CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

RITA A. SUTTON AND KAI CARLSON, APPELLEES, V. HELEN KILLHAM ET AL., APPELLEES, AND 3RP OPERATING, INC., INTERVENOR-APPELLANT.

825 N.W.2d 188

Filed January 11, 2013. No. S-11-083.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the District Court for Cheyenne County, BRIAN C. SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Gregory J. Beal for intervenor-appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellees Helen Killham et al.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., receiver.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

NATURE OF CASE

Intervenor-appellant, 3RP Operating, Inc., filed a claim with the receiver for payment of operating expenses of an oil well. The receiver denied 3RP Operating's claim. 3RP Operating intervened in the pending action in which the receiver had been appointed. Thereafter, the receiver filed a motion for summary judgment. The district court for Cheyenne County sustained the receiver's motion for summary judgment, thus approving the denial of 3RP Operating's claim. 3RP Operating appealed to the Nebraska Court of Appeals. The Court of Appeals determined that it had jurisdiction over 3RP Operating's appeal and, with respect to the merits, affirmed the district court's judgment. See *Sutton v. Killham*, 19 Neb. App. 842, 820 N.W.2d 292 (2012). We granted 3RP Operating's petition for further review. Although our reasoning differs from that of the Court of Appeals, we agree that appellate jurisdiction exists. With respect to the merits, we agree with the Court of Appeals that the claim of 3RP Operating was properly denied and that its challenge to the sufficiency of the receiver's bond is without merit. We affirm.

STATEMENT OF FACTS

This appeal stems from underlying cases filed in the county court for Cheyenne County, in which six siblings are disputing the assets of their parents' estate which was put into trusts. The county court transferred one case to the district court for Cheyenne County pursuant to Neb. Rev. Stat. § 25-2706 (Reissue 2008). That case gives rise to the instant appeal. In its order transferring the case to the district court, the county

court noted that as a general rule, equity jurisdiction remains with the district court, and that the request for damages in the case exceeded the county court's jurisdictional authority under Neb. Rev. Stat. § 24-517 (Cum. Supp. 2002).

After the case was transferred to district court, the court created a receivership pursuant to Neb. Rev. Stat. § 25-1081 (Reissue 1995). See Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995 & Cum. Supp. 2006). The receiver and successor receiver managed the oil well at issue pending resolution of ownership issues related to the oil well. It appears from the record that the issues raised by the siblings in the underlying action have been resolved through mediation or court order but that the oil well which is the asset subject to the receivership has not been disposed of.

On January 11, 2007, 3RP Operating filed a claim with the receiver in connection with the operation of the oil well. 3RP Operating sought operating expenses from 2003 through June 2006. The receiver denied the claim. 3RP Operating intervened in the district court case, seeking payment based on contract and quantum meruit. It did not align itself with any other party.

On November 1, 2010, the receiver filed a motion for summary judgment. On December 30, the district court granted the receiver's motion for summary judgment, thus approving the denial of the claim for payment of services. 3RP Operating appealed this order.

The Court of Appeals determined that it had jurisdiction over 3RP Operating's appeal. With respect to the merits, the Court of Appeals agreed with the district court that because 3RP Operating had no corporate existence during the time period for which it sought payment, the receiver correctly denied the claim and the district court correctly approved the receiver's denial. The Court of Appeals affirmed the district court's grant of summary judgment. In connection with an unrelated assignment of error, the Court of Appeals found no merit to 3RP Operating's challenge to the adequacy of the bond of the receiver. We granted 3RP Operating's petition for further review.

ASSIGNMENT OF ERROR

On further review, 3RP Operating assigns, rephrased, that the Court of Appeals erred when it affirmed the summary judgment denying its claim and found no error with respect to the receiver's bond.

STANDARDS OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[2,3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Jurisdiction: Final, Appealable Order.

This case is before us on further review. After extensive analysis, the Court of Appeals concluded it had appellate jurisdiction and proceeded to the merits. The Court of Appeals concluded that the order appealed from was not a final order under Neb. Rev. Stat. § 25-1911 (Reissue 2008). However, the Court of Appeals determined that the order at issue was a further direction to the receiver and concluded that it had appellate jurisdiction based on its reading of § 25-1090, which provides in part: "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees."

[4,5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has

jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012). Generally, only final orders are appealable. See § 25-1911. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

Within its finality analysis, the Court of Appeals determined that the denial of claim order does not fall within the second category because the order is not an order that affects a substantial right and was not made during a special proceeding. In making this determination, the Court of Appeals referred to *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), in which we stated that special proceedings entail civil remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. The Court of Appeals reasoned that because the denial of claim issue is encompassed by the receivership created under chapter 25, it was not a special proceeding and thus not an order that affects a substantial right made in a special proceeding.

The proposition in *Nebraska Nutrients* upon which the Court of Appeals relied has been abrogated by our subsequent decisions. For example, in *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 597, 788 N.W.2d 538, 546 (2010), we clarified that

> special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions. This statement does not mean that statutory remedies within the civil procedure statutes are never special proceedings because, as *Webb* [*v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004)] illustrates, they sometimes are located within those statutes.

Thus, to the extent that the Court of Appeals reasoned that the order appealed from could not be a final order because it stemmed from a proceeding initiated under chapter 25 of the Nebraska Revised Statutes, we disapprove of this reasoning. Instead, we conclude that the order at issue is a final order from which an appeal may be taken. In view of this determination, we do not analyze the correctness of the Court of Appeals' determination that the denial of claim order was appealable under § 25-1090.

Merits of the Denial of Claim Order on Appeal.

The Court of Appeals determined that the district court properly entered summary judgment for the receiver, thus approving the denial of 3RP Operating's claim for operating expenses. We find no error in this decision. We note for completeness that the Court of Appeals observed that the record contains evidence that certain individuals did work to operate the well, but that the claim at issue was not presented by the individuals in their individual capacities for individual compensation and thus expressed no view on the strength of these potential claims. We agree with this observation.

In its opinion, the Court of Appeals stated:

> The district court's basic rationale for the finding that the receiver did not have to pay the claim of 3RP Operating was that the claim was being brought by a corporation for costs and expenses for the operation of the [well], but that such corporation did not even exist during the time when the claim was asserted.

Sutton v. Killham, 19 Neb. App. 842, 860, 820 N.W.2d 292, 306 (2012). The Court of Appeals continued, "3RP Operating, the corporate entity making the claim before us in this appeal, has never been the operator of [the well at issue]." *Id.* at 861, 820 N.W.2d at 307.

The claim filed by 3RP Operating was for costs and expenses from 2003 through June 2006. The undisputed evidence shows that 3RP Operating did not gain legal existence until September 2006. Based on the record, there is no issue of material fact regarding the claim; 3RP Operating is not entitled to be paid

for the operating expenses it seeks. The Court of Appeals properly determined that the district court correctly granted the receiver's motion for summary judgment.

Sufficiency of Bond.

In its opinion, the Court of Appeals recited the procedural history of the bond posted by the receiver. It is not necessary to repeat the history, except to say that after no bond was initially required, the record shows that in response to a subsequent district court order, the receiver posted a bond in the amount of $10,000. In argument made to the Court of Appeals, 3RP Operating asserted that the amount of the bond was inadequate. The Court of Appeals rejected this argument, as do we on further review.

In its opinion, the Court of Appeals considered 3RP Operating's claim regarding the receiver's bond and stated:

> The intervenor's argument is that given that the receiver had in excess of $40,000 in his possession, he should have had a bond. We cannot disagree, but the intervenor, 3RP Operating, . . . by virtue of the summary judgment which we have affirmed, has no financial interest in the estate or what remains of this case. In short, the intervenor does not make any argument telling us how this error in the proceedings caused it prejudice, and no other party complains about the matter in this appeal. Accordingly, we find no prejudice to the intervenor or any other ground for any relief to the receiver [sic] on this basis.

Sutton v. Killham, 19 Neb. App. at 864, 820 N.W.2d at 308.

We agree with this reasoning of the Court of Appeals. Although the parties initially stipulated that the receiver could serve without the necessity of posting a bond, the district court correctly determined that such waiver was not permissible under § 25-1084 and ordered the receiver to post a bond. 3RP Operating has not advanced any argument on further review which casts doubt on the reasoning of the Court of Appeals or why the outcome before the Court of Appeals should be reversed. We find no merit to this assignment of error.

CONCLUSION

We affirm the decision of the Court of Appeals finding appellate jurisdiction, affirming the district court's grant of the receiver's motion for summary judgment, and finding no merit to 3RP Operating's challenge to the sufficiency of the bond.

AFFIRMED.

CASSEL, J., not participating.

CONNOLLY, J., concurring.

I concur in the majority's judgment. I write separately to explain why the district court's order was final and appealable.

I agree with the majority that our arbitration cases show that special proceedings can be statutory remedies that lie within chapter 25 of the Nebraska Revised Statutes.[1] Moreover, I believe that our reasoning in those arbitration cases and the rules applicable to receiverships support a conclusion that receiverships are special proceedings. That is, a court can appoint a receiver only in an action that is pending, and the issues presented by a motion for a receiver are discrete and independent of the issues presented by the parties' pleadings in the action.[2] The majority's opinion, however, could be interpreted to mean that the court's order was issued in a special proceeding. But this characterization of the order would be incorrect.

Because 3RP Operating intervened in the main action between the parties, the primary jurisdiction issue is whether the appeal is from a final order *in an action*.[3] If not, then the secondary jurisdiction issue is whether Neb. Rev. Stat. § 25-1090 (Reissue 2008) authorized 3RP Operating's appeal

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[1] See, *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010); *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[2] See, Neb. Rev. Stat. § 25-1082 (Reissue 2008); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *Cressman v. Bonham*, 129 Neb. 201, 260 N.W. 818 (1935); *Mann v. German-American Investment Co.*, 70 Neb. 454, 97 N.W. 600 (1903). See, also, *Kremer, supra* note 1.

[3] See Neb. Rev. Stat. § 25-1902 (Reissue 2008).

from an interlocutory order. I believe that § 25-1090 applies only to interlocutory orders, and an order cannot be both final and interlocutory. So I write to explain why 3RP Operating has appealed from a final order in an action.

Under § 25-1902, a summary judgment proceeding is a step in the overall action, not a special proceeding or summary application.[4] Orders granting partial summary judgment are usually considered interlocutory and not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.[5] The order must completely dispose of the whole merits of the case and leave nothing for the court's further consideration.[6]

A substantial legal right includes those legal rights that a party is entitled to enforce or defend.[7] An order that completely disposes of the subject matter of the litigation in an action or a proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.[8]

In its opinion, the Nebraska Court of Appeals noted that despite requesting the parties to brief the jurisdiction issue, the appellees had not pointed to any outstanding claim in the action.[9] After reviewing this record, I conclude that there are no unresolved issues in the action.

The record shows that in August 2004, the parties entered into a settlement agreement in the district court's presence. This entire transcript was later incorporated into a court order to set out the terms of the agreement. That transcript shows that the parties agreed to dismiss with prejudice and to mutually release each other from all claims and counterclaims, except for two opposing claims: the claim of appellee Rita A. Sutton that she was entitled to purchase her sibling's mineral interests in the property versus her sibling's counterclaims that

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[4] See *Big John's Billards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[5] See *id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Sutton v. Killham*, 19 Neb. App. 842, 820 N.W.2d 292 (2012).

they were entitled to have the property, including the mineral interests, partitioned. In March 2005, Sutton's claim was resolved against her in a summary judgment, and in August 2007, the court adopted the referee's recommendation to sell the parties' interest and divide the proceeds.

Unfortunately, the trial court did not dismiss the action and clarify that it was retaining the receiver only to perform postjudgment duties: to manage and protect the parties' interests pending an appeal and to execute its judgment to sell the property if its judgment were affirmed. Instead, in October 2008, the court permitted 3RP Operating to intervene. But the court's summary judgment for the receiver unquestionably decided the last remaining claim in the action.

The Court of Appeals concluded that the order was not a final order in an action solely because the court had not terminated the receivership.[10] I believe that this reasoning incorrectly confuses the finality of the receivership proceeding with the finality of the underlying action. Neb. Rev. Stat. § 25-1081(6) (Reissue 2008) permits a court to appoint a receiver "after judgment or decree to carry the judgment into execution, to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal." The trial court retained the receiver solely to perform the same postjudgment duties that are allowed under § 25-1081(6). So I do not believe that the court's retention of the receiver was an action that affected whether it entered a final order in the action. To conclude otherwise would indefinitely leave parties in limbo, without a right of appeal.

Because the court's order decided the last of the issues between these parties and it retained the receiver only to perform postjudgment duties, I believe that 3RP Operating has appealed from a final order in an action.

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[10] See *id.*