REL: October 25, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180215

Magic City Capital, LLC

v.

Twickenham Place Partners, LLC

Appeal from Madison Circuit Court
(CV-17-900921)

STEWART, Justice.

Magic City Capital, LLC ("Magic City"), appeals from a summary judgment entered by the Madison Circuit Court ("the trial court") in favor of Twickenham Place Partners, LLC ("Twickenham"). Because events that occurred during the trial-

court proceedings rendered the action moot and the trial court, therefore, was divested of subject-matter jurisdiction, we dismiss the appeal.

Facts and Procedural History

The following facts are undisputed. On August 15, 2014, Twickenham executed a lease agreement with Huntsville Asian Rim, LLC ("HAR"), in which HAR agreed to lease certain property from Twickenham for the purpose of opening a restaurant in Huntsville. Section 5.4 of the lease provided, among other things:

> "OWNERSHIP OF IMPROVEMENTS. All trade fixtures, equipment and other property placed on the Premises by and any alterations or replacements thereof, including, but not limited to, all bars, booths, decorative light fixtures, stoves, ovens and other restaurant equipment, shall remain the property of, and may be removed by, [HAR]. Upon the expiration or earlier termination of this Lease, any such property belonging to [HAR] which [HAR] has failed to remove from the Premises within thirty (30) days of said expiration or termination shall become the property of [Twickenham]. [Twickenham] may thereafter elect to remove and dispose of such property at [HAR'S] reasonable cost and expense. Should [HAR] remove any such fixture, or any alteration or replacement thereof, affixed to the Premises that was placed on the Premises by [HAR], [HAR], at its sole cost and expense shall repair any damage to the Premises caused by such removal."

The lease also provided in § 14.3:

> "[Twickenham] hereby expressly subordinates any and all claim, right, lien (including, without limitation, any common law or statutory landlord's lien), title and security interest in and to all furniture, goods, equipment and personal property of the security interest of [HAR'S] lender, if any, either existing as of the execution date of this Lease or hereafter."

On November 17, 2014, HAR executed a security agreement in favor of Magic City in exchange for a $250,000 loan. Pursuant to the security agreement, Magic City was granted a security interest in HAR's personal property used in operating the restaurant. In September 2015, HAR defaulted on its lease obligations to Twickenham, and, thereafter, HAR removed some of, but not all of, its personal property from the restaurant. On October 5, 2015, Twickenham notified Magic City by letter that HAR had defaulted on its lease obligations. In that letter, Twickenham recognized Magic City's priority lien on HAR's furniture and equipment and indicated that it was potentially interested in acquiring that property from Magic City. Twickenham asked that Magic City contact Twickenham if it was interested in selling the personal property. On October 15, 2015, Twickenham served HAR with a notice of the termination of the lease.

At some point thereafter, HAR defaulted on its loan obligations to Magic City. According to Magic City's complaint, Magic City declared HAR in default of the loan obligations and demanded possession of the personal property from HAR and from Twickenham. Twickenham denied that Magic City demanded possession of the personal property from it.

In February 2016, HAR filed a petition for protection pursuant to Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Alabama. The bankruptcy proceedings were terminated on May 17, 2017. According to Twickenham, Magic City did not assert its purported superior interest in the personal property at any time during the pendency of the bankruptcy proceedings. On May 30, 2017, Magic City sued Twickenham and Prime, Inc., the new tenant for the property, seeking a judgment declaring its security interest superior to Twickenham's and the recovery of, or the reasonable value of, the personal property.

On June 30, 2017, Twickenham and Prime filed a motion to dismiss in which they asserted, among other things, that Prime did not have possession or control of the personal property sought by Magic City. On September 12, 2017, the trial court granted the motion to dismiss in part and dismissed Prime as

a defendant. Thereafter, Twickenham filed an answer and asserted various affirmative defenses, including the doctrines of laches and equitable estoppel.

On June 8, 2018, Magic City filed a motion for a summary judgment in which it argued that Twickenham's interest in the personal property was subordinate to Magic City's interest and that Twickenham had wrongfully converted the personal property. In support of its motion, Magic City submitted a copy of the lease agreement, a copy of the security agreement, copies of correspondence between Twickenham and HAR and Magic City, an affidavit of Brian Bateh, a manager of Magic City, and an affidavit of Roy Hockman, the former managing member of HAR. Hockman testified in his affidavit that HAR had defaulted on its lease and loan obligations and that Magic City had demanded possession of the personal-property collateral from both HAR and Twickenham. Hockman did not specify the dates on which the alleged demands for possession of the personal property occurred. Bateh provided affidavit testimony similar to Hockman's.

On September 13, 2018, Twickenham filed another motion to dismiss in which it asserted that HAR's debt allegedly secured by the personal property to which Magic City claimed a

superior interest had been paid in full by Hockman and, therefore, that Magic City's claims were moot and there was no longer a justiciable controversy before the trial court. Magic City filed a response to Twickenham's motion to dismiss in which it alleged that, in November 2014, when HAR entered into the security agreement with Magic City, Hockman had executed a guaranty agreement pursuant to which he guaranteed all of HAR's obligations. Magic City further asserted that Hockman had executed and delivered to Magic City a mortgage in which he gave Magic City a lien relative to some of his real property. Magic City alleged that, on June 12, 2018, Hockman sold the real property and remitted payment to Magic City to satisfy his obligations under the guaranty agreement. Magic City argued that, as a surety, Hockman was entitled to enforce Magic City's rights in order to seek reimbursement through subrogation. Magic City further asserted that Hockman, who was not a party, should be permitted to continue the action in Magic City's name as a surety, rather than being added as a party, pursuant to Rule 25(c), Ala. R. Civ. P. Magic City, however, did not submit the alleged guaranty agreement or any

other documentation evidencing Hockman's status as HAR's surety.[1]

On October 1, 2018, Twickenham filed a response in opposition to Magic City's summary-judgment motion and a cross-motion for a summary judgment. In its motion, Twickenham argued that HAR had abandoned the property it left in the leased premises and that the equitable doctrines of laches and estoppel barred Magic City's claims. Twickenham argued that, pursuant to § 5.4 of the lease, because HAR did not remove the personal property within 30 days of termination of the lease, the property became Twickenham's property. Therefore, Twickenham argued, there was no basis to subordinate Twickenham's interest in the personal property and Magic City did not have security interest in it. Twickenham further asserted that, even if Magic City maintained a security interest and had lawful grounds on which to assert a superior claim to the personal property, the doctrines of laches and equitable estoppel foreclosed its claims because Magic City waited almost two years to assert its claim to the personal

[1]In support of its initial motion to dismiss, Twickenham submitted, among other documents, a mortgage between Hockman and his wife and Magic City.

property HAR had abandoned after defaulting under the lease. In support of its motion, Twickenham provided an affidavit from William Stroud, the managing member of Triad Properties Holdings, LLC, the managing member of Twickenham. In his affidavit, Stroud testified that at no time during the pendency of HAR's bankruptcy proceedings did Magic City assert any superior interest in the personal property. Twickenham also provided a copy of the lease agreement between Twickenham and HAR.

Magic City filed a response in opposition to Twickenham's cross-motion for a summary judgment. In its response, Magic City argued that its security interest in the personal property survived Twickenham's termination of the lease because, it said, HAR had granted Magic City a security interest in the personal property. Magic City also argued that Hockman's satisfaction of his guaranty obligations made no difference as to whether Twickenham's termination of the lease defeated Magic City's security interest.

Twickenham responded to Magic City's opposition and submitted additional material in support of its motion to dismiss and cross-motion for a summary judgment in which it again argued that Magic City's claims were moot because, it

asserted, once Hockman satisfied HAR's indebtedness to Magic City, Magic City no longer had a security interest in the personal property. On October 24, 2018, the trial court entered a summary judgment in favor of Twickenham without specifying the ground or grounds upon which it relied. Magic City filed a notice of appeal.

Discussion

Magic City challenges the summary judgment on the bases that the lease demonstrates Magic City's superior security interest and that Twickenham did not carry its burden of demonstrating the applicability of the doctrine of laches or equitable estoppel. Magic City does not address the argument in Twickenham's summary-judgment motion that Hockman's payment of HAR's debt renders the action moot. Because the trial court did not specify the ground upon which it entered the summary judgment, Magic City's failure to address that argument as an alternate ground upon which the trial court could have based its judgment results in a waiver of that argument and, generally, affirmance of the summary judgment. See Soutullo v. Mobile Cty., 58 So. 3d 733, 738 (Ala. 2010). See also Ex parte Sikes, 218 So. 3d 839, 847 (Ala. Civ. App. 2016).

In this situation, however, if Hockman's payment of HAR's debt extinguished Magic City's security interest in the personal property and, thus, mooted the action, the trial court lacked subject-matter jurisdiction to do anything but dismiss the action. In considering mootness,

> "'[t]his Court has often said that, as a general rule, it will not decide questions after a decision has become useless or moot. Ex parte McFry, 219 Ala. 492, 122 So. 641 (1929); Byrd v. Sorrells, 265 Ala. 589, 93 So. 2d 146 (1957); Chisolm v. Crook, 272 Ala. 192, 130 So. 2d 191 (1961); Jacobs Banking Company v. Campbell, 406 So. 2d 834 (Ala. 1981). Alabama courts do not give opinions in which there is no longer a justiciable controversy; yet, Alabama has recognized two exceptions to the mootness doctrine: questions of great public interest and questions that are likely of repetition of the situation. Byrd v. Sorrells, supra, State ex rel. Eagerton v. Corwin, 359 So. 2d 767 (Ala. 1977). Neither of these exceptions seems applicable here ....'

"Arrington v. State ex rel. Parsons, 422 So. 2d 759, 760 (Ala. 1982).

> "'"'A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.'" Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) (quoting American Fed'n of State, County & Mun. Employees v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). "The test

for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004) (citing VE Corp. v. Ernst & Young, 860 S.W.2d 83, 84 (Tex. 1993)). "A case becomes moot if at any stage there ceases to be an actual controversy between the parties." Id. (emphasis added) (citing National Collegiate Athletic Ass'n v. Jones, 1 S.W.3d 83, 86 (Tex. 1999)).

"'"There must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief under the declaratory judgment statutes, and if there was no justiciable controversy existing when the suit was commenced the trial court had no jurisdiction." State ex rel. Baxley v. Johnson, 293 Ala. 69, 73, 300 So. 2d 106, 110 (1974). "'"Unless the trial court has before it a justiciable controversy, it lacks subject matter jurisdiction and any judgment entered by it is void ab initio."'" Sustainable Forests, L.L.C. v. Alabama Power Co., 805 So. 2d 681, 683 (Ala. 2001) (quoting Hunt Transition & Inaugural Fund, Inc. v. Grenier, 782 So. 2d 270, 272 (Ala. 2000), quoting in turn Ex parte State ex rel. James, 711 So. 2d 952, 960 n. 2 (Ala. 1998)). "A moot case lacks justiciability." Crawford, 153 S.W.3d at 501. Thus, "[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent acts or events." Case, 939 So. 2d at 884 (citing Employees of Montgomery County Sheriff's Dep't v. Marshall, 893 So. 2d 326, 330 (Ala. 2004)).

"'"'The lack of a justiciable controversy may be raised either by a

> motion to dismiss, Rule 12, [Ala. R. Civ. P.], or a motion for summary judgment.'" Hornsby v. Sessions, 703 So. 2d 932, 937 (Ala. 1997)(quoting Smith v. Alabama Dry Dock & Shipbuilding Co., 293 Ala. 644, 649, 309 So. 2d 424, 427 (1975)). Indeed, "[i]t is well settled that lack of subject-matter jurisdiction can be raised at any time by the parties or by the court ex mero motu." Ex parte V.S., 918 So. 2d 908, 912 (Ala. 2005). "'"[I]f there is an absence of jurisdiction over ... the subject matter, a court has no power to act, and jurisdiction over the subject matter cannot be created by waiver or consent."'" Id. (quoting Flanniqan v. Jordan, 871 So. 2d 767, 768 (Ala. 2003), quoting in turn Norton v. Liddell, 280 Ala. 353, 356, 194 So. 2d 514, 517 (1967)). A court without subject-matter jurisdiction "'may take no action other than to exercise its power to dismiss the action.... Any other action ... is null and void.'" State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999) (quoting Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)). ...'

"Chapman v. Gooden, 974 So. 2d 972, 983-84 (Ala. 2007) (first emphasis original; other emphasis added).

"A declaratory-judgment action may be rendered moot.

> "'Declaratory-judgment actions in Alabama are governed by the Declaratory Judgment Act, codified at §§ 6-6-220 through -232, Ala.Code 1975 ("the Act"). The Act does not "'empower courts to decide moot questions, abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of

> future cases.'" Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (quoting Town of Warrior v. Blaylock, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963))(emphasis added in Stamps). Pursuant to § 6-6-226, declaratory relief may be afforded in cases "in which a judgment will terminate the controversy or remove the uncertainty," but § 6-6-229 emphasizes the corollary that "[t]he court may refuse to enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding."'
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> "Bruner v. Geneva County Forestry Dep't, 865 So. 2d 1167, 1175 (Ala. 2003). See also Hunt Transition & Inaugural Fund, Inc. v. Grenier, 782 So. 2d 270, 272 (Ala. 2000) ('For a court to grant declaratory relief, it must have before it a bona fide, presently existing justiciable controversy that affects the legal rights or obligations of the parties.'); VanLoock v. Curran, 489 So. 2d 525, 531 (Ala. 1986) ('Indeed, moot questions are not properly the subject of declaratory judgment actions.' (citing City of Mobile v. Scott, 278 Ala. 388, 178 So. 2d 545 (1965)))."

Underwood v. Alabama State Bd. of Educ., 39 So. 3d 120, 127-28 (Ala. 2009).

Magic City's complaint sought a judgment declaring that its interest in the personal property abandoned by HAR at the termination of the lease was superior to Twickenham's interest and asserted a claim seeking the recovery of the personal property or its value, plus damages. Magic City's interest in the personal property arose from its security agreement with

HAR. The purpose of a security interest is to protect the creditor in the event the debtor defaults on its loan obligations. See, e.g., 3 UCC Transaction Guide § 27:27 (West 1991)("The primary purpose of a security interest is to give the secured party a special, definite, and exclusive interest in the debtor's collateral.").

When Twickenham asserted that Hockman had paid the debt HAR owed to Magic City, it was incumbent upon Magic City to present substantial evidence demonstrating the existence of a genuine issue of material fact as to whether Hockman was entitled to pursue the action on Magic City's behalf. Magic City did not present any evidence demonstrating that Hockman had paid the debt as surety or guarantor on HAR's behalf. Because Magic City acknowledged that HAR's indebtedness had been satisfied, Magic City was no longer entitled to recover the collateral to satisfy that indebtedness. See, e.g., Pharmacia Corp. v. Suggs, 932 So. 2d 95, 99 (Ala. 2005)("Because the Suggses accepted the settlement that resulted in the entirely appropriate dismissal of their claims in this case, the matters made the basis of the complaint became moot, and the trial court no longer had subject-matter

jurisdiction to entertain a motion to amend the moot complaint.").

Whether Hockman is entitled to pursue potential rights of subrogation with regard to the personal-property collateral is irrelevant. The only issue for the trial court's resolution was whether Magic City held a priority security interest in the personal property as against Twickenham and whether Magic City was entitled to recover that property. That controversy became moot when HAR's debt to Magic City was satisfied, and the trial court was left with only "'"an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned."'" Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007) (quoting Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006), quoting in turn American Fed'n of State, Cty. & Mun. Emps. v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31 (1958)). Therefore, the trial court was required to dismiss the action, and the summary judgment is void. See Underwood, 39 So. 3d at 126-28. Accordingly, we must dismiss the appeal. "'A judgment entered by a court lacking subject-matter jurisdiction is absolutely void and will not support an appeal; an appellate court must dismiss an attempted appeal from such a void judgment.'" MPQ, Inc. v. Birmingham Realty Co., 78 So. 3d 391,

394 (Ala. 2011) (quoting Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008)).

APPEAL DISMISSED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Sellers, J., concurs in the result.