Rel: June 16, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0871

John M. Penrose and Amy Lynn Penrose

v.

Jose Garcia, Jr.; Nereyda P. Garcia; Tammy Chavers; Prattville Real Estate Properties, LLC, d/b/a Re/Max Properties II; Greg Watts; AAA Inspections, LLC; James E. Brown; and Brown Properties, Inc.

Appeal from Montgomery Circuit Court
(CV-22-900055)

MITCHELL, Justice.

John M. Penrose and Amy Lynn Penrose bought a house in Montgomery. After moving in, they discovered multiple problems with the house and sued several parties that had been involved in the transaction, alleging that those parties' negligent or intentional acts had prevented the Penroses from discovering the house's problems before the purchase closed.

During discovery, the Penroses failed to provide timely and complete responses to the defendants' discovery requests or to appear at two hearings on the resulting motions to compel. Following the second missed hearing, the Montgomery Circuit Court dismissed the Penroses' lawsuit with prejudice. Invoking Rule 60(b), Ala. R. Civ. P., the Penroses moved the trial court to reinstate their lawsuit, arguing among other things that the dismissal violated their due-process rights because no defendant had moved for dismissal and because the trial court had given them no indication that it was considering that sanction. The trial court denied their motion. The Penroses appeal. We affirm.

Facts and Procedural History

After a new job required John to relocate from South Carolina to Alabama, the Penroses engaged Tammy Chavers, a real-estate agent

with Prattville Real Estate Properties, LLC, d/b/a Re/Max Properties II ("Re/Max"), to assist them with their long-distance house hunt. Chavers helped the Penroses find a house in Montgomery that they liked, and, after Chavers allegedly assured them that there were no problems with the house, the Penroses signed a contract with the sellers, Jose Garcia, Jr., and Nereyda P. Garcia. Under the terms of that contract, the Penroses had a period to perform inspections before deciding whether to complete the transaction.

The Penroses hired Greg Watts, an inspector with AAA Inspections, LLC, to conduct a formal inspection of the house for them. After receiving Watts's inspection report, the Penroses asked the Garcias to remedy some minor problems that Watts had identified. The Garcias apparently agreed to do so, and none of the problems Watts identified or the repairs the Garcias completed are at issue in this action.

The Penroses also had a termite inspection done on the house. Although the Garcias had signed a disclaimer denying any knowledge of termite activity, the pest-control company that performed the inspection submitted a report stating that there were signs of a previous termite

infestation -- and that the Garcias had hired the company two years earlier to treat an infestation.

Around this same time, James E. Brown, a licensed real-estate appraiser and the owner of Brown Properties, Inc. ("BPI"), conducted an appraisal of the house. Brown's initial appraisal indicated that the market value of the house was $85,000 less than the price the Penroses had agreed to pay. But the Penroses state that Chavers then persuaded Brown to issue a new appraisal that included a bonus room above the garage in the calculated square footage of the house. The Penroses say that Brown agreed to this request even though the bonus room did not meet industry standards to be considered living space. The second appraisal came in $45,000 higher.

The Penroses proceeded with purchasing the house and moved in shortly after the July 2021 closing. They say that almost immediately they began discovering problems with the house, most notably termite and water damage. Six months later, the Penroses sued the Garcias, Chavers and Re/Max ("the Re/Max defendants"), Watts and AAA Inspections ("the AAA defendants"), and Brown and BPI ("the BPI

defendants"), asserting negligence, wantonness, fraud, breach-of-contract, and conspiracy claims.

The Re/Max defendants, the AAA defendants, and the BPI defendants filed separate answers to the Penroses' complaint.[1] At about the same time, they also served interrogatories and requests for production on the Penroses. The Penroses eventually produced some documents, but they did not answer the interrogatories. After repeatedly asking for the requested discovery -- and after receiving repeated assurances that it was coming -- the Re/Max defendants, the AAA defendants, and the BPI defendants finally filed motions asking the trial court to compel the Penroses to respond.

The trial court held a hearing on the motions. Neither the Penroses nor their attorney appeared at that hearing. After considering the movants' arguments, the trial court ordered the Penroses to produce the requested discovery within 14 days.

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[1]The Garcias did not file an answer and have not participated in either the trial-court litigation or these appellate proceedings. After the time for filing an answer had run, the Penroses successfully moved the trial court to enter a default judgment against the Garcias. The record shows that a damages hearing was scheduled, but there is no indication whether that hearing was held or whether the amount of damages was ever set.

One day after the deadline set by the trial court, the Penroses finally submitted responses to some of the interrogatories while objecting to others because, the Penroses argued, the questions sought confidential or irrelevant information. The Re/Max defendants, the AAA defendants, and the BPI defendants then filed new motions to compel asking the trial court to strike the Penroses' objections and to direct them to provide full responses.

The trial court held a hearing on this second round of motions to compel; again, neither the Penroses nor their attorney showed up. After hearing from the movants, the trial court entered a judgment noting that the Penroses' attorney had failed to appear at the last two hearings and stating that, after a review of the record, it was dismissing the Penroses' lawsuit with prejudice based on their failure to prosecute.

Forty-two days later, the Penroses moved the trial court to reinstate their lawsuit under Rule 60(b), arguing that dismissal with prejudice (1) was unwarranted under the circumstances[2] and (2) violated their due-

[2]The Penroses stated that their attorney had missed the first hearing only because his child was admitted to the hospital earlier that morning and had missed the second hearing because he was not aware of it due to problems with his email receiving Alacourt notifications.

process rights. The Re/Max defendants, the AAA defendants, and the BPI defendants filed a joint response arguing that the Penroses' motion was effectively a motion to alter, amend, or vacate that was untimely because it had not been filed within the 30-day period permitted by Rule 59, Ala. R. Civ. P. In the alternative, they argued that the trial court's dismissal of the Penroses' lawsuit was appropriate under the circumstances. The trial court denied the Penroses' postjudgment motion. The Penroses appealed.

Motion to Dismiss the Penroses' Appeal

Echoing the argument that they made in their joint response to the Penroses' postjudgment motion, the Re/Max defendants, the AAA defendants, and the BPI defendants have moved this Court to dismiss this appeal. Specifically, they state that the Penroses' motion was in substance an untimely Rule 59 motion that did not toll the time for taking an appeal. Accordingly, they argue, the Penroses' notice of appeal -- filed 49 days after the trial court dismissed the lawsuit -- was untimely and failed to invoke this Court's jurisdiction. See generally R & G, LLC v. RCH IV-WB, LLC, 122 So. 3d 1253, 1256-57 (Ala. 2013) (explaining that an untimely Rule 59 motion does not toll the time for filing a notice of

appeal and that this Court has no jurisdiction over an untimely appeal). Whether this timeliness argument is meritorious turns on whether the Penroses' motion is considered a Rule 59 or a Rule 60(b) motion.

To be sure, the postjudgment motion filed by the Penroses bears indicia of both a Rule 59 and a Rule 60(b) motion. For starters, the Penroses styled their motion as a "motion to reconsider order of dismissal and/or relief pursuant to Rule 60(b)." Although "[t]he Alabama Rules of Civil Procedure make no reference to a 'motion to reconsider,'" this Court has stated that it will treat "a motion so styled as a Rule 59(e) motion to 'alter, amend, or vacate' a judgment, if it complies with the guidelines for such post-trial motions set out in Rule 59." Ex parte Johnson, 673 So. 2d 410, 412 (Ala. 1994).[3] The body of the Penroses' motion additionally contains language expressly asking the trial court to "alter, amend, or vacate" its judgment dismissing the lawsuit. While this language is not accompanied by a citation to Rule 59, it is clearly rooted in Rule 59(e), not Rule 60(b).

[3]Of course, the Penroses' postjudgment motion did not comply "with the guidelines for … post-trial motions set out in Rule 59," Johnson, 673 So. 2d at 412, because it was filed more than 30 days after the entry of the trial court's judgment of dismissal.

On the other hand, the Penroses' motion expressly invokes Rule 60(b) and contains no mention of Rule 59. The motion also contains an argument that undisputedly may be raised in a Rule 60(b) motion -- whether the trial court's judgment was entered in violation of the Penroses' due-process rights. See Ex parte Full Circle Distrib., L.L.C., 883 So. 2d 638, 641 (Ala 2003) (explaining that a judgment is void and may be set aside at any time under Rule 60(b)(4) if it was entered in a manner inconsistent with due process).

Citing Cornelius v. Green, 477 So. 2d 1363 (Ala. 1985), the defendants moving to dismiss this appeal suggest that the Penroses' failure to invoke a specific Rule 60(b) ground in their motion is fatal to their argument that their motion should be considered under Rule 60(b). We disagree. In Cornelius, this Court held that a postjudgment motion was properly considered a Rule 59 motion as opposed to a Rule 60(b) motion in part because that motion "did not allege any of the 60(b) grounds." 477 So. 2d at 1364-65. But, notably, that motion failed to cite Rule 60(b) at all and did not contain any argument addressing one of the enumerated Rule 60(b) grounds. Id. In contrast, the Penroses have cited Rule 60(b) and have argued that the trial court's dismissal of their

lawsuit violated their due-process rights. While it is true the Penroses did not specifically cite Rule 60(b)(4) in their motion, this Court has indicated that a specific citation like that is not necessary if the applicable ground can be discerned from the motion itself. See R.E. Grills, Inc. v. Davison, 641 So. 2d 225, 230 (Ala. 1994) ("Because [the plaintiff's] 'Motion to Reinstate' does not specify any Rule 60(b) ground for relief, we must interpret the substance of the grounds alleged in his motion to determine which of the six clauses of Rule 60(b) applies.").

In sum, the Penroses' postjudgment motion invoked Rule 60(b) and contained a due-process argument that is a proper subject for a Rule 60(b) motion. Considering that motion as a whole, and not merely its title or any isolated part, we conclude that the motion is best viewed as a Rule 60(b) motion. We therefore treat it as such for the purpose of determining whether this appeal is timely.[4] Because a party may file a Rule 60(b) motion alleging that a judgment was entered in violation of that party's due-process rights at any time postjudgment, see Full Circle Distrib.,

[4]This Court has repeatedly stated that it "will look at the substance of a motion, rather than its title, to determine how that motion is to be considered under the Alabama Rules of Civil Procedure." Pontius v. State Farm Mut. Auto. Ins. Co., 915 So. 2d 557, 562-63 (Ala. 2005).

L.L.C., 883 So. 2d at 641, and because a party may appeal the denial of such a motion by filing a notice of appeal within 42 days of the trial court's denial, see Ex parte Keith, 771 So. 2d 1018, 1021-22 (Ala. 1998), the Penroses' notice of appeal was timely and the motion to dismiss must be denied.

Standard of Review

A trial court's denial of a Rule 60(b) postjudgment motion alleging that the underlying judgment was entered in violation of the movant's due-process rights is reviewed de novo. Campbell v. Taylor, 159 So. 3d 4, 8 (Ala. 2014); see also Nationwide Mut. Fire Ins. Co. v. Austin, 34 So. 3d 1238, 1242 (Ala. 2009) (explaining that the de novo standard of review applies to the denial of a motion based on Rule 60(b)(4) grounds "because the issue of jurisdiction raised in a Rule 60(b)(4) motion is a purely legal one"). We note, however, that while "a party may appeal the denial of a Rule 60(b) motion, … the scope of appellate review is limited to the correctness of the denial of the Rule 60(b) motion, and not the correctness of the underlying judgment." Keith, 771 So. 2d at 1021 (citing Hilliard v. SouthTrust Bank of Alabama, N.A., 581 So. 2d 826 (Ala. 1991)). Thus, to the extent that the Penroses also argued in their postjudgment motion

that the trial court exceeded its discretion by dismissing their lawsuit for failure to prosecute, see Curry v. Miller, 261 So. 3d 1175, 1178 (Ala. 2018), they may not repeat that argument on appeal -- we can consider only whether the underlying judgment of dismissal is void due to the alleged lack of due process afforded the Penroses.

Analysis

In Ex parte Weeks, 611 So. 2d 259 (Ala. 1992), this Court explained the procedural due-process rights that parties are entitled to under the United States Constitution and the Alabama Constitution. In doing so, we stated that due process generally requires "a fair and open hearing before a legally constituted court or other authority, with notice and the opportunity to present evidence and argument, … and information as to the claims of the opposing party, with reasonable opportunity to controvert them." Weeks, 611 So. 2d at 261.

The Penroses argue that their due-process rights were violated because they were given no notice or opportunity to respond before the trial court dismissed their lawsuit for failure to prosecute. In their telling, this appeal is simply about a trial court that dismissed an action with prejudice after an attorney mistakenly failed to show up for a

hearing. To support their position, they cite multiple cases in which either this Court or the Court of Civil Appeals has reversed a dismissal entered following a missed hearing. See Burdeshaw v. White, 585 So. 2d 842 (Ala. 1991); Thompkins v. Wal-Mart Assocs., Inc., 336 So. 3d 195 (Ala. Civ. App. 2021); Hosey v. Lowery, 911 So. 2d 15 (Ala. Civ. App. 2005); Brown v. Brown, 896 So. 2d 573 (Ala. Civ. App. 2004); Miller v. Miller, 618 So. 2d 728 (Ala. Civ. App. 1993).

But, as the trial court noted in its judgment dismissing the Penroses' lawsuit, it took that action after their attorney missed a second hearing and "after … a review of the filings." Those filings show that the failure to attend the second hearing was far from the only example of "dilatoriness on the part of the plaintiff[s]." Link v. Wabash R.R. Co., 370 U.S. 626, 634 (1962). Rather, the record indicates that the Penroses repeatedly gave little heed to the rules and orders of the court.

To review, the Re/Max defendants, the AAA defendants, and the BPI defendants served interrogatories and requests for production upon the Penroses in February 2022. The Penroses did not respond to those interrogatories within the 30-day period set forth in Rule 33(a), Ala. R. Civ. P. No less than eight times, attorneys for those defendants contacted

the Penroses' attorney requesting the overdue discovery responses. The record contains email correspondence indicating that the Penroses' attorney was working on the discovery, but the Penroses resisted providing some of the requested information because, they said, the information sought was personal or irrelevant. Nevertheless, the Penroses' attorney repeatedly told the defendants that responses were coming.

Finally, more than two months after the deadline for serving the discovery responses had passed, the Re/Max defendants, the AAA defendants, and the BPI defendants filed motions to compel asking the trial court to intervene. After the Penroses' attorney missed the hearing on those motions, the trial court ordered the Penroses to submit their responses within 14 days. They did not do so. One day after the deadline set by the trial court, the Penroses finally submitted responses to the interrogatories, but their responses were incomplete. For example, the Penroses objected to providing background information about their educations, their employment histories, and other real-estate transactions in which they had been involved. The Re/Max defendants, the AAA defendants, and the BPI defendants then filed another round of

motions to compel, again asking the trial court to order the Penroses to respond. After the Penroses' attorney did not appear at the hearing on those motions, the trial court dismissed their lawsuit with prejudice.

When the trial court reviewed the filings in this case, it found a pattern of the Penroses failing to comply with court rules and orders. While the failure to attend the second hearing may have been the straw that broke the camel's back, it is undisputed that the Penroses had by then already failed to respond to discovery requests for over three months and that, after the trial court finally ordered them to respond, they still failed to do so within the timeline set by the court. Moreover, their late responses contained objections to innocuous requests for information, and the trial court could have rightfully concluded that at least some of those objections were frivolous. The Penroses do not address this aspect of their conduct in their appellate brief, focusing instead on the hearings that were missed. But, all things considered, it is clear that this case is distinguishable from the cases on which the Penroses have relied, in which a dismissal was entered on the basis of a single missed hearing. See, e.g., Hosey, 911 So. 2d at 18 (concluding that the plaintiffs' due-process rights were violated when the trial court sua sponte dismissed

their claims against one of the defendants because their attorney did not attend a hearing on a motion that had been rendered moot).

The United States Supreme Court's decision in Link is instructive. There, a federal district court sua sponte dismissed a plaintiff's lawsuit for failure to prosecute after the plaintiff's attorney had failed to show up for a pretrial conference. 370 U.S. at 629. In rejecting the plaintiff's argument that the district court had erred by doing so, the Supreme Court recognized that the fundamental requirement of due process is the opportunity to be heard but also noted that "this does not mean that every order entered without notice and a preliminary adversary hearing offends due process." Id. at 632. The Court then explained that the circumstances of the case before it -- which included evidence of other "dilatoriness on the part of the plaintiff," id. at 634 -- were "such as to dispense with the necessity for advance notice and hearing." Id. Accordingly, the Court affirmed the dismissal. Id. at 636.

This Court's caselaw is consistent with Link. We have repeatedly explained that a trial court has the inherent authority to act sua sponte to dismiss an action for failure to prosecute or for failure to comply with court rules and orders. See, e.g., S.C. v. Autauga Bd. of Educ., 325 So. 3d

793, 797 (Ala. 2020); Ex parte Folmar Kenner, LLC, 43 So. 3d 1234, 1239 (Ala. 2009); Ex parte Courtaulds Fibers, Inc., 784 So. 2d 1036, 1038 (Ala. 2000). And any due-process concerns that might attend a dismissal entered sua sponte are mitigated when the party whose action is dismissed later presents argument to the trial court in a postjudgment motion challenging the dismissal. That is what happened here -- and though the trial court ultimately denied the Penroses' postjudgment motion, there is no reason to think their motion was not duly considered.

Conclusion

The trial court dismissed the Penroses' lawsuit sua sponte after they failed to provide timely and complete responses to discovery requests or to appear at two hearings held to consider motions to compel stemming from that failure. The Penroses argue that the trial court violated their due-process rights by dismissing their case without giving them prior notice; but, based on our review of what occurred below, it is clear that the trial acted well within its authority. The order denying the Penroses' Rule 60(b) motion seeking to set aside the judgment of dismissal is therefore affirmed.

AFFIRMED.

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