**Rel: 03/17/2017**



# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2016-2017**

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**1150692**

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**Deborah Michelle Blackmon and the Estate of Brian Alan Blackmon**

**v.**

**Renasant Bank**

**Appeal from Madison Circuit Court**
**(CV-14-901198)**

PARKER, Justice.

Deborah Michelle Blackmon ("Deborah") and the estate of Brian Alan Blackmon ("the estate") appeal from a partial summary judgment entered in favor of Renasant Bank and against

them by the Madison Circuit Court. We dismiss the appeal as being from a nonfinal judgment.

Facts and Procedural History

On November 8, 2004, Deborah and her husband Brian Alan Blackmon (hereinafter collectively referred to as "the Blackmons") executed an agreement establishing a home-equity line of credit with Renasant Bank secured by a mortgage on the Blackmons' house.[1] The affidavit testimony of Jerry Harris, first vice president of Renasant Bank, indicates that, also on November 8, 2004, the Blackmons made an initial draw on their home-equity line of credit in the amount of $110,000. Harris's affidavit states that, from July 21, 2006, to June 6, 2013, the Blackmons made a total of 125 withdrawals on the home-equity line of credit totaling "approximately $387,929.00." In addition to making withdrawals on the home-equity line of credit, the Blackmons also made payments on the home-equity line of credit during that time.

On June 14, 2013, Brian Alan Blackmon died. Harris's affidavit states that, following Brian Alan Blackmon's death,

[1]We note that Deborah contests the fact that she executed the documents establishing the home-equity line of credit and the mortgage document.

Deborah "made five separate payments" on the home-equity line of credit. However, the payments made by Deborah did not satisfy the entirety of the money the Blackmons owed Renasant Bank under the terms of the home-equity line of credit, and Deborah failed to make any additional payments. Deborah denied that she had executed the home-equity line of credit or the mortgage and, thus, denied liability for any outstanding balance due under the home-equity line of credit. Harris's affidavit states that the home-equity line of credit "is currently in default." Harris's affidavit states: "The balance on [the home-equity line of credit] as of June 23, 2015, is $129,545.86, inclusive of principal, interest and late fees." Harris's affidavit further states that "[t]he total amount due to Renasant Bank at this time, inclusive of principal, interest and attorney fees is $146,545.86."

On June 5, 2014, Renasant Bank sued Deborah and the estate seeking a judgment declaring that the Blackmons had executed the agreement establishing a home-equity line of credit with Renasant Bank and a mortgage on the Blackmons' house securing the home-equity line of credit and asserting a claim of breach of contract seeking to recover the amount of

money owed under the terms of the home-equity line of credit. On July 7, 2014, Deborah and the estate filed an answer to Renasant Bank's complaint and asserted a counterclaim, requesting a judgment declaring that the mortgage on the Blackmons' house was not enforceable.

On May 4, 2015, by leave of the circuit court, Renasant Bank filed an amended complaint against Deborah and the estate. Renasant Bank reasserted its breach-of-contract claim and asserted additional claims for "equitable mortgage," "open account," and "account stated." Through these various theories of recovery, Renasant Bank's sole request for damages was the outstanding balance owed on the home-equity line of credit. On August 21, 2015, Renasant Bank filed a second amended complaint against Deborah and the estate. In addition to the claims detailed above, Renasant Bank asserted the following claims: unjust enrichment, money had and received, "quasi-contract," and "constructive trust." Through these various theories of recovery, Renasant Bank's sole request for damages was the outstanding balance owed on the home-equity line of credit.

On November 12, 2015, Renasant Bank filed a motion for a summary judgment. On December 31, 2015, the circuit court entered a partial summary judgment in favor of Renasant Bank on its claims alleging unjust enrichment and money had and received in the amount of $142,612.85. The circuit court specifically stated that "[a]ll other counts asserted by the parties remain pending."

On January 28, 2016, Deborah and the estate filed a motion to alter, amend, or vacate the circuit court's partial summary judgment in favor of Renasant Bank. On February 23, 2016, the circuit court denied Deborah and the estate's postjudgment motion.

On March 28, 2016, Deborah and the estate purported to appeal the circuit court's December 31, 2015, partial summary judgment in favor of Renasant Bank. On November 28, 2016, the clerk of the Supreme Court entered an order remanding the case to the circuit court because all the claims pending before the circuit court had not been adjudicated in the circuit court's December 31, 2015, partial summary judgment. On remand, upon motion of Deborah and the estate, the circuit court certified its December 31, 2015, partial summary judgment in favor of

Renasant Bank as final pursuant to Rule 54(b), Ala. R. Civ. P.[2]

Standard of Review

"Whether the action involves separate claims and whether there is a final decision as to at least one of the claims are questions of law to which we will apply a de novo standard of review." Scrushy v. Tucker, 955 So. 2d 988, 996 (Ala. 2006)(emphasis added).

Discussion

Although neither party challenges the appropriateness of the circuit court's Rule 54(b) certification of its December 31, 2015, partial-summary-judgment order in favor of Renasant Bank, "it 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). In the present

[2]We note that Deborah and the estate filed a third-party complaint against Brenda G. Day, the notary public who notarized the home-equity line of credit agreement and the mortgage, asserting various claims. On March 24, 2016, the circuit court entered a partial summary judgment in favor of Day as to some of the third-party claims against her; the circuit court did not certify that judgment as final pursuant to Rule 54(b). Day is not a party to the appeal before this Court.

case, as noted above, the circuit court certified as final pursuant to Rule 54(b) its December 31, 2015, partial summary judgment as to Renasant Bank's unjust-enrichment and money-had-and-received claims against Deborah and the estate. This Court has stated that "'[n]ot every order has the requisite element of finality that can trigger the operation of Rule 54(b).'" Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 361 (Ala. 2004) (quoting Goldome Credit Corp. v. Player, 869 So. 2d 1146, 1147 (Ala. Civ. App. 2003) (emphasis omitted)). We will first consider whether the circuit court's Rule 54(b) certification of its December 31, 2015, partial summary judgment is appropriate.

Rule 54(b) states, in relevant part:

> "When 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."

Clearly, Renasant Bank's complaint involves multiple claims against multiple parties. "'[F]or a Rule 54(b) certification of finality to be effective, it must fully adjudicate at least

one claim or fully dispose of the claims as they relate to at least one party.' Haynes v. Alfa Fin. Corp., 730 So. 2d 178, 181 (Ala. 1999)." Scrushy, 955 So. 2d at 996.

We must consider whether Renasant Bank's unjust-enrichment and money-had-and-received claims were separate and distinct claims that were fully adjudicated by the circuit court's December 31, 2015, partial summary judgment. This Court considered a very similar issue in Scrushy. In North Alabama Electric Cooperative v. New Hope Telephone Cooperative, 7 So. 3d 342, 345 (Ala. 2008), this Court summarized the applicable law from Scrushy:

> "The Scrushy Court quoted with approval the United States Court of Appeals for the Seventh Circuit for '"certain rules of thumb to identify those types of claims that can never be considered separate"' for purposes of Rule 54(b). 955 So. 2d at 998 (quoting Stearns v. Consolidated Mgmt., Inc., 747 F.2d 1105, 1108 (7th Cir. 1984)). One such rule is that '"'claims cannot be separate unless separate recovery is possible on each.... Hence, mere variations of legal theory do not constitute separate claims.'"' Id. (quoting Stearns, 747 F.2d at 1108-09, quoting in turn Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1071 (7th Cir. 1981)). The Scrushy Court also noted the similar rule of the United States Court of Appeals for the Second Circuit, see Rieser v. Baltimore & Ohio R.R., 224 F.2d 198, 199 (2d Cir. 1955), which was summarized by the commentators of Federal Practice and Procedure:

> "'"A single claimant presents multiple claims for relief under the Second Circuit's formulation when the possible recoveries are more than one in number and not mutually exclusive or, stated another way, when the facts give rise to more than one legal right or cause of action .... However, when a claimant presents a number of legal theories, but will be permitted to recover only on one of them, the bases for recovery are mutually exclusive, or simply presented in the alternative, and plaintiff has only a single claim for relief for purposes of Rule 54(b)."'
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> "955 So. 2d at 998 (quoting 10 Charles Alan Wright et al., Federal Practice & Procedure § 2657 (3d ed. 1998)(footnotes omitted))."

In Scrushy, this Court adopted the principles discussed above and concluded that "the various claims in the complaint [at issue in that case were] not all variations on a single theme." 955 So. 2d at 998. This Court so concluded because some of the claims asserted by the plaintiff in that case sought damages that other of the claims did not. See id. (stating that "[the plaintiff's] alleged breach of duty in accepting bonuses that HealthSouth was not legally obligated to pay is a sufficiently separate breach that is not alleged elsewhere in the complaint").

In the present case, Renasant Bank alleges the following claims against Deborah and the estate: a claim seeking a

judgment declaring that Deborah executed the agreement establishing a home-equity line of credit with Renasant Bank and a mortgage on the Blackmons' house securing that line of credit; breach of contract; "equitable mortgage"; "open account"; "account stated"; unjust enrichment; money had and received; "quasi-contract"; and "constructive trust." Unlike in Scrushy, the only damages requested by Renasant Bank for each of the above-asserted claims is the outstanding balance Renasant Bank alleges Deborah and the estate owe under the home-equity line of credit. Although Renasant Bank has asserted several different legal theories, it has requested the same damages as to each claim. In fact, we note that Renasant Bank states that all of its claims, including its equitable claims, "originated" from "the written contract." Renasant Bank's brief, at p. 28. According to Renasant Bank, there is only one recovery possible for each claim: the outstanding balance under the home-equity line of credit.[3]

[3]In its partial summary judgment in favor of Renasant Bank, the circuit court awarded Renasant Bank $142,612.85 of the $146,545.86 it requested in damages. Based on the fact that the circuit court awarded the majority of the damages requested by Renasant Bank, it would appear that the circuit court adjudicated all the claims against Deborah and the estate. However, the circuit court specifically stated in its partial summary judgment that "[a]ll other counts [besides

Therefore, under the principles set forth in Scrushy, Renasant Bank's several claims are actually just one claim, which the circuit court's December 31, 2015, partial summary judgment did not fully adjudicate. Consequently, the adjudication of Renasant Bank's unjust-enrichment and money-had-and-received claims are not appropriate for Rule 54(b) certification; the circuit court's partial summary judgment did not fully adjudicate a single claim.[4] See James v. Alabama Coalition

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unjust enrichment and money had and received] asserted by the parties remain pending." Accordingly, we must conclude that the circuit court did not fully adjudicate the claims asserted by Renasant Bank against Deborah and the estate.

[4]We also note that Renasant Bank's unjust-enrichment claim (which was adjudicated by the circuit court's partial summary judgment) and its breach-of-contract claim (which remains pending in the circuit court), which are based on the same facts and contract, are mutually exclusive. See, e.g., Lass v. Bank of America, N.A., 695 F.3d 129, 140 (1st Cir. 2012) ("[D]amages for breach of contract and unjust enrichment are mutually exclusive ...."); Univalor Trust, SA v. Columbia Petroleum, LLC, 315 F.R.D. 374, 382 (S.D. Ala. 2016) ("[T]he existence of an express contract extinguishes an unjust enrichment claim altogether because unjust enrichment is an equitable remedy which issues only where there is no adequate remedy at law."); Shedd v. Wells Fargo Home Mortg., Inc., Civil Action No. 14-00275-CB-M (S.D. Ala. Nov. 17, 2014) (not reported in F. Supp. 3d) ("[B]reach of contract and unjust enrichment are mutually exclusive when both claims are based on the same set of facts."); Clark v. Green Tree Servicing LLC, 69 F. Supp. 3d 1203, 1222 (D. Colo. 2014) (noting that plaintiff may plead contract claim and estoppel claim in the alternative but may not ultimately prevail on both); Superior Edge, Inc. v. Monsanto Co., 44 F. Supp. 3d 890, 900 (D. Minn.

for Equity, Inc., 713 So. 2d 937, 942 (Ala. 1997) ("'Only a fully adjudicated whole claim against a party may be certified under Rule 54(b). See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742–44, 96 S. Ct. 1202, 1206, 47 L. Ed. 2d 435

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2014) (noting that party cannot recover under both a quasi-contract and express-contract theory); Naiser v. Unilever U.S., Inc., 975 F. Supp. 2d 727, 748 (W.D. Ky. 2013) ("[U]njust enrichment 'has no application in a situation where there is an explicit contract which has been performed.'"); Harrell v. Colonial Holdings, Inc., 923 F. Supp. 2d 813, 826–27 (E.D. Va. 2013) (noting that breach of contract and unjust enrichment are alternative theories of recovery); Miami Valley Mobile Health Servs., Inc. v. ExamOne Worldwide, Inc., 852 F. Supp. 2d 925, 939 (S.D. Ohio 2012) (noting that breach of express contract, breach of implied contract, and unjust enrichment are alternative claims); Vives v. Rodriquez, 849 F. Supp. 2d 507, 515 n.6 (E.D. Pa. 2012) (same); CoMentis, Inc. v. Purdue Research Found., 765 F. Supp. 2d 1092, 1098 (N.D. Ind. 2011) (same); CLN Props., Inc. v. Republic Servs., Inc., 688 F. Supp. 2d 892, 902 (D. Ariz. 2010) (same); Scowcroft Grp., Inc. v. Toreador Res. Corp., 666 F. Supp. 2d 39, 44 (D.D.C. 2009) ("'[T]here can be no claim for unjust enrichment when an express contract exists between the parties.'" (quoting Schiff v. American Ass'n of Retired Persons, 697 A.2d 1193, 1194 (D.C. 1997))); Ryffel Family P'ship, Ltd. v. Alpine Country Constr., Inc., 386 Mont. 165, 171, 386 P.3d 971, 977 (2016) ("[B]reach of contract and unjust enrichment are mutually exclusive theories of recovery."); Lee v. Shim, 310 Ga. App. 725, 733, 713 S.E.2d 906, 913 (2011) (noting that breach of contract and unjust enrichment are mutually exclusive claims); and Russell v. Russell, 91 Conn. App. 619, 638, 882 A.2d 98, 111 (2005) ("[U]njust enrichment and breach of contract are mutually exclusive theories of recovery."). It would not be prudent to try these mutually exclusive claims in piecemeal fashion.

(1976).'" (quoting Aktiengesellschaft v. Smoked Foods Prods. Co., 813 F.2d 81, 84 (5th Cir. 1987))).

## Conclusion

We dismiss the appeal as being from a nonfinal judgment.

APPEAL DISMISSED.

Stuart, Bolin, and Wise, JJ., concur.

Shaw, J., concurs specially.

SHAW, Justice (concurring specially).

I agree that the partial summary judgment on two counts of the complaint in this case cannot be made a final judgment by virtue of a certification pursuant to Rule 54(b), Ala. R. Civ. P. There are several reasons that lead me to this conclusion.

Renasant Bank's second amended complaint contained nine counts alleging (1) the need for a judgment declaring, essentially, whether the line of credit was valid and enforceable and the amount due the bank under it; (2) equitable mortgage; (3) breach of contract; (4) open account; (5) account stated; (6) unjust enrichment; (7) money had and received; (8) quasi-contract; and (9) constructive trust. As the main opinion notes, these all appear to be separate legal theories advanced as part of one claim--different avenues to recover payment of the balance outstanding on the home-equity line of credit.[5] The circuit court expressly disposed of two of those counts in the bank's favor. This would appear to

[5]The declaratory-judgment count, to the extent it seeks a judgment as to the respective rights of the parties under the line of credit, might be deemed to encompass some additional claims different from the recovery of money under the line of credit.

implicitly dispose of the entire claim; Renasant Bank could not later recover a second time on its other counts. Thus, by ruling in favor of the bank on the two equitable counts, the circuit court also appeared to dispose of the remaining counts. See, e.g., Baldwin v. Panetta, 4 So. 3d 555, 557 n.1 (Ala. Civ. App. 2008) (concluding, when the trial court ruled in favor of the appellees on two of their five counts, that the judgment was nonetheless final because the remaining counts "arose out of the same acts, were proved by the same evidence, and constituted, in effect, the same claim for relief, for which the [appellees] were entitled to recover only once"). However, the circuit court, in its order, explicitly stated that the other counts remained pending. This would tend to negate any inference that the circuit court also disposed of the remaining counts. If the remaining counts, which appear to be part of the same claim, are still pending, then the single claim is not fully adjudicated for purposes of Rule 54(b).

A Rule 54(b) certification "should not be entered if the issues in the claim being certified and a claim that will remain pending in the trial court '"are so closely intertwined

that separate adjudication would pose an unreasonable risk of inconsistent results."'" Schlarb v. Lee, 955 So. 2d 418, 419–20 (Ala. 2006) (quoting Clarke–Mobile Counties Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002), quoting in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987)). By the circuit court's entry of a judgment on two of the equitable counts, it would appear that the bank would not also be entitled to a judgment on a theory that an express contract existed. Cf. note 4, supra. The partial summary judgment calls into question whether the circuit court could later rule in favor of the bank on its declaratory-judgment count or breach-of-contract count (or against Deborah Blackmon and the estate of Brian Alan Blackmon on their own declaratory-judgment counterclaim challenging the existence of a valid contract). Yet, according to the circuit court, those counts based on express contract remain pending, thus raising the possibility of a later inconsistent judgment.[6]

[6]It is possible that the circuit court merely intended to express that the other claims in the case remained pending, and not the remaining "counts." However, the remaining claims--Deborah Blackmon and the estate's counterclaim and what is left of Renasant Bank's declaratory-judgment claim--

This illustrates why the judgment should not be certified as final. A nonfinal, interlocutory judgment "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b); see also Hallman v. Marion Corp., 411 So. 2d 130, 132 (Ala. 1982). If in later proceedings on the remaining counts the circuit court determines that a contract did in fact exist and that the bank was entitled to a judgment on its express-contract theories, it would be free to revise its interlocutory judgment in favor of the bank on the two equitable counts.

Additionally, if this Court were to conclude in the instant appeal that the judgment before us is final and go on to consider the merits and affirm the partial summary judgment, our decision might be read as determining the similar issues remaining in the circuit court; further, this Court in a subsequent appeal might be required to review the very same facts again on the remaining issues. However,

> "'[i]t is uneconomical for an appellate court to review facts on an appeal

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might still be subject to a later judgment inconsistent with the judgment currently before this Court.

> following a Rule 54(b) certification that it is likely to be required to consider again when another appeal is brought after the [trial] court renders its decision on the remaining claims or as to the remaining parties.
>
> "'An appellate court also should not hear appeals that will require it to determine questions that remain before the trial court with regard to other claims.'"

Centennial Assocs., Ltd. v. Guthrie, 20 So. 3d 1277, 1281 (Ala. 2009) (quoting 10 Charles Alan Wright et al., Federal Practice and Procedure § 2659 (1998) (footnotes omitted in Centennial)). This case illustrates why Rule 54(b) certifications should be entered only in exceptional cases and why appellate review in a piecemeal fashion is disfavored. Id.