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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Ex parte Lasonya Lindsey

PETITION FOR WRIT OF MANDAMUS

(In re: Lasonya Lindsey

v.

Charles H. Sims III and Doris Wallace)

(Dallas Circuit Court, CV-18-900001)

MITCHELL, Justice.

Lasonya Lindsey seeks to enforce her right to a civil jury trial. She first asks this Court to reinstate claims

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that were dismissed by the trial court. But because the dismissal of those claims is not addressable on a mandamus petition, we need not decide whether she would be entitled to a jury trial on those claims. She is entitled to a jury trial, however, on new issues raised in her most recent amended complaint because those issues are based on facts different from those that supported her original claim -- and her demand for a jury trial as to those new issues was timely made. We therefore grant her petition in part, deny it in part, and issue a writ of mandamus directing the Dallas Circuit Court to vacate its order striking her jury demand with respect to the new issues in her second amended complaint.

Facts and Procedural History

On April 1, 2016, Lasonya Lindsey agreed to purchase real property located in Selma ("the property") from Doris Wallace. Attorney Charles H. Sims III was retained by one or both of the transacting parties in connection with the sale. On April 26, 2016, Sims incorrectly represented to Lindsey that the property was unencumbered by any liens. The transaction closed two days later.

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On November 10, 2017, Lindsey received written notice that the property had been sold two days earlier at a foreclosure sale after Wallace defaulted on a mortgage on the property. Lindsey and her family were ordered to immediately vacate the property, which they had already spent \$20,000 improving.

On January 2, 2018, Lindsey brought a single-count complaint against Sims under the Alabama Legal Services Liability Act, § 6-5-570 et seq., Ala. Code 1975 ("the ALSLA"), alleging that Sims breached his duty of care by misrepresenting that the property was free and clear of any encumbrances to the title. Lindsey filed a first amended complaint on January 31 for the sole purpose of correcting the spelling of Sims's name. Neither the original complaint nor the first amended complaint contained a jury demand. Sims filed an answer to the first amended complaint on March 8, and on April 25 he submitted a response to Lindsey's interrogatories in which he stated that he had never represented Lindsey, that his only involvement in the transaction had been to prepare a warranty deed at Wallace's

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instruction, and that he did not perform any title work as part of his representation of Wallace.

Lindsey filed a second amended complaint on May 1, 2018. This complaint added a new theory to count I, the original legal-malpractice claim, by alleging that Sims represented both Lindsey and Wallace in the transaction despite an obvious conflict of interest. The second amended complaint also added three new counts. Count II asserted a fraud claim against Wallace, alleging that she falsely represented that she would convey the property free of encumbrances. Count III asserted a fraud claim against Sims and Wallace, alleging that Sims falsely represented that the title was unencumbered and that Wallace was liable under a theory of respondeat superior. And count IV alleged that Sims and Wallace conspired to defraud Lindsey. The second amended complaint included, for the first time, a jury demand on all counts.

Sims filed a motion to dismiss counts III and IV for failure to state a claim, arguing that the alleged underlying conduct was covered by the ALSLA and that the only viable claim that Lindsey could maintain against him was the existing legal-services-liability claim in count I. He also filed a

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motion to strike Lindsey's jury demand as untimely under Rule 38(b), Ala. R. Civ. P., because, he said, it was asserted more than 30 days after service of the last pleading on the triable issue, Sims's March 8, 2018, answer.

On August 9, 2018, the trial court granted both motions and entered orders dismissing counts III and IV of the second amended complaint and striking the jury demand as untimely. Lindsey petitioned this court for a writ of mandamus directing the trial court to vacate both orders.

Standard of Review

For a writ of mandamus to issue, Lindsey must 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 Utilities Bd. of Foley, 265 So. 3d 1273, 1279 (Ala. 2018) (quoting other cases). Mandamus is an appropriate vehicle by which to review the availability of a jury trial. Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (2014) (citing Ex parte BancorpSouth Bank, 109 So. 3d 163 (Ala. 2012)).

Analysis

It is necessary to discuss Lindsey's jury demand with respect to counts III and IV of her second amended complaint only if we issue the writ of mandamus directing the trial court to reinstate those claims. Thus, we begin our analysis by discussing the dismissal of counts III and IV. We then discuss the timeliness of Lindsey's jury demand.

1. Dismissal of Counts III and IV

The trial court's order dismissing counts III and IV of Lindsey's second amended complaint is not reviewable on mandamus because any error in dismissing those counts can be adequately remedied on appeal. A writ of mandamus will not issue absent "the lack of another adequate remedy." Ex parte Utilities Bd. of Foley, 265 So. 3d at 1279. A petition for a writ of mandamus may not be used as a substitute for an appeal, because an adequate remedy generally exists if the petitioner will have the opportunity to make her argument on appeal. See Ex parte A.M.P., 997 So. 2d 1008, 1014 (Ala. 2008) (citing Ex parte Daimler Chrysler Corp., 952 So. 2d 1082 (Ala. 2006), Ex parte Jackson, 780 So. 2d 681 (Ala. 2000), and Ex parte Inverness Constr. Co., 775 So. 2d 153 (Ala. 2000)).

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Because an adequate remedy is available on appeal, we have held that "the denial of a motion to dismiss or a motion for summary judgment is not reviewable by petition for writ of mandamus," Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761-62 (Ala. 2002) (emphasis added), absent certain exceptions such as immunity or forum non conveniens. See Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d at 1064. This principle applies with equal force to the granting of a motion to dismiss. The granting of a motion to dismiss is adequately remedied by a direct appeal or by an interlocutory appeal under Rule 54(b), Ala. R. Civ. P. See Ex parte Uhakheme, 214 So. 3d 324, 324 (Ala. 2016) (Murdock, J., concurring specially).

Because Lindsey has an adequate remedy on appeal for the dismissal of counts III and IV, we deny her petition for a writ of mandamus directing the trial court to vacate its order dismissing counts III and IV of her second amended complaint.

2. Jury Demand

There is no need to discuss Lindsey's jury demand with respect to counts III and IV of her second amended complaint because we are not issuing a writ of mandamus directing the

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trial court to reinstate those claims. But counts I and II of the second amended complaint remain pending, and Lindsey argues that the trial court improperly struck her demand for a jury trial on those counts. At the outset, "we emphasize that '[p]ublic policy, the Alabama Rules of Civil Procedure, and the Alabama Constitution all express a preference for trial by jury.'" Ex parte North Am. Adjusters, Inc., 205 So. 3d 1215, 1217 (Ala. 2016) (quoting Ex parte AIG Baker Orange Beach Wharf, L.L.C., 49 So. 3d 1198, 1200-01 (Ala. 2010)). We turn to our analysis of Lindsey's jury demand with that preference in mind.

The procedure for invoking the right to trial by jury in a civil action is governed by Rule 38, Ala. R. Civ. P. At issue in this case is the requirement in Rule 38(b) that a jury demand be made "not later than thirty (30) days after the service of the last pleading directed to" the issue as to which the jury trial is sought. It follows that "'[a]n amended or supplemental pleading sets in motion the thirty-day time period for demanding a trial for new issues raised in that pleading.'" Ex parte Jackson, 737 So. 2d 452, 454 (1999) (emphasis added) (quoting 1 Champ Lyons, Jr., Alabama Rules of

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Civil Procedure § 38.6 (3d ed. 1996)); see also Ex parte Reynolds, 447 So. 2d 701, 702 (Ala. 1984); Washington v. Walton, 423 So. 2d 176, 179 (Ala. 1982) (same). Because 30 days elapsed, without a jury demand, from the time of Sims's March 8, 2018, answer to Lindsey's first amended complaint, Lindsey's jury demand in the second amended complaint was timely only with respect to "new issues."

An issue is considered a "new issue" for purposes of a jury demand if it "is one of an entirely different character from those already raised, or one based on a set of facts different from those that supported the original claims." Ex parte Twintech Indus., Inc., 558 So. 2d 923, 925 (Ala. 1990). In Ex parte Jackson, this Court adopted this language from Twintech as a test for identifying new issues. 737 So. 2d at 455. We therefore examine whether the issues raised in Lindsey's second amended complaint are "of an entirely different character" from the issues raised in the first amended complaint or are "based on a set of facts different from those that supported the original claims." Twintech, 558 So. 2d at 925. If either part of the Twintech test is

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satisfied with respect to an issue, Lindsey is entitled to a jury trial on that issue.

A. Count I: Sims's Alleged Legal Malpractice

In support of her ALSLA claim in the first amended complaint, Lindsey alleged that "[Sims] breached the duty of care in misrepresenting to [her] that the transfer of the subject property was being made to her free and clear of any encumbrances on the title to said property." But after receiving interrogatory responses from Sims in which he claimed to have solely represented Wallace in the real-estate transaction, Lindsey amended count I to include an alternative theory of legal malpractice -- that "Sims breached the duty care in ... representing both [her] and ... Wallace in the real estate transaction despite the real and obvious conflict of interest that existed with him doing so."

The new conflict-of-interest allegation in count I of Lindsey's second amended complaint is "based on a set of facts different from those that supported the original claims," Twintech, 558 So. 2d at 925, because it updates Lindsey's theory of malpractice to conform to newly disclosed facts provided in discovery responses from Sims. The revelation

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that Sims represented Wallace in the transaction caused Lindsey to broaden her claim -- to include not only an allegation that Sims performed an inadequate title search, but also an allegation that he improperly represented both sides of the transaction. Count I of Lindsey's second amended complaint thus presented a "new issue" and started a new 30-day window for a jury demand on that issue. That demand was timely made in the second amended complaint. The trial court therefore improperly struck Lindsey's jury demand with respect to her conflict-of-interest allegation in count I of her second amended complaint.

Although Lindsey waived her right to a jury trial on the original negligence theory underlying her legal-services-liability claim, she is entitled to a jury trial on her new, alternative theory that Sims is liable under the ALSLA for his alleged representation of both Lindsey and Wallace on opposite sides of the real-estate transaction.

B. Count II: Wallace's Alleged Fraud

Lindsey's second amended complaint included for the first time count II, which alleged:

"20. Defendant Wallace represented to [Lindsey] that she held good and marketable title to the subject

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property and could, and would, convey said property to [her] free and clear of any encumbrances at closing.

"21. Said representations were false and were relied upon by [Lindsey] in purchasing the subject property."

Those allegations are factually distinct from the allegations against Sims in the first amended complaint. The fraud alleged against Wallace in the second amended complaint is independent of the wrongdoing alleged against Sims in the first amended complaint. Lindsey would be able to maintain her fraud claim against Wallace even if Lindsey admitted that Sims appropriately discharged his professional duties. Lindsey's count II is thus "based on a set of facts different from those that supported the original claims." Twintech, 558 So. 2d at 925. It presents a new issue that entitles Lindsey to a new 30-day window in which to demand a jury trial -- and that demand was timely made. Thus, the trial court improperly struck Lindsey's jury demand with respect to count II.

Conclusion

Because any error can be adequately remedied on appeal, we deny Lindsey's petition for a writ of mandamus to the extent it asks us to direct the trial court to vacate its

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order dismissing counts III and IV of the second amended complaint. We grant the petition for a writ of mandamus, however, to the extent it asks us to direct the trial court to vacate its order striking the jury demand in the second amended complaint with respect to new issues. The second amended complaint included two new issues -- the conflict-of-interest allegation against Sims in count I and the fraud claim against Wallace in count II -- and Lindsey made a timely demand for a trial by jury on both of those issues.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

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

Sellers, J., concurs in the result.