

REL: June 25, 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.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200106

Jeremy Smith

v.

Connie Dunn and Henry Burton

**Appeal from Calhoun Circuit Court
(CV-19-900755)**

EDWARDS, Judge.

In October 2019, Jeremy Smith filed a complaint in the Calhoun Circuit Court ("the trial court") seeking to eject Connie Dunn and Henry

2200106

Burton from a parcel of real property that Smith had purchased at a tax sale held in December 2018. Smith also sought mesne profits and damages based on Dunn and Barton's refusal to vacate the property after receiving notice to do so. Dunn and Burton answered the complaint, indicating in their answer that they were pursuing redemption of the property. Although several status hearings were held, the action was not set for a trial.

On June 5, 2020, Dunn and Burton filed what they entitled a "motion to dismiss" Smith's ejectment action on the ground that they had redeemed the property. Although the motion purported to be one made pursuant to Rule 12(b)(6), Ala. R. Civ. P., Smith and Dunn attached to the motion an order granting their application for redemption that was entered by the Calhoun Probate Court ("the probate court") on May 19, 2020. On the same day, only one hour later, the trial court entered an order dismissing Smith's ejectment action "with prejudice." Smith filed a postjudgment motion on June 28, 2020, which the trial court set for a hearing to be held on September 30, 2020, which date was after the expiration of the 90-day period for ruling on the motion. See Rule 59.1,

2200106

Ala. R. Civ. P. Although the trial court held the scheduled hearing, it concluded that it lacked jurisdiction because Smith's postjudgment motion had been denied by operation of law. Smith then filed a notice of appeal to this court; however, because the appeal was not within our appellate jurisdiction, see Ala. Code 1975, § 12-3-10 (setting out the appellate jurisdiction of the Court of Civil Appeals), we transferred the appeal to the Alabama Supreme Court, which, in turn, transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

We must first determine the standard of review applicable to this matter. See Riddle v. Everett, [Ms. 2190817, Feb. 12, 2021] ___ So. 3d ___ (Ala. Civ. App. 2021). Relying on a case involving an appeal from a denial of a motion to compel arbitration, Smith contends that the only question before the trial court was a legal issue and that, therefore, our review of the trial court's June 5, 2020, order is de novo. Dunn and Barton contend, inexplicably, that the ore tenus rule applies to this appeal, despite the fact that the trial court took no evidence and, in fact, granted their motion to dismiss one hour after it was filed; they also assert that the correct standard of review is whether the trial court abused its discretion.

2200106

Neither party appears to realize that the motion to dismiss was converted to a motion for a summary judgment by virtue of the attachment of the probate court's order granting the application for redemption. Riddle, ___ So. 3d at ___ (explaining that, generally, an attachment to a motion to dismiss that is considered by the trial court converts a Rule 12(b)(6) motion into a summary-judgment motion). Because Dunn and Barton asserted in their motion to dismiss that Smith was no longer entitled to possession of the property by virtue of their redemption of the property, as supposedly evidenced by the probate court's order, the trial court necessarily relied on that attachment in concluding that Smith's ejectment action should be dismissed. Thus, the standard of review applicable to this appeal is that applicable to appeals from a summary judgment.

Our review of a summary judgment is de novo; that is, we apply the same standard as was applied in the trial court. Ex parte Ballew, 771 So. 2d 1040, 1041 (Ala. 2000). Rule 56(c)(3), Ala. R. Civ. P., provides that a motion for a summary judgment is to be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as

2200106

a matter of law. Generally, a party moving for a summary judgment must make a prima facie showing "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Rule 56(c)(3); see Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992). If the movant meets that burden, "the burden then shifts to the nonmovant to rebut the movant's prima facie showing by 'substantial evidence.'" Lee, 592 So. 2d at 1038. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). Furthermore, when considering a motion for a summary judgment, "the court must view the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts against the moving party." Waits v. Crown Dodge Chrysler Plymouth, Inc., 770 So. 2d 618, 618 (Ala. Civ. App. 1999).

On appeal, Smith appears to concede that he has no right to possession of the property as a result of the redemption. However, as he points out, an ejectment action is not solely concerned with restoring

2200106

possession of property. Smith requested mesne profits and damages in his complaint, as permitted by Ala. Code 1975, § 6-6-280(b) ("The plaintiff may recover in [an ejectment] 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"). As we explained in Prescott v. Milne, 308 So. 3d 906, 912 (Ala. Civ. App. 2019), the termination of an ejectment plaintiff's right to possession by redemption of the property does not prevent the ejectment plaintiff from being awarded mesne profits or damages resulting from the wrongful possession of the property during the period the ejectment plaintiff had the right of possession. In so deciding, we explained:

"[O]ur supreme court held [in Hairston v. Dobbs, 80 Ala. 589, 2 So. 147 (1887),] that[, even after termination of their right to possession,] 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 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 v. Elson, 242 Ala. [230,] 232, 5 So. 2d [477,] 478-79 [(1941)] ('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.')."

308 So. 3d at 912. As we pointed out in Prescott, the principle underlying the decisions in Pridgen v. Elson, 242 Ala. 230, 5 So. 2d 477 (1941), and Hairston v. Dobbs, 80 Ala. 589, 2 So. 147 (1887), is currently embodied in Ala. Code 1975, § 6-6-292, which 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."

In the present case, the motion for a summary judgment challenged solely Smith's right to possession by presenting evidence indicating that Dunn and Barton had redeemed the property and that Smith no longer had a right to possession. Smith was not given an opportunity to present

2200106

evidence creating a genuine issue of material fact as to that issue; however, he has apparently conceded that fact. The summary-judgment motion did not challenge Smith's rights to mesne profits or other damages to which he might be entitled under § 6-6-280(b) and § 6-6-292, but the trial court's order, which "dismissed" Smith's entire action with prejudice, sua sponte terminated his right to recover those damages without allowing Smith the right to present evidence creating a genuine issue of material fact regarding whether he was entitled to mesne profits or other damages as he had claimed.

Our supreme court has explained that,

"if a motion under Rule 12(b)(6)[, Ala. R. Civ. P.,] is converted into a motion for summary judgment, both parties shall be given a reasonable opportunity to submit affidavits and other extraneous proofs to avoid a party being taken by surprise through conversion of the motion to dismiss to one for summary judgment. Davis v. Howard, 561 F.2d 565 (5th Cir. 1977); Moore's Federal Practice, Vol. 2A, ¶ 12.09(3), N. 25. It is also clear that the spirit of Rule 56[, Ala. R. Civ. P.,] requires the same notice and hearing where the court contemplates summary judgment on its own initiative as it does when a party moves for summary judgment; i.e., ten days notice. See Davis v. Howard, supra; Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967); Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958). The entry of summary judgment by a trial court, sua sponte, without

2200106

giving to the party against whom such judgment is entered adequate and reasonable notice, as well as an opportunity to present evidence in opposition, is prejudicial error requiring reversal. Id."

Hales v. First Nat'l Bank of Mobile, 380 So. 2d 797, 799 (Ala. 1980).

The trial court entered a summary judgment terminating Smith's right to seek mesne profits or other damages that might have resulted from Dunn and Barton's retention of possession during the period that Smith had the right to possession of the property. That judgment was entered without notice to Smith that the issue of mesne profits and damages was being considered and without allowing Smith the opportunity to present evidence to create a genuine issue of material fact regarding whether he was entitled to mesne profits or other damages. Accordingly, we reverse the judgment of the trial court and remand the cause for further proceedings related to Smith's claim for mesne profits and damages.

REVERSED AND REMANDED.

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