Rel: January 21, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200671

Howard Moore and Charles Lloyd

v.

Margaret Sue Mikul

Appeal from Shelby Circuit Court
(CV-20-900392)

BRYAN, Justice.

Howard Moore and Charles Lloyd appeal from a summary judgment entered by the Shelby Circuit Court in favor of Margaret Sue Mikul regarding a complaint for ejectment filed by Moore and Lloyd concerning certain real property ("the property"). See § 6-6-280, Ala. Code 1975. For

the reasons explained below, we affirm the circuit court's judgment.

Background[1]

The history of this dispute is somewhat complicated. Moore and Lloyd were judgment creditors in the aggregate amount of $185,000. In 2012, Moore and Lloyd obtained a writ of execution and the property, in which Mikul had an ownership interest, was sold at an execution sale, at which Moore and Lloyd were the highest bidders at $130,000.

There was a question regarding whether Moore and Lloyd were required to pay any cash to obtain a sheriff's execution deed concerning the property, given that the amount of their judgment exceeded the amount of the execution sale price. Moore and Lloyd filed a petition for the writ of mandamus in the circuit court to resolve the issue, and Mikul intervened in that action, which was designated in the circuit court as

[1]The following summary reflects information contained in the record on appeal in this action and in other records of this Court pertaining to prior proceedings referenced by the parties in this case. See Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 65 n.2 (Ala. 2010)("[T]his Court may take judicial notice of its own records in another proceeding when a party refers to the proceeding." (citing Butler v. Olshan, 280 Ala. 181, 187-88, 191 So. 2d 7, 13 (1966))).

case no. CV-13-900004. Moore and Lloyd ultimately prevailed in the action, and the circuit court directed the sheriff to sign and deliver a deed concerning the property to Moore and Lloyd. Mikul appealed to the Court of Civil Appeals, which transferred the appeal to this Court. This Court affirmed the circuit court's judgment, without an opinion, in September 2016. See Mikul v. Moore (No. 1150689, Sept. 16, 2016), 233 So. 3d 926 (Ala. 2016)(table).

Days later, Moore and Lloyd initiated an ejectment action against Mikul in the circuit court, which action was designated in that court as case no. CV-16-900764. Ultimately, the circuit court entered an order in October 2018 concluding that Moore and Lloyd were entitled to possession of the property and that Mikul was not liable to Moore and Lloyd for mesne profits or rents. The circuit court stated: "[T]he Court finds no legal way [or] avenue to prevent [Moore and Lloyd] from taking possession of the subject property ...."[2]

[2]In this sentence, the October 2018 order incorrectly referred to Moore and Lloyd as "the Defendants." In a subsequent order, the circuit court stated that the reference was a clerical error and that the October 2018 order should be amended to instead refer to "the Plaintiffs."

However, in the same order, the circuit court immediately stayed execution of the order after considering the parties' arguments regarding whether Mikul should be required to post a supersedeas bond to stay execution of the judgment, insofar as it awarded Moore and Lloyd possession of the property, should Mikul choose to appeal. The circuit court did not order the payment of a supersedeas bond because it had awarded no damages, but it stated the following in explaining its issuance of a stay:

> "[Mikul] will definitely be irreparably harmed and injured absent a stay, the property is being maintained, evidenced by the stipulated value [of $1,000,000. T]herefore, the stay will not substantially injure [Moore and Lloyd], and this Court has weighed [Mikul]'s likelihood of success on appeal among all other relevant factors regarding whether a stay should be granted."

The circuit court certified its October 2018 order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. Moore and Lloyd thereafter filed a petition for the writ of mandamus in this Court, challenging the October 2018 order insofar as the circuit court failed to award Moore and Lloyd damages for mesne profits or rent, issued the stay, and certified the order as final. This Court denied the petition by order (No. 1180032, Nov. 14,

2018).

In the circuit court, Moore and Lloyd thereafter filed various motions directed at the October 2018 order. Ultimately, the circuit court entered a judgment in April 2019 concluding that it lacked jurisdiction to modify the October 2018 order because Moore and Lloyd had not, it determined, filed a timely postjudgment motion with respect to the October 2018 order. The circuit court's judgment also stated: "All other claims for relief are hereby DENIED." (Capitalization in original.) The circuit court also entered an order directing that the action be marked "as disposed and closed to further court review." Moore and Lloyd appealed to this Court (No. 1180560). By order, this Court dismissed the appeal as untimely filed on November 13, 2019.

Two days later, a form writ of execution was issued by the circuit-court clerk directing the sheriff to restore possession of the property to Moore and Lloyd. Mikul filed a motion to quash the writ of execution, noting, among other things, that the circuit court had immediately stayed execution of its October 2018 order awarding possession of the property to Moore and Lloyd and that Moore and Lloyd had been unsuccessful in

their attempts to have the October 2018 order altered. Moore and Lloyd filed a response to Mikul's motion, arguing, among other things, that the case "ha[d] already been through the appeal process so no stay is entitled to continue to have any force or affect at this time." In February 2020, the circuit court entered an order granting Mikul's motion to quash the writ of execution. Moore and Lloyd then filed a petition for the writ of mandamus in the Court of Civil Appeals, which transferred the petition to this Court. This Court denied the petition by order on March 27, 2020 (No. 1190434).

On May 5, 2020, Moore and Lloyd commenced the action giving rise to this appeal, which was designated in the circuit court as case no. CV-20-900392. The complaint for ejectment that Moore and Lloyd filed in the new ejectment action, case no. CV-20-900392, appears to be substantially identical to the initial complaint for ejectment they filed in the previous ejectment action, case no. CV-16-900764. In June 2020, Mikul answered the complaint, asserting, among other things, the defenses of estoppel and laches and the doctrine of res judicata.

Moore and Lloyd then filed a motion to inspect the property. Mikul

opposed the motion, stating, among other things:

> "[Mikul] is 84 years old and has recently experienced serious and significant medical issues including hospitalizations and surgeries and treatment for a severe and life-threatening infection which requires medication and [intravenous] therapy. [Mikul] has isolated herself from non-family contact, to the extent possible, as she is a person at high risk for exposure to the COVID-19 virus."

Before the circuit court ruled on the motion to inspect the property filed by Moore and Lloyd, Mikul filed a motion for a summary judgment, asserting that the relief sought by Moore and Lloyd should be denied based on the defenses of equitable estoppel and laches and the doctrine of res judicata. Moore and Lloyd filed a response in opposition to Mikul's summary-judgment motion, and Mikul replied to their response.

The circuit court denied the motion to inspect the property filed by Moore and Lloyd. After conducting a hearing, the circuit court entered a final judgment on June 15, 2021, granting Mikul's summary-judgment motion. Moore and Lloyd appeal.

Analysis

On appeal, the principal appellate brief filed by Moore and Lloyd focuses on the grounds asserted in Mikul's summary-judgment motion.

In particular, Moore and Lloyd contend that the present ejectment action is not barred by the doctrine of res judicata because, they say, § 6-6-298, Ala. Code 1975, specifically contemplates the prosecution of two ejectment actions:

> "Two judgments in favor of the defendant in an action of ejectment or in an action in the nature of an action of ejectment between the same parties in which the same title is put in issue are a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies founded on the same title."

See MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d 493, 498 (Ala. 1985)(considering the interplay between § 6-6-298 and the doctrine of res judicata). Moore and Lloyd also argue that Mikul's defenses of equitable estoppel and laches are inapplicable.

Even assuming, without deciding, that the arguments asserted by Moore and Lloyd are generally correct as they relate to their claim that they are entitled to possession of the property, their principal appellate brief largely ignores the central impediment to the relief they seek in this Court. As noted above, the circuit court's October 2018 order in case no. CV-16-900764 explicitly stated: "[T]he Court finds no legal way [or]

avenue to prevent [Moore and Lloyd] from taking possession of the subject property ...." However, as Mikul notes on appeal, the reason she is still in possession of the property is because, in the same order, the circuit court immediately stayed execution of the October 2018 order.

The principal appellate brief submitted by Moore and Lloyd does not address the stay until the "Conclusion" section of the brief, in which they state that the circuit court is acting as "as though the stay is in place apparently forever." Moore and Lloyd's brief at 37. In their reply brief, Moore and Lloyd argue, for the first time, that the apparently indefinite stay entered by the circuit court in case no. CV-16-900764 is "immoderate." Among other things, Moore and Lloyd point out that, in Ex parte American Family Care, Inc., 91 So. 3d 682, 683 (Ala. 2012), a trial court entered an indefinite stay of a pending action without expressing a reason for doing so. In granting mandamus relief, this Court stated:

> "It is well established that '[a] stay must not be "immoderate." ' Ortega Trujillo v. Conover & Co. Commc'ns, Inc., 221 F.3d 1262, 1264 (11th Cir. 2000)(quoting CTI-Container Leasing Corp. v. Uiterwyk Corp., 685 F.2d 1284, 1288 (11th Cir. 1982)). 'In considering whether a stay is "immoderate," [appellate courts] examine both the scope of the stay (including its potential duration) and the reasons cited by

> the [trial] court for the stay.' Id. Clearly, the indefinite stay ordered by the trial court, with no stated justification for it, is immoderate and, consequently, beyond the scope of the trial court's discretion."

As noted, Moore and Lloyd assert this argument for the first time in their reply brief.

> " 'The law of Alabama provides that where no legal authority is cited or argued, the effect is the same as if no argument had been made.' Bennett v. Bennett, 506 So. 2d 1021, 1023 (Ala. Civ. App. 1987)(emphasis added). '[A]n argument may not be raised, nor may an argument be supported by citations to authority, for the first time in an appellant's reply brief.' Improved Benevolent & Protective Order of Elks v. Moss, 855 So. 2d 1107, 1111 (Ala. Civ. App. 2003), abrogated on other grounds, Ex parte Full Circle Distribution, L.L.C., 883 So. 2d 638 (Ala. 2003). Where an appellant first cites authority for an argument in his reply brief, it is as if the argument was first raised in that reply brief, and it will not be considered."

Steele v. Rosenfeld, LLC, 936 So. 2d 488, 493 (Ala. 2005). Moreover, the record in this case -- case no. CV-20-900392 -- demonstrates that Moore and Lloyd did not seek dissolution of the stay entered by the circuit court in case no. CV-16-900764 as being an immoderate stay. "[T]he appellate courts will not reverse a trial court on any ground not presented to the trial court." Rogers Found. Repair, Inc. v. Powell, 748 So. 2d 869, 872 (Ala. 1999); see also State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d

806, 821 (Ala. 2005)("This Court cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal."). Therefore, we cannot reverse the circuit court's judgment in this action based on the arguments presented by Moore and Lloyd on appeal.

However, with regard to the circuit court's October 2018 order in case no. CV-16-900764, execution of which is apparently still stayed, we note that "[a] trial court has inherent authority to interpret, clarify, and enforce its own final judgments." State Pers. Bd. v. Akers, 797 So. 2d 422, 424 (Ala. 2000). See also Ex parte Caremark Rx, LLC, 229 So. 3d 751, 757 (Ala. 2017)("[A] trial court nevertheless continues to hold 'residual jurisdiction' even after that 30-day period [imposed by Rule 59, Ala. R. Civ. P.,] expires such that it can still take any steps that are necessary to enforce its judgment."); but see George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004)("Although a trial court has 'residual jurisdiction or authority to take certain actions necessary to enforce or interpret a final judgment,' that authority is not so broad as to allow substantive modification of an

otherwise effective and unambiguous final order. Helms v. Helms' Kennels, Inc., 646 So. 2d 1343, 1347 (Ala. 1994)."). If the stay of execution of the circuit court's October 2018 order entered in case no. CV-16-900764 should be dissolved such that the order can now be effectuated, a dissolution should be sought in that action.

Conclusion

Moore and Lloyd have failed to demonstrate that the circuit court's judgment in this case -- case no. CV-20-900392 -- should be reversed. To the extent that they seek a dissolution of the stay entered by the circuit court pertaining to the execution of its October 2018 order in case no. CV-16-900764, a dissolution should be sought in that action. Accordingly, the circuit court's judgment in this action is affirmed.

AFFIRMED.

Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Bolin and Bryan, JJ., concur specially.

Parker, C.J., and Mitchell, J., dissent.

BRYAN, Justice (concurring specially).

As the author of the main opinion, I fully concur in its rationale and disposition. However, I write specially to express my view that the Shelby Circuit Court can immediately dissolve the stay of execution concerning the October 2018 order entered in case no. CV-16-900764. As noted in the main opinion, this Court has explained:

> "It is well established that '[a] stay must not be "immoderate." ' Ortega Trujillo v. Conover & Co. Commc'ns, Inc., 221 F.3d 1262, 1264 (11th Cir. 2000) (quoting CTI-Container Leasing Corp. v. Uiterwyk Corp., 685 F.2d 1284, 1288 (11th Cir. 1982)). 'In considering whether a stay is "immoderate," [appellate courts] examine both the scope of the stay (including its potential duration) and the reasons cited by the [trial] court for the stay.' Id."

Ex parte American Family Care, Inc., 91 So. 3d 682, 683 (Ala. 2012).

The circuit court's October 2018 order did not specify a duration of the stay of execution implemented in that order. As Howard Moore and Charles Lloyd have noted, it appears that the circuit court is treating the stay as indefinite in duration. However, in the same order, the circuit court also concluded that there is "no legal way [or] avenue to prevent [Moore and Lloyd] from taking possession of the subject property." Thus,

it appears that the circuit court has already concluded that Moore and Lloyd are entitled to possession of the property; therefore, it is unclear why the stay is still in effect.

As is also noted in the main opinion, "[a] trial court has inherent authority to interpret, clarify, and enforce its own final judgments." State Pers. Bd. v. Akers, 797 So. 2d 422, 424 (Ala. 2000). Thus, I believe the circuit court can, sua sponte, lift or dissolve the stay of execution concerning its October 2018 order entered in case no. case no. CV-16-900764. Given the protracted nature of this dispute, the circuit court may conclude that such a dissolution is warranted to finally effectuate the terms of its October 2018 order and enforce the legal right to which it has already determined Moore and Lloyd are entitled.

Bolin, J., concurs.

PARKER, Chief Justice (dissenting).

The main opinion reasons that, regardless of whether Margaret Sue Mikul had a viable defense to the plaintiffs' ejectment claim, the summary judgment in her favor must be affirmed because the plaintiffs' only remedy is to seek relief from the stay of the earlier ejectment judgment in their favor. I disagree.

If Mikul's defense of res judicata does not apply, then the first judgment and its stay are simply irrelevant. If the first judgment has no res judicata effect on the present action, then there is nothing to prevent the plaintiffs from bringing this action arising from the same facts. And if the first judgment has no effect, then even less can the stay of that judgment have any effect. If res judicata does not apply, the plaintiffs can relitigate the ejectment claim on the merits and obtain a second judgment in their favor.

Regarding whether res judicata actually applies, an ejectment statute provides that "[t]wo judgments in favor of the defendant … in an action in the nature of an action of ejectment between the same parties in

which the same title is put in issue are a bar to any action for the recovery of the land … between the same parties." § 6-6-298, Ala. Code 1975. This statute altered the common-law rule -- that res judicata did not apply to ejectment actions -- by limiting a plaintiff to two unsuccessful ejectment actions against a defendant. MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d 493, 497 (Ala. 1985). The statute does not apply here, though, because it requires prior judgments "in favor of the defendant," and the judgment in the first ejectment action was in favor of the plaintiffs, not Mikul. Thus, the common-law rule of no res judicata applies, and the second ejectment claim is not barred by that procedural doctrine.

Mikul's other defenses appear to be likewise without merit. Equitable estoppel appears irrelevant: The plaintiffs do not seem to have made any representation or engaged in any conduct that could have led Mikul to believe that she could retain possession of the property or that they would not bring a second suit. Laches also appears inapplicable: The plaintiffs have not been dilatory in pursuing ejectment since they purchased the property.

Because the stay in the earlier case is procedurally irrelevant and the defenses asserted by Mikul in her summary-judgment motion do not apply, summary judgment in her favor was improper. This Court should reverse.

MITCHELL, Justice (dissenting).

I agree with Chief Justice Parker that the doctrine of res judicata does not apply here. I write separately to say that, in my view, the plaintiffs, Howard Moore and Charles Lloyd, have two possible courses available to them to get the relief they seek. As Chief Justice Parker notes in his dissent, Moore and Lloyd are free to relitigate their ejectment claim on the merits in this action. Or, as Justice Bryan points out in the majority opinion, they can seek to have the stay of execution dissolved in the first ejectment action. The latter option may be more expedient, as the circuit court has already determined that Moore and Lloyd are entitled to possession of the real property at issue. But the plaintiffs -- not this Court -- get to choose which course to take.