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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

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Ex parte Utilities Board of the City of Roanoke

PETITION FOR WRIT OF MANDAMUS

(In re: Charles Ester and Evella Ester

v.

**Crawford Grading and Pipeline, Inc.; John Landers, Jr.; and
Utilities Board of the City of Roanoke)**

(Randolph Circuit Court, CV-15-900006)

STEWART, Justice.

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The Utilities Board of the City of Roanoke ("the Utilities Board") petitions this Court for a writ of mandamus directing the Randolph Circuit Court to vacate an order purporting to reinstate a case that the circuit court had previously disposed of. Because we conclude that the circuit court lacked jurisdiction to issue the order purporting to reinstate the case, we grant the petition and issue the writ.

Facts and Procedural History

In February 2015, Charles Ester and Evella Ester filed a complaint against Crawford Grading and Pipeline, Inc. ("Crawford Grading"), and John Landers, Jr., alleging property damage and personal injuries arising out of two alleged occurrences in which sewage had backed up into the Esters' house. Regarding Crawford Grading, the complaint asserted claims of negligent or wanton construction, maintenance, or repair of the involved sewer line. Regarding Landers, who sold the house to the Esters, the complaint asserted claims of fraudulent suppression, breach of contract, and breach of the warranty of habitability. In April 2015, the Esters filed their first amended complaint, adding the City of Roanoke as a defendant and alleging claims of negligence and wantonness related to

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the second alleged sewer backup. Subsequently, the Esters filed their second amended complaint, substituting the Utilities Board for the City of Roanoke as a defendant.

In June 2017, the Esters' first set of attorneys withdrew. On August 4, 2017, the circuit court entered an order dismissing Landers from the case. The Esters retained new counsel on August 9, 2017. Nearly two years later, the Utilities Board filed a motion for a summary judgment on August 8, 2019, and the circuit court set the hearing on the motion for August 28, 2019. On August 15, 2019, Crawford Grading, the only other remaining defendant, also filed a motion for a summary judgment, which the circuit court also set for a hearing on August 28, 2019.

On August 26, 2019, the Esters' second set of attorneys withdrew. The Esters were apparently unaware of the hearing set for August 28. The circuit court proceeded with the hearing, and the Esters were not present in court. Neither the Esters' second set of attorneys nor the Esters themselves had filed a response to the summary-judgment motions. On September 9, 2019, the circuit court entered an order ("the September 9 order") that stated:

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"This matter coming before court on defendant's Motions for Summary Judgment. Upon call of the case the Plaintiff failed to appear; counsel for the defendant was present. Based on the Plaintiff's failure to appear the Defendant's Motion for Summary Judgment is granted and this case is dismissed. The Plaintiff is given forty-five (45) days from the date[] of this order to request the case be reinstated."

On October 22, 2019, 43 days after the circuit court entered the September 9 order, the Esters, acting without counsel, filed a motion to reinstate the case. In that motion, the Esters stated that they had used the time between the entry of the September 9 order and the filing of the motion to reach a settlement with Crawford Grading. On October 23, 2019, the Esters, with the assistance of new counsel, filed a second motion to reinstate the case. On the same day, the Utilities Board filed an objection to the motion to reinstate.

On January 4, 2021, the circuit court entered an order purporting to reinstate the case. That order noted that the Esters' second set of attorneys had withdrawn from the case before the hearing was held and that the Esters, themselves, never received notice of the hearing on the summary-judgment motions. The circuit court further stated that the Utilities Board had agreed to the condition in the September 9 order that

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the Esters be given 45 days in which to request reinstatement of the case. The Utilities Board filed a motion to reconsider the order reinstating the case. At a hearing on the Utilities Board's motion to reconsider, the Utilities Board informed the circuit court that it planned to file the instant petition for writ of mandamus if the motion to reconsider was denied. The circuit court then stated for the record that it would not grant the motion to reconsider but that it would withhold ruling on the merits of the Utilities Board's motion for a summary judgment. This mandamus petition followed.

Standard of Review

" 'A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.' "

Ex parte Chmielewski, 280 So. 3d 386, 388 (Ala. 2018) (quoting Ex parte BOC Grp. Inc., 823 So. 2d 1270, 1272 (Ala. 2001)).

Discussion

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In its petition for a writ of mandamus, the Utilities Board argues that, because the Esters did not file a timely postjudgment motion pursuant to Rule 59(e), Ala. R. Civ. P., the circuit court lost subject-matter jurisdiction over the case 30 days after the circuit court entered the September 9 order and that, therefore, the circuit court lacked the authority to enter the order granting the Esters' motion to reinstate the case. Rule 59(e) states that "[a] motion to alter, amend, or vacate the judgment shall be filed not later than thirty (30) days after entry of the judgment." This Court has held that "[i]f no Rule 59 motion is filed after a judgment is entered, the trial court that entered the judgment generally loses jurisdiction to amend the judgment 30 days after the judgment is entered." Ex parte Caremark Rx, LLC, 229 So. 3d 751, 757 (Ala. 2017)(citing Pierce v. American Gen. Fin., Inc., 991 So. 2d 212, 215 (Ala. 2008)); see also George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004) ("Generally, a trial court has no jurisdiction to modify or amend a final order more than 30 days after the judgment has been entered, except to correct clerical errors.").

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The Utilities Board contends that the September 9 order is a final judgment. A final judgment is one that "conclusively determines the issues before the court and ascertains and declares the rights of the parties." Palughi v. Dow, 659 So. 2d 112, 113 (Ala. 1995). This Court has also stated that a final judgment "is one that puts an end to the proceedings between the parties to a case and leaves nothing for further adjudication." Ex parte Wharfhouse Rest. & Oyster Bar, Inc., 796 So. 2d 316, 320 (Ala. 2001)(citing City of Birmingham v. City of Fairfield, 396 So. 2d 692 (Ala. 1981)). The Utilities Board contends that the September 9 order disposed of all the Esters' claims against all the remaining defendants in their entirety and that, despite the provision in the September 9 order purporting to allow the Esters 45 days to file a motion to reinstate the case, the 30-day period under Rule 59(e) began to run upon the entry of that order. A review of the September 9 order reveals that the circuit court unequivocally entered a summary judgment and "dismissed" the case. Thus, the September 9 order, on its face, appears to be a final judgment.

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The Esters, however, contend that, based on a variety of factors and circumstances surrounding the entry of the September 9 order, that order cannot be construed to be a final judgment. This Court has said:

"We construe [a] trial court's judgment like other written instruments: the rules of construction for contracts are applicable for construing judgments. Hanson v. Hearn, 521 So. 2d 953, 954 (Ala. 1988); Moore v. Graham, 590 So. 2d 293, 295 (Ala. Civ. App. 1991). We are free to review 'all the relevant circumstances surrounding the judgment,' and 'the entire judgment ... should be read as a whole in the light of all the circumstances as well as of the conduct of the parties.' Hanson, 521 So. 2d at 955."

Boykin v. Law, 946 So. 2d 838, 848 (Ala. 2006). First, the Esters allege that the September 9 order was not a final judgment because the order adjudicated fewer than all their claims against all the remaining defendants. See Rule 54(b), Ala. R. Civ. P. (providing that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment"). " ' "The purpose of Rule 54(b) ... is to

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make final 'an order which does not adjudicate the entire case but as to which there is no just reason for delay in the attachment of finality.' ' ' "Ghee v. USAble Mut. Ins. Co., 253 So. 3d 366, 371 (Ala. 2017),(quoting Stephens v. Fines Recycling, Inc., 84 So. 3d 867, 874 (Ala. 2011), quoting, in turn, other cases). The Esters contend that the provision of the September 9 order authorizing the Esters to request reinstatement of the case within 45 days indicates that the circuit court intended not to terminate the case, that the circuit court intended to preserve the Esters' claims for the 45-day period, and that the circuit court concluded that there was just reason to delay entry of a final judgment.

As our Court of Civil Appeals has recognized, "[n]either Rule 59(b) nor Rule 59(e)[, Ala. R. Civ. P.,] provide for such an extension of time, and the 30-day time limit for the filing of motions contemplated by those rules therefore cannot be extended." Ex parte Patterson, 853 So. 2d 260, 262 (Ala. Civ. App. 2002). Similarly, "[a]lthough trial courts can interpret and clarify the meaning of their judgments, they cannot convert a final judgment into a nonfinal judgment simply by declaring it to be nonfinal." Ex parte Chmielewski, 280 So. 3d at 390 (citing Smith v. Fruehauf Corp.,

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580 So. 2d 570, 572 (Ala. 1991)). In addition, Rule 6(b), Ala. R. Civ. P., provides that a court "may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b)[, Ala. R. Civ. P.,] except to the extent and under the conditions stated in them." Accordingly, the provision in the September 9 order authorizing the Esters to request reinstatement of the case within 45 days neither had the legal effect of extending the circuit court's jurisdiction over the case beyond 30 days after the entry of that order nor made the order a nonfinal judgment.

Second, the Esters contend that, in the September 9 order, the circuit court limited its summary-judgment ruling to a single defendant when it used the singular possessive noun "defendant's" rather than the plural possessive noun "defendants' "; thus, the Esters contend, the circuit court entered a summary judgment in favor of only one of the two defendants who had pending summary-judgment motions -- i.e., the Utilities Board or Crawford Grading -- and that the circuit court did not specify which defendant's motion was being granted. A reading of the September 9 order, however, reveals that the circuit court's placement of the apostrophe is more likely the result of a scrivener's error, and,

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therefore, the failure of the September 9 order to expressly identify the defendants in whose favor the circuit court was entering a summary judgment does not alter the fact that the order disposed of all the Esters' claims against all the remaining defendants. Particularly noteworthy is the circuit court's unequivocal language in the September 9 order stating that the case was being "dismissed," thus indicating that no further claims were pending before the circuit court. Additionally, the Esters' motion to reinstate specifically requested reinstatement of the entire case, not just the claims against one party. Moreover, the circuit court's order of January 4, 2021, purporting to reinstate the case does not provide any indication that less than all claims had been disposed of but, instead, purports to reinstate the "matter" to the circuit court's docket. Further still, the failure of the September 9 order to specifically reference the defendants by name does not indicate that the circuit court left claims pending against one party. See Ex parte Chmielewski, 280 So. 3d 386 (reviewing all the relevant circumstances surrounding the entry of a judgment and concluding that, despite the failure of a judgment of dismissal to expressly reference a defendant who had filed a motion to

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dismiss and who had asserted the same arguments as another defendant, the judgment did not leave the proceedings pending as to either defendant).

Third, the Esters point out that the January 4, 2021, order purporting to reinstate the case to the circuit court's docket states that "[t]he defendants agreed to a granting of said Motion for ... Summary Judgment subject to reinstatement by the plaintiffs upon Motion filed within 45 days." In its petition to this Court, the Utilities Board denies that it had agreed to the 45-day reinstatement period, but, even if it did so, the actions of parties cannot vest a trial court with subject-matter jurisdiction. Stated otherwise, "subject-matter jurisdiction may not be conferred by consent." Espinoza v. Rudolph, 46 So. 3d 403, 413 (Ala. 2010). Thus, even if the Utilities Board had consented to the provision in the September 9 order allowing the Esters 45 days to request reinstatement of the case, the circuit court was nevertheless without jurisdiction to take any further action in the case after the 30-day period following the entry of the September 9 order had expired.

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Fourth, the Esters argue that the circuit court failed to comply with Rule 56(c)(2), Ala. R. Civ. P., when it held the hearing on the summary-judgment motions on August 28, 2019. Rule 56(c)(2) ensures that a party opposing a summary-judgment motion has a meaningful opportunity to respond by requiring a minimum of 10 days between the date the summary-judgment motion is served and the date of the hearing. See, e.g., Hilliard v. SouthTrust Bank of Alabama, N.A., 581 So. 2d 826, 828 (Ala. 1991). The 10-day notice requirement was met in this case because the Utilities Board's summary-judgment motion and supporting materials were filed on August 8, 2019, Crawford Grading's summary-judgment motion and supporting materials were filed on August 15, 2019, and the circuit court held the hearing on the motions on August 28, 2019. Although the Esters, themselves, may have not been aware of the hearing, the summary-judgment motions were filed and properly served on the Esters' second set of attorneys, who withdrew two days before the hearing. No responses to the motions were filed. " It is elementary that omissions and commissions of an attorney at law are to be regarded as acts of the client whom he represents." Lawrence v. Gayle, 294 Ala. 91, 94, 312 So.

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2d 385, 387 (1975). This Court has also stated that "[k]nowledge of the attorney will be imputed to the client if the knowledge comes to the attorney while engaged in a service for the client after the attorney-client relationship has commenced." Sanders v. Flournoy, 640 So. 2d 933, 939 (Ala. 1994). Moreover, notice of a hearing that is provided to an attorney constitutes notice to the attorney's client. Shirley v. McDonald, 220 Ala. 50, 53, 124 So. 104, 106 (1929) ("[C]ounsel's knowledge ... of the date of trial[] must be imputed to [the] defendant as a matter of law"). We conclude that the Esters, through their former counsel, received adequate notice of the hearing on the summary-judgment motions under Rule 56(c), and their argument that the circuit court should not have proceeded with the hearing is without merit.

Under the totality of the circumstances surrounding the entry of the September 9 order, we conclude that the order was a final judgment. The provision of the order granting the Esters 45 days to request reinstatement of the case did not extend the time for the Esters to file a postjudgment motion under Rule 59(e). After expiration of the 30-day period prescribed by Rule 59(e), the circuit court lost jurisdiction to take

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any further action in the case. Accordingly, the circuit court lacked authority to enter the January 4, 2021, order purporting to reinstate the case to its docket.

Finally, we conclude that, even if the circuit court had considered the Esters' motion to reinstate the case to be a motion filed pursuant to Rule 60(b), Ala. R. Civ. P., the Esters would not be entitled to have the September 9 order set aside under that rule. This Court has stated:

"Without question, a movant must both allege and prove one of the grounds set forth in Rule 60 in order to be granted relief under that rule. Moreover, because Rule 60(b) relief is extraordinary relief, a movant has the burden of proving extraordinary circumstances and/or extreme hardship or injustice sufficient to entitle him to relief under Rule 60(b)(6). And, while the decision of whether to grant or deny the motion is within the sound discretion of the trial judge, that discretion is not unbridled."

Ex parte Baker, 459 So.2d 873, 876 (Ala.1984)(internal citations omitted).

The Esters' motion to reinstate the case did not set forth any of the grounds for relief under Rule 60(b), and the Esters' motion lacked evidentiary support. See Ex parte Wallace, Jordan, Ratliff & Brandt, L.L.C., 29 So. 3d 175, 178 (Ala. 2009)(concluding that the trial court exceeded its discretion in granting a Rule 60(b) motion when a party failed

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to cite the allegedly applicable subsection of the rule on which it based its motion and when the party failed to offer evidence in support of its motion). Accordingly, Rule 60(b) provided no basis for the circuit court to grant relief to the Esters.

Conclusion

For the foregoing reasons, we grant the petition and issue a writ of mandamus directing the circuit court to vacate its order of January 4, 2021, purporting to reinstate the case.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.