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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1190814

Ex parte SE Property Holdings, LLC

**PETITION FOR WRIT OF CERTIORARI
TO THE BALDWIN CIRCUIT COURT**

(In re: SE Property Holdings, LLC

v.

David L. Harrell)

(Baldwin Circuit Court, CV-10-901862)

1190816

SE Property Holdings, LLC

v.

David L. Harrell

**Appeal from Baldwin Circuit Court
(CV-10-901862)**

SHAW, Justice.

In case no. 1190816, the appellant and plaintiff below, SE Property Holdings, LLC ("SEPH"), has appealed the Baldwin Circuit Court's denial of its petition seeking to hold the appellee and defendant below, David L. Harrell, in contempt for failing to comply with the trial court's postjudgment charging order entered in a previous action involving the parties and its failure to hold a hearing on its contempt petition. In case no. 1190814, SEPH has also petitioned this Court for a writ of certiorari, seeking the same relief. This Court consolidated the proceedings ex mero motu. In case no. 1190816, we reverse the trial court's decision and remand the case; in case no. 1190814, we dismiss the certiorari petition.

Facts and Procedural History

In December 2006, Water's Edge, LLC ("Water's Edge"), a real-estate development company, entered into a construction-loan agreement ("the

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agreement") with a bank that later merged into SEPH for two construction loans totaling \$17,000,000. Some of Water's Edge's members, including Harrell, served as guarantors on the loans and, pursuant to the agreement, guaranteed timely payment of the two loans by November 30, 2010. According to SEPH, the last payment made by Water's Edge on both loans occurred in May 2010.

In October 2010, SEPH sued Water's Edge and the loan guarantors, including Harrell. Following years of litigation, the trial court entered a judgment against Water's Edge for \$13,863,052.94. The trial court also entered a judgment against the guarantors, including Harrell, for \$9,084,076.14 on one loan and for different amounts totaling \$2,297,431 -- including \$84,392 against Harrell -- on the other loan.

In February 2015, SEPH filed a motion in the previous action seeking a charging order pursuant to § 10A-5A-5.03, Ala. Code 1975, on the basis that Harrell had not satisfied the judgment against him. According to SEPH, Harrell owned a membership interest in various companies, including Southern Land Brokers, LLC ("SLB"), formerly

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known as Alabama Land Brokers. Thus, under § 10A-5A-5.03, SEPH contended, it was entitled to an order

"charging the membership interest of Harrell in the subject Companies with payment of the unsatisfied amount of [SEPH's] judgment, with accrued interest and costs. Under the Charging Order, a lien is created on Harrell's interest, and the Companies would be required to report and distribute to [SEPH] any amounts that become due or distributable."

The trial court granted SEPH's request and issued a charging order directing SLB and the other companies to "distribute to the Clerk of Court any income, officer's fees, bonuses, distributions, salaries or dividends paid or otherwise conveyed to [Harrell] by reason of any interest [he] own[s] in the Limited Liability Companies until [SEPH's] judgment is satisfied in full." According to SEPH, despite the entry of the trial court's charging order, the judgment has not been fully satisfied.

On June 12, 2020, SEPH filed a petition asking the trial court to hold Harrell in contempt and to sanction him for violating the charging order. According to SEPH, Harrell and his wife, Carolyn, each owned 50% of SLB. SLB's operating agreement required that all distributions, profits, and income be distributed to each member based on their

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ownership interest in the company.¹ SEPH alleged that, after the trial court had entered its charging order, Harrell, as SLB's managing member, began making distributions solely to Carolyn in violation of SLB's operating agreement. Those distributions to Carolyn, SEPH alleged, included distributions actually owed to Harrell, thereby violating the trial court's charging order.

SEPH also alleged that SLB had been making payments on Harrell's American Express account for his personal expenses. Because those expenses were not related to the business, SEPH alleged, those payments were "de facto distributions" to Harrell that should have been paid to the clerk of court in accordance with the charging order. In support of its petition, SEPH attached numerous financial documents that it had obtained from Harrell and SLB, including Schedule K-1 federal tax forms on which Harrell declared that he had received distributions from SLB in the years following the trial court's issuance of its charging order.

¹A copy of the operating agreement was included in the record on appeal.

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Harrell filed an objection to SEPH's petition in which he acknowledged that, pursuant to § 10A-5A-5.03(a), the charging order issued by the trial court gave SEPH the right to receive any distributions from SLB to which Harrell would otherwise be entitled as a result of any transferrable interest held by him in the company. He also acknowledged that, pursuant to § 10A-5A-5.03(c), the charging order constituted a lien on his transferrable interests and that § 10A-5A-5.03(f) provided the exclusive remedy by which a judgment creditor of a member or transferee could satisfy a judgment out of his transferrable interests. He asserted, however, that SEPH's petition was due to be denied because, he said, he had not transferred "any transferrable interest he maintains in and to [SLB] and [he had] not received an actual cash distribution (K-1) from the profits, if any, earned by [SLB]." No documentary evidence or affidavits were filed with Harrell's objection.

After SEPH filed a response to Harrell's objection, the trial court, without holding a hearing, issued an order on July 1, 2020, denying SEPH's petition.

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As noted above, SEPH filed both an appeal and a petition for certiorari review. Before the adoption of Rule 70A(g), Ala. R. Civ. P., and Rule 33.6, Ala. R. Crim. P., a trial court's contempt ruling was subject to appellate review by a petition for a writ of certiorari. Ex parte Dearman, 322 So. 3d 5, 9 n.5 (Ala. 2020) ("Before the adoption of Rule 33, Ala. R. Crim. P., and its provision for the appeal of contempt findings, all contempt findings were reviewed by petition for the writ of certiorari.").² Rule 70A(g), which was adopted in 1994 and is applicable in civil cases, provides that an adjudication or finding of contempt is subject to direct appeal.³ As SEPH correctly points out, the language of the rule

²Even when a party purported to appeal a trial court's contempt ruling, our appellate courts treated those appeals as petitions for the writ of certiorari. See, e.g., Thomas v. Thomas, 406 So. 2d 939, 941 (Ala. Civ. App. 1981) ("Although the appropriate method of review of a contempt order is by way of extraordinary writ, ... this court will treat the husband's appeal as a petition for certiorari and consider his arguments accordingly."). The same was true when a party appealed the denial of a request for a finding of contempt, as was done in this case. See, e.g., Citicorp Person to Person Fin. Ctr., Inc. v. Sanderson, 421 So. 2d 1293, 1295 (Ala. Civ. App. 1982) ("Certiorari, and not an appeal, is the proper method to review a trial court's action in refusing to hold a party in contempt of court.").

³Rule 70A(g) provides:

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contemplates an appeal only when a party has been found in contempt; it does not provide that an aggrieved party may appeal a trial court's order denying a finding of contempt.

However, our appellate courts have since clarified that, in many cases, a petition seeking the imposition of sanctions based on a finding of contempt initiates an independent proceeding that requires payment of a filing fee. See, e.g., Morgan v. Morgan, 183 So. 3d 945 (Ala. Civ. App. 2014) (recognizing that an action for contempt requires the payment of a new filing fee, new service of process, and the addition of a new suffix to the case number); Kyle v. Kyle, 128 So. 3d 766, 772 (Ala. Civ. App. 2013) (recognizing that "[a] motion or petition seeking the imposition of sanctions based on a finding of contempt initiates an independent

"(1) Where Contemnor Is in Custody. An adjudication of contempt is reviewable by appeal if the person found in contempt is being held in custody pursuant to that adjudication, unless the writ of habeas corpus is an available remedy.

"(2) Where Contemnor Is Not in Custody. If the person found in contempt is not being held in custody pursuant to the adjudication of contempt, the adjudication is reviewable by appeal."

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proceeding that requires the payment of a filing fee.' " (quoting Kaufman v. Kaufman, 934 So. 2d 1073, 1082 (Ala. Civ. App. 2005)); and Wilcoxon v. Wilcoxon, 907 So. 2d 447, 449 n.1 (Ala. Civ. App. 2005) (recognizing that the filing of a contempt petition initiated a separate and independent proceeding from the underlying action). Under § 12-22-2, Ala. Code 1975, an appeal lies from "any" final judgment of a circuit court or a probate court. See, e.g., Richburg v. Richburg, 895 So. 2d 311 (Ala. Civ. App. 2004) (recognizing that a judgment is final and appealable if it disposes of all the claims and controversies between the parties). Our appellate courts have previously reviewed denials of contempt petitions on appeal -- instead of by certiorari petition -- in cases in which those denials were part of final judgments. See, e.g., J.S.S. v. D.P.S., 281 So. 3d 434 (Ala. Civ. App. 2019); Hummer v. Loftis, 276 So. 3d 215 (Ala. Civ. App. 2018); and Seymour v. Seymour, 241 So. 3d 733 (Ala. Civ. App. 2017). Therefore, the denial of a petition for contempt that initiates an independent proceeding and is adjudicated in a final judgment is subject to appeal.

In the present case, SEPH filed the underlying petition for contempt and paid a filing fee, thereby initiating an independent action below. The

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trial court's judgment adjudicated all the claims against all the parties and was a final judgment for purposes of Rule 54, Ala. R. Civ. P. Therefore, the trial court's ruling is properly reviewed by appeal; therefore, we dismiss SEPH's separately filed certiorari petition in case no. 1190814 as superfluous.

Standard of Review

"The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence.' "

J.S.S. v. D.P.S., 281 So. 3d at 437-38 (quoting Poh v. Poh, 64 So. 3d 49, 61 (Ala. Civ. App. 2010)). See also Hummer v. Loftis, 276 So. 3d at 225.

Discussion

SEPH argues that the trial court, in denying its petition to hold Harrell in contempt for failing to comply with the charging order, exceeded its discretion because, it says, the record contains undisputed evidence establishing that Harrell violated the charging order. It also argues that the trial court erred in denying its petition without first holding a hearing on that petition.

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Under Alabama law,

"[o]n application to a court of competent jurisdiction by any judgment creditor of a member or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged and after the limited liability company has been served with the charging order, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the transferable interest."

§ 10A-5A-5.03(a). A "transferrable interest" is "a member's right to receive distributions from a limited liability company or a series thereof." § 10A-5A-1.02(t), Ala. Code 1975. "Distribution" is defined as "a transfer of money or other property from a limited liability company, or series thereof, to another person on account of a transferable interest." § 10A-5A-1.02(h). A "distribution" does not include "amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of the limited liability company's activities and affairs under a bona fide retirement plan or other benefits program." § 10A-5A-4.06(e), Ala. Code 1975.

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As noted previously, SEPH applied for and was granted a charging order in 2015 after Harrell had failed to satisfy the judgment issued against him. The trial court's charging order stated, in pertinent part:

"[A] lien is charged against the financial interests of David L. Harrell in [SLB, Crystal Waters, LLC, Lowmar Properties, LLC, and Harrell Development, LLC (the 'Limited Liability Companies')] in the amount of \$9,084,076.14 and \$84,392.00, being the unsatisfied judgment of December 17, 2014, plus accrued interest on the judgment and that said [Limited Liability] Companies are ORDERED to distribute to the Clerk of Court any income, officer's fees, bonuses, distributions, salaries or dividends paid or otherwise conveyed to [Harrell] by reason of any interest [he] own[s] in the Limited Liability Companies until [SEPH's] judgment is satisfied in full."

The record before us indicates that Harrell and his wife, Carolyn, each own 50% of SLB. SLB's operating agreement makes clear that the profits and income earned by SLB must be distributed to Harrell and Carolyn in proportion to their membership interests.

Despite the trial court's charging order requiring SLB to pay any income or distributions that would normally be directed to Harrell to the clerk of court until SEPH's judgment is satisfied in full, SEPH alleged that, after the trial court entered its charging order, Harrell, as SLB's managing member, began making distributions solely to Carolyn in

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violation of SLB's operating agreement. SEPH further alleged that the distributions Carolyn received included distributions owed to Harrell and, thus, violated the trial court's charging order. Indeed, copies of Schedule K-1 federal tax forms included in the record on appeal show that Harrell and Carolyn each declared income and distributions from SLB for tax years 2015-2017 -- the years following the issuance of the charging order -- in the total amount of approximately \$415,000 each.

SEPH contends that this evidence demonstrates that Harrell and SLB are intentionally evading the trial court's charging order and must, therefore, be held in contempt. In his objection filed below, Harrell argued that SEPH's petition was due to be denied because, he asserted, he had not "received an actual cash distribution (K-1) from the profits, if any, earned by [SLB]." However, Harrell did not provide any additional information in support of that assertion. He also did not attach any documentation or evidence to his objection showing that to be the case, and there is nothing in the record before us, other than his conclusory denial, supporting his assertion. There is nothing before us demonstrating that he did not intentionally avoid otherwise required disbursements. In

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fact, as demonstrated above, the evidence before us indicates that the opposite is true.

In addressing civil-contempt issues, the Court of Civil Appeals recently stated:

" 'Civil contempt' is defined as a 'willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with.' Rule 70A(a)(2)(D), Ala. R. Civ. P...."

" Routzong v. Baker, 20 So. 3d 802, 810 (Ala. Civ. App. 2009). " The failure to perform an act required by the court for the benefit of an opposing party constitutes civil contempt. Carter v. State ex rel. Bullock County, 393 So. 2d 1368, 1370 (Ala. 1981)." J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1012 (Ala. Civ. App. 2007). Furthermore, "[t]he purpose of a civil contempt proceeding is to effectuate compliance with court orders and not to punish the contemnor." Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997)." Hall v. Hall, 892 So. 2d 958, 962 (Ala. Civ. App. 2004)."

"Reed v. Dyas, 28 So. 3d 6, 8 (Ala. Civ. App. 2009) (emphasis added)."

Cheshire v. Cheshire, 296 So. 3d 851, 862 (Ala. Civ. App. 2019). In the present case, the evidence in the record demonstrates that Harrell

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"fail[ed] to perform an act required by the court for the benefit of an opposing party." Carter v. State ex rel. Bullock Cnty., 393 So. 2d 1368, 1370 (Ala. 1981). Thus, the trial court exceeded its discretion in denying SEPH's petition based on the materials in the record.

Further, our caselaw makes clear that "[a] person cannot be found in contempt without a hearing." Thompson v. Thompson, 649 So. 2d 208, 210 (Ala. Civ. App. 1994) (citing Rule 70A(c)(2), Ala. R. Civ. P.) . Indeed, Rule 70A(c)(2) provides:

"Upon the filing of a contempt petition, the clerk shall issue process in accordance with these rules, unless the petition is initiated by a counterclaim or cross-claim authorized under Rule 13[, Ala. R. Civ. P.]. In any case, the person against whom the petition is directed shall be notified (1) of the time and place for the hearing on the petition and (2) that failure to appear at the hearing may result in the issuance of a writ of arrest pursuant to Rule 70A(d), to compel the presence of the alleged contemnor."

Nothing in the record before us indicates that a hearing was held or that, if one was held, Harrell was "notified ... of the time and place for the hearing on the petition." Thus, in case no. 1190816, we reverse the trial court's judgment and remand the case for further proceedings consistent

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with this decision, including a hearing pursuant to Rule 70A(c)(2), at which the parties may present their evidence.

1190814 -- PETITION DISMISSED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.

1190816 -- REVERSED AND REMANDED .

Bryan, Mendheim, and Mitchell, JJ., concur.

Parker, C.J., concurs in part and concurs in the result.

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PARKER, Chief Justice (concurring in part and concurring in the result in case no. 1190816).

I agree that we have jurisdiction and that the judgment must be reversed. SE Property Holdings, LLC ("SEPH"), filed legally sufficient allegations of contempt, so the circuit court could not deny the claim without holding the hearing required by Rule 70A(c)(2), Ala. R. Civ. P. Thus, the circuit court's error was not holding David L. Harrell in contempt without a hearing or proper notice, as the main opinion seems to suggest, but denying the contempt claim without a hearing.

Moreover, within the context of contempt procedure, I believe that Rule 70A(c)(2) contemplates an evidentiary hearing -- essentially a trial on the contempt claim. As this Court has said,

"[w]here an individual is charged with indirect or constructive contempt [(which is now governed by Rule 70A(c))], due process requires that he be given ... the right to call witnesses and confront his accuser[] and the right to give testimony relevant either to complete exculpation or to extenuation of the offense and evidence in mitigation of the penalty to be imposed."

State v. Thomas, 550 So. 2d 1067, 1073 (Ala. 1989). See, e.g., Augmentation, Inc. v. Harris, 225 So. 3d 103, 104-10 (Ala. Civ. App. 2016)

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(illustrating evidentiary nature of hearing). Thus, to be in evidence, documents supporting or opposing a finding of contempt must be presented at that hearing.⁴ Therefore, contrary to the main opinion's characterization, the documents filed in support of SEPH's contempt claim were not evidence, and Harrell had no duty to respond by filing contrary documents before a hearing. Accordingly, I disagree with the main opinion where it indicates that the "evidence" established that Harrell was in contempt and also faults Harrell for not filing contrary documents.

⁴Conceivably, at the evidentiary hearing a trial court could consider previously filed documents as evidence if the opposing party does not object, but that did not happen here because there was no evidentiary hearing.