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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

SC-2022-0445

Ex parte Robert Keith Honaker

PETITION FOR WRIT OF MANDAMUS

(In re: Ricky Hill d/b/a Ricky Hill Trucking

v.

Robert Keith Honaker)

(Winston Circuit Court, CV-14-900106)

SELLERS, Justice.

Robert Keith Honaker has petitioned this Court to issue a writ of mandamus directing the Winston Circuit Court to dismiss a breach-of-contract claim brought against Honaker by Ricky Hill. According to Honaker, Hill's claim should be dismissed because it was commenced while the same claim was already pending in another civil action. We deny Honaker's petition.

In August 2014, Hill commenced an action against Honaker in the Winston Circuit Court ("the 2014 action"), alleging that Honaker had failed to pay for gravel or landscaping rock that Hill had delivered to Honaker. Hill stated a single count alleging breach of contract and requested that the trial court enforce a materialman's lien on Honaker's real property to compensate Hill for damages arising from Honaker's alleged failure to pay for the rock. Honaker answered the complaint and filed a counterclaim against Hill, asserting that Hill had failed to deliver the entire amount of rock agreed upon.

Nearly five years later, in June 2019, the trial court in the 2014 action entered an order dismissing Hill's claim as a sanction for his failure to respond to overdue discovery requests. Honaker's

counterclaim, however, remained pending. Thus, the dismissal of Hill's claim was interlocutory and not final.

In September 2019, Hill commenced another action in the Winston Circuit Court ("the 2019 action"), making the same factual averments against Honaker regarding his alleged failure to pay for the rock Hill had delivered. The 2019 action was assigned to the same trial judge presiding over the 2014 action. In addition to a breach-of-contract claim, Hill alleged in the 2019 action that Honaker had defrauded and slandered Hill. The fraud claim is based on Honaker's alleged misrepresentation that he would pay Hill for the rock, and the slander claim appears to be based on Honaker's alleged statements to third parties that Hill had committed a crime by not delivering the amount of rock agreed upon.

In February 2021, the trial court in the 2014 action entered an order vacating its earlier June 2019 order that had dismissed Hill's claim in the 2014 action, thereby reinstating that claim. Hill then filed a motion to consolidate the 2014 action and the 2019 action, which, as noted, raised fraud and slander claims in addition to a breach-of-contract claim. The trial court denied that motion.

The trial court's reinstatement of Hill's claim in the 2014 action prompted Honaker to file a motion requesting that the trial court dismiss that claim again, this time based on § 6-5-440, Ala. Code 1975, commonly known as Alabama's abatement statute, which "prohibits a plaintiff from prosecuting two actions at the same time for the same cause of action against the same parties." Nettles v. Rumberger, Kirk & Caldwell, P.C., 276 So. 3d 663, 665-66 (Ala. 2018). The trial court denied Honaker's motion to dismiss Hill's claim in the 2014 action and instead entered an order in the 2019 action appearing to dismiss that action in its entirety.¹

¹The order of dismissal in the 2019 action does not indicate that it was based on the abatement statute and the pendency of the 2014 action as a defense to the 2019 action. Rather, the order states in conclusory fashion that a motion to dismiss or for a summary judgment that had been filed by Honaker in the 2019 action was granted. That motion, however, did not ask the trial court to enter a judgment against Hill on all of his claims in the 2019 action. Rather, it asked the trial court to enter a judgment on the fraud and slander claims based on the statute of limitations and to transfer the breach-of-contract claim to a different venue. Nevertheless, the trial court's order states that "this case [i.e., the 2019 action,] is dismissed with prejudice, costs taxed as paid." Honaker asserts in his petition for a writ of mandamus that the trial court erred to the extent that it dismissed the entire 2019 action and that the trial court's order most likely would be vacated upon reconsideration. There is, however, nothing in the materials submitted to this Court indicating that that has occurred. For all that appears, the 2019 action is no longer pending and the deadline for an appeal has expired.

Honaker timely filed a petition for a writ of mandamus challenging the trial court's order in the 2014 action denying his motion to dismiss Hill's claim based on the abatement statute. "[A] writ of mandamus is an extraordinary remedy, which requires the petitioner to demonstrate a clear, legal right to the relief sought" Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656, 660 (Ala. 2001). "Mandamus is the appropriate remedy to correct a trial court's failure to properly apply § 6-5-440[, Ala. Code 1975]." Ex parte Compass Bank, 77 So. 3d 578, 581 (Ala. 2011).

Section 6-5-440 provides as follows:

"No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times."

(Emphasis added.) There is no serious dispute that, for purposes of abatement, Hill's claim against Honaker in the 2014 action was also asserted in the 2019 action. When the same cause is asserted in two different actions that are commenced at different times, the pendency of the cause in the first action is a defense to the second action. Id. See also Johnson v. Brown-Serv. Ins. Co., 293 Ala. 549, 552, 307 So. 2d 518, 521

(1974) ("Ordinarily, the rule is that only a prior action may be pleaded in abatement of a subsequent one, and not vice versa."). According to Honaker, the trial court "recommenced" Hill's claim in the 2014 action by vacating its earlier order dismissing that claim. He argues that the 2019 action was already pending at that time and that the 2019 action therefore should be considered the first action. Thus, he reasons, Hill's claim in the 2014 action is subject to dismissal based on the abatement statute.

"A petitioner carries a heavy burden in securing mandamus relief." Ex parte Gray, 308 So. 3d 4, 10 (Ala. 2020). Honaker has not satisfied that burden. Significantly, the trial court's order dismissing Hill's claim in the 2014 action was an interlocutory nonfinal order. Honaker's petition for a writ of mandamus does not provide meaningful discussion of that circumstance. Critically, the petition does not discuss any legal authority supporting Honaker's position regarding the order of commencement of the two actions at issue for purposes of abatement. Specifically, the petition does not provide discussion of authority supporting Honaker's suggestion that an action that is dismissed pursuant to an interlocutory order, but which is later reinstated, should

be considered as having been commenced after a separate action asserting the same claim is commenced before reinstatement of the previous action.

Nettles v. Rumberger, Kirk & Caldwell, P.C., supra, is instructive. In that case, Nettles, one of the defendants in an action seeking to recover on personal guarantees, filed a third-party complaint against his former law partners and their new law firm. Pursuant to his third-party complaint, Nettles sought, among other things, compensation for his loss of capital contributions to his former law firm and for decreased earning capacity. The trial court in Nettles dismissed the portions of the third-party action seeking recovery of lost capital contributions and compensation for decreased earning capacity because, the trial court determined, those damages were not recoverable in a third-party action under Rule 14, Ala. R. Civ. P. 276 So. 3d at 665. Thereafter, Nettles commenced a separate "supplemental lawsuit" seeking to recover those damages. Id. Later, the trial court in the third-party action entered a summary judgment against Nettles on the remaining aspects of his third-party complaint. That judgment, however, was interlocutory because it did not resolve all matters pending in the case in which the third-party

complaint had been filed. Eventually, the trial court presiding over the supplemental lawsuit entered a final judgment against Nettles in that action, and Nettles appealed from that judgment.

On appeal from the final judgment entered in the supplemental lawsuit, this Court determined that that lawsuit was subject to the abatement statute based on the earlier third-party action. In doing so, the Court rejected any notion that the summary judgment against Nettles on all of his claims in the third-party action could have cured any multiplicity-of-action problems. That conclusion was based on the fact that the summary judgment was an interlocutory nonfinal judgment: "[T]he multiplicity of actions was not cured by the trial court's entry of a nonfinal judgment as to Nettles's third-party claim in the [action in which it was filed]. Thus, for the purposes of § 6-5-440, Nettles's third-party action ... remains pending." Id. at 672. In support of its reasoning, the Court stressed the fact that the nonfinal summary judgment entered in the third-party action could have been reconsidered and vacated by the trial court at any time before entry of a final judgment, which exposed the third-party defendants to the possibility of having to continue defending the third-party action while defending the same claims in the

supplemental lawsuit. Id. The Court also analogized the situation in Nettles to precedent standing for the proposition that the dismissal of an action does not render the abatement statute inapplicable to a subsequent action if the dismissal could still be the subject of an appeal. See, e.g., L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 454 So. 2d 506, 508 (Ala. 1984) (holding that a federal-court action, which had been dismissed, was still pending for purposes of the abatement statute during the time before expiration of the deadline to appeal from that dismissal and concluding that a state-court action asserting the same cause of action was abated because it had been commenced before expiration of the deadline to appeal from the federal-court judgment); Ex parte J.E. Estes Wood Co., 42 So. 3d 104, 108 (Ala. 2010) ("The dismissal of an earlier filed federal action does not render § 6-5-440 inapplicable during the pendency of an appeal from that dismissal."). The Court in Nettles summed up its reasoning by noting that, "'for purposes of abatement, a case is pending until it has been finally adjudged.'" 276 So. 3d at 671 (quoting Ex parte Compass Bank, 77 So. 3d at 585). Nettles's reasoning that a case is considered pending for purposes of the abatement statute until it has been finally adjudged suggests that Hill's claim in the 2014

action was still pending for abatement purposes when Hill commenced the 2019 action.

As noted, Honaker's petition for a writ of mandamus does not discuss any authority supporting the proposition that Hill's claim in the 2014 action should be considered as having been commenced for abatement purposes when it was reinstated by the trial court. Honaker also fails to acknowledge the Court's opinion in Nettles. In his reply brief, Honaker points to the Court of Civil Appeals' decision in Graul v. S&R Travels, Inc., 773 So. 2d 1049 (Ala. Civ. App. 1999). In that case, a counterclaim plaintiff asserted in his counterclaim one count alleging breach of contract and one count alleging malicious prosecution. The counterclaim defendants moved to dismiss the malicious-prosecution claim, arguing that it had to be brought in a separate action, and the counterclaim plaintiff thereafter filed a separate action asserting a malicious-prosecution claim. After he filed the separate action, the counterclaim plaintiff's malicious-prosecution claim in the original action was dismissed, which appears to have been an interlocutory ruling because the counterclaim plaintiff's breach-of-contract claim remained pending.

The defendants in the separate action, who were also the counterclaim defendants in the original action, successfully moved to dismiss the separate action based on the abatement statute. The Court of Civil Appeals, however, reversed the trial court's judgment, holding that the abatement statute did not apply to the separate action because the malicious-prosecution counterclaim in the original action had been dismissed and, according to the Court of Civil Appeals, there was therefore only one claim alleging malicious prosecution pending when the separate action was dismissed.

The court in Graul provided no reasoning for its decision other than to simply point to the fact that the malicious-prosecution counterclaim in the original action had been dismissed. To the extent that the conclusion in Graul conflicts with the reasoning in Nettles, we are bound by Nettles; when a claim is dismissed in an interlocutory order, it is nevertheless considered still pending for purposes of abatement until finally resolved.

In sum, Honaker has not established that Hill's claim in the 2014 action was not still pending for purposes of abatement when the 2019 action was commenced. Thus, he has not demonstrated that the 2019 action should be considered the earlier action and therefore "a good

SC-2022-0445

defense to [Hill's claim in the 2014 action]" under § 6-5-440. Because Honaker has not demonstrated a clear legal right to the relief he seeks, we deny his petition for a writ of mandamus.

PETITION DENIED.

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