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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0939

**Ex parte Insurance Express, LLC, Wayne Taylor, and Julie
Singley**

PETITION FOR WRIT OF MANDAMUS

(In re: Insurance Express, LLC

v.

Lynne Ernest Insurance, LLC, et al.)

(Choctaw Circuit Court: CV-20-9)

SHAW, Justice.

Insurance Express, LLC ("Insurance Express"), Wayne Taylor, and Julie Singley ("the petitioners") have filed a petition for a writ of mandamus directing the Choctaw Circuit Court to vacate an order staying the underlying action against the defendants below, Lynne Ernest Insurance, LLC ("LEI"), Lynne Ernest, Chynna Ernest, and Deadra Stokley. We grant the petition and issue the writ.

Facts and Procedural History

Insurance Express commenced an action against LEI, Lynne, Chynna, and Stokley ("the defendants"). According to the complaint, Lynne and Stokley were longtime employees of Insurance Express. It alleged that they, while still employed by Insurance Express, entered Insurance Express's office after business hours and, without authorization, made electronic copies of various business records related to Insurance Express's clients and insurance policies. Lynne and Stokley resigned soon after and began employment with LEI, which purportedly had been formed by Lynne and Chynna and was a direct competitor of Insurance Express. Lynne and Stokley, it is alleged, then induced some Insurance Express clients to transfer their policies to LEI. The complaint also claimed that Lynne had paid premiums for Insurance Express

clients from a trust account without first collecting the premiums from the clients and had used Insurance Express funds to pay her personal expenses.

Insurance Express sought injunctive relief to, among other things, prevent the defendants from communicating with past or current customers of Insurance Express and to require the defendants to return any customer information taken by them. It further sought damages for breach of contract, conversion, intentional interference with business relations, breach of fiduciary duty, and civil conspiracy.

The defendants filed counterclaims apparently seeking declaratory and injunctive relief and damages on counts of hostile work environment/sexual harassment, assault and battery, defamation, tortious interference with a contractual or employment relationship, and conversion. The counterclaim pleadings are not included in the materials provided to this Court, but it appears that Taylor, the principal owner of Insurance Express, and Singley, an employee, were added to the action as counterclaim defendants.

As discovery progressed, Taylor was deposed. After the deposition, the defendants filed a motion to stay the litigation. They asserted that,

in his deposition, Taylor had stated that he had contacted the Alabama Department of Insurance ("the Department"), the Alabama Attorney General's Office, the Federal Bureau of Investigation ("FBI"), and the Choctaw County District Attorney, requesting that those entities criminally prosecute the defendants for their conduct alleged in the complaint. Taylor, the defendants alleged, had indicated that some of those entities had opened investigations of the defendants' conduct, that he believed that those investigations remained open, and that he intended to continue to push for the prosecution of Lynne and Stokley. The defendants argued that, under Alabama law, the underlying action was due to be stayed until such time as any statute of limitations expired for any criminal charges that Taylor intended to pursue.

In their response to the motion to stay, the petitioners contended, among other things, that the evidence did not demonstrate that there was a criminal investigation. Specifically, the petitioners claimed that the defendants' "sole evidence" consisted of assertions by Taylor during his deposition that "he intended to pursue a criminal case" against them, which, the petitioners argued, was insufficient to support a motion to stay.

After the filing of a reply by the defendants and a hearing, the trial court granted their motion and stayed the case "until all applicable statutes of limitations have expired for any potential criminal prosecution that could be brought against Defendants based on the allegations [in Insurance Express's] Complaint." The trial court stated that "Taylor's deposition testimony unequivocally shows that he intends to use Defendants' deposition testimony in an attempt to have ongoing criminal investigations culminate in criminal charges against" the defendants and that Taylor's testimony showed that investigations by the Choctaw County District Attorney and the Department were still pending.

The petitioners timely filed their petition seeking a writ of mandamus directing the trial court to vacate the stay. This Court ordered answer and briefs. We grant the petition and issue the writ.

Standard of Review

Generally, a trial court's decision on a motion to stay a civil action when a party alleges that it is the subject of a criminal proceeding may be challenged by a petition for a writ of mandamus. See, e.g., Ex parte

Rawls, 953 So. 2d 374 (Ala. 2006), and Ex parte Weems, 711 So. 2d 1011 (Ala. 1998).

"A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus 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 BOC Group, Inc., 823 So.2d 1270, 1272 (Ala. 2001)."

Rawls, 953 So. 2d at 377 (quoting Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)). In granting the motion for a stay in the instant case, the trial court received no live, in-court testimony and instead considered only the arguments of counsel and evidentiary materials. Thus, our review of the facts and the application of the law to those facts is de novo. Antonucci, 917 So. 2d at 830. Further, "the purpose of our review is to determine only if the petitioner[s] [have] shown that the trial court exceeded the discretion accorded it in determining whether to grant the requested stay." Id.

Discussion

Under certain circumstances, a civil action may be stayed by a court when a party's right against self-incrimination under the Fifth

Amendment to the Constitution of the United States may be implicated. "Generally, under the Fifth Amendment ..., '[n]o person ... shall be compelled in any criminal case to be a witness against himself.'" Ex parte McDaniel, 291 So. 3d 847, 852 (Ala. 2019). The Fifth Amendment "'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" Rawls, 953 So. 2d at 379-80 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). A party in a civil action may assert the Fifth Amendment privilege against self-incrimination even when "no criminal charges have been instituted ... so long as the party reasonably apprehends a risk of self-incrimination. A party need not be indicted to properly claim the Fifth Amendment privilege." Ex parte Ebbers, 871 So. 2d 776, 787 (Ala. 2003).

However, "'the Constitution does not require a stay of civil proceedings pending the outcome of potential criminal proceedings.'" Rawls, 953 So. 2d at 378 (quoting Ex parte Coastal Training Inst., 583 So. 2d 979, 980 (Ala. 1991)). Nevertheless, a trial court has the discretion

to delay or postpone discovery in a civil action "'when "justice requires" that it do so "to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense.'"'" Id. (quoting Ex parte Coastal Training, 583 So. 2d at 981, quoting in turn Rule 26(c), Ala. R. Civ. P.).

Three factors are addressed in determining whether a stay is warranted:

"(1) whether the civil proceeding and the criminal proceeding are parallel, see Ex parte Weems, 711 So. 2d 1011, 1013 (Ala. 1998); (2) whether the moving party's Fifth Amendment protection against self-incrimination will be threatened if the civil proceeding is not stayed, see Ex parte Windom, 763 So. 2d 946, 950 (Ala. 2000); and (3) whether the requirements of the balancing tests set out in Ex parte Baugh, 530 So. 2d [238,] 244 [(Ala. 1988)], and Ex parte Ebberts, 871 So. 2d 776, 789 (Ala. 2003), are met."

Rawls, 953 So. 2d at 378.

The petitioners contend that the defendants did not demonstrate that there exists a parallel criminal proceeding to the underlying civil action. It is undisputed that the defendants have not been criminally charged. Despite this, a stay may be warranted if the existence of a parallel criminal investigation is clearly demonstrated:

"Alabama caselaw is staunchly committed to the proposition that actual criminal charges are not necessary to

justify the assertion of the Fifth Amendment privilege against self-incrimination, so long as the party moving for the stay clearly demonstrates to the trial judge that that party is the subject of an ongoing, and overlapping, criminal investigation."

Ex parte Ebbers, 871 So. 2d at 785 (second emphasis added). Compare McDaniel, 291 So. 3d at 854-55 (holding that a party who was the target of a criminal investigation failed to clearly demonstrate that such investigation was parallel to the civil proceedings in which the party sought a stay), and Ex parte Pegram, 646 So. 2d 644, 646 (Ala. 1994) (holding that a plaintiff demonstrated a clear right to a writ of mandamus vacating a stay when the evidence was insufficient to show that the defendant was under a criminal investigation), with Ex parte Williams, 775 So. 2d 146, 148 (Ala. 2000) (holding that a stay was warranted when, although a criminal charge had been withdrawn, there remained an ongoing criminal investigation and allegations by a State agency of statutory violations), and Ex parte S.B., 164 So. 3d 599, 601 (Ala. Civ. App. 2014) (holding that a stay was required in a termination-of-parental-rights case when the mother faced a criminal investigation and likely criminal prosecution).

The key evidence relevant to the possibility of a criminal investigation in this case is Taylor's deposition testimony and a letter from the Department discussing an investigation of the defendants. As to Taylor's testimony, it appears that he was questioned regarding certain documents and letters he had sent to Insurance Express's customers urging them to not change their insurance from Insurance Express to LEI. He was also questioned as to his efforts to have various law-enforcement entities investigate the defendants.

Specifically, Taylor was questioned regarding a letter from the Choctaw County District Attorney's Office indicating that it "couldn't help" him with an investigation. Taylor denied knowing whether any such investigation was "closed" and stated that it was "possibly" still ongoing. However, Taylor had not actually spoken to the Choctaw County District Attorney after receiving the letter.

Taylor was further questioned about a letter he had sent to a United States Attorney's Office. Taylor did not know the status of any complaint to that office or any investigation by that office, did not receive a "formal" response to his letter, and received no communication from anyone in the office. Taylor also stated that he had communicated with individuals

from the National Insurance Crime Bureau, a non-law-enforcement organization, whose representatives had told him that the matter should be "in the hands of the FBI." Taylor, however, testified that he had not actually spoken with the FBI.

Taylor did contact the local sheriff, who indicated that his office could not handle a "very large white-collar case" involving "forensic computer work" and advised Taylor to consult other law-enforcement agencies. Taylor further contacted the Gilbertown Police Department, who examined his records but, purportedly at his request, did not charge the defendants. The materials before us do not indicate that Taylor further pursued the matter with that department. Taylor also testified that he had contacted the Attorney General's Office, which, he said, had referred him to the Department.

Taylor was also questioned about correspondence he had sent to Insurance Express's customers claiming that there was a fraud investigation against LEI, that the individual defendants would be soon arrested, that there were 15 counts of fraud involved, and that theft, forgery, and other charges existed. Taylor acknowledged, when questioned, that no such charges had been filed and that the individual

defendants had never been arrested. At one point Taylor also claimed that he had documentation from his computerized record system showing that Lynne had received customer information, but he had not provided such documentation in discovery and, despite all his efforts to seek a criminal investigation, had not provided it to law enforcement. The following exchange appears to summarize the status of any investigation:

"[Counsel for the petitioners:] And in some of your contacts with law enforcement it sounds like you were told that they were considering or potentially planning on pursuing criminal charges against Lynne Ernest and/or Ms. Stokley, was that your understanding of some of these conversations?

"[Taylor:] That's correct.

"[Counsel:] Again, as we sit here today you're not aware that anything like that has happened; is that right?

"[Taylor:] That's right."

Taylor, however, indicated that he had not "given up" on seeking criminal charges against the defendants:

"[Taylor:] Let's just say this has been a pretty big thing, there's been a lot of work going into this and it's not something that I'm taking lightly.

"[Counsel for the defendants:] You haven't given up on criminal prosecution, have you?

"[Taylor:] No, I have not.

"[Counsel:] You plan to continue to pursue that as long as you can?

"[Taylor:] Yes."¹

It appears that the Department, in response to complaints by Taylor, conducted some form of an investigation of the defendants. Taylor indicated that an investigator with the Department, Agent Reed, came to Insurance Express's office and reviewed materials. According to Taylor, Agent Reed said that 15 insurance-fraud charges were uncovered. The Department also received documents and records from Taylor as well as a response from Lynne. It subsequently issued a letter, authored by counsel for the Department, stating in part as follows:

"[O]fficials with the Department made a significant investment of time and effort in determining whether the allegations presented in your complaint and the opposing claims set forth by [Lynne] were supported by confirmed facts and existing documentary evidence. From the initial investigation performed by Special Agent Reed to the several conference calls and meetings between you and your team and

¹There was no testimony by Taylor indicating that he intended to use the deposition testimony of the defendants to further his attempts to have the defendants criminally prosecuted, nor is there anything before this Court suggesting the defendants' deposition testimony would reveal information relevant to such attempts.

members of the Department staff, every claim was carefully substantiated to the extent possible and analyzed to determine if an actionable violation was committed by [Lynne], or any other licensee of the Department whom you identified as a potential wrongdoer."

The letter indicated that the Department "did not identify any instances of actionable insurance fraud, or clear violations of the Alabama Insurance Code, which would provide a sufficient basis for initiating an administrative action against [Lynne]" or "to take regulatory action." (Emphasis added.) It concluded:

"Lastly, it is my understanding all of these allegations, or areas of dispute, are the subject of civil litigation which you initiated against [Lynne]. Once concluded, that action would presumably resolve the question of whether [Lynne] committed the acts you alleged in your complaint to the Department. Because it is the Department's policy to refrain from duplicating, or relitigating, issues and disputes currently before the courts, no further action will be taken at this time regarding your complaint until a final result is reached in the civil case. Upon its conclusion, we will be happy to revisit the matter if the outcome and conditions warrant doing so."

The evidence in this case, namely Taylor's deposition and the Department's letter, does not clearly establish the existence of a criminal investigation. The agencies Taylor claimed that he had contacted have either not replied, declined to investigate, not initiated charges, or, after

an actual investigation and review of the allegations and evidence, found no actionable wrongdoing. Many forms of conduct underlying the basis of civil litigation may also form the basis of a potential criminal prosecution. When allegations of wrongdoing in a civil action purportedly could rise to the level of criminal misconduct, but law-enforcement and regulatory agencies repeatedly decline to investigate, to prosecute, or to prosecute after an investigation, and years have passed with no further law-enforcement action -- in this case, three years -- we cannot hold that a party has "clearly demonstrate[d]" that it "is the subject of an ongoing, and overlapping, criminal investigation." Ebbers, 871 So. 2d at 785 (emphasis added).

The defendants point out that Taylor testified that he continues to desire to seek criminal prosecution. Although it is true that he claims to maintain that subjective desire, the evidence indicates that his efforts have been continually fruitless and, in effect, rejected. The defendants further point out that the Department has not foreclosed the possibility of later opening another investigation. This, however, merely confirms that an investigation does not exist; as Ebbers notes, to require a stay, there must be an "ongoing" investigation. The Department previously

conducted and concluded an investigation, found no wrongdoing, and declined to pursue charges. At best, the defendants' concerns are speculative, which will not support the issuance of a stay. Ebbers, 871 So. 2d at 788 ("[A] motion to stay civil discovery during the pendency of a parallel criminal proceeding is not properly granted upon speculative or conclusory grounds." (quoting Ex parte Hill, 674 So. 2d 530, 533 (Ala. 1996))).

The defendants did not establish that a stay was warranted in the underlying action. Thus, the trial court exceeded its discretion in granting a stay.

Conclusion

For the above reasons, the petitioners have established that they have a clear legal right to the relief sought. Therefore, we grant the petition for a writ of mandamus and direct the trial court to vacate its order granting a stay.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Wise, Bryan, Sellers, Mendheim, Stewart, Mitchell, and Cook, JJ., concur.