



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ACCREDITED SURETY AND CASUALTY COMPANY, INC.,	§	No. 08-21-00039-CV
	§	
Appellant,	§	Appeal from the
	§	
v.	§	112th Judicial District Court
	§	
TARGA SOUTHERN DELAWARE, LLC,	§	of Pecos County, Texas
	§	
Appellee.	§	(TC# P-12305-B-112-CV)

MEMORANDUM OPINION

This appeal arises from litigation involving a construction project abandoned midstream due to financial difficulties encountered by the general contractor. Among the various claims asserted in the ongoing dispute, Appellee Targa Southern Delaware, LLC (Targa), the project owner, faced competing claims to its statutory retainage obligation arising under the Texas Property Code. *See* TEX. PROP. CODE ANN. § 53.101. DanCar Energy Construction, LLC (DanCar), a primary subcontractor of the project, and multiple sub-subcontractors who likewise performed project work, each sought recovery of unpaid liens against Targa's retainage obligation.¹ Appellant, Accredited Surety and Casualty Company, Inc. (Accredited), the bond

¹ The sub-subcontractors include Benchmark Electrical Solutions, Inc., Control Insulation Services LLC (CIS), Marquez Construction & Maintenance, LLC (Marquez), Global Welding Services, Inc. (Global Welding), Lexicon, Inc. (Lexicon), Texas Gamma Ray, LLC d/b/a TGR Industrial Services (TGR), Inspection Associates, Inc. (Inspection

surety of the project, also claimed an interest in the same fund. After Targa and numerous sub-subcontractors settled their dispute, they filed a joint motion for summary judgment seeking to resolve and discharge their claims and receive an agreed portion of the retainage funds. Pursuant to settlement terms, the trial court granted summary judgment, and entered an order severing certain claims from trial court cause number P-12305-112-CV, and ordered those claims be assigned to trial court cause number P-12305-B-112-CV, which is the underlying cause of this appeal. In this Court, Accredited originally challenged both the trial court's grant of summary judgment and its severance order, and included as Appellees, Targa, DanCar, the primary subcontractor, and the multiple sub-subcontractors. While the appeal remained pending, Accredited and the sub-subcontractors settled their dispute and Accredited moved to partially dismiss its appeal as to all appellees except Targa. Accredited further abandoned its complaints against the trial court's summary judgment and only sought to pursue its complaints regarding the trial court's severance order. We ultimately conclude Accredited's remaining issues are moot and dismiss this appeal for lack of jurisdiction.

I. BACKGROUND

A. The parties

Targa contracted with general contractor Trailhead Engineering, LLC (Trailhead), for the design, construction, and completion of a cryogenic gas processing facility in Pecos County, Texas. Trailhead in turn contracted with DanCar, to perform as the project's primary subcontractor. In turn, DanCar retained multiple sub-subcontractors to work on the project.

Associates), and Sunstate Equipment Company, LLC (Sunstate).

As surety, Accredited issued a total of six performance and payment bonds pertaining to the project totaling \$20 million. Those bonds varied in amounts ranging from \$2.5 million to nearly \$4.7 million. Of importance, DanCar was named principal on two of the bonds, a performance bond, and a payment bond, respectively, in the amount of \$2.5 million each. By its terms, the DanCar payment bond provided that qualified sub-subcontractor claimants were intended beneficiaries of the surety agreement.

Trailhead informed Targa it was no longer solvent to cover payments on the project and the project was not completed. As a result, multiple sub-subcontractors filed liens on Targa's property alleging they were not fully paid for all labor and materials provided during the project. Litigation among these several parties soon ensued.

B. Sub-subcontractor files suit

Benchmark, one of the aggrieved sub-subcontractors, was the first to file suit to foreclose on its lien on Targa's property, alleging unpaid invoices totaling more than \$2.9 million. Benchmark's original petition asserted direct liability claims against Targa, Trailhead, DanCar, and Accredited. As against Targa, Benchmark alleged it was obligated to withhold monies from Trailhead and retain those funds for its benefit and for the benefit of other qualified claimants, pursuant to Chapter 53 of the Texas Property Code. As against Accredited, Benchmark alleged it was not paid money due and owing, and it demanded payment, asserting it fully performed all acts necessary to perfect and protect its claims and rights against the named defendants and the bond issued by Accredited.

Accredited generally denied the allegations of Benchmark's suit, and it further filed an interpleader counterclaim, as well as a third-party claim including the multiple sub-subcontractors

as third-party defendants. As a surety of DanCar, it alleged it was entitled to the benefit and protection of any defenses that DanCar had or may have against claims asserted by Benchmark. Additionally, Accredited asserted it had received multiple claims against its payment bond from claimants in privity with DanCar. Accredited asserted the maximum liability for any obligations it may have under the payment bond was capped at the penal limit of \$2.5 million, but that the total amount of claims submitted to it had exceeded that amount by a multiple of three times. Faced with the potential of multiple and inconsistent liabilities, along with incidental costs, Accredited expressed its desire to interplead and deposit the \$2.5 million penal limit of the payment bond into the court's registry, and it further sought a complete release and discharge of claims from the court. In response, many of the third-party defendants named in the suit similarly asserted counterclaims and crossclaims against Accredited, DanCar, and Targa.

Accredited filed a motion for summary judgment on its claim to interplead the bond funds. The trial court entered an agreed judgment on Accredited's interpleader action finding it had unconditionally tendered the bond penal sum of \$2.5 million into the court's registry. The trial court awarded Accredited attorney's fees to be paid out of the interpleaded funds and ordered the remainder be administered as laid out in the order. But sub-subcontractors were only partially paid because their claims exceeded the penal sum of the bond.

C. Targa and the sub-subcontractors settle their dispute

To resolve liens on the project, Targa tendered the retainage liability into the court's registry, amounting to nearly \$2.9 million, pursuant to a provision of the Texas Property Code. *See* TEX. PROP. CODE ANN. § 53.101 (laying out that the funds required to be reserved by the owner should be "10 percent of the contract price of the work to the owner"). Targa soon settled its dispute

with the qualified sub-subcontractor claimants, wherein the parties agreed on the amount of Targa's maximum retainage liability and how the funds would be distributed among the several parties. Neither DanCar nor Accredited joined in this agreement.

Instead, Accredited claimed an interest in the retainage alleging it had paid millions of dollars in bond claims and expenses. After numerous pleadings and counter pleadings, Accredited ultimately asserted two types of claims against Targa: (1) a subrogation claim asserting in personam liability; and (2) a claim asserting ownership of DanCar's lien against retainage funds due to an indemnity agreement it made with DanCar.

After Targa and the sub-subcontractors settled their claims, the parties jointly filed a motion for summary judgment on Targa's declaratory judgment claim, and a motion for interpleader and partial dismissal. The trial court granted these motions. Within its order, the trial court discharged DanCar's lien against Targa's property due to the lien's expiration, ordered that Accredited had no enforceable interest in DanCar's lien, and further ordered that DanCar and Accredited were not entitled to share in any portion of the retainage funds. Additionally, the trial court dismissed with prejudice all pending claims and counterclaims filed against Targa by the sub-subcontractors. It also ordered all summary judgments filed against Targa by any of the sub-subcontractors were fully resolved by the judgment. Moreover, the trial court ordered Targa to pay into the registry of the court the sum of \$2,849,370.45, and further ordered the specific distribution to the parties as stated in the judgment. Once the funds were paid, the trial court ordered Targa released from liability imposed by Chapter 53 of the Texas Property Code and ordered all liens on Targa's property were discharged. Lastly, the trial court ordered all claims asserted by the sub-subcontractors against Targa be dismissed with prejudice. Targa and the sub-subcontractors next

filed a joint motion for severance, which Accredited opposed. The trial court granted the motion for severance ordering the listed claims would be severed from the current cause number—P-12305-112-CV—and placed into a new cause number—P-12305-B-112-CV.

Accredited timely filed its notice of appeal in severed cause number P-12305-B-112-CV, challenging the trial court's rendering of summary judgment and its grant of a joint motion for severance.

II. SCOPE OF REVIEW

By its appeal, Accredited originally presented six issues. The first four issues brought substantive complaints against the trial court's summary judgment granted pursuant to Targa and the sub-subcontractors settlement. Specifically, Issue One challenged the interpleader of Targa; Issue Two challenged the trial court's determination that limitations barred Accredited's assertion of the DanCar lien; Issue Three challenged the grant of summary judgment against Accredited's claim of equitable assignment and equitable subrogation in relation to sub-subcontractor liens; and Issue Four challenged the trial court's insertion of findings into its summary judgment order. The remaining two issues dealt with the trial court's severance order and whether it created a final judgment.

After Accredited submitted its opening brief, it settled and resolved its dispute over its claimed right to a portion of the statutory retainer funds. Based on that development, Accredited filed a motion to partially dismiss its appeal as to all sub-subcontractors along with its asserted substantive complaints against the trial court's grant of summary judgment (Issues One through Four). Accredited further stated it was now only pursuing Issues Five and Six on appeal as against Targa only.

Accordingly, on October 25, 2021, we granted Accredited's motion for partial dismissal and dismissed the appeal against the sub-subcontractor Appellees and DanCar.² *Accredited Sur. & Cas. Co., Inc. v. Benchmark Elec. Sols., Inc.*, No. 08-21-00039-CV, 2021 WL 4947321, at *1 (Tex. App.—El Paso Oct. 25, 2021, no pet.) (mem. op.). Accredited's appeal against Targa would remain pending but modified. *Id.* Based on Accredited's brief, Issues One through Four against Targa were considered abandoned. *Id.* Issues Five and Six remain pending and would be submitted to the Court for consideration. *Id.*

Now, in Accredited's fifth issue, it contends the trial court abused its discretion by severing claims which are factually interwoven with unadjudicated claims. Lastly, should we find the trial court erred in entering the severance order, Issue Six requests this Court to dismiss for want of jurisdiction given the absence of a final judgment.

III. TARGA'S MOTION TO DISMISS ON MOOTNESS

Prior to filing its responsive brief, Targa filed a motion to dismiss this appeal asserting the settlement between the parties rendered Accredited's appeal moot. We carried the motion forward to consider with the appeal. Targa's responsive brief filed thereafter also asserted the same argument, that we lack jurisdiction over the appeal because Accredited's settlement and requested dismissal rendered moot all remaining complaints.

A. Standard of review and applicable law

Appellate courts do not have authority to provide advisory opinions, or to decide cases on hypothetical or contingent facts. *See Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990). The mootness doctrine will preclude a court from rendering an

² Accredited noted that it did not fully settle its dispute with DanCar but still wished to dismiss it from the appeal.

advisory opinion. *Camarena v. Tex. Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988).

Mootness is a component of subject-matter jurisdiction. *Labrado v. County of El Paso*, 132 S.W.3d 581, 589 (Tex. App.—El Paso 2004, no pet.). Mootness defeats a court's subject-matter jurisdiction over a particular controversy. *State ex rel. D.L.S.*, 446 S.W.3d 506, 513–14 (Tex. App.—El Paso 2014, no pet.). Because subject-matter jurisdiction is essential to a court's authority to dispose of cases, it may be raised *sua sponte* at any time. *City of El Paso v. Waterblasting Techs., Inc.*, 491 S.W.3d 890, 904 (Tex. App.—El Paso 2016, no pet.). “A case is rendered moot when: (1) it appears that a party seeks to obtain a judgment upon some controversy, when in reality none exists; or (2) a party seeks a judgment upon some matter which cannot have a practical legal effect upon a then existing controversy.” *Beltran v. Beltran*, 324 S.W.3d 107, 110 (Tex. App.—El Paso 2010, no pet.). When an actual controversy no longer exists between the parties, “the decision of an appellate court would be a mere academic exercise.” *Hanna v. Godwin*, 876 S.W.2d 454, 457 (Tex. App.—El Paso 1994, no writ).

B. Analysis

The current state of Accredited's appeal claims the trial court abused its discretion in entering the severance order and that, if we conclude the severance order did not create a final judgment, this appeal should be dismissed for lack of jurisdiction. Specifically, Accredited contends that severance was in error because the claims within the summary judgment are interwoven with other claims still at issue before the trial court. *See Guar. Fed. Savs. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (“A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so

interwoven with the remaining action that they involve the same facts and issues.”).³

Targa urges that even if the severance was an abuse of discretion, this Court, nevertheless, cannot remedy any error because the severed claims were subsequently settled and resolved. Originally, when filing its appeal, Accredited advanced complaints against the substance of the trial court’s summary judgment, and further challenged the severance order which purportedly made the summary judgment final and appealable. Accredited’s arguments relied on its claimed right to recover a portion of the statutory retainage interpleaded in the court’s registry, which the summary judgment did not award to Accredited. But thereafter, Accredited entered a settlement with the sub-subcontractors whereby it abandoned Issues One through Four of the appeal, as to all Appellees, pertaining to its challenge against the summary judgment. By requesting dismissal of those issues against all parties, Accredited no longer challenged the substance of the summary judgment based on its settlement agreement. Rather, it only maintained Issues Five and Six on appeal, as to Targa only.

Targa now suggests that any decision on the severance order—as currently raised and maintained in Issue Five—would have no legal effect on the proceedings because the claims within the summary judgment have been finally settled by agreement.

In response, Accredited asserts the trial court abused its discretion in rendering the

³ We note here that Accredited requests us to dismiss for want of final judgment, based on its assertion of an improper severance. Notably, Accredited argues this Court has no jurisdiction on appeal because there is no final appealable order; that it brought this appeal out of an abundance of caution only so as not to lose its right to appeal certain claims. In instances when the severance constitutes reversible error, we have held that we should reverse and remand, not dismiss for want of jurisdiction. *See In re Hoover, Bax & Slovacek, L.L.P.*, 6 S.W.3d 646, 649 (Tex. App.—El Paso 1999, no pet.) (discussing the correct disposition of an appeal, after the court concludes the trial court abused its discretion in entering a severance order, is to reverse the order and remand for further proceedings, not dismiss for want of jurisdiction). Before we reach the question of how to dispose of the appeal to the extent it challenges the trial court’s severance order, we determine first that we must address the mootness question.

severance order because overlapping claims and affirmative defenses remain at issue between it and Targa. Accredited also claims the appeal is not moot because its appellate issues involve the status of its in personam subrogation claims against Targa, which it asserts the trial court did not dispose, or if it did, it did so improperly. The substance of its argument is that the severance order was overly broad in scope as the language included that the following would be severed:

[The claim brought between] Targa and Accredited arising under the terms and provisions of Chapter 53 of the *Texas Property Code*, or related to the \$2,849,370.45 in statutory retainage [interpleaded] by Targa, including Targa's Declaratory Judgment Against [Accredited] detailed in Targa's August 28, 2020 Pleading, or related to Accredited's equitable subrogation and assignment claims[.]

Although Targa acknowledges that Accredited still has live claims pending before the trial court, Accredited asserts this position does not comport with the language in the severance order in that Accredited's in personam claim is included within its scope. Accredited fears that dismissal based on mootness will allow Targa to change its position and argue later, in the trial court, that the in personam claim was severed and subject to final judgment. But the summary judgment itself does not mirror such language. Moreover, a severance order only acts to allow appeal on the underlying order and is not itself a judgment on the merits of any claims.

A case is rendered moot when no controversy exists, or a party seeks judgment upon a matter which will have no practical legal effect upon a then existing controversy. *Beltran*, 324 S.W.3d at 110. The question at hand is whether a live controversy exists in this appeal, or whether Accredited seeks a judgment upon a matter which cannot have a practical legal effect, not whether there are any controversies still pending before the trial court. Accredited's fear of Targa's arguments that could hypothetically be brought in the future does not constitute a live controversy for our purposes. A review by this Court of any of Accredited's claims still pending before the

trial court would be a mere academic exercise, and we are precluded from issuing advisory opinion. *Camarena*, 754 S.W.2d at 151. Given the record of this case, it is no longer possible for this Court to remedy any purported error in the severance order. *See Cappadonna Elec. Mgmt. v. Cameron Cnty.*, 180 S.W.3d 364, 375 (Tex. App.—Corpus Christi 2005, no pet.) (finding that there was no active controversy regarding the severance order when, following the severance order, the parties successfully arbitrated their claims to settlement). Additionally, Accredited’s complaints regarding undisposed claims still pending before the trial court is premature for our consideration on appeal. *See Hegar v. Space City Mgmt., L.L.C.*, 650 S.W.3d 593, 598 (Tex. App.—El Paso 2021, no pet.) (“The essence of the ripeness doctrine is to avoid premature adjudication . . . [and] to hold otherwise would be the essence of an advisory opinion, advising what the law would be on a hypothetical set of facts.” (quoting *Robinson v. Parker*, 353 S.W.3d 753, 756 (Tex. 2011))). We conclude the two issues remaining of this appeal are moot.

IV. CONCLUSION

We grant Targa’s motion to dismiss due to mootness and the appeal is dismissed for want of jurisdiction.

GINA M. PALAFOX, Justice

January 31, 2023

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J. (Not Participating)