

REL: August 13, 2021

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1190430

Robbie Dellinger, Joe S. Kimbrough, and Steve Kimbrough, LLC

v.

**Bryant Bank, Audrey Flemming, and Michael Francis Flemming
III**

**Appeal from Jefferson Circuit Court
(CV-18-903544)**

MITCHELL, Justice.

This case arises from a residential-construction dispute in Jefferson County. Robbie Dellinger and Steve Kimbrough, LLC ("the plaintiffs"),

1190430

sued Bryant Bank, Audrey Flemming, and Michael Francis Flemming III ("the defendants") for the cost of work performed on the Flemmings' property. The trial court issued a final judgment in favor of the defendants. Later, the plaintiffs filed an amended complaint adding Joe S. Kimbrough as a plaintiff, which the trial court struck. Kimbrough and the plaintiffs ("the construction parties") appealed. Because the construction parties' appeal is untimely, we lack jurisdiction and must dismiss the appeal.

Facts and Procedural History

Audrey and Michael Flemming sought to build an addition to their Birmingham home and secured financing from Bryant Bank to do so. In 2017, the Flemmings were introduced to a contractor, Robbie Dellinger, who offered his services for their home-expansion project. Throughout his career, Dellinger performed various jobs in the residential home-building trade and often did business as Home Maintenance and Repair ("HMA"). He also served as a member, officer, and employee of Steve Kimbrough, LLC, for which he did residential contracting work. Steve Kimbrough, LLC, was managed by another contractor, Joe S. Kimbrough, who

1190430

frequently worked with Dellinger on projects. Dellinger told the Flemmings that HMA was not a licensed home builder but that HMA performed work under the supervision and control of licensed home builder Joe S. Kimbrough and as an employee, member, and officer of Steve Kimbrough, LLC. Dellinger took the job and, with Joe S. Kimbrough, began work on the home expansion.

After the work on the home concluded, Dellinger submitted a bill to the Flemmings for labor and materials totaling \$421,744.07. The Flemmings refused to pay. Dellinger sent several letters to the Flemmings threatening to file a lien against their property if they continued to deny him payment, but the Flemmings maintained that they did not owe Dellinger anything.

On September 4, 2018, Dellinger filed and recorded a lien against the Flemmings' home. Two days later, Dellinger filed suit against the defendants in the Jefferson Circuit Court to recover the costs of the home-expansion project and to gain priority over Bryant Bank's mortgage on the Flemmings' property. Within a month, the defendants moved to dismiss Dellinger's claims based on lack of subject-matter jurisdiction. They

1190430

argued that because Dellinger was not a licensed home builder, Alabama's home-builder licensure statute, §34-14A-1 et seq., Ala. Code 1975, deprived him of the ability to bring his claims. Specifically, they cited § 34-14A-14(d), Ala. Code 1975, which states that "[a] residential home builder, who does not have the license required, shall not bring or maintain any action to enforce the provisions of any contract for residential home building which he or she entered into in violation of" the home-builder licensure statute.

The trial court held a hearing on the defendants' motions to dismiss. Before the trial court could rule on those motions, Dellinger amended his complaint to add Steve Kimbrough, LLC as a plaintiff. The defendants responded with new motions containing arguments similar to those asserted in their first motions to dismiss. This time, however, they styled their motions as "Motions to Dismiss, or in the Alternative Motions for Summary Judgment," and attached supporting affidavits. They argued that the plaintiffs still could not bring their claims because neither held the home-builder's license necessary to do so. Although Joe S. Kimbrough

1190430

possessed a home-builder's license as an individual, Steve Kimbrough, LLC, did not possess the required license.

The trial court held a hearing on the defendants' new motions on March 12, 2019, and had before it materials outside the pleadings, including affidavits submitted by both sets of parties. On May 29, 2019, the trial court entered an order granting the defendants' motions ("the May order"). The trial court held that because § 34-14A-14(d) barred Dellinger and Steve Kimbrough, LLC, from bringing their claims, it lacked subject-matter jurisdiction over the case. Accordingly, it dismissed, with prejudice, any and all claims asserted by Dellinger and Steve Kimbrough, LLC, against the defendants.

Ten days after the trial court issued the May order, Dellinger and Steve Kimbrough, LLC, amended their complaint again. In addition to reasserting all claims previously brought by Dellinger and Steve Kimbrough, LLC, the second amended complaint added Joe S. Kimbrough as a plaintiff. The construction parties filed two motions requesting that the trial court reconsider its ruling in the May order. The first of those motions was a "Motion to Reconsider" filed on June 9, 2019. That motion

1190430

specifically stated that it was not a motion to alter, amend, or vacate pursuant to Rule 59(e), Ala. R. Civ. P. The second motion, filed on June 28, 2019, was a Rule 59(e) motion to alter, amend, or vacate the May order. The defendants jointly moved to strike the second amended complaint and contested the construction parties' other motions.

The trial court denied the construction parties' motion to alter, amend, or vacate on August 27, 2019. It granted the defendants' motion to strike the second amended complaint in January 2020. This appeal followed on February 19, 2020.¹

The construction parties primarily argue that the trial court erred in denying them the ability to amend the complaint again after the issuance of the May order. In their view, the May order was not a final judgment, and Rules 15 and 78, Ala. R. Civ. P., entitled them to add Joe S. Kimbrough via subsequent amendment. The defendants view the May order as a final judgment that began the construction parties' time to appeal. Because the construction parties did not appeal until well after

¹After receiving a notice of bankruptcy from Dellinger, this Court issued a stay that remained in effect until April 14, 2021.

1190430

the time allowed by Rule 4, Ala. R. App. P., the defendants argue that this Court should dismiss the appeal as untimely.

Standard of Review

This Court has consistently held that the timeliness of a notice of appeal is a matter of jurisdiction. See, e.g., Beatty v. Carmichael, 293 So. 3d 874, 877 (Ala. 2019) ("[W]ithout a timely filed notice of appeal, the jurisdiction of this Court is not invoked, meaning that this Court has no authority or power to review the judgment being appealed."); Harden v. Laney, 118 So. 3d 186, 187 (Ala. 2013) (" 'Timely filing of the notice of appeal is a jurisdictional act. It is the only step in the appellate process which is jurisdictional.' ") (citation omitted); Holmes v. Powell, 363 So. 2d 760, 762 (Ala. 1978) (noting that the "timely filing of the notice of appeal is jurisdictional"). We may consider jurisdictional matters ex mero motu. Harden, 118 So. 3d at 187 (quoting Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)).

Analysis

The dispositive question here is whether the trial court's May order was a final judgment. If the May order served as a final judgment, the

1190430

clock for appealing began to run from the date of the order. In that scenario, the construction parties did not appeal in time -- even when their postjudgment motions are accounted for. On the other hand, if the May order was not a final judgment, the construction parties' appeal was timely because there was no final order from which to appeal until the trial court struck their second amended complaint in January 2020.

A. The May Order Was a Final Judgment

After the plaintiffs filed the amended complaint, the defendants filed "Motions to Dismiss, or in the Alternative Motions for Summary Judgment." While it is undisputed that the trial court granted those motions in some form, the precise action taken by the trial court in the May order is now contested by the parties. The construction parties assert that the May order merely granted the defendants' motions to dismiss under Rule 12(b)(1), Ala. R. Civ. P. In their view, the case was still alive after the entry of the May order and they could still amend the complaint under Rules 15 and 78, Ala. R. Civ. P. The defendants argue that the record supports their position -- that is, that the May order

1190430

granted their summary-judgment motions under Rule 56, Ala. R. Civ. P., and resolved the entire case.

When assessing whether a trial court has sufficiently issued a final judgment, we look to the substance of the order and not the particular words used by the trial court. See Rule 58(b), Ala. R. Civ. P.; Deutsche Bank Nat'l Trust Co. v. Karr, 306 So. 3d 882, 888-89 (Ala. 2020) (examining the substance of the trial court's order to determine if a final judgment had been entered); Ex parte Wharfhouse Rest. & Oyster Bar, Inc., 796 So. 2d 316 (Ala. 2001) (same). "A written order or a judgment will be sufficient if it is signed or initialed by the judge ... and indicates an intention to adjudicate, considering the whole record, and if it indicates the substance of the adjudication." Rule 58(b).

The May order was signed by the trial judge, and its substance "indicate[d] an intention to adjudicate" the case through summary judgment. This intention is clear based on the circumstances surrounding the order and the text of the order itself. First, the defendants definitively moved for summary judgment, and those motions were properly before the trial court. Second, the trial court was within its power to enter summary

1190430

judgment at the time the defendants made their motions. The trial court based its order on the conclusion that it lacked subject-matter jurisdiction. "A court has jurisdiction to determine its own jurisdiction." Jefferson Cnty. Comm'n v. Edwards, 32 So. 3d 572, 583 (Ala. 2009). "When a court determines that it does not have jurisdiction, it has the power to order the case dismissed." Taylor v. Paradise Missionary Baptist Church, 242 So. 3d 979, 1000 (Ala. 2017) (Shaw, J., concurring in the result). But "[t]he 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)). Therefore, a trial court may enter summary judgment in favor of a party based on the lack of subject-matter jurisdiction when a party makes such a motion -- as long as the procedural requirements of Rule 56, Ala. R. Civ. P., are satisfied. Based on the record before us, the trial court complied with the procedures of Rule 56 and provided the plaintiffs the hearing to which they were entitled.

1190430

Third, the content of the May order shows that the trial court used and applied the standard for summary judgment under Rule 56, Ala. R. Civ. P., rather than the standard for a motion to dismiss under Rule 12, Ala. R. Civ. P. In that vein, the trial court relied on matters outside the pleadings, including undisputed affidavits submitted by the defendants regarding the plaintiffs' lack of home-building licenses. And while a trial court is permitted to consider extraneous materials when a party moves to dismiss for want of jurisdiction under Rule 12(b)(1), see Taylor, 242 So. 3d at 1000 (Shaw, J., concurring in the result), that fact does not deprive the trial court of its power to dispose of the case via summary judgment when a properly supported motion is before it. See Hornsby, 703 So. 2d at 937. Viewed in substance, the trial court opted to proceed under Rule 56 -- not Rule 12 -- and indicated an intention to adjudicate.

The finality of the judgment is underscored by the fact that the May order resolved all the issues before the trial court. See Palughi v. Dow, 659 So. 2d 112, 113 (Ala. 1995) ("An appeal will ordinarily lie only from a final judgment; that is, a judgment that conclusively determines the issues before the court and ascertains and declares the rights of the

1190430

parties."); Queen v. Belcher, 888 So. 2d 472, 475 (Ala. 2003) (" '[I]t is not the title of an order that makes it final; rather, the test of a judgment's finality is whether it sufficiently ascertains and declares the rights of the parties.' ") (citation omitted)). The plaintiffs' amended complaint placed two broad legal issues before the trial court: whether the plaintiffs could seek and were entitled to compensation and, if so, whether Dellinger's lien took priority over Bryant Bank's mortgage. In disposing of the case, the trial court dismissed all of the plaintiffs' claims with prejudice and ordered that Dellinger's lien on the Flemmings' property be lifted. It definitively -- and with finality -- resolved the issues before it.

This holding should come as no surprise. While not pertinent to the legal assessment of the May order's finality, the record makes clear that the trial court and the parties understood the procedural posture of the case. The trial court consistently referred to the May order as a "final judgment." In its order denying the construction parties' motion to alter, amend, or vacate, the trial court stated: "[T]he [construction parties] have not provided evidence sufficient enough for this Court to alter, amend, or vacate its final judgement dated May 29, 2019." Similarly, in granting the

1190430

defendants' motion to strike the second amended complaint, the trial court said: "On May 29, 2019, this Court entered a Final Order granting Defendants' motions which conclusively determined all issues before the Court."

In their motions responding to the construction parties' second amended complaint, the defendants described the May order as "a final judgment." And the construction parties themselves characterized the May order this way in their motion to alter, amend, or vacate when they asserted "summary judgment should have been denied." But perhaps the biggest indicator that the construction parties understood that the May order was a final judgment is that they filed a Rule 59(e) motion to alter, amend, or vacate, which may be filed only in reference to a final judgment. See, e.g., SCI Alabama Funeral Servs., Inc. v. Hester, 984 So. 2d 1207, 1208 n.1 (Ala. Civ. App. 2007). The decision to file that motion makes plain that the May order was understood to be final by all involved.

B. The Construction Parties Did Not Appeal in Time

As a general matter, an appeal must be filed within 42 days of the entry of final judgment or order appealed from. Rule 4(a)(1), Ala. R. App.

1190430

P. If an appeal is not filed in time, it will be dismissed due to a lack of jurisdiction. Rule 2(a)(1), Ala. R. App. P. But, "[t]he filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure ... shall suspend the running of the time for filing a notice of appeal." Rule 4(a)(3), Ala. R. App. P. If such a motion is filed, "the full time fixed for filing a notice of appeal shall be computed from the date of the entry in the civil docket of an order granting or denying such motion." Id.

The trial court issued its final judgment on May 29, 2019. That began the period for the plaintiffs to exercise their right to appeal under Rule 4. But the construction parties filed a Rule 59(e) motion to alter, amend, or vacate the May order on June 28, 2019, which suspended the running of the time to appeal. The time to appeal did not begin to run again until the trial court denied their motion to alter, amend, or vacate on August 27, 2019. That gave them 42 days from the entry of that order to file a notice of appeal.

Their notice of appeal was not filed until February 19, 2020 -- well past the cutoff established by Rule 4. The construction parties' appeal,

1190430

therefore, was several months late -- leaving this Court without jurisdiction to decide it.

Conclusion

This appeal is dismissed as untimely. The construction parties' attempt to amend a complaint in a case disposed of with prejudice -- instead of appealing the final judgment -- caused them to miss their window for appeal.

APPEAL DISMISSED.

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