REL: January 11, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170991

Thomas C. Donald

v.

James P. Kimberley and Carol J. Kimberley

Appeal from DeKalb Circuit Court
(CV-17-900198)

PER CURIAM.

In August 2017, Thomas C. Donald, acting pro se, initiated a civil action against James P. Kimberley ("James") in the DeKalb Circuit Court in which Donald sought declaratory and injunctive relief, as well as damages. That action was

assigned case number CV-17-900198. In pertinent part, Donald alleged in his complaint that he owned a tract of land adjacent to a tract of land owned by James; that the tracts shared a common boundary, i.e., the line between Sections 23 and 26 of the United States Government survey of Township 5 South, Range 10 East in DeKalb County ("the section line"); that James had installed fence posts, barriers, and other markers on and along the north side of a roadway that, Donald alleged, lay within his tract; and that, if the roadway were deemed to lie on James's tract, Donald and his predecessors in title had used the roadway for a sufficient time to warrant a determination that Donald had gained a right to use the road by prescription. Donald thereafter filed a number of additional papers in the trial court, such as a motion requesting that the trial court take judicial notice of certain matters and affidavits regarding the location of the section line and a section corner marker. Donald later moved for the entry of a summary judgment in his favor as to all claims not involving requests for awards of monetary damages.

In October 2017, James, acting through counsel, answered Donald's complaint, denying its material allegations, and

asserted a counterclaim against Donald seeking an award of $10,000 in compensatory damages, $25,000 in punitive damages, attorney's fees of $7,500, and costs. James asserted, among other things, that Donald had "trespassed on [James's] land and caused damage to the land" and that Donald was an "inveterate litigant involving coterminous landowners" who "knew or should have known[] there is no merit to his contentions" in his complaint. See generally the Alabama Litigation Accountability Act ("the ALAA"), Ala. Code 1975, § 12-19-270 et seq. Donald filed motions seeking a more definite statement from James and to dismiss James's counterclaim. While those motions were pending, Donald filed further papers, including a brief and a motion regarding the propriety of judicial notice of matters such as facts shown in online mapping programs and a surveying manual published by the United States Bureau of Land Management, as well as an affidavit regarding section lines depicted on county tax maps.

The trial court held a hearing on Donald's summary-judgment motion on January 23, 2018, at which time the absence of an indispensable party, i.e., James's wife, Carol J. Kimberley ("Carol"), was suggested. The trial court entered

an order denying Donald's summary-judgment motion because of the absence of Carol as a party, after which Donald amended his complaint to name Carol as an additional defendant and filed a renewed summary-judgment motion. James and Carol (hereinafter referred to collectively as "the Kimberleys") moved to dismiss the amended complaint on various grounds, including that Donald's claims were purportedly time-barred as to Carol and that the amended complaint had been filed without leave of court; after that motion was denied, the Kimberleys jointly filed an answer to the amended complaint and asserted a counterclaim that was substantially similar to the counterclaim previously asserted by James, i.e., seeking relief based upon theories of trespass and initiation of allegedly baseless litigation as described in the ALAA. The Kimberleys also filed a response in opposition to Donald's renewed summary-judgment motion, which response was supported by their joint affidavit. In addition to filing a reply to the Kimberleys' response to his renewed summary-judgment motion and an objection to their joint affidavit, Donald again moved for a more definite statement as to the counterclaim and to strike the amended answer and counterclaim.

On April 12, 2018, the trial court entered an order overruling Donald's objections to the Kimberleys' affidavit, denying Donald's motion to strike, denying Donald's motion for a more definite statement, and denying Donald's renewed summary-judgment motion. Donald unsuccessfully sought reconsideration of the trial court's order, and he then sought review of the trial court's April 12, 2018, order via a petition for the writ of mandamus. However, the record reveals that our supreme court denied by order Donald's mandamus petition seeking review of the trial court's order. Ex parte Donald (No. 1170721, May 31, 2018).

On June 6, 2018, the trial court entered an order stating that Donald's complaint and the Kimberleys' counterclaim "are hereby severed for trial" and providing that a trial on the complaint would be held on June 11, 2018, and that a trial would be held on the counterclaim at a later date. Notably, the trial court's order did not specify that the claims set forth in the complaint and those asserted in the counterclaim would be treated as two separate civil actions, and papers filed and orders entered in the trial court thereafter list case number CV-17-900198 as a single pending action. The

trial court held an ore tenus proceeding as scheduled on June 11, 2018, at which Donald and two land surveyors testified and various documents were admitted into evidence. After that trial had concluded and the parties had filed briefs in support of their positions, the trial court entered an order on June 21, 2018. The trial court's June 21, 2018, order stated that that court had "severed the complaint and the counterclaim" and had held a trial as to the issues raised in the complaint. After discussing the general location of the parties' tracts of land and the testimony of Donald and the surveyors, the trial court determined in its order that the true location of the section line was "consistent with the findings of Surveyor Johnny Croft"; that the northwest corner of the Kimberleys' property was the point Croft had determined to be the midpoint of the section line; and that the disputed roadway was located in Section 26 on the Kimberleys' property. The trial court denied any other relief sought by Donald in his complaint and set a trial date for hearing the Kimberleys' counterclaim.

On July 7, 2018, Donald filed a motion seeking reconsideration of the matters determined in the June 21,

2018, order on Donald's complaint, which motion was set for a July 31, 2018, hearing. Before that hearing, however, Donald filed on July 23, 2018, what he termed a "motion to clarify" the June 21, 2018, order. In the "motion to clarify," Donald intimated that the trial court had indicated its intent that the June 21, 2018, order be treated as a final judgment; he requested that the trial court direct the entry of a final judgment as to the June 21, 2018, order pursuant to Rule 54(b), Ala. R. Civ. P. In response to the "motion to clarify," the trial court issued an order denying the motion, but opining that Rule 4(a)(3), Ala. R. App. P., which pertains to the tolling of time for taking an appeal during the pendency of a postjudgment motion under Rules 50, 52, 55, or 59, Ala. R. Civ. P., was "applicable to the issue raised" in the "motion to clarify." Donald filed a notice of appeal from the June 21, 2018, order on July 31, 2018. Thereafter, the trial court entered an order on August 9, 2018, modifying its June 21, 2018, order in some respects but denying Donald's motion to reconsider. Donald's appeal from the trial court's June 21, 2018, order (as amended on August 9, 2018) was

transferred from our supreme court to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

The parties to this appeal do not address in their briefs the matter of this court's appellate jurisdiction to consider the correctness of the trial court's June 21, 2018, order as amended. Regardless, "we must consider whether we have jurisdiction over this appeal, because '"jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu."'" Spradlin v. Lovvorn, 891 So. 2d 351, 353 (Ala. Civ. App. 2004) (quoting Nobles v. Alabama Christian Acad., 724 So. 2d 527, 529 (Ala. Civ. App. 1998), quoting in turn Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)). In Spradlin, this court considered the question of appellate jurisdiction as to an order entered in a civil action involving two sets of coterminous landowners: one set of landowners, the Lovvorns, sought in their complaint a judgment quieting title in their favor as to certain real property, whereas their opponents, the Spradlins, asserted a counterclaim alleging, among other things, that the Lovvorns had trespassed upon the Spradlins' property and sought damages based on that claim, among other claims sounding in tort.

After the trial court had entered an order establishing the parties' common boundary, the Spradlins appealed. This court determined, however, that the Spradlins' appeal was due to be dismissed:

> "This court has stated:
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> > "'"It is a well established rule that, with limited exceptions, an appeal will lie only from a final judgment which determines the issues before the court and ascertains and declares the rights of the parties involved." Taylor v. Taylor, 398 So. 2d 267, 269 (Ala. 1981). A ruling that relates to fewer than all the parties in a case, or that determines fewer than all the claims, is ordinarily not final as to any of the parties or as to any of the claims. Rule 54(b), Ala. R. Civ. P.; see McGlothlin v. First Alabama Bank, 599 So. 2d 1137 (Ala. 1992). However, pursuant to Rule 54(b), a court may direct the entry of a final judgment as to fewer than all of the claims presented in a particular case. See Bean v. Craig, 557 So. 2d 1249 (Ala. 1990). Furthermore, "when the trial court grants separate trials of single claims under Rule 42(b), [Ala. R. Civ. P.,] a judgment entered as to fewer than all the claims or parties is not generally appealable absent a Rule 54(b) determination." Walker County Petroleum Council, Inc. v. Walker County, 368 So. 2d 862, 863 (Ala. 1979).'
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> "Waters v. Moody, 716 So. 2d 728, 729 (Ala. Civ. App. 1998).
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> "It appears from the record that the trial court separated the claim to establish the true boundary

> line between the parties' properties and the claim seeking injunctive relief from the tort claims seeking damages. The trial court's order establishing the boundary line between the parties' properties and ordering that the Spradlins are to have unobstructed access to their property along the 'old roadbed' free of any obstruction from the Lovvorns did not address or dispose of the tort claims alleged in the Spradlins' counterclaim seeking damages for injury to their property. Further, the trial court's judgment was not certified as final pursuant to Rule 54(b), Ala. R. Civ. P. Therefore, we conclude that this court lacks jurisdiction to hear this appeal. Accordingly, we must dismiss this appeal as being from a nonfinal judgment."

Spradlin, 891 So. 2d at 353.

We relied upon Spradlin and Waters v. Moody, 716 So. 2d 728 (Ala. Civ. App. 1998), in reaching a similar conclusion in Day v. Davis, 989 So. 2d 1118 (Ala. Civ. App. 2008), in which one set of coterminous landowners, the Davises, had asserted in their complaint a boundary-line-establishment claim and had sought an award of damages on claims alleging trespass and conversion, whereas their neighbors and opponents, the Days, had asserted a counterclaim alleging that they owned the property in dispute and also sought an award of damages for trespasses purportedly committed by the Davises. The trial court's order from which the Days sought to appeal determined that the boundary line that had been advocated by the Davises

was the correct boundary between the parties' properties, but honored the parties' agreement to "'bifurcate the issues of this case'" and "'reserve[d] ruling on all other issues ... before it.'" Day, 989 So. 2d at 1119. Again, this court concluded that no final judgment existed:

> "In this case, the record indicates that the parties and the trial court intended to address the issues in this action in separate trials. However, when separate trials are ordered, a ruling on fewer than all the pending issues is not sufficiently final to support an appeal. Bryant v. Flagstar Enters., Inc., 717 So. 2d 400, 402 (Ala. Civ. App. 1998). The Committee Comments Adopted February 13, 2004, to Rule 21, Ala. R. Civ. P., explain:
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> > "'Rule 21 provides that: "Any claim against a party may be severed and proceeded with separately." Confusion has sometimes arisen between a true severance and an order providing for separate trials pursuant to Rule 42(b)[, Ala. R. Civ. P.] The distinction has at least the significance that a judgment on the first of two separate trials is not final, absent an order pursuant to Rule 54(b), Ala. R. Civ. P., while after a true severance a judgment on the first action to come to trial is final and appealable without reference to the proceedings in the severed action. Key v. Robert M. Duke Ins. Agency, 340 So. 2d 781, 783 (Ala. 1976)....'
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> "In Bryant v. Flagstar Enterprises, Inc., supra, this court stated:
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> > "'[T]he Alabama Supreme Court long ago noted the distinction between a trial

> court's severance of claims from an action, pursuant to Rule 21, Ala. R. Civ. P., and its ordering separate trials in a single action, pursuant to Rule 42, Ala. R. Civ. P.:
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> > "'"[S]eparate trials of different claims in a single action under Rule 42(b) usually result in a single judgment. Consequently, when the court wishes to enter judgment as to fewer than all the claims or parties, in a single action, Rule 54(b) must be followed. When, however, a claim is severed from the original action, as authorized by Rule 21, [Ala. R. Civ. P.], a new action is created, just as if it had never been a part of the original action, and a completely independent judgment results. Because the new action is no longer connected to the original action, the judgment rendered is not a determination as to fewer than all the parties and claims, and Rule 54(b) does not apply."
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> "'Key v. Robert M. Duke Ins. Agency, 340 So. 2d 781, 783 (Ala. 1976) (emphasis added); see also Seybold v. Magnolia Land Co., 372 So. 2d 865, 866 (Ala. 1979) (dismissing appeal from order relating to single plaintiff, where three other plaintiffs' claims remained pending, relying on Key).'

"717 So. 2d at 402. Under appropriate circumstances, a trial court may certify as final pursuant to Rule 54(b), Ala. R. Civ. P., an order determining one of several pending claims. Waters

> v. Moody, 716 So. 2d 728 (Ala. Civ. App. 1998). However, we note that when claims 'are so interrelated that they should be adjudicated simultaneously and not piecemeal,' a Rule 54(b) certification is not appropriate. Bridges v. Bridges, 598 So. 2d 935, 936 (Ala. Civ. App. 1992); see also Hurst v. Cook, 981 So. 2d 1143 (Ala. Civ. App. 2007).
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> "....
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> "The trial court in this action bifurcated the claims for separate trials. The trial court's April 18, 2007, order specifically reserves jurisdiction to rule on the remaining issues pending between the parties. That order contains no indication as to whether the trial court considered a Rule 54(b) certification of finality to be appropriate under the facts of this case. The April 18, 2007, order from which this appeal is taken is not sufficiently final to support the appeal; accordingly, we dismiss the appeal."

Day, 989 So. 2d at 1120–21 (some emphasis added).

In this case, despite the trial court's use of the term "sever" to refer to its action in bifurcating the trials envisioned on the claims pleaded in Donald's complaint and the claims pleaded in the Kimberleys' counterclaim, the trial court did not separate those sets of claims into separate actions under Rule 21, Ala. R. Civ. P., so as to enable the June 21, 2018, order to constitute an adjudication of all claims as to all parties sufficient to constitute a final judgment. Neither did that court, in response to Donald's

request, direct the entry of a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., as to its June 21, 2018, order.[1] On the authority of Waters, Spradlin, and Day, supra, we conclude that the June 21, 2018, order of the trial court (as amended on August 9, 2018) as to which Donald has sought review is not a final judgment that will support an appeal.

APPEAL DISMISSED.

All the judges concur.

[1]Because the trial court declined to grant Donald's request for the entry of a Rule 54(b) certification, we will not explore in detail the hypothetical propriety of such a certification in this case. But see Owen v. Hopper, 999 So. 2d 953, 957 (Ala. Civ. App. 2008) (holding that claims in complaint alleging, among other things, criminal trespass across disputed boundary line were "too intertwined" with counterclaim seeking declaration of true boundary-line location and asserting adverse possession as to same disputed boundary to support a Rule 54(b) certification).