Rel: 12/02/2016

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1151054

Ex parte LERETA, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Fronia Warhurst

v.

City of Tuscumbia et al.)

(Colbert Circuit Court, CV-14-900218)

MAIN, Justice.

LERETA, LLC, petitions this Court for a writ mandamus directing the Colbert Circuit Court to vacate its order

denying LERETA's motion to set aside a default judgment entered against it in the action brought by Fronia Warhurst and to enter an order setting aside the default judgment. Because we conclude that Warhurst did not perfect service of process on LERETA, we grant the petition and issue the writ.

I. Facts and Procedural History

Warhurst's house flooded during a rainstorm in September 2012. On July 28, 2014, Warhurst sued the City of Tuscumbia, JP Morgan Chase Bank, N.A. ("Morgan Chase"), and LERETA. Warhurst averred that Tuscumbia negligently and/or wantonly maintained or repaired a storm-drainage system near her house, which, she said, proximately resulted in the flooding. Warhurst further alleged that, before the flooding, Morgan Chase, the holder of Warhurst's mortgage, wrongfully terminated her flood insurance. Finally, Warhurst alleged that LERETA, a company that provides flood-zone-determination reports and certifications to lenders, incorrectly informed Morgan Chase that Warhurst's house was not in a flood zone. Warhurst demanded judgment against all three defendants in the amount of $250,000, "or as a jury may determine."

Warhurst attempted to serve LERETA via certified mail addressed to its corporate headquarters. The certified mail was not addressed to any particular individual; rather, it was addressed generally to "Lereta LLC," as follows:

> "Lereta LLC
> "1123 Parkview Drive
> "Covina, California
> "91724"

The certified mail was received and signed for by an employee of LERETA on August 4, 2014. It is undisputed that the employee who signed the certified-mail receipt was not an officer, partner, managing agent, general agent, or agent authorized by appointment or by law to receive service of process. Further, the employee who signed for the certified mail did not check the "agent" box on the certified-mail return receipt.

LERETA did not file an answer. On September 15, 2014, Warhurst filed an application for entry of a default judgment against LERETA and requested that the judgment be entered in the amount of $250,000. On October 9, 2014, the circuit court entered a default judgment against LERETA in the amount of $250,000. The claims against Tuscumbia and Morgan Chase remained pending, and, on the motion of Tuscumbia, the circuit

court stayed the action as to Tuscumbia pending Warhurst's collection efforts against LERETA.

On March 25, 2016, LERETA filed a motion to set aside the default judgment. In its motion, LERETA argued that the court's October 9, 2014, order purporting to enter a default judgment was not a final judgment and thus was subject to being set aside by the circuit court. It also argued that Warhurst had not perfected service on LERETA because the certified mail was not addressed to an officer, member, managing agent, general agent, or an agent authorized by appointment or law to receive service of process. LERETA further averred that it has a meritorious defense, that no prejudice will result to Warhurst if the default judgment is set aside, and that the default judgment was not a result of its own culpable conduct. In support of its motion, LERETA attached an affidavit of its chief executive officer, John Walsh. Walsh testified that he was unaware of the action against LERETA until March 2016. He testified that the employee who signed for the certified mail was not an officer, member, or managing or general agent of LERETA and was not an agent authorized to receive service of the complaint.

Warhurst states that, on April 20, 2016, she initiated formal debt-collection proceedings in California in an attempt to collect on the default judgment entered against LERETA. On May 26, 2016, the circuit court entered an order denying LERETA's motion to set aside the default judgment. This petition for the writ of mandamus followed.

II. Analysis

Initially, we address whether a petition for a writ of mandamus is the proper vehicle by which to address the circuit court's denial of LERETA's motion to set aside the default judgment.

> "'"Mandamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"
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> "'Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003) (quoting Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)). Mandamus will lie to direct a trial court to vacate a void judgment or order. Ex parte Chamblee, 899 So. 2d 244, 249 (Ala. 2004).'"

Ex parte Scrushy, 940 So. 2d 290, 293-94 (Ala. 2006)(quoting Ex parte Sealy, L.L.C., 904 So. 2d 1230, 1232 (Ala. 2004)).

Ordinarily, "[i]f we were dealing with a true judgment by default, where damages had been assessed and the judgment was otherwise 'final,' the petitioners would have an adequate remedy by means of appeal, and mandamus would not be appropriate." Ex parte Family Dollar Stores of Alabama, Inc., 906 So. 2d 892, 897 (Ala. 2005). The default judgment in this case, however, did not adjudicate all the claims as to all the parties, and the circuit court did not certify the judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. Thus, the order is interlocutory and does not support a direct appeal. See Progress Indus., Inc. v. Wilson, 52 So. 3d 500, 505 (Ala. 2010) ("'A judgment by default, rendered in advance against one of several defendants, is interlocutory until final disposition is made as to all defendants.'" (quoting Hallman v. Marion Corp., 411 So. 2d 130, 132 (Ala. 1982))).

Nevertheless, despite the nonfinal nature of the judgment, Warhurst has initiated legal proceedings in California against LERETA in an attempt to collect on the judgment, and the circuit court in this case has indefinitely

stayed the action against Tuscumbia pending Warhurst's collection efforts. Accordingly, LERETA is currently faced with defending against collection proceedings related to a nonfinal judgment as to which it has no present right to appeal. Under these circumstances, LERETA has no adequate means by which to challenge the nonfinal judgment, other than a petition for writ of mandamus. Thus, a writ of mandamus is the appropriate remedy in this case. See, e.g., Ex parte Family Dollar, 906 So. 2d at 897 (holding mandamus review proper from the denial of a motion to set aside a nonfinal default judgment).

Further supporting our conclusion that mandamus is the proper remedy is LERETA's contention that the default judgment is void for want of personal jurisdiction. "'"[M]andamus will lie to direct a trial court to vacate a void judgment or order."'" Ex parte Trust Co. of Virginia, 96 So. 3d 67, 69 (Ala. 2012) (quoting Ex parte Scrushy, 940 So. 2d at 294, quoting in turn Ex parte Sealy, 904 So. 2d at 1232). LERETA argues that the circuit court never obtained personal jurisdiction over it and, thus, that the default judgment is void and is due to be set aside. Specifically, LERETA

contends that it was not served in accordance with Rule 4, Ala. R. Civ. P., because the certified mail was not addressed to a natural person who is "an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." Rule 4(c), Ala. R. Civ. P. We agree.

Although a circuit court has "great discretion" in ruling on a motion to set aside a default judgment, if a default judgment is void, it must be set aside:

> "'"The standard of review in the case of an order setting aside, or refusing to set aside, a default judgment proceeds on the basis that the trial judge has great discretion, and his judgment will not be disturbed unless he has clearly [exceeded] such discretion." Roberts v. Wettlin, 431 So. 2d 524, 526 (Ala. 1983). However, "[w]hen the grant or denial [of a request for relief from a judgment] turns on the validity of the judgment, discretion has no place for operation. If the judgment is void, it is to be set aside; if it is valid, it must stand." Smith v. Clark, 468 So. 2d 138, 141 (Ala. 1985).'"

Boudreaux v. Kemp, 49 So. 3d 1190, 1194 (Ala. 2010) (quoting Cameron v. Tillis, 952 So. 2d 352, 353 (Ala. 2006)); see also LVNV Funding, LLC v. Boyles, 70 So. 3d 1221, 1226-27 (Ala. Civ. App. 2009) ("In reviewing the ruling of a trial court on

a motion to vacate a default judgment on the ground that the judgment was void, this court applies a de novo standard of review. ... Discretion plays no part in determining whether a default judgment is void.").

Failure to prefect service renders a default judgment void. "'The failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the trial court of personal jurisdiction over the defendant and renders a default judgment void.'" Boudreaux, 49 So. 3d at 1194 (quoting Nichols v. Pate, 992 So. 2d 734, 736 (Ala. Civ. App. 2008)).

In this case, Warhurst attempted service on LERETA by requesting the clerk to issue service of process by certified mail pursuant to Rule 4(i)(2)(B)(i), Ala. R. Civ. P. That provision authorizes a plaintiff to effectuate service by certified mail as follows:

> "(i) In the event of service by certified mail by the clerk, the clerk shall place a copy of the process and complaint or other document to be served in an envelope and shall address the envelope to the person to be served with instructions to forward. In the case of an entity within the scope of one of the subdivisions of Rule 4(c), the addressee shall be a person described in the appropriate subdivision. ..."

(Emphasis added.) Rule 4(c)(6) provides upon whom process must be served when seeking to serve "Corporations and Other Entities." Thus, when seeking to serve a corporation or other business entity by certified mail, Rule 4(c)(6) directs to whom the certified mail must be addressed. That section provides:

> "(c) Upon Whom Process Served. Service of process ... shall be made as follows:
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> "....
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> "(6) Corporations and Other Entities. Upon a domestic or foreign corporation or upon a partnership, limited partnership, limited liability partnership, limited liability company, or unincorporated organization or association, by serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process."

(Emphasis added.) The Committee Comments to Amendment to Rule 4 Effective August 1, 2004, make clear that Rule 4(c)(6) was intended to require that personal or certified-mail service to a business entity must be accomplished by directing service to a "specific person" or a registered agent:[1]

[1]"Although the committee comments are not binding, they may be highly persuasive." Iverson v. Xpert Tune, Inc., 553 So. 2d 82, 88 (Ala. 1989). See also Thomas v. Liberty Nat'l Life Ins. Co., 368 So. 2d 254, 257 (Ala. 1979).

> "The former provision allowing corporations and other business entities to be served by certified mail at any of their usual places of business has been eliminated. Now, personal or certified mail service must be directed to the registered or appointed agent or to a specific person, such as an 'officer.'"

(Emphasis added.)

Furthermore, Rule 4(i)(2)(C) provides when service by certified mail is deemed effective:

> "(C) When Effective. Service by certified mail shall be deemed complete and the time for answering shall run from the date of delivery to the named addressee or the addressee's agent as evidenced by signature on the return receipt. Within the meaning of this subdivision, 'agent' means a person or entity specifically authorized by the addressee to receive the addressee's mail and to deliver that mail to the addressee. Such agent's authority shall be conclusively established when the addressee acknowledges actual receipt of the summons and complaint or the court determines that the evidence proves the addressee did actually receive the summons and complaint in time to avoid a default. An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within time to avoid a default. In the case of an entity included in one of the provisions of Rule 4(c), 'defendant,' within the meaning of this subdivision, shall be such a person described in the applicable subdivision of 4(c)."

Again, the Committee Comments specifically state that effective service by certified mail to a business entity requires delivery to an "addressee," who must be a person as

identified in Rule 4(c)(6), or, alternatively, to the addressee's agent specifically authorized to receive the addressee's mail. The Committee Comments state: "If the defendant is an entity, such as a corporation within Rule 4(c)(6), the 'addressee' will have to be a person defined in that rule, such as an 'officer' or a 'managing agent.'" (Emphasis added.)

Based on the above, we are clear to the conclusion that service on a corporation or business entity cannot be perfected by certified mail addressed merely to the entity itself.[2] Rule 4 plainly and specifically provides that service on a business entity by certified mail requires the mailing to be addressed to an "officer, a partner (other than

[2]We note that a number of unpublished federal district court decisions have reached the same conclusion. See, e.g., Parks v. Quality Serv. Integrity, No. 2:13-CV-909-WKW, Nov. 9, 2015 (M.D. Ala. 2015) ("[Plaintiff's certified mailing] was not addressed to a natural person who was authorized to receive process on behalf of Defendant. As a result, service of process was not proper under Alabama law."); Johnson v. Champions, No. 12-0334-WS-M, Jan. 24, 2013 (S.D. Ala. 2013) ("[T]he mailing must be addressed, not simply to the artificial entity, but to a human being affiliated with the entity as an officer, partner or agent as described in Rule 4(c)(6)."); and Weckesser v. Sea Tow Corp., No. 08-0528-WS-M, Aug. 24, 2010 (S.D. Ala. 2010) ("There is no human addressee on the certified mailing to Sea Tow, so service was not effective under Alabama law.).

a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." To be effective, the certified mail must be delivered to that addressee or that addressee's authorized agent.

In the present case, the certified mail was addressed only to "Lereta LLC." It was not addressed to an "officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." Accordingly, service by certified mail to LERETA was ineffective; the circuit court never obtained personal jurisdiction over LERETA; and, consequently, the default judgment is void. Therefore, the circuit court exceeded its discretion in denying LERETA's motion to set aside the default judgment. See LVNV Funding, 70 So. 3d at 1232 (holding that circuit court erred in denying relief from default judgment where certified-mail service to limited-liability corporation was not addressed to an officer, partner, managing or general agent of the limited-liability corporation or an agent authorized to receive service of process on behalf of the limited-liability corporation).

III. Conclusion

Because the circuit court lacked personal jurisdiction to enter the default judgment, LERETA's motion to set aside the default judgment was due to be granted. Accordingly, we direct the circuit court to set aside its order of May 26, 2016, order denying LERETA's motion to set aside the default judgment and to enter an order setting aside the default judgment.

PETITION GRANTED; WRIT ISSUED.

Stuart, Parker, Wise, and Bryan, JJ., concur.

Bolin, J., concurs in the result.

Murdock and Shaw, JJ., dissent.

MURDOCK, Justice (dissenting).

I believe we are providing mandamus relief based on a faulty premise as framed in the main opinion: "LERETA[, LLC,] is currently faced with defending against collection proceedings related to a nonfinal judgment as to which it has no present right to appeal." ___ So. 3d at ___. That situation simply cannot be. Because the judgment against LERETA does not adjudicate all claims against all parties and has not been certified as final by the Colbert Circuit Court under Rule 54(b), Ala. R. Civ. P., it is not a final judgment for purposes of appeal (indeed, the circuit court is free to alter or rescind the default judgment under Rule 54, Ala. R. Civ. P.), by definition it is not a final judgment for purposes of execution. Finality for purposes of execution and appeal is the same. One cannot be subject to execution of a judgment without having the full due-process right of an appeal of that judgment. Not only is this conclusion intuitively and logically correct, it is also rooted in the language of Rule 54(a), Ala. R. Civ. P., which defines a "judgment" as simply "a decree or any order from which an

appeal lies." (Emphasis added.) If no appeal lies, then there is no "judgment" for execution.[3]

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[3]Compare Wallace v. Belleview Props. Corp., 120 So. 3d 485, 500-01 (Ala. 2012) (Murdock, J., concurring specially):

> "[I]t is important to acknowledge the synonymous nature of the finality of a Rule 54(b) judgment for purposes of execution and for purposes of appeal. The purposes and effects of a Rule 54(b) certification necessarily mean that an order certified as final under Rule 54(b) is final for all the same purposes as any other judgment and, accordingly, must be viewed as being 'as final' as any other final judgment. 10 Charles Alan Wright et al., Federal Practice and Procedure § 2654 (3d ed. 1998), for example, states that 'Rule 54(b) also is important because of the collateral effects of a determination under the rule.' ... As further explained in Federal Practice and Procedure:
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> > "'Because Rule 54(b) provides a means of rendering a final judgment on part of a multiple-claim or multiple-party action, it has an effect on various other rules or procedures connected with the rendition of judgment. For example, as was stated earlier, once there has been a Rule 54(b) certification and a final judgment has been entered, the time for appeal begins to run. Similarly, preclusion principles are based on a final judgment so that since a Rule 54(b) order is viewed as final, it has binding effect. On the other hand, if no certificate issues, the court's decision or order remains interlocutory and the above effects will not take place.
> >
> > "'Other matters that should be noted in relation to the entry of a judgment

> under Rule 54(b) are that it enables a lien to be imposed on the judgment debtor's property and a writ of execution to be issued to begin the process of collecting any damage[s] award. Section 1962 of Title 28 provides that every district-court judgment shall be a lien on the property in the state in which the court is sitting, in accordance with the law of that state; state law commonly requires a judgment to be final in order to create a lien.
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> "'Another effect of a Rule 54(b) order is on the accrual of interest on a judgment, since interest begins to accumulate only on a judgment that has become final.'

"10 Federal Practice and Procedure § 2661. Professor Moore likewise explains that a judgment certified as final under Rule 54(b) is a final judgment 'for all purposes,' specifically emphasizing its finality for purposes of the 'running of time to appeal,' as well as for purposes of 'res judicata,' the accrual of interest and 'execution.' See Moore's Federal Practice § 54.26 [1]-[4]. See also Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721, 728 (D.C. Cir. 1969)('[T]he role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well.' (footnote omitted)).

"The latter authorities, including the opinion of the United States Court of Appeals for the District of Columbia in Redding, point to the absolute unworkability -- 'chaos' would be the right word in many cases -- of a scenario where a judgment as to a claim is certified as final and execution ensues (so that a money judgment is collected or a

LERETA will have an adequate remedy by appeal, if and when the judgment against it is made final. LERETA will say, of course, that the remedy of an appeal is not "adequate" because of the imminent collection efforts. But again, the judgment against LERETA is not final -- Fronia Warhurst has no "judgment" upon which she properly may execute at the present time. LERETA's proper interlocutory remedy, in other words, is to seek mandamus relief to stop the collection efforts on

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> judgment deed to land is delivered), only to have the losing party decide years later that he or she should not so readily have acquiesced in the certified judgment and therefore choose to appeal an already executed judgment along with the judgment entered on the remainder of the claims in the case. A judgment is either final or it is not. The law does not have two types of finality, one brand of finality for purposes of being able to execute upon a judgment and another brand of finality for purposes of appealability. Finality for purposes of appeal and for purposes of execution are the same. 'Enforcement of a judgment by execution ... presupposes a judgment which determines with finality the rights and liabilities of the parties.' 30 Am. Jur. 2d Executions, Etc. § 57 (2005). See also, e.g., 2 Federal Procedure, Lawyer Edition § 3:133 ('Since an execution ordinarily issues only a final judgment, finality for purposes of execution and finality for purposes of appeal should be the same.')."

(Footnote omitted; emphasis omitted; emphasis added.)

a nonfinal judgment. But it has not requested such relief in this case.[4]

[4]I also believe that the circumstances of Ex parte Family Dollar Stores of Alabama, Inc., 906 So. 2d 892, 897 (Ala. 2005), cited in the main opinion, are distinguishable from those of the present case (a fact suggested by Justice Lyons in his special writing in that case concurring in part and concurring in the result in part). I further believe that the substantive analysis offered by Justice Lyons (joined by Justice Johnstone), as well as the similar position expressed by Justice Woodall in his dissenting opinion in that case, is correct.