Rel: June 25, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1200062

Cathedral of Faith Baptist Church, Inc., and Lee Shefton Riggins

v.

Donald Moulton, Sr., et al.

Appeal from Jefferson Circuit Court
(CV-19-902687)

BOLIN, Justice.

Cathedral of Faith Baptist Church, Inc., and Lee Shefton Riggins ("the plaintiffs") appeal from the Jefferson Circuit Court's dismissal of their complaint asserting various claims against, among others, Donald Moulton, Sr., Broken Vessel United Church ("Broken Vessel"), Lucien Blankenship, Blankenship & Associates, Antoinette M. Plump, Felicia Harris-Daniels, Tara Walker, and Tavares Roberts ("the defendants").[1]

Facts and Procedural History

On June 14, 2019, the plaintiffs sued the defendants, alleging, in part:

> "The Cathedral Church purchased property located [in] ... Birmingham ... and obtained a Warranty Deed [on] February 27,1992, which was recorded in the Jefferson County Probate Court in Book 4222 Page 161.
>
> "Cathedral Church conducted worship at the property until membership dwindled and discontinued meeting. A mortgage existed on the property with Regions Bank which was outstanding and failed to be paid by [Lee Shefton] Riggins

[1]It appears from the record that Blankenship & Associates is a law firm of which Lucien Blankenship is the principal and founding member, that Harris-Daniels was employed as an attorney at Blankenship & Associates, and that Plump, Roberts, and Walker were employees of Blankenship & Associates. The record further indicates that Blankenship, Moulton, and Plump are siblings.

(Paid in January, 2015). Riggins and Ms. Willie Bell Hall are the sole survivors and interest holders of Cathedral Church; their interest conveyed legally to Riggins.

"In 2014, [Donald] Moulton, on behalf of Broken Vessel Church, sought to rent the Cathedral Church property from Riggins. Riggins agreed to rent the property to Moulton and Broken Vessel Church; Moulton and Broken Vessel Church were to seek financing in the amount of TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00) to purchase the property.

"Moulton and Broken Vessel Church were to pay the commercial liability insurance Cathedral Church maintained with Planter's Insurance.

"Moulton and Broken Vessel unilaterally changed the insurance carrier in July 2015 to Nationwide [Mutual Insurance Company] without Cathedral Church and Riggins['s] knowledge or consent.

" Moulton and Broken Vessel never obtained financing to purchase the property and never paid any money to Riggins or Cathedral Church. Riggins paid for all Cathedral Church repairs and renovations required.

"On November 26, 2016 Cathedral Church burned and was a total loss. Moulton made a claim to Nationwide for the lost premises and contents. No money was paid to Riggins.

"Riggins discovered the property settlement with Nationwide in or around August 2017.

"Riggins also discovered subsequently two (2) recordings of a general warranty deed in the Jefferson County Tax

Assessor's office purporting to be a sale of the property by Riggins to Broken Vessel dated January 1, 2012 for $150,000.00.

"The first recording is dated January 16, 2015 in Land Record 201510, Page 10836 and typed 'consideration sum of $250,000.00' struck through the '2' and handwritten '1' -- which was not initialed. Other defects are apparent on the face of the General Warranty Deed which was notarized by Antoinette Plump and witnessed by Tara Walker and Tavares Roberts and dated January 1, 2012. A grantor's signature purporting to be that of 'L. Shefton Riggins' was revealed with no signatures of Moulton individually or on behalf of Broken Vessel. Those defects include lack of a proper legal description of the property, no Real Estate Sales Validation Form submitted to Judge of Probate in accordance with Code of Alabama (1975), Section 40-22-1; no certified resolution in accordance with Code of Alabama (1975), Section 10A-20-2.06 filed for record in the Probate Office of Jefferson County, Alabama.

"The second document was re-recorded in Instrument 20180001982 -- wherein handwritten is '250,000.00' as the sales price. None of the defects listed ... above were addressed nor corrected.

"Nationwide and its agent/producer [Sydney Keith] Brooks accepted a commercial insurance application from Moulton and Broken Vessel Church on July 2, 2015 requesting coverage for the property ... without requiring proper proof of an insurable interest by Moulton and Broken Vessel Church in the Cathedral Church property. The application contained multiple false statements attributed to Moulton which a background check and due diligence regarding a warranty deed or title search would have revealed."

In count I of the complaint, the plaintiffs asserted a forgery claim, alleging that the January 1, 2012, general warranty had been forged, against Moulton, Broken Vessel, Plump, Walker, Roberts and, it appears, Blankenship and Blankenship & Associates.[2] Riggins denied having conveyed the church property to Moulton or Broken Vessel, denied that his signature on the January 1, 2012, general warranty deed was valid, and denied that he had executed the January 1, 2012, general warranty deed in the presence of Plump, as a notary public, and Walker and Roberts, as witnesses. The plaintiffs sought, among other things, a judgment declaring that the January 1, 2012, general warranty deed was forged and invalid and an award of damages, including attorney's fees and costs.

In count II of the complaint, the plaintiffs asserted a claim of fraud and conspiracy to commit fraud against Blankenship, Blankenship & Associates, Walker, Roberts, Plump, Moulton, and Broken Vessel, alleging

[2]It appears from the record that the plaintiffs sought to hold Blankenship and Blankenship & Associates liable as to this count based on a theory of respondeat superior, see note 1, supra, although this claim as to Blankenship and Blankenship & Associates was inartfully pleaded.

that those defendants had conspired to create and had created a forged general warranty deed purporting to convey the church property to Moulton and Broken Vessel. The plaintiffs sought, among other things, an order voiding the general warranty deed and an award of damages, including attorney's fees and costs.

In count III of the complaint, the plaintiffs asserted a conversion claim against Harris-Daniels, Blankenship, Blankenship & Associates, Moulton, and Broken Vessel, alleging that those defendants had engaged in a scheme whereby they had obtained and converted insurance proceeds paid by Nationwide for the loss of the church property to fire. The plaintiffs sought the payment of an amount equal to the amount of the insurance proceeds paid by Nationwide to Moulton and Broken Vessel, punitive damages, interest, and attorney's fees and costs.

In count IV of the complaint, the plaintiffs asserted an unjust-enrichment claim against Moulton and Broken Vessel, alleging that those defendants had been unjustly enriched as a result of the payment of insurance proceeds from Nationwide to Moulton and Broken Vessel. The plaintiffs sought the payment of an amount equal to the amount of the

insurance proceeds paid by Nationwide to Moulton and Broken Vessel, compensatory and punitive damages, interest, and attorney's fees and costs.[3] A review of the defendants' responsive motions is pertinent to this Court's disposition of the appeal.

On December 4, 2019, Moulton and Plump filed pro se responses to the complaint, requesting that it be dismissed. On December 11, 2019, Blankenship moved the trial court, pursuant to Rule 12(b)(6), Ala. R. Civ. P., to dismiss the claims asserted against him, specifically arguing that the fraud claim had not been pleaded with sufficient particularity, as required by Rule 9(b), Ala. R. Civ. P., and that the conversion claim failed to aver that any payment of insurance proceeds by Nationwide had been

[3]The plaintiffs also asserted a negligence claim against Nationwide and its agent, Sydney Keith Brooks, alleging that they had negligently issued property insurance on the church property to Moulton and Broken Vessel without having properly ascertained proof of ownership of the church property. On August 5, 2019, Nationwide and Brooks moved the trial court, pursuant to Rule 12(b)(6), Ala. R. Civ. P., to dismiss the claims against them. On September 20, 2019, the trial court entered an order granting the motion to dismiss filed by Nationwide and Brooks. The plaintiffs have not challenged the order dismissing the claims against Nationwide and Brooks, and Nationwide and Brooks were not named as parties to this appeal by the plaintiffs.

made to or received by Blankenship. Blankenship supported his motion to dismiss with his affidavit, in which he stated that he had no business or personal relationship with Broken Vessel; had never seen the general warranty deed at issue and had no knowledge regarding the notarization and witnessing of the deed; and had never received any money from Nationwide, Broken Vessel, or Moulton.

On January 10, 2020, Harris-Daniels moved the trial court to dismiss the conversion claim against her, pursuant to Rule 12(b)(6), arguing that the plaintiffs had failed to state a claim of conversion against her because, she said, she simply had represented Moulton and Broken Vessel in an action commenced against Nationwide after the insurance claim had been settled and that she had not been a party to the policy of insurance between Nationwide and Moulton and Broken Vessel. Harris-Daniels also argued that the plaintiffs' claim against her was due to be dismissed pursuant to Rule 12(b)(5), Ala. R. Civ. P., because, she said, she had not been properly served.

On February 10, 2020, Blankenship, now joined by Blankenship & Associates, filed an amended Rule 12(b)(6) motion to dismiss, arguing that

counts I and II of the complaint were barred by the applicable statutes of limitations. Blankenship and Blankenship & Associates also argued that count III of the complaint failed to state a claim of conversion because, they said, Riggins had helped Moulton prepare the statement of loss that had been submitted to Nationwide in support of the fire-loss claim, Riggins had known that the insurance proceeds would be paid to Moulton and Broken Vessel, and nothing in the complaint alleges that Blankenship and Blankenship & Associates had received any insurance proceeds from Nationwide.

On July 27, 2010, Plump filed an amended motion to dismiss, pursuant to Rule 12(b)(6), arguing that count II of the complaint was barred by the applicable statute of limitations.

On July 30, 2020, the plaintiffs moved the trial court, pursuant to Rule 55(b)(2), Ala. R. Civ. P., to enter a default judgment against Broken Vessel. The plaintiffs asserted that both Moulton and Broken Vessel had been named as buyers of the church property on the January 1, 2012, general warranty deed; that Moulton was the agent of record for Broken Vessel; that Moulton had been properly served, both individually and as

the agent of Broken Vessel; and that Moulton, individually, had filed a response seeking the dismissal of the complaint but had not to date filed any response on behalf of Broken Vessel. By way of relief, the plaintiffs requested that a default judgment be entered against Broken Vessel; that the deed dated January 1, 2012, be declared invalid; that all liens against the church property attributed to Broken Vessel be declared invalid; and that a judgment be entered against Broken Vessel in the amount of $984,790, plus attorney's fees, costs, and interest. On July 31, 2020, the trial court entered a default judgment against Broken Vessel but set for a later date a hearing to determine the amount of damages to be assessed against Broken Vessel.

On August 3, 2020, Moulton filed an amended motion to dismiss, pursuant to Rule 12(b)(6), arguing, among other things, that the claims asserted against him in the complaint were barred by the applicable statutes of limitations.

On August 28, 2020, the plaintiffs moved the trial court, pursuant to Rule 55(b)(2), to enter a default judgment against Roberts, alleging that the complaint had been filed on June 14, 2019, that Roberts had been

properly served on July 8, 2020, and that Roberts had failed to file a responsive pleading. The plaintiffs requested that a judgment be entered against Roberts in the amount of $984,840, plus attorney's fees and costs. On September 4, 2020, the trial court entered a default judgment against Roberts but set for a later date a hearing to determine the amount of damages to be assessed against Roberts.

On September 2, 2020, the plaintiffs moved to "bifurcate" the claims. The plaintiffs argued that the claims all hinge on or are dependent on the trial court's determination regarding the validity of the January 1, 2012, general warranty deed. The plaintiffs contended that an initial determination regarding the validity of the general warranty deed was in the best interests of judicial economy and the parties because, they asserted, if the trial court determined that the general warranty deed was valid, then the pending motions to dismiss would be moot. The plaintiffs stated that an initial determination regarding the validity of the general warranty deed would enable the case to move more "expeditiously." On that same day, Moulton, Blankenship, and Blankenship & Associates filed responses in opposition to the motion to bifurcate, arguing that the

pending motions to dismiss based on the statute of limitations must be considered first because, they said, if the trial court determined that the claims were barred by the statute of limitations, then the trial court lacked jurisdiction to decide anything concerning the general warranty deed.

On September 15, 2020, Plump filed a response in opposition to the plaintiffs' motion to bifurcate, also arguing that her Rule 12(b)(6) motion to dismiss based on the statute of limitations must be considered first to determine whether the trial court properly had jurisdiction to consider the matters asserted in the complaint.

On September 17, 2020, the trial court conducted a hearing on the pending motions to dismiss. Blankenship, Blankenship & Associates, Harris-Daniels, Plump, and Moulton each argued during the hearing that the claims asserted against them were barred by the applicable statutes of limitations.[4] Broken Vessel and Roberts, both of whom had had default

[4]As stated above, Blankenship and Blankenship & Associates filed an amended Rule 12(b)(6) motion to dismiss on February 10, 2020. In that amended motion, Blankenship and Blankenship & Associates asserted that counts I and II of the complaint were barred by the applicable

judgments previously entered against them, were not present and did not participate in the hearing. Walker had never been served and was not present at the hearing.

During the hearing, the following transpired:

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statutes of limitations. Blankenship and Blankenship & Associates did not assert in their amended motion to dismiss that count III of the complaint was barred by the applicable statute of limitations but, rather, argued that count III failed to state a claim for conversion because, they said, Riggins had helped Moulton prepare the statement of loss that had been submitted to Nationwide in support of the fire-loss claim, Riggins had known that the insurance proceeds would be paid to Moulton and Broken Vessel, and nothing in the complaint alleges that Blankenship and Blankenship & Associates had received any insurance proceeds from Nationwide. Nationwide first asserted the statute-of-limitations defense as to count III at the September 17, 2020, hearing on the pending motions to dismiss. On January 10, 2020, Harris-Daniels moved the trial court to dismiss the conversion claim against her, pursuant to Rule 12(b)(6), arguing that the plaintiffs had failed to state a claim of conversion against her, and pursuant to Rule 12(b)(5), arguing that she had not been properly served. Harris-Daniels first asserted the statute-of-limitations defense at the September 17, 2020, hearing on the pending motions to dismiss. Finally, on July 27, 2020, Plump filed an amended motion to dismiss, pursuant to Rule 12(b)(6), arguing that count II of the complaint was barred by the applicable statute of limitations. Plump first asserted the statute-of-limitations defense as to count I at the September 17, 2020, hearing on the pending motions to dismiss.

> "THE COURT: Okay. Is there -- and y'all help me with this. Is there anyone that's a defendant that may be pro se that's not present today?
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> "[Counsel for Harris-Daniels]: I believe there is a question about a default judgment against someone.
>
> "THE COURT: Right.
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> "[Counsel for Harris-Daniels]: I came into the case pretty late, so I'm not positive about that.
>
> "THE COURT: I held off on that, and I don't think it would be appropriate to move forward on damages on that at this point until we resolve the issues on the other matters. Because would it be y'all's position from a defense standpoint that, given the arguments, that could be applicable to all parties, even if they have a motion --
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> "[Counsel for Harris-Daniels]: Yes.
>
> "THE COURT: -- to dismiss, given the fact that, you know, if it's pled -- you know, if I find that way, it would be inequitable or it would be inconsistent not to find for all in regards --
>
> "[Counsel for Harris-Daniels]: Yes, sir.
>
> "[Counsel for Plump]: No problem, yes."

At the close of the hearing, the trial court requested that counsel for the defendants that were present at the hearing prepare a proposed order dismissing the plaintiffs' complaint in its entirety as to all defendants,

based on a finding that the claims were barred by the applicable statutes of limitations. The trial court also requested that the plaintiffs prepare a proposed order granting a motion for leave to amend their complaint to assert their claims with more particularity.

On September 25, 2020, the plaintiffs filed an amended complaint containing a more definite statement of their allegations and a statement regarding the tolling of the statute of limitations. Specifically, the amended complaint provides both a more detailed statement of the plaintiffs' factual allegations and provides the plaintiffs' explanation as to why the limitations period applicable to their fraud claim should have been tolled.

On September 28, 2020, Plump, Moulton, and Harris-Daniels moved to strike the amended complaint, stating that the trial court had conducted a hearing on September 17, 2020, at which time the trial court had requested that the parties submit proposed orders within 14 days of the hearing, including requesting that the plaintiffs submit a proposed order granting a motion for leave to amend their complaint. Plump, Moulton, and Harris-Daniels argued in their motion to strike that the

plaintiffs had never actually filed a motion for leave to amend the complaint and that the trial court had never granted the plaintiffs leave to amend their complaint.

On October 14, 2020, the trial court entered an order dismissing the claims asserted against Blankenship, Blankenship & Associates, Plump, Harris-Daniels, and Moulton based on the applicable statutes of limitations. The trial court further purported to dismiss the claims asserted against Broken Vessel, Roberts, and Walker based on the applicable statutes of limitations, finding that "the arguments for dismissal as to the claims of the plaintiffs [are] applicable to all other named Defendants." Finally, because the trial court had purported to dismiss the plaintiffs' claims as to all the defendants based on the applicable statutes of limitations, it denied as moot all other pending motions.[5] The plaintiffs appealed.

Discussion

[5]To the extent that the trial court entered an order purporting to dismiss the claims against Walker, that order is a nullity because Walker was never served and was not a party to the action. Harris v. Preskitt, 911 So. 2d 8 (Ala. Civ. App. 2005).

"[I]t is well settled that this Court may consider, ex mero motu, whether a judgment or order is sufficiently final to support an appeal." Natures Way Marine, LLC v. Dunhill Entities, LP, 63 So. 3d 615, 618 (Ala. 2010).

> " 'Ordinarily, an appeal can be brought only from a final judgment. Ala. Code 1975, §12-22-2. If a case involves multiple claims or multiple parties, an order is generally not final unless it disposes of all claims as to all parties. Rule 54(b), Ala. R. Civ. P. However, when an action contains more than one claim for relief, Rule 54(b) allows the court to direct the entry of a final judgment as to one or more of the claims, if it makes the express determination that there is no just reason for delay.' "

North Alabama Elec. Coop. v. New Hope Tel. Coop., 7 So. 3d 342, 344-45 (Ala. 2008)(quoting Grantham v. Vanderzyl, 802 So. 2d 1077, 1079-80 (Ala. 2001)).

As discussed above, the trial court entered default judgments against both Broken Vessel and Roberts but specifically reserved for a later date the determination of damages as to both. " 'A default judgment that reserves the assessment of damages is interlocutory and may be set aside at any time; once the trial court assesses damages on the default judgment, the judgment becomes final.' " Ex parte Family Dollar Stores

of Alabama, Inc., 906 So. 2d 892, 896 (Ala. 2005) (quoting Keith v. Moore, 771 So. 2d 1014, 1017 (Ala. Civ. App. 1997), rev'd on other grounds, 771 So. 2d 1018 (Ala. 1998)). At the September 17, 2020, hearing on the pending motions to dismiss, the trial court, sua sponte, raised the affirmative defense of the statute of limitations on behalf of Broken Vessel and Roberts and then entered an order dismissing the complaint against those two defendants based on that affirmative defense. Although the interlocutory default judgments could have been set aside at that time, before damages had been assessed against Broken Vessel and Roberts, the trial court lacked the authority to sua sponte raise the affirmative defense of the statute of limitations and to dismiss the claims against Broken Vessel and Roberts for that reason. In Waite v. Waite, 891 So. 2d 341, 343-44 (Ala. Civ. App 2004), the Court of Civil Appeals addressed the issue of a trial court's authority to sua sponte raise an affirmative defense on behalf of a defendant and dismiss an action based on that defense:

> "Other courts ... have concluded that a trial court may dismiss an action on its own motion, but only if the basis for that dismissal is jurisdictional. See People v. Matulis, 117 Ill. App. 3d 876, 454 N.E.2d 62, 73 Ill. Dec. 318 (1983) (the trial court erred in dismissing, sua sponte, the action because the

defect was not jurisdictional). See also Diamond Nat'l Corp. v. Dwelle, 164 Conn. 540, 325 A.2d 269 (1973); Lease Partners Corp. v. R & J Pharmacies, Inc., 329 Ill. App. 3d 69, 768 N.E.2d 54, 263 Ill. Dec. 294 (2002); Adams v. Inman, 892 S.W.2d 651 (Mo. Ct. App.1994); and Neal v. Maniglia (No. 75566, April 6, 2000) (Ohio Ct. App. 2000) (not published in Ohio Appellate Reports or in Northeastern Reporter). In two of those cases, the courts determined that the statute of limitations served as a jurisdictional basis that supported affirming a trial court's sua sponte dismissal of an action. Diamond Nat'l Corp. v. Dwelle, supra; Neal v. Maniglia, supra. However, in several of the other cases, the courts concluded that, although a trial court is permitted to dismiss an action based on a lack of jurisdiction, the statute of limitations is not a proper basis for such a dismissal because the statute of limitations is an affirmative defense that must be raised by a party. Lease Partners Corp. v. R & J Pharmacies, Inc., supra; Adams v. Inman, supra. See also McCarvill v. McCarvill, 144 Or. App. 437, 441, 927 P.2d 115, 116 (1996) (a trial court 'may not raise defenses on its own and then dismiss the complaint on the basis of its determination of the defenses'); Francke v. Gable, 121 Or. App. 17, 853 P.2d 1366 (1993) (a trial court may not raise an affirmative defense on behalf of a defendant and then dismiss the action based on that defense).

"The doctrines of res judicata and collateral estoppel are affirmative defenses, Rule 8(c), Ala. R. Civ. P.; Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 516 (Ala. 2002), and do not affect a court's jurisdiction to consider an action. Affirmative defenses may be waived if they are not pleaded by a party against whom a claim is asserted. Rule 8(c), Ala. R. Civ. P.; Bechtel v. Crown Cent. Petroleum Corp., 451 So. 2d 793 (Ala.1984) (citing 2A J. Moore, Federal Practice § 8.27[3] at 8-251 (2d ed. 1948)). By its actions in the present case, the trial court, in essence, asserted the affirmative

> defenses of the doctrines of res judicata and collateral estoppel on behalf of the defendants and dismissed the matter based on those affirmative defenses.
>
> "After careful consideration, we find most persuasive the reasoning of the courts that have held that, although a trial court may dismiss an action on its own motion on a jurisdictional basis, affirmative defenses such as the statute of limitations or the doctrine of res judicata are not jurisdictional bases upon which a court may base a sua sponte dismissal."

This Court adopted the reasoning of Waite in Ex parte Beck , 988 So. 2d 950 (Ala. 2007). See also Wausau Dev. Corp. v. Natural Gas & Oil, Inc., 144 So. 3d 309 (Ala. 2013).

Because the trial court lacked the authority to sua sponte raise the affirmative defense of the statute of limitations on behalf of Broken Vessel and Roberts and dismiss the claims against those defendants on that basis, the nonfinal, interlocutory default judgments entered against those defendants remain pending. Because the trial court's judgment in this case adjudicated fewer than all the claims before the court, it is a nonfinal judgment and will not support this appeal. See Rule 54, Ala. R. Civ. P. Accordingly, we must dismiss the appeal. See Schlarb v. Lee, 955 So. 2d 418 (Ala. 2006).

APPEAL DISMISSED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur.