Rel: May 24, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1180199

Ex parte David McDaniel and Lisa McDaniel

PETITION FOR WRIT OF MANDAMUS

(In re: David McDaniel and Lisa McDaniel

v.

SouthFirst Bancshares, Inc., d/b/a SouthFirst Bank; Southern Craftsman Custom Homes, Inc.; Jeffrey A. Rusert; Larry M. Curry, Sr.; Mari G. Gunnels; and Danny Keeney)

(Shelby Circuit Court, CV-18-900702)

SHAW, Justice.

David McDaniel and Lisa McDaniel, plaintiffs in a civil action below, petition this Court for a writ of mandamus

directing the Shelby Circuit Court to vacate its order staying the proceedings against the defendants--Southern Craftsman Custom Homes, Inc. ("SCCH"); Jeffrey A. Rusert; Larry M. Curry, Sr.; SouthFirst Bancshares, Inc., d/b/a SouthFirst Bank ("SouthFirst"); Mari G. Gunnels; and Danny Keeney--while one of those defendants, Rusert, awaits the outcome of a federal criminal investigation against him. For the reasons stated below, we grant the petition and issue the writ.

Facts and Procedural History

In 2017, the McDaniels contacted Rusert for the purpose of entering into an agreement with SCCH to build a house. According to the McDaniels, Rusert represented himself as the president of SCCH. At some point, Rusert recommended that the McDaniels speak with Gunnels, who worked for SouthFirst, to secure a loan to pay for the construction of the new house. In November 2017, with Gunnels's assistance, the McDaniels began the process of applying for a construction loan with SouthFirst.

On November 4, 2017, the McDaniels and SCCH entered into a written agreement for the construction of the house. The total amount of the construction contract was $585,000.

Pursuant to the terms of the contract, the McDaniels paid 10 percent of the contract amount--$58,500--as a down payment. The McDaniels contend that they made numerous inquiries with Gunnels concerning the status of the approval of their construction loan and questioned the delay in the closing of the loan. According to the McDaniels, Gunnels assured them that the delay in closing the loan was simply the result of certain signatories for SouthFirst being out of town that prevented SouthFirst from executing the appropriate documents. The McDaniels contend, however, that the delay in closing the loan was actually attributable to concerns allegedly raised by Keeney, also a SouthFirst employee, regarding Rusert's ability to perform the work designated in the construction contract.

The delay in closing of the loan allegedly led Rusert to seek additional funds from the McDaniels to "hold 2017 material prices." In December 2017, the McDaniels paid Rusert an additional $15,000 to satisfy that request.

At some point, the McDaniels learned that another person, Curry, had signed another copy of the construction contract between SCCH and the McDaniels to replace the construction contract previously executed by Rusert. SouthFirst indicated

to them that Curry was the president of SCCH and that he, not Rusert, held the builder's license for the company. According to the McDaniels, Rusert's license to perform homebuilding services had been revoked, and SouthFirst had encountered prior issues with SCCH and Rusert's defaulting on other construction projects.

The loan closing occurred on January 26, 2018. The McDaniels executed, among other agreements, a written construction-loan agreement, a promissory note, and a construction-loan disbursement agreement in the total amount of $589,500 for the construction of their house. In conjunction with the execution of those agreements, the McDaniels executed a mortgage on the property in favor of SouthFirst. At the loan closing, Rusert was given a "start-up draw" in the amount of $29,843.65. Subsequently, SouthFirst funded three additional draw requests from Rusert.

On March 5, 2018, the McDaniels met with Rusert at the property site to discuss some concerns they had with the ongoing construction. During that meeting, Rusert provided the McDaniels with a credit application from a local building-supply company and asked them to execute it so that, he said,

he could use the McDaniels' credit to purchase building materials and supplies. The McDaniels contacted that local building-supply company and learned that it refused to do business with SCCH, Rusert, and Curry because all three had purportedly failed to pay significant amounts owed the company. The McDaniels immediately contacted Gunnels and placed a "stop-payment" order on the most recent draw request from SCCH and Rusert. At that point, only the foundation had been poured.

On July 26, 2018, the McDaniels sued SCCH, Rusert, Curry, SouthFirst, Gunnels, and Keeney. In their complaint, the McDaniels sought damages for negligence, suppression, fraudulent misrepresentation, civil conspiracy, conversion, and the infliction of emotional distress. The McDaniels further alleged breach-of-contract claims against SouthFirst, SCCH, Rusert, and Curry, as well as a claim of breach of fiduciary duties against SouthFirst. Finally, the McDaniels sought a judgment against SouthFirst, Gunnels, and Keeney declaring the loan agreement and mortgage void. At some point, SouthFirst, Gunnels, and Keeney filed a motion for leave to file a cross-claim against Rusert, Curry, and SCCH.

On August 13, 2018, Rusert and SCCH moved to stay the civil proceedings against them pending the outcome of a federal criminal investigation against Rusert. See Ex parte Ebbers, 871 So. 2d 776, 787 (Ala. 2003) (noting that individuals cannot be compelled to testify or to provide discovery in a civil proceeding while there is a parallel criminal action pending against them). According to Rusert and SCCH, Rusert was being investigated by the federal government for alleged bank fraud and wire fraud. No documents, affidavits, or other evidence was filed in support of that motion.

The McDaniels filed an opposition to the motion to stay and requested a hearing. On October 17, 2018, Rusert and SCCH moved for a protective order and a temporary injunction seeking to prevent any discovery pending resolution of their motion to stay. Attached to that motion was a copy of a "target letter"[1] Rusert had received from the United States Department of Justice ("the USDOJ") informing him that he was

[1]Black's Law Dictionary defines a "target letter" as "[a] prosecutor's letter to a potential defendant stating that a criminal investigation is underway and suggesting that the recipient consult counsel." Black's Law Dictionary 1684 (10th ed. 2014).

being investigated for bank fraud and wire fraud. The trial court granted the motion to stay on October 18, 2018.

The presumptively reasonable time for the McDaniels to file a petition for a writ of mandamus challenging the stay is 42 days. See Rule 21(a)(3), Ala. R. App. P., and Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 546 (Ala. 2007) ("[A] petition for a writ of mandamus must ordinarily be filed within 42 days of the challenged order."). On November 9, 2018, the McDaniels filed a motion to lift the stay. The motion was in substance a motion for the trial court to reconsider its decision; that motion would not have tolled or extended the time in which to file a mandamus petition challenging the order granting the stay. See Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003) (holding that a "motion to reconsider" does not toll the time for seeking mandamus review). On November 29, 2018--42 days after the trial court granted the motion to stay--the McDaniels filed the present petition.

The materials before us suggest that, after the McDaniels filed this mandamus petition, the trial court held a hearing

on the McDaniels' motion to lift the stay;[2] following that hearing, the trial court issued an order denying the motion to lift the stay.

Standard of Review

A petition for a writ of mandamus is a proper method by which to challenge a trial court's decision on a motion to stay a civil proceeding when a party to that proceeding is the subject of a criminal investigation. See, e.g., Ex parte Rawls, 953 So. 2d 374 (Ala. 2006); 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

[2]"The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction or stay the case." Ex parte Spencer, 111 So. 3d 713, 716 n.1 (Ala. 2012). If the petitioner does not ask this Court to stay the lower court proceedings, the trial court has jurisdiction to reconsider the challenged order; if the trial court grants the relief that is sought in this Court in the mandamus petition, then the petition may be mooted. Ex parte Southeastern Energy Corp., 203 So. 3d 1207, 1212 (Ala. 2016). Here, the materials before us reveal that no new evidence was presented to the trial court to support or oppose the pending stay; further, the stay was retained. This petition was therefore not mooted by any proceedings that occurred in the trial court after the entry of its October 18, 2018, order.

> (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).'
>
> "Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)."

Rawls, 953 So. 2d at 377. "[T]he purpose of our review is to determine only if the petitioner has shown that the trial court exceeded the discretion accorded it in determining whether to grant the requested stay." Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005).

Discussion

As an initial matter, the McDaniels move to strike three exhibits SCCH and Rusert attached to their brief filed in response to the mandamus petition: a detailed list of the civil actions against SCCH and Rusert that, they claim, were active at or around the time Rusert received his target letter from the USDOJ; an e-mail exchange between Rusert's criminal-defense attorney, SCCH, and Rusert's civil-defense attorney that asserted that the circumstances underlying the McDaniels' lawsuit were part of the USDOJ's criminal investigation of

Rusert; and a subpoena issued by the United States District Court for the Northern District of Alabama requesting that SCCH turn over all documents related to its and Rusert's dealings with certain parties and entities, including the McDaniels. In their motion to strike, the McDaniels argue that those materials were never presented to the trial court below for consideration and thus cannot be considered by this Court on mandamus review. Rusert and SCCH did not file a response to the McDaniels' motion to strike and have not disputed that those exhibits were never presented to the trial court below.

This Court has repeatedly recognized that in "mandamus proceedings, '[t]his Court does not review evidence presented for the first time'" in a mandamus petition. Ebbers, 871 So. 2d at 794 (quoting Ex parte Ephraim, 806 So. 2d 352, 357 (Ala. 2001)). In reviewing a mandamus petition, this Court considers "only those facts before the trial court." Ex parte Ford Motor Credit Co., 772 So. 2d 437, 442 (Ala. 2000). Further, in ruling on a mandamus petition, we will not consider "evidence in a party's brief that was not before the trial court." Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002). Because SCCH and Rusert did not first

present the above exhibits to the trial court and those exhibits, therefore, did not form a basis for the trial court's decision, they cannot be considered by this Court.

This is true despite the obvious relevance of the exhibits to the ultimate issue before us. In Ex parte Oliver, 864 So. 2d 1064 (Ala. 2003), the petitioner argued in the trial court that a stay of civil proceedings was warranted in light of a criminal investigation stemming from the same underlying facts as the civil case and the alleged imminent return of an indictment against him. Oliver, 864 So. 2d at 1065-66. While the petition was pending in this Court, the petitioner was indicted. Although a stay was "proper in light of the new fact presented by the issuance of an indictment," this Court refused to issue the writ because that fact was not first presented to the trial court: "Oliver, however, has not presented this change in circumstance--the return of the indictment, which creates an imperative duty for the trial court to stay the civil proceedings--to the trial court." 864 So. 2d at 1067. See Ebbers, 871 So. 2d at 794-95 (declining to consider materials that would support a stay that were not first presented to the trial court). Similarly, we cannot

consider the exhibits Rusert and SCCH have submitted and we grant the McDaniels' motion to strike. See also Ex parte Wayne Farms, LLC, 210 So. 3d 586, 592 (Ala. 2016) (refusing to consider exhibits filed in response to a mandamus petition when the content of those exhibits had not been presented to the trial court); Ex parte Quality Carriers, Inc., 183 So. 3d 937, 941 (Ala. 2015) (striking exhibits attached to the responses to a mandamus petition that were not before the trial court at the time it issued the challenged decision); and Ford Motor Credit, 772 So. 2d at 442-43 (striking an affidavit filed in response to a mandamus petition that was not provided to the trial court).

In their petition, the McDaniels argue that the trial court exceeded its discretion in staying their action based on Rusert's desire to invoke his Fifth Amendment right against self-incrimination pending the outcome of the federal criminal investigation against him. Generally, under the Fifth Amendment to the Constitution of the United States, "[n]o person ... shall be compelled in any criminal case to be a witness against himself." "'While the Constitution does not require a stay of civil proceedings pending the outcome of

potential criminal proceedings, a court has the discretion to postpone civil discovery when "justice requires" that it do so "to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense."'" Rawls, 953 So. 2d at 378 (quoting Ex parte Coastal Training Inst., 583 So. 2d 979, 980-81 (Ala. 1991)). This Court has previously recognized that 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. Turkey, 414 U.S. 70, 77 (1973)). The right against self-incrimination must be "liberally construed" in favor of the accused and is applicable to state proceedings. Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988).

Regarding a trial court's decision on a motion to stay civil proceedings based on Fifth Amendment concerns,

> "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."

Ebbers, 871 So. 2d at 785 (some emphasis added). In Rawls, 953 So. 2d at 378, this Court stated that, in order to determine if a stay is warranted under such circumstances, three factors must be addressed:

> "(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. 2003)], and Ex parte Ebbers, 871 So. 2d 776, 789 (Ala. 2003), are met."

First, the McDaniels argue that Rusert and SCCH failed to demonstrate that the civil proceeding against Rusert is "parallel" to the federal criminal investigation. SCCH and Rusert argue, however, that they provided the trial court with a copy of the "target letter" from the USDOJ. That letter, dated August 6, 2018, states, in pertinent part:

> "This letter is to advise you that you are the target of a federal grand jury investigation currently being conducted in the Northern District of Alabama. You are advised that the Grand Jury is conducting an investigation of possible violations

> of federal criminal laws involving, but not necessarily limited to Bank Fraud and Wire Fraud pursuant to 18 U.S.C. §§ 1344 and 1343."

Nothing in this very general letter indicates that the offenses being investigated by the federal grand jury--bank fraud and wire fraud--are in any way connected to the McDaniels' lawsuit. Neither the motion to stay nor the subsequently filed motion for a protective order and a temporary injunction provided any analysis or argument connecting the criminal investigation with the facts underlying this civil action. Although it is true that some of the allegations in the McDaniels' complaint alleged wrongdoing by Rusert in drawing funds from SouthFirst, there is no clear relationship stated in the target letter allowing a connection between the two.

Generally, in cases in which this Court has found that civil and criminal proceedings were "parallel" for purposes of requesting a stay of the civil proceeding, there was clear evidence demonstrating that both proceedings shared overlapping acts or incidents. See, e.g., Ex parte Decatur City Bd. of Educ., 265 So. 3d 1254 (Ala. 2018) (holding that a civil proceeding and a criminal proceeding were parallel

when both proceedings were premised upon identical allegations and documents from both proceedings discussed overlapping acts); Ex parte Antonucci, 917 So. 2d at 830 (holding that the party moving for a stay had "clearly demonstrated the existence of an ongoing criminal investigation" by presenting affidavits from his criminal-defense counsel, who testified that his client was the subject of a criminal investigation, noted his communications with law-enforcement officials who confirmed the investigation, and demonstrated that the criminal investigation "stems from the very conduct complained of in the civil proceedings"); Ebbers, 871 So. 2d at 790–91 (noting that the party moving for a stay provided, among other things, an affidavit by his criminal-defense attorney detailing the criminal investigation and its relationship to the civil proceedings); and Ex parte Coastal Training Inst., 583 So. 2d at 982, 983 (holding that "the trial judge had sufficient evidence" to issue a stay when affidavits from counsel and other materials made "it obvious that the material facts in this civil action would also be material and potentially incriminating in the criminal action").

Nothing in the target letter indicates that Rusert's alleged actions made the basis of the McDaniels' case are related to the USDOJ's investigation into his alleged bank-fraud and wire-fraud activities, that they overlapped with the USDOJ's investigation, or that the criminal proceeding was parallel to the McDaniels' civil action in any way. Although it is true that some of the allegations in the McDaniels' complaint alleged wrongdoing by Rusert in drawing funds from SouthFirst, which is a bank, and thus an inference of a connection could be made, a party requesting a stay must "clearly demonstrate" that it is the subject of an ongoing and overlapping criminal investigation. Ebbers, 871 So. 2d at 785. The target letter does not clearly demonstrate such a fact, and "'[a] motion to stay civil discovery during the pendency of a parallel criminal proceeding is not properly granted upon speculative or conclusory grounds.'" 871 So. 2d at 788 (quoting Ex parte Hill, 674 So. 2d 530, 533 (Ala. 1996)).

Next, SCCH and Rusert note that their counsel stated in the hearing on the motion to lift the stay, which occurred after the trial court issued the October 18, 2018, order

challenged here, that he had spoken with Rusert's criminal-defense attorney before the hearing and that Rusert's attorney had indicated that the circumstances underlying the McDaniels' action were part of the USDOJ's investigation. For the same reasons the exhibits discussed above were stricken, counsel's statements at this hearing did not form the basis of the trial court's order and are not before us. In any event, even if those statements were before us, it is well settled that assertions of counsel are not evidence. See, e.g., Ex parte Alabama Dep't of Mental Health & Mental Retardation, 937 So. 2d 1018, 1026 n.13 (Ala. 2006) (noting that "[a]rgument of counsel is not evidence"); American Nat'l Bank & Trust Co. of Mobile v. Long, 281 Ala. 654, 656, 207 So. 2d 129, 132 (1968) (noting that an "unsworn statement of counsel was not evidence"); and Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005) (recognizing that "[t]he unsworn statements, factual assertions, and arguments of counsel are not evidence" (citing Singley v. Bentley, 782 So. 2d 799, 803 (Ala. Civ. App. 2000))). See also Ex parte Merrill, 264 So. 3d 855, 860 n.4 (Ala. 2018) ("Motions, statements in motions, and arguments of counsel are not evidence." (citing Westwind

Techs., Inc. v. Jones, 925 So. 2d 166, 171 (Ala. 2005))). We do not mean to imply that counsel, who is an officer of the court and who is bound by numerous ethical obligations, misrepresented facts in this case. Nevertheless, there is a duty to "clearly demonstrate" that a stay is required to protect a party's Fifth Amendment rights. An assertion in court as to another person's out-of-court assertion does not meet this burden; it lacks the necessary context, completeness, and foundation to fully evaluate the basis and merits of the assertion.

SCCH and Rusert also point to the exhibits they attached to their response to this Court that, they say, confirm that the McDaniels' case was part of the USDOJ's investigation. As noted previously, however, none of those documents was presented to the trial court below, even in the proceedings that occurred after this petition was filed. Because we have granted the McDaniels' motion to strike those exhibits on that basis and cannot consider them, there is no merit to this argument.

The "target letter" was the only evidence before the trial court addressing the USDOJ's investigation against

Rusert. As discussed above, that letter alone is insufficient to clearly demonstrate that the civil proceeding and the criminal investigation against Rusert are parallel. Thus, there was insufficient evidence to support the trial court's decision, and it exceeded its discretion in granting the stay.[3]

The McDaniels also argue that, even if a stay is appropriate as to Rusert, it should not extend to the remaining defendants; in its separate response to this petition, SouthFirst contends that it would be prejudiced in defending the action and in prosecuting its cross-claim against Rusert if such a limited stay were allowed. Because of our resolution of this mandamus petition, that issue is pretermitted. In the event Rusert files a new motion to stay

[3]Additionally, for the reasons discussed above, the second factor discussed in Rawls, supra--whether Rusert's Fifth Amendment right against self-incrimination is threatened by the civil proceeding--was not demonstrated in the present case. Further, a discussion of the third factor set forth in Rawls, supra--whether the requirements of the balancing test set out in Ex parte Baugh, 530 So. 2d at 244, and Ebbers, 871 So. 2d at 789, are met--is also pretermitted. See Ex parte Butts, 183 So. 3d 931 (Ala. 2015) (stating that the conclusion that a party's right against self-incrimination was not threatened by a civil proceeding obviated the need to discuss the third issue in Rawls).

with additional or new supporting evidence and the trial court grants that motion, that issue would again be presented to the trial court.

Rusert did not clearly establish that a stay of this civil action was necessary in this case. Thus, the trial court exceeded its discretion in granting a stay, and the McDaniels have established that they have a clear legal right to the relief sought.

Conclusion

For the foregoing reasons, we conclude that the McDaniels have established a clear legal right to relief from the trial court's October 18, 2018, order. Accordingly, we grant the petition for a writ of mandamus and direct the trial court to vacate the October 18, 2018, order staying the underlying case.

MOTION TO STRIKE GRANTED; PETITION GRANTED; WRIT ISSUED.

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