. *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 840-41 (Tex. 1990); *General Land Office v. Oxy USA, Inc.*, 789 S.W.2d 569, 570 (Tex. 1990). A pending motion for sanctions does not affect whether a judgment is final. See *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000). Such a motion must be heard while the trial court retains plenary jurisdiction. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996); *Velte*, 140 S.W.3d at 712.

Appellant's motion for sanctions depends upon whether appellee's claim against it was frivolous at the time of filing and was not a claim for affirmative relief. Accordingly, the pending motions for sanctions did not mean that the judgment of March 24, 2004 was interlocutory. That judgment actually disposed of all parties and issues in front of the court. Because no motions that would have extended the appellate timetable were filed, the notice of appeal was due April 23, 2004. The notice of



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appeal filed on June 16, 2004 was late and could not confer jurisdiction on this Court. See Tex. R. App. P. 25.1(b); *City of Lancaster v. Texas Natural Res. Conservation Comm'n*, 935 S.W.2d 226, 227 (Tex. App.--Austin 1996, writ denied). Accordingly, we dismiss the appeal for want of jurisdiction. See Tex. R. App. P. 42.3(a).

Dismissed for Want of Jurisdiction

1. Although a motion for non-suit is effective when filed, the appellate timetable begins on the date the trial court signs an order of dismissal. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995); *Hervey v. Flores*, 975 S.W.2d 21, 23-24 (Tex. App.--El Paso 1998, pet. denied).

