

REL: December 13, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180270

Tyler Montana Jul Prescott

v.

Brenda K. Milne

2180305

Brenda K. Milne

v.

Tyler Montana Jul Prescott

Appeals from Mobile Circuit Court
(CV-18-901458)

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DONALDSON, Judge.

In appeal no. 2180270, Tyler Montana Jul Prescott, the substituted plaintiff in an ejectment action brought against Brenda K. Milne in the Mobile Circuit Court ("the trial court"), appeals from the trial court's judgment in that action insofar as it determined that Prescott was not entitled to recover mesne profits from Milne.¹ In appeal no. 2180305, Milne cross-appeals from that judgment insofar as it determined that Prescott's predecessors in title were not obligated to demand possession of the house at issue before commencing the ejectment action. With respect to Prescott's appeal, we reverse. With respect to Milne's cross-appeal, we affirm.

Facts and Procedural History

In May 2014, a house owned by Milne ("the house") was sold at a tax sale for nonpayment of the 2013 ad valorem taxes. The State purchased the house at the tax sale and subsequently received a tax-sale certificate. See §§ 40-10-18

¹"The general definition of 'mesne profits' is the value of the use or occupation of land during the time that it was wrongfully possessed by [the defendant in an ejectment action], and it is commonly measured in terms of rents." Miller v. Parvin, 450 So. 2d 146, 147 (Ala. Civ. App. 1984) (citing Black's Law Dictionary 893 (5th ed. 1979)).

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and 40-10-20, Ala. Code 1975. In February 2017, the State assigned the tax-sale certificate to Drew Bienvenue and June Rackley. See § 40-10-21, Ala. Code 1975. In August 2017, Bienvenue and Rackley obtained a tax deed conveying to them title to the house. See § 40-10-29, Ala. Code 1975. Milne never vacated the house.

In June 2018, without making a prior demand that Milne surrender possession of the house, Bienvenue and Rackley, pursuant to § 6-6-280, Ala. Code 1975, brought an action stating a claim of ejectment or, in the alternative, a claim in the nature of ejectment ("the ejectment action") against Milne. Alleging that they owned title to the house, Bienvenue and Rackley sought possession of the house and the recovery of mesne profits for the period Milne had occupied the house after Bienvenue and Rackley obtained the tax deed.² Milne answered the complaint with a general denial. Milne also filed a motion asking the trial court to ascertain the amount necessary to redeem the house pursuant to § 40-10-83, Ala.

²In pertinent part, § 6-6-280(b), Ala. Code 1975, provides: "The plaintiff may recover in this action mesne profits and damages for waste or any other injury to the lands, as the plaintiff's interests in the lands entitled him to recover, to be computed up to the time of the verdict."

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Code 1975,³ and asserted that the amount should not include an attorney's fee for bringing the ejectment action because, Milne said, the ejectment action was premature. In addition, Milne filed a motion to dismiss Bienvenue and Rackley's claims after the trial court had ascertained the amount necessary to redeem the house pursuant to § 40-10-83. As the ground of that motion, Milne asserted that Bienvenue and Rackley had not demanded possession of the house before commencing the ejectment action and that, therefore, their claims had not accrued because, Milne said, § 40-10-74, Ala. Code 1975, provides that Bienvenue and Rackley could bring an ejectment action only if Milne had not surrendered possession after a demand for possession had been made. In response, Bienvenue and Rackley asserted that Milne's motion to dismiss should be denied because, they said, § 6-6-280 does not require them to demand possession of the house before bringing their ejectment

³In McGuire v. Rogers, 794 So. 2d 1131, 1136 (Ala. Civ. App. 2000), this court stated: ""The purpose of § 40-10-83 is to preserve the right of redemption without a time limit, if the owner of the land seeking to redeem has retained possession."" (Quoting Ervin v. Amerigas Propane, Inc., 674 So. 2d 543, 544 (Ala. Civ. App. 1995), quoting in turn Gulf Land Co. v. Buzzelli, 501 So. 2d 1211, 1213 (Ala. 1987).)

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action. Responding to Milne's motion asking the trial court to ascertain the amount necessary to redeem the house, Bienvenue and Rackley asserted that Milne was entitled to redeem the house only if she paid all the amounts specified in § 40-10-83, which included a reasonable attorney's fee for bringing the ejectment action.

In September 2018, Bienvenue and Rackley filed a motion to substitute Prescott as the plaintiff in the action because they had conveyed to Prescott title to the house while the action was pending. Following a hearing, the trial court, on November 15, 2018, entered a judgment providing, in pertinent part:

"1. [Milne's] Motion to Dismiss is denied. The Court holds as a matter of law that since [Bienvenue and Rackley] acquired a 'tax deed' (as opposed to a 'tax certificate'), they were not required to give [Milne] the six month notice set forth in § 40-10-74 and § 41-10-73, [Ala.] Code 1975, prior to filing the subject ejectment action. It was admitted by [Bienvenue and Rackley] that they did not give [Milne] the six month statutory notice.

"2. [Milne] is allowed to redeem the subject property upon payment into Court of the following:

"Tax years 2013-2016 (paid on 02/03/17)	\$1,286.37
Interest for 560 days	266.44
"2017 taxes (paid on May 25, 2018)	305.36

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Interest for 154 days	15.46
"Tax year 2018 (paid 10/26/2018)	627.22
"Insurance Premium (paid 08/31/17)	470.00
Interest for 421 days	<u>65.05</u>
	\$3,035.90

"Additionally, [Milne] shall pay into Court the original filing fee, plus reasonable attorney fees for [Bienvenue and Rackley] to be later determined by the Court at an evidentiary hearing. Upon final determination of the total amount, [Milne] shall pay the same into Court within 45 days at which point an Order shall be entered as a judgment for [Milne] for the land, and all title and interests in the land shall by such judgment ... be divested out of [Rackley and Bienvenue]; all remaining claims shall be dismissed with prejudice; and [Rackley and Bienvenue] shall have no interest in or lien upon the subject property. If [Milne] shall fail to pay said amount into Court, upon notification from [Rackley and Bienvenue], an Order of Ejectment shall be entered.

"3. Having considered the oral argument of the parties' counsel, and having been made aware of Hairston v. Dobbs, 2 So. 147, 148 (Ala. 1887) and Pridgen v. Elson, 5 So. 2d 477 (Ala. 1941), the Court finds that [Rackley and Bienvenue] are not entitled to recover mesne profits in connection with their ejectment claim pursuant to Ala. Code [1975,] § 6-6-280.

"4. The Motion to Substitute Parties is Granted."

On December 10, 2018, Prescott, as the substituted plaintiff, filed a motion asking the trial court to hold a

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hearing at which he could introduce evidence to prove the amount of the reasonable attorney's fees Milne was obligated to pay him in order to redeem the house. The trial court set such a hearing for February 8, 2019; however, on December 27, 2018, Prescott filed a notice of appeal to this court. On January 7, 2019, Milne cross-appealed to this court. Because this court lacked appellate jurisdiction, it transferred Prescott's appeal and Milne's cross-appeal to our supreme court. On November 15, 2019, the supreme court transferred the appeals back to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Finality of the Trial Court's Judgment

As a threshold matter, Prescott has asked this court to determine whether the trial court's November 15, 2018, judgment is a final, appealable judgment. Generally, a judgment is not final for purposes of an appeal unless it disposes of all the parties' claims. See, e.g., Adams v. NaphCare, Inc., 869 So. 2d 1179, 1181 (Ala. Civ. App. 2003).

Section 40-10-83, the Code section applicable to Milne's redemption claim, provides, in pertinent part:

"When the action is against the person for whom the taxes were assessed or the owner of the land at

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the time of the sale, his or her heir, devisee, vendee or mortgagee, the court shall, on motion of the defendant made at any time before the trial of the action, ascertain (i) the amount paid by the purchaser at the sale and of the taxes subsequently paid by the purchaser, together with 12 percent per annum thereon; ... (iii) with respect to any property which contains a residential structure at the time of the sale regardless of its location, all insurance premiums paid or owed by the purchaser for casualty loss coverage on the residential structure ..., together with 12 percent per annum thereon; and (iv) a reasonable attorney's fee for the plaintiff's attorney for bringing the action. Upon such determination the court shall enter judgment for the amount so ascertained in favor of the plaintiff against the defendant, and the judgment shall be a lien on the land sued for. Upon the payment into court of the amount of the judgment and costs, the court shall enter judgment for the defendant for the land, and all title and interest in the land shall by such judgment be divested out of the owner of the tax deed."⁴

The November 15, 2018, judgment determined that Milne was entitled to redeem the house and ascertained a portion of the amount necessary to redeem the house under § 40-10-83; however, it did not ascertain the amount of Prescott's reasonable attorney's fee, which § 40-10-83(iv) provides is to be included in calculating the amount necessary to redeem. Moreover, because the November 15, 2018, judgment conditioned

⁴In 2018, the legislature enacted Act No. 2018-494, Ala. Acts 2018, which will become effective on January 1, 2020, to, among other things, amend § 40-10-83 to reduce the interest rates provided for therein.

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the entry of a judgment awarding Milne title to the house on the occurrence of a future event, i.e., Milne's payment into court of the total redemption amount within 45 days, the November 15, 2018, judgment neither vested Milne with title to the house nor divested Prescott of title to the house.

Although the November 15, 2018, judgment did not resolve whether Milne was entitled to an award of title to the house, our supreme court's decision in Moorer v. Chastang, 247 Ala. 676, 26 So. 2d 75 (1946), nonetheless indicates that the November 15, 2018, judgment is a final, appealable judgment. In Moorer v. Chastang, Josephine Chastang and others ("the complainants") brought a quiet-title action against Monte L. Moorer with respect to a parcel of property that the State had bought at a tax sale and had subsequently conveyed to W.M. Wright, who, in turn, had conveyed the property to Moorer. The complainants alleged that they were in possession of the property and sought to redeem it pursuant to § 296, Title 51, Ala. Code 1940, which is a predecessor to § 40-10-83. On February 26, 1945, the Mobile Circuit Court entered a judgment determining that the complainants were entitled to redeem the property; that Moorer held a lien against the property in the

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amount of \$212, which was the amount Wright had paid the State for the property, and for any ad valorem taxes paid by Moorer after the tax sale, together with interest; and that Moorer was liable to the complainants in the amount of \$49 for taking seven barrels of crude turpentine that the trees on the property had produced, together with interest. The February 26, 1945, judgment also provided:

"'4. It is further ordered, and decreed that it be referred to the Register of this Court to ascertain the amount required for the redemption of said lands from said tax sale by ascertaining the amount due of principal and interest paid the State and the taxes paid upon said lands since the sale thereof by the State Land Commissioner to ... Wright, and report to the Court the full amount of principal and interest due under said deed to ... Wright and the full amount of principal and interest due for subsequent taxes paid. He shall also report the full amount of principal and interest due from [Moorer for the turpentine he had taken], the same to be deducted from the amount due [Moorer].

"'5. [Moorer] is taxed with the fees and costs of this proceeding the same to be deducted from the amount ascertained and reported to be due [Moorer] when paid into Court.

"'6. The Court retains jurisdiction to make such further orders as it may deem meet, upon the coming in of the Register's report."

247 Ala. at 677, 26 So. 2d at 76 (reporter's synopsis).
Thereafter, the register reported that the net amount

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necessary to redeem the property was \$377.80. Moorer filed an objection to the register's report, but the complainants deposited \$377.80 in the registry of the Mobile Circuit Court. On July 30, 1945, the Mobile Circuit Court entered a second judgment in which it overruled Moorer's objection to the register's report, noted that the complainants had deposited in the registry the amount necessary to redeem the property, and divested Moorer of title to the property. 247 Ala. at 677-78, 26 So. 2d at 77 (reporter's synopsis). Moorer appealed from the July 30, 1945, judgment to our supreme court. On appeal, Moorer asserted error with respect to not only the July 30, 1945, judgment but also the February 26, 1945, judgment. Noting that it could not consider error with respect to the February 26, 1945, judgment if that judgment was a final one, our supreme court analyzed whether the February 26, 1945, judgment was final or interlocutory and concluded that it was a final judgment

"because it settled the equities of the parties and the principles on which relief is granted. The balance of the proceedings, including the reference before the register, was merely to carry into effect the decree of February 26, 1945. Ascertainment of the amount due is not a primary requisite to establish the right to redemption but is only necessary to carry redemption into effect."

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247 Ala. at 680, 26 So. 2d at 78-79. Accordingly, our supreme court declined to review the error asserted with respect to the February 26, 1945, judgment. Our supreme court's decision in Chastang is consistent with the principle that "a judicial-redemption claim brought under § 40-10-83 sounds in equity, not in law ..., and it is well settled that a judgment in equity can be final as to some issues and contemplate further proceedings as to others." First Props., L.L.C. v. Bennett, 959 So. 2d 653, 656 (Ala. Civ. App. 2006). Based on our supreme court's holding in Chastang, we conclude that the November 15, 2018, judgment entered in the present case is a final, appealable judgment.

Standard of Review

Because the facts material to these appeals are undisputed, we "'must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review.'" First Properties, 959 So. 2d at 655 (quoting Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1035 (Ala. 2005)).

Prescott's Appeal

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Prescott argues that the trial court's determination that he is not entitled to recover mesne profits is erroneous. In support of the judgment, the trial court cited Hairston v. Dobbs, 80 Ala. 589, 592, 2 So. 147, 149 (1887), and Pridgen v. Elson, 242 Ala. 230, 232, 5 So. 2d 477, 478-79 (1941). In Hairston, the plaintiffs, who were the grandchildren of the life tenant of a parcel of property, bought their grandmother's interest in the property and brought an ejectment action against the defendant, who was adversely possessing the property. The plaintiffs' grandmother died while the ejectment action was pending, which terminated the plaintiffs' claim to possession of the property. Nonetheless, our supreme court held that the plaintiffs were still entitled to prosecute their claim for mesne profits, explaining:

"It is contended for the [defendant] that, to maintain the action of ejectment, or our statutory substitute for it, the plaintiff must not only have a right of recovery at the commencement of the suit, but that right must continue to the trial. That is certainly the rule, so far as the recovery of possession is concerned. But ejectment, or its corresponding statutory action, under our system, has a two-fold object. It recovers possession, and also rents, or mesne profits. If it fails in its primary object, by reason of the termination of the title from natural causes, or inherent imperfection pendente lite, being sufficient when the suit was brought, it may nevertheless be continued for the

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recovery of mesne profits, or damages. The plaintiffs in this case have shown a prima facie right to recover mesne profits and costs"

80 Ala. at 592, 2 So. at 149 (citations omitted; emphasis added); accord Pridgen, 242 Ala. at 232, 5 So. 2d at 478-79 ("If, pending the [ejectment action], the plaintiff's title expires, he may proceed to recover the mesne profits up to the time his right to possession ended.").⁵ In our view, if Prescott were not allowed to recover the mesne profits despite Milne's redemption of the house, he would not be compensated for Milne's wrongful possession of the house between the date Prescott or his predecessors in title became entitled to possession of the house and the date of the redemption. Accordingly, we reverse the judgment of the trial court insofar as it determined that Prescott was not entitled to recover mesne profits and remand the cause for further proceedings consistent with this opinion.

Milne's Cross-Appeal

⁵Although § 6-6-292, Ala. Code 1975, apparently was not cited to the trial court, we note that that Code section, which is within the article of the Code dealing with ejectment, provides: "If the interest or title of the plaintiff expired before the time in which he could be put in possession, he may obtain a judgment for damages only."

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Citing § 40-10-74, Milne argues that the trial court's determination that Bienvenue and Rackley were not obligated to demand possession of the house six months before they commenced the ejectment action is erroneous. First, we note that, because the State purchased the house at the tax sale, § 40-10-73, Ala. Code 1975, is the pertinent Code section rather than § 40-10-74, which applies to any purchaser at the tax sale other than the State. Second we conclude that § 40-10-73 applies only to the holder of a tax-sale certificate who seeks possession of property sold for taxes; it does not apply to the holder of a tax deed.

In pertinent part, § 40-10-73 provides:

"When the lands are bid in for the state at tax sales, the state shall be entitled to possession of said lands immediately upon execution of the certificate of sale by the judge of probate. If possession is not surrendered within six months from the date of sale after demand therefor is made by the Land Commissioner in behalf of the state, or if the certificate has been assigned by the assignee, then the Land Commissioner in the name of the state or the assignee of the state, if the certificate has been assigned, may maintain an action in ejectment or a statutory real action in the nature of ejectment or other proper remedy for the recovery of the possession of the lands purchased at such sales and shall be entitled to hold the possession thereof on recovery, subject, however, to all rights of redemption provided for in this title."

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(Emphasis added.) Before the enactment of the Alabama Code of 1886, the holder of a tax deed had a right to possession of property sold at a tax sale, but the holder of tax-sale certificate did not. See Hibbard v. Brown, 51 Ala. 469, 470 (1874). Section 599, Ala. Code 1886, however, granted the holder of a tax-sale certificate the right to maintain an action in ejectment, an action in unlawful detainer, or an action in the nature of ejectment six months after the tax sale to obtain possession of the property sold at the tax sale. See Abates v. Timbes, 214 Ala. 591, 592, 108 So. 534, 535 (1926). As our supreme court explained in Abates:

"The purchaser at a tax sale obtains a certificate of purchase, but no deed passing title until the end of the redemption period Usually the right of possession follows the legal title. So, in the absence of statute, the purchaser at a valid tax sale was not entitled to possession until he obtained his tax deed. Costley v. Allen, 56 Ala. 198 [(1876)]. By statute of February 17, 1885 [codified as § 599, Ala. Code 1886, and subsequently codified as § 3099, Ala. Code 1923], the purchaser is entitled to, and may sue for, possession six months after the tax sale."

Id. Neither § 599, Ala. Code 1886, nor its successor, § 3099, Ala. Code 1923, required the holder of a tax-sale certificate to demand possession before bringing an action to obtain possession. In 1935, however, the Alabama Legislature enacted

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Act No. 194, Ala. Acts 1935. Section 251 of Act No. 194 provided that the holder of a tax-sale certificate that had been assigned to him or her by the State could maintain an action in ejectment or in the nature of ejectment six months after the tax sale after demanding possession. Section 251 of Act No. 194, Ala. Acts 1935, was codified as Title 51, § 286, Ala. Code 1940, and subsequently codified as § 40-10-73, Ala. Code 1975.

Unlike the holder of a tax-sale certificate, the holder of a tax deed is vested with "all the right, title, interest and estate of the person whose duty it was to pay the taxes on [the] real estate [sold at the tax sale]," § 40-10-29, Ala. Code 1975, and his or her right to maintain an action in ejectment or in the nature of ejectment derives from his or her title to the property rather than the rights granted the holder of a certificate of sale in § 40-10-73. Section 6-6-280 does not require that the plaintiff in an action in ejectment or in the nature of ejectment demand possession before commencing his or her action. See Steele v. First Nat'l Mortg. Ass'n, 69 So. 3d 89, 93 (Ala. 2010) ("[T]here is no requirement in § 6-6-280 that a party with superior title to

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the land make any demand for possession to an unlawful possessor before initiating an ejectment action."). Accordingly, we affirm the judgment of the trial court insofar as it determined that Bienvenue and Rackley were not obligated to demand possession of the house before commencing the ejectment action.

2180270 -- REVERSED AND REMANDED.

2180305 -- AFFIRMED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.