REL: April 5, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170591

Thomas Denault and Carol Denault

v.

Federal National Mortgage Association and Seterus, Inc.

Appeal from Jefferson Circuit Court
(CV-14-901195)

EDWARDS, Judge.

Thomas Denault and Carol Denault have appealed from separate September 18, 2017, orders entered by the Jefferson Circuit Court ("the trial court") that (1) entered a summary judgment in favor of Federal National Mortgage Association

("FNMA") regarding its claim against the Denaults "in the nature of an action in ejectment," Ala. Code 1975, § 6-6-280(b); (2) entered a summary judgment in favor of Seterus, Inc., regarding the Denaults' third-party claims against Seterus alleging, among other things, wrongful foreclosure; and (3) entered a summary judgment in favor of Bank of America, N.A., regarding the Denaults' third-party claims against Bank of America alleging, among other things, wrongful foreclosure. While the appeal was pending, the Denaults entered into a pro tanto settlement with Bank of America, and the appeal has been dismissed with regard to the third-party claims against Bank of America.

We dismiss the Denaults' appeal from the September 2017 orders in favor of FNMA and Seterus because a final judgment has not been entered in this case.

Facts and Procedural History

On February 17, 2006, Thomas Denault executed a promissory note in the principal amount of $156,000 ("the promissory note") to America's Wholesale Lender. America's Wholesale Lender is allegedly a trade name of Countrywide Home Loans, Inc. The promissory note was to be repaid in monthly

installments of $947.87, due on the first day of each month beginning on April 1, 2006, with the final payment due on March 1, 2036. The promissory note specifically states that it would be secured by a mortgage dated the same date as the promissory note.

Also on February 17, 2006, the Denaults executed a mortgage ("the mortgage") on their home in Trussville as security for the promissory note. The mortgage was recorded in the Jefferson Probate Court, and the mortgage states that, after recording, it was to be returned to "Countrywide Home Loans, Inc." Also, the mortgage states that Mortgage Electronic Registration Systems, Inc. ("MERS"), was the mortgagee, but that MERS was acting solely as nominee for America's Wholesale Lender and its successors and assigns. The mortgage granted MERS, its successors and assigns, a power of sale in conjunction with its right to foreclose the mortgage. The mortgage also stated that the promissory note and mortgage could be sold without prior notice to the Denaults and that such a sale might result in a change in the entity servicing the Denaults' loan.

The loan servicer for Countrywide Home Loans, Inc., eventually merged into Bank of America. It is undisputed that Bank of America, or its predecessors in interest, was the servicer of the Denaults' loan from its inception until October 1, 2012.

The Denaults made each monthly installment payment due under the terms of the promissory note and mortgage until July 6, 2012. The Denaults did not make any monthly installment payments after July 6, 2012.[1] On July 17, 2012, MERS executed an assignment purporting to assign the mortgage "together with the note(s) and obligations therein described" to Bank of America. The assignment reflected America's Wholesale Lender as the original lender and referenced the Denaults and the original loan principal amount of $156,000. The assignment to Bank of America was recorded in the Jefferson Probate Court.

Effective October 1, 2012, Bank of America transferred servicing of the Denaults' loan to Seterus. The Denaults did

[1]The Denaults filed a bankruptcy proceeding in June or July 2012, and they thereafter decided to stop making the payments due under the promissory note and mortgage. The Denaults were eventually discharged from bankruptcy, and their bankruptcy case was closed.

not have any contact with Bank of America after October 1, 2012.

On October 4, 2012, Bank of America executed an assignment purporting to assign the mortgage "together with the note(s) and obligations therein described" to FNMA. The assignment reflected America's Wholesale Lender as the original lender and referenced the Denaults and the original principal loan amount of $156,000. The assignment further states: "Contact [FNMA] for this instrument c/o Seterus ..., which is responsible for receiving payments." The assignment to FNMA was recorded in the Jefferson Probate Court.

On May 13, 2013, Seterus contacted Thomas Denault to discuss the status of the loan, but Seterus and Thomas Denault were unable to agree on any payment arrangement for the loan.

On August 29, 2013, Seterus sent a letter to the Denaults that stated:

> "RE: Loan number ... serviced by Seterus.
>
> "Your loan is in default, due to the non-payment of the following amount:
>
> "Amount Due: $15,744.72
> "Amount Due By: October 03, 2013 ('Expiration Date')

> "We hereby demand that you bring your loan up-to-date ('cure this default') by payment of the amount shown above. In addition, your regular payment may become due by the Expiration Date. The delinquent amount of principal continues to accrue interest.
>
> "....
>
> "IF THE DEFAULT IS NOT CURED ON OR BEFORE THE EXPIRATION DATE, THE LOAN OWNER AND WE INTEND TO ENFORCE THE LOAN OWNER'S RIGHTS AND REMEDIES AND MAY PROCEED WITHOUT FURTHER NOTICE TO COMMENCE FORECLOSURE PROCEEDINGS. ADDITIONAL FEES SUCH AS FORECLOSURE COSTS AND LEGAL FEES MAY BE ADDED PURSUANT TO THE TERMS OF THE LOAN DOCUMENTS.
>
> "....
>
> "If you have any questions, please contact us at [telephone number omitted]. For borrowers having difficulty making their payments, we have loan specialists available Monday-Thursday 5 a.m. to 9 p.m., Friday 5 a.m. to 6 p.m., and Saturday 9 a.m. to 12 p.m. (Pacific time). Saturday hours may vary."

According to the trial court's orders, the August 2013 letter complied with the pre-foreclosure requirements of the mortgage and informed the Denaults of the availability of assistance for borrowers who were having difficulty making their payments.

On January 14, 2014, Seterus's counsel sent the Denaults a "Notice of Acceleration of Promissory Note and Mortgage." The January 2014 notice states, in pertinent part:

> "RE: ....
> "Our Client: Seterus, Inc., as servicer for [FNMA]
> "Loan No. ....
>
> "YOU ARE HEREBY NOTIFIED that the terms of the Promissory Note and Mortgage for the above referenced loan dated the 17th day of February, 2006, are in default. By virtue of default in the terms of said Note and Mortgage, [FNMA] hereby accelerates to maturity the entire remaining unpaid balance of the debt, including attorney's fees, accrued interest, and other lawful charges. The amount due and payable as of the date of this letter is $160,441.97. This payoff amount will change on a daily basis. If you wish to pay off your mortgage, please call our office at [telephone number omitted] to obtain an updated figure. Additionally, if you are interested in foreclosure alternatives, please contact your servicer, Seterus, Inc. at [telephone number omitted].
>
> "We are at this time commencing foreclosure under the terms of the Mortgage, and enclosed is a copy of the foreclosure notice. Please note that the foreclosure sale is scheduled for February 26, 2014. For further information regarding this matter, please call [telephone number omitted]."

Also on January 14, 2014, Seterus's counsel sent the Denaults an additional letter and a copy of the publication notice for the foreclosure sale, which was to be published on January 15, January 22, and January 29, 2014. It is undisputed that the notice was properly published on those dates. The additional letter from Seterus's counsel states, in pertinent part:

> "RE: Loan Number: ....
>
> "Your mortgage loan servicer, Seterus, Inc., has referred your loan to us for foreclosure. However, you may still have foreclosure prevention alternatives available to you.
>
> "If you are interested in avoiding foreclosure, you should contact your servicer about your situation so that they can determine whether you qualify for temporary or long-term relief. Your servicer may have previously sent you a letter advising you of possible alternatives to foreclosure, along with the documents for you to complete and return to them to be evaluated for these alternatives. If you did not receive or no longer have the documents, or have not returned all of the documents, please contact your servicer at [telephone number omitted].
>
> "Even if you have previously indicated that you are not interested in saving your home, you can still be evaluated for alternatives to foreclosure. If you need assistance, please contact your servicer at [telephone number omitted]."

The foreclosure sale was held on February 26, 2014. FNMA was the highest bidder at the foreclosure sale; FNMA's bid was $162,393.18. The foreclosure deed to FNMA indicates that the Denaults had defaulted on their mortgage to MERS, as nominee for America's Wholesale Lender, and that the mortgage had been subsequently assigned to FNMA.

Also on February 26, 2014, FNMA sent the Denaults a "Demand for Possession." The demand quoted Ala. Code 1975, § 6-5-251 (delivery of possession by mortgagor on demand), and

informed the Denaults that their mortgage had been foreclosed, that FNMA was "now the owner of the property," that "written demand is hereby made upon you to deliver possession of the property to [FNMA] within ten (10) days," and that, unless possession was delivered with 10 days, the Denaults' right of redemption would be forfeited. It is undisputed that the Denaults refused to vacate the property.

On March 18, 2014, FNMA filed a complaint against the Denaults asserting a claim in the nature of an action in ejectment. FNMA requested an order of possession, damages against the Denaults for wrongful retention of the property, and a declaration that the Denaults had forfeited their rights to redeem the property because they had refused to surrender possession. See Ala. Code 1975, § 6-5-251(c) (discussing forfeiture of the mortgagor's right of redemption).

On July 3, 2014, the Denaults filed their answer to FNMA's complaint. The answer included a general denial of the allegations in FNMA's complaint. The Denaults also asserted, as an affirmative defense, that FNMA had not received title to the property because, according to the Denaults, the foreclosure sale was void.

On February 9, 2015, FNMA filed a motion for a summary judgment. FNMA's motion for a summary judgment requested that the trial court enter an order awarding FNMA possession of the property at issue and declaring that the Denaults had forfeited their right of redemption. In support of its motion, FNMA submitted copies of various documents and an affidavit from Nathan Abeln, an authorized representative of Seterus, as servicer for FNMA. FNMA's summary-judgment motion makes no specific reference to FNMA's claim for damages for wrongful retention of the property, and the motion includes no supporting evidentiary materials as to the amount of FNMA's alleged damages for wrongful retention.

On July 26, 2015, the Denaults amended their answer to FNMA's complaint. The amendment added further affirmative defenses challenging the validity of the foreclosure sale and added third-party claims against Seterus and Bank of America. The claims against Seterus and Bank of America included breach of contract; fraud; defamation, libel, and slander; breach of the covenant of good faith and fair dealing; negligence; wantonness; unjust enrichment; false light; unfair and deceptive trade practices; and violation of the Fair Credit

Reporting Act, 15 U.S.C. § 1681s. The Denaults' amended complaint also included claims against Seterus for wrongful foreclosure, slander of title, and violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e.

On August 25, 2015, the Denaults filed a motion seeking additional time for discovery for purposes of opposing FNMA's motion for a summary judgment. The next day, the Denaults filed a motion to strike Abeln's affidavit, which they contended was not in compliance with Rule 56(e), Ala. R. Civ. P.; they also filed a response to FNMA's motion for a summary judgment. On September 23, 2015, the trial court entered an order allowing the Denaults additional time for discovery.

On March 9, 2016, FNMA filed a "Motion to Escrow Funds" ("FNMA's escrow motion"). FNMA's escrow motion alleged that the Denaults had been living on the property for four years, without making any payments on their mortgage or for rent. FNMA requested that the trial court enter an order requiring the Denaults

> "to make monthly rent payments into an escrow account of the Clerk of Court of Jefferson County, Alabama, in monthly intervals ... until such time as this case is fully adjudicated, in an amount equal to [the Denaults'] monthly mortgage payment, as well as to deposit into the Court any and all funds

> previously paid to and held in escrow by [the Denaults'] counsel, or otherwise set aside in any manner by [the Denaults] as monthly mortgage payments."

FNMA's escrow motion does not disclose what funds were being held in escrow by the Denaults' counsel, and the motion alleges that payments under the promissory note were "currently due for the August 2012 payment and all subsequent payments." According to FNMA's escrow motion, FNMA was

> "entitled to use and occupancy damages from [the Denaults] pursuant to Ala. Code (1975), § 6-6-280, as mesne profits and damages for the wrongful use and occupancy of the property from the date of the foreclosure sale to the date of said judgment. Requiring [the Denaults] to deposit these monthly payments into Court would at least partially satisfy this relief as provided for under Alabama law."

(Emphasis added.) FNMA requested "an Order requiring [the Denaults] to pay rent in the amount of $947.87 per month, or such other amount as deemed appropriate by the Court"; FNMA submitted no evidentiary materials regarding the rental value of the property, but it stated in a footnote that "Zillow [a real-estate web site] estimates fair rental value of the Property as of the date of this filing to be $1,398/month, based on public property data and similar properties listed for rent." See Jones-Lowe Co. v. Southern Land & Expl. Co.,

18 So. 3d 362, 368 (Ala. 2009) ("'"[M]otions and arguments of counsel are not evidence." Williams v. Akzo Nobel Chemicals, Inc., 999 S.W.2d 836, 845 (Tex. App. 1999). "[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight." Singh v. Immigration & Naturalization Serv., 213 F.3d 1050, 1054 n.8 (9th Cir. 2000).'" (quoting Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000))). FNMA requested that the payments to be made by the Denaults be held in an interest-bearing escrow account "until such time as all claims involved in this litigation have been fully and finally resolved." "[FNMA] further request[ed] that it be permitted to stake a claim to the proceeds at the end of this litigation as provided for under Ala. Code (1975), § 6-6-280, should [FNMA] prevail on its ejectment claim."

On May 4, 2016, the Denaults filed a response to FNMA's escrow motion. The Denaults noted that they had "filed an answer ... and disputed that [FNMA] had valid title due to a defective and void foreclosure sale and deed." The Denaults argued that,

> "[w]hile [FNMA] would have the right to recover mesne profits based upon the fair rental value of the property in the event that the Court ultimately determines that the [Denaults] have improperly

> remained in possession, at this time, there is no basis to make an interim ruling which would in effect grant an award of interim damages to [FNMA] while this matter is being litigated and without the Court having had the opportunity to hear any evidence in support of or in opposition to [FNMA's] rights to such an award."

On May 5, 2016, the trial court entered an order granting FNMA's escrow motion "in part." That order required Thomas Denault to "begin making payments of $500.00 per month beginning June 1, 2016, to the Clerk of Court of Jefferson County for said funds to be held in escrow in an interest bearing account until final adjudication of this matter."

On June 2, 2017, Seterus filed a motion for a summary judgment regarding the Denaults' claims against it. Seterus's motion was supported by copies of various documents; by an affidavit from Umeka Jackson, custodian of foreclosure records for Seterus; and by the Denaults' respective depositions. Also on June 2, 2017, Bank of America filed a motion for a summary judgment regarding the Denaults' claims against it. Bank of America's motion was supported by copies of various documents; by an affidavit from Ansheen Littlejohn, an officer of Bank of America; and by the Denaults' respective depositions.

On July 18, 2017, the trial court entered an order setting the motions for a summary judgment for a hearing to be held on August 31, 2017, at 10:00 a.m.

On August 29, 2017, the Denaults filed a response opposing the respective summary-judgment motions. In their response, the Denaults incorporated supporting documents they had filed with their response to FNMA's motion for a summary judgment and the evidentiary submissions that Seterus and Bank of America had submitted in support of their respective motions for a summary judgment. The Denaults contended that issues of material fact existed regarding the validity of the foreclosure sale and that FNMA, Seterus, and Bank of America had failed to submit admissible evidence in support of their respective summary-judgment motions. Further, the Denaults contended that FNMA had not sought an attorney-fee award, and they erroneously contended that FNMA had failed to assert a claim for damages in its complaint.

On August 31, 2017, before the scheduled hearing on the motions for a summary judgment, FNMA, Seterus, and Bank of America filed replies to the Denaults' response to the respective summary-judgment motions. FNMA contended, in part,

that the Denaults' response to FNMA's motion for a summary judgment failed to provide any "fact that would justify this Court denying [FNMA] possession of its real property or the damages it is clearly entitled to under Ala. Code 1975, § 6-6-280." FNMA asserted that "[t]he only reason the motion to escrow was granted in part was because the Court determined that $500 was a reasonable monthly amount when [FNMA] contended the agreed upon [principal and interest] payment within the [promissory] note should be the applied monthly payment." FNMA's reply also stated that FNMA had not sought an attorney-fee award but that such an award "would be within the purview of [the trial] court's authority." A footnote then adds:

> "[FNMA] does not waive or intend to waive any rights now or in the future to recover any damages from the Denaults not enumerated within these pleadings but as would be allowed for under the terms of the Denaults' Mortgage and Note including collection of attorneys' fees for having to enforce the Mortgage and Note due to the Denaults' default and years of refusal to peacefully vacate the property despite repeated requests."

On September 18, 2017, the trial court entered separate orders granting Seterus's and Bank of America's motions for a summary judgment. Also on September 18, 2017, the trial court

entered an order granting FNMA's motion for a summary judgment. The September 2017 order granting FNMA's motion for a summary judgment states:

> "1. The Denaults did not carry their burden pursuant to Rule 56(e), [Ala. R. Civ. P.,] of setting forth specific facts showing that there is a genuine issue for trial, because the Denaults failed to submit substantial evidence to establish a genuine issue of fact, as required by Alabama law....
>
> "2. [FNMA] has made a prima facie showing that it is entitled to immediate possession of the property in accordance with Ala. Code 1975, § 6-6-280.
>
> "3. Final judgment is hereby entered in favor of [FNMA] and against [the Denaults] on [FNMA's] ejectment claim brought pursuant to Ala. Code 1975, § 6-6-280.
>
> "4. Possession of the real property set out below ... is hereby awarded to [FNMA] and any lawful sheriff of the County of Jefferson is hereby ordered to restore possession of the real property to [FNMA].
>
> "[legal description omitted]
>
> "5. [The Denaults] have forfeited their right of redemption.
>
> "6. [FNMA] is entitled to all payments, plus interest, previously paid into this Court by the Denaults. The Clerk of Court is directed to release all funds paid into the Court by the [Denaults], to be made payable to [FNMA] and delivered to its counsel of record ... within 30 days of this Order.

> "7. For good cause having been shown, [FNMA] is immediately entitled to a Writ of Possession for recovery of its aforementioned property ..., without any necessity to observe the automatic stay provision of Ala. R. Civ. P. 62(a). The Denaults, despite not paying their loan since 2012, have continued to reside in the aforementioned property despite [FNMA's] entitlement to possession. Good cause has been shown for no further delay in [FNMA's] recovery of its aforementioned real property.
>
> "8. This is a FINAL ORDER.
>
> "9. Costs taxed as paid."

The September 2017 order granting FNMA's motion for a summary judgment includes no finding of fact regarding FNMA's damages arising from the Denaults' alleged wrongful retention of the property, the amount that the Denaults had paid to the Jefferson Circuit Clerk, or what interest had accrued on any such payments.

On September 21, 2017, FNMA obtained a writ of execution from the Jefferson Circuit Clerk. The writ sought "possession only"; reflected a "judgment amount of $0.00" and "damages/rent of $0.00"; and ordered the collection of "$0.00 for detention of the property."

On October 18, 2017, the Denaults filed a postjudgment motion and, contemporaneously therewith, an emergency motion

requesting that the trial court stay execution of its orders pending disposition of their postjudgment motion. See Rule 62(b), Ala. R. Civ. P. The Denaults argued that they had submitted substantial evidence indicating that the foreclosure sale was wrongful and that FNMA had failed to establish it was entitled to possession of the property. FNMA and Seterus filed responses opposing the Denault's postjudgment motion and their emergency motion to stay. FNMA's opposition to an emergency stay stated, in pertinent part:

> "[T]his Court will recall that the Denaults are under Court order to make monthly escrow payments pending the finality of this case. Per the Clerk of Court, as of yesterday, the Denaults have failed to make the September or October 2017 payments. This information is offered to only further highlight why the Denaults are not entitled to the extraordinary equitable relief of a stay."

The trial court held a hearing on the Denaults' postjudgment motion and emergency motion to stay. Thereafter, on October 23, 2017, the trial court entered an order "tak[ing] under advisement [the] Denaults' [postjudgment motion]" regarding the respective orders entering summary judgments in favor of FNMA and Seterus and staying those orders "pending a Court Order" on the Denaults' postjudgment motion. See Ex parte T.R.S., 794 So. 2d 1157, 1159 (Ala. Civ.

App. 2001) (holding that granting a motion for a stay is not an adjudication of a postjudgment motion for purposes of Rule 59.1, Ala. R. Civ. P.). The order did not expressly stay the September 2017 order entering a summary judgment in favor of Bank of America.

The trial court did not enter a subsequent ruling on the Denaults' postjudgment motion regarding the summary judgments in favor of FNMA and Seterus. On February 26, 2018, the Denaults filed a notice of appeal to this court; FNMA did not file a cross-appeal. We transferred the appeal to the Alabama Supreme Court for lack of jurisdiction; the Alabama Supreme Court then transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Analysis

In an action in the nature of an action in ejectment under Ala. Code 1975, § 6-6-280(b), "[t]he plaintiff may recover ... 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, to be computed up to the time of the verdict." See Black's Law Dictionary 39 (10th ed. 2014) (defining an "action for mesne profits" as "[a] lawsuit

seeking damages suffered by a landowner ... whereby the plaintiff may recover for both the use of the land during the wrongful occupation and the costs of ejectment"). FNMA, not the Denaults, would have had the burden of proof as to each element of FNMA's wrongful-retention claim at trial. Accordingly, FNMA had the burden of presenting evidence in support of its summary-judgment motion, including evidence establishing the amount of mesne profits and damages to which FNMA claimed it was entitled.[2] See Pritchett v. ICN Med.

[2]In Denmark v. Mercantile Stores Co., 844 So. 2d 1189 (Ala. 2002), the supreme court stated that,

> "[i]f ... '"the movant [for a summary judgment] has the burden of proof at trial, the movant must support his motion with credible evidence, using any of the material specified in Rule 56©, [Ala.] R. Civ. P. ('pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits')."' [Ex parte General Motors Corp.,] 769 So. 2d [903,] 909 [(Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially))]. '"The movant's proof must be such that he would be entitled to a directed verdict [now referred to as a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.] if this evidence was not controverted at trial."' Id. In other words, 'when the movant has the burden [of proof at trial], its own submissions in support of the motion must entitle it to judgment as a matter of law.' Albee Tomato, Inc. v. A.B. Shalom Produce Corp., 155 F.3d 612, 618 (2d Cir. 1998) (emphasis added)."

Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006) ("'The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law.'" (quoting Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994))). As noted above, however, FNMA presented no evidence as to the value of the use of the property during the Denaults' alleged wrongful retention of the property; FNMA merely presented evidence as to the amount of the monthly installments the Denaults had been required to pay under the promissory note and mortgage. Nevertheless, without making any finding as to FNMA's damages, the September 2017 order granting FNMA's summary-judgment motion purports to award FNMA "all payments, plus interest, previously paid into this Court by the Denaults" and directs the Jefferson Circuit Clerk "to

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844 So. 2d at 1195; see also Jones-Lowe Co. v. Southern Land & Expl. Co., 18 So. 3d 362, 367 (Ala. 2009) ("'"[T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden, then he is not entitled to judgment. No [response] to an insufficient showing is required."' Horn [v. Fadal Machining Ctrs., LLC], 972 So. 2d [63,] 69 [(Ala. 2007)] (quoting Ray v. Midfield Park, Inc., 293 Ala. 609, 612, 308 So. 2d 686, 688 (1975)).").

release all funds paid into the Court by the [Denaults]" to FNMA.

> "It is a settled jurisprudential principle that an appellate court must initially consider whether it has jurisdiction to hear and decide an appeal: '[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.' Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)."

Alabama Dep't of Revenue v. WestPoint Home, LLC, 256 So. 3d 1197, 1199 (Ala. Civ. App. 2018).

As the Alabama Supreme Court stated in Clary v. Cassels, 258 Ala. 183, 189, 61 So. 2d 692, 697 (1952):

> "The remedy by appeal 'was entirely unknown to the common law. Consequently, the remedy by appeal in actions at law and in equity is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision, and the courts have no inherent authority with respect thereto.' 4 C.J.S., Appeal and Error, § 18."

See also Wood v. Finney, 207 Ala. 160, 160, 92 So. 264, 264 (1922) ("Appeals are entirely of statutory creation" and an order appealed from must "come within" the pertinent provisions of a statute.).

Section 141(b), Ala. Const. 1901 (Off. Recomp.), provides that this court "shall exercise appellate jurisdiction under such terms and conditions as shall be provided by law and by

rules of the supreme court." See also Ala. Code 1975, § 12-3-10 (outlining the jurisdiction of Court of Civil Appeals).[3] Section 12-22-2, Ala. Code 1975, states: "From any final judgment of the circuit court ... , an appeal lies to the appropriate appellate court as a matter of right by either party, ... within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure." Thus, except in limited circumstances not applicable here, this court does not have jurisdiction to consider an appeal taken from a nonfinal judgment. See, e.g., James v. Rane, 8 So. 3d 286, 288 (Ala. 2008); Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 362 (Ala. 2004); see also Devane v. Smith, 216 Ala. 177, 178, 112 So. 837, 837 (1927) ("Appeal is statutory, and the question [of the appealability of an interlocutory order] is a jurisdictional one."). "'"When it is determined that an order appealed from is not a final judgment, it is the duty of

[3]Section 12-2-7, Ala. Code 1975, describes the jurisdiction of the Alabama Supreme Court. The Alabama Supreme Court transferred this appeal to this court pursuant to Ala. Code 1975, § 12-2-7, which states that "[t]he Supreme Court shall have authority: ... (6) To transfer to the Court of Civil Appeals, for determination by that court, any civil case appealed to the Supreme Court and within the appellate jurisdiction of the Supreme Court," subject to certain exceptions not applicable here.

the [appellate] [c]ourt to dismiss the appeal ex mero motu."'" Dzwonkowski, 892 So. 2d at 362 (quoting Tatum v. Freeman, 858 So. 2d 979, 980 (Ala. Civ. App. 2003), quoting in turn Powell v. Republic Nat'l Life Ins. Co., 293 Ala. 101, 102, 300 So. 2d 359, 360 (1974)); see also Worthington v. Morris, 212 Ala. 334, 335, 102 So. 620, 620 (1925) ("This appeal must be and is dismissed by this court ex mero motu, because the statute does not authorize it, and this court, without authority by statute, cannot take jurisdiction of it.").

For a judgment to be final, it must "put[] an end to the proceedings between the parties to a case and leave[] nothing for further adjudication." Ex parte Wharfhouse Rest. & Oyster Bar, Inc., 796 So. 2d 316, 320 (Ala. 2001). "The test of finality of a judgment or decree to support an appeal is whether such judgment or decree 'ascertains and declares such rights embracing the substantial merits of the controversy and the material issues litigated or necessarily involved in the litigation.' McClurkin v. McClurkin, 206 Ala. 513, 514, 90 So. 917, 918 (1921)." Morton v. Chrysler Motors Corp., 353 So. 2d 505, 507 (Ala. 1977).

As to the issue of finality in relation to a damages award, the supreme court has stated that "damages should be assessed with specificity leaving the parties with nothing to determine on their own. A judgment for damages to be final must, therefore, be for a sum certain determinable without resort to extraneous facts." Jewell v. Jackson & Whitsitt Cotton Co., 331 So. 2d 623, 625 (Ala. 1976) (final emphasis added). See also Drane v. King, 21 Ala. 556, 557 (1852) ("[W]e entertain no doubt that the judgment nisi in the present case is sufficiently certain; it is for sixty-three dollars, the debt, and twenty-six dollars and seventy-six cents damages, with interest from the second day of October, 1848. Without resort to any extraneous fact, we can ascertain the precise amount of this recovery.").

The supreme court also has stated that, "[w]here the amount of damages is an issue, ... the recognized rule of law in Alabama is that no appeal will lie from a judgment which does not adjudicate that issue by ascertainment of the amount of those damages." Moody v. State ex rel. Payne, 351 So. 2d 547, 551 (Ala. 1977) (emphasis added); see also 49 C.J.S. Judgments § 122 (2009) (footnotes omitted) ("[A] judgment for

money should be complete in itself, and must specify with definiteness and certainty the amount for which it is rendered.").

In Lucky v. Deutsche Bank National Trust Co., 46 So. 3d 966 (Ala. Civ. App. 2009), this court concluded that a judgment granting Deutsche Bank National Trust Company's ejectment claim but that "did not ... determine money damages owed to Deutsche Bank for Lucky's wrongful retention of the property, as Deutsche Bank had requested in its complaint," was not a final judgment. Id. at 967. "'That a judgment is not final when the amount of damages has not been fixed by [that judgment] is unquestionable. Moody v. State ex rel. Payne, 351 So. 2d 547 (Ala. 1977).' 'Automatic' Sprinkler Corp. of America v. B.F. Goodrich Co., 351 So. 2d 555, 557 (Ala. 1977)." Id.

Likewise, this court addressed the issue of the finality of a damages award in Young v. Sandlin, 703 So. 2d 1005 (Ala. Civ. App. 1997). In Young, J.H. Sandlin borrowed $29,600 from Florence Municipal Credit Union ("FMCU"); the loan was secured by a mortgage on land owned by Sandlin. Thereafter, Sandlin conveyed the land to June Young, who agreed to assume

Sandlin's obligations to FMCU. With Sandlin's cooperation, Young obtained credit-life insurance on Sandlin's life, and Young paid the premiums for the credit-life insurance in connection with the loan payments she made to FMCU.

Sandlin died on March 27, 1995, and, thereafter, FMCU received two checks totaling $25,500.60 from CUNA Mutual Insurance Society, which had issued the credit-life insurance to Sandlin. FMCU

> "applied $25,232.09 to the loan secured by the mortgage Young had agreed to assume and deposited the remaining $268.51 into Sandlin's share account.
>
> "[Sandlin's] Estate subsequently filed a complaint in the Lauderdale County Circuit Court naming Young as a defendant. In its complaint as amended, the Estate alleged that the credit union's application of the proceeds amounted to a payment by the Estate of a debt owed by Young, and that Young had thereby been unjustly enriched; the Estate further alleged that Young had obtained the proceeds through fraudulent or wrongful means. In addition, the Estate asserted that it was entitled either to a mortgage upon Young's property by right of subrogation to the credit union or to payment of the amount of the policy proceeds. The Estate's complaint demanded compensatory damages in the amount of $25,232.09, unspecified punitive damages, interest and costs."

703 So. 2d 1007 (footnote omitted). The trial court in Young entered a summary judgment in favor of Sandlin's estate; the judgment provided "'[that Young] is legally obligated to repay

the life insurance proceeds to the [Estate].'" Id. On appeal, this court stated:

> "Although neither Young nor the Estate has questioned this court's appellate jurisdiction in this case, we must first consider whether this court has jurisdiction over this appeal, because 'jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.' Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 211 (Ala. Civ. App. 1997) (quoting Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)). In pertinent part, Ala. Code 1975, § 12-22-2, provides that an appeal will lie to the appropriate appellate court, within the time and in the manner prescribed by the Rules of Appellate Procedure, '[f]rom any final judgment of the circuit court' (emphasis added).
>
> However, the trial court's summary judgment for the Estate awards no relief. First, the summary judgment does not assess a specific amount of compensatory damages, but states only that Young 'is legally obligated to repay the life insurance proceeds' to the Estate. This amount is not determinable from the face of the judgment, but only from extraneous facts. The Alabama Supreme Court has held that '[a] judgment for damages to be final must ... be for a sum certain determinable without resort to extraneous facts.' Moody v. State ex rel. Payne, 351 So. 2d 547, 551 (Ala. 1977) (quoting Jewell v. Jackson & Whitsitt Cotton Co., 331 So. 2d 623, 625 (Ala. 1976))."

Id. (some emphasis original; some emphasis added).[4]

[4]The Young court further noted that the judgment was not final because "the judgment does not award punitive damages, interest, or costs to which the Estate may be entitled, nor does it address the Estate's alternative contention that it is entitled to a mortgage upon Young's property." 703 So. 2d at

In the present case, title to the escrow account was not at issue, like, for instance, title to an account might be in a divorce proceeding. What was at issue, according to FNMA's complaint, was FNMA's entitlement to damages for the Denaults' alleged wrongful retention of the property. FNMA's escrow motion alleged that requiring the Denaults to pay $947.87 per month into the escrow account pending the adjudication of its wrongful-retention claim would only "partially satisfy" its claim for "mesne profits and damages for the wrongful use and occupancy of the property from the date of the foreclosure sale to the date of said judgment." (Emphasis added.) However, the trial court's escrow order merely required the Denaults to make payments of $500 per month beginning on June 1, 2016, "until final adjudication of this matter." (Emphasis added.)

FNMA's motion for a summary judgment made no mention of its claim alleging wrongful retention, and FNMA included no evidentiary submission as to the amount of damages FNMA allegedly had suffered or was continuing to suffer as a result of the Denaults' alleged wrongful retention of the property.

1008.

As noted above, in FNMA's reply to the Denaults' response to FNMA's motion for a summary judgment, FNMA mentioned its claim alleging wrongful retention and the escrow order, but FNMA again made no evidentiary submission as to the amount of damages caused by the Denaults' alleged wrongful retention of the property.

The record on appeal does not include a transcript of the hearing on the summary-judgment motions. Thus, the record does not disclose whether FNMA waived its right to pursue damages in addition to whatever amount the Denaults had paid into the escrow account, plus interest, as of the entry of the September 2017 order or whether FNMA and the Denaults might have agreed that the amount in the escrow account, plus interest, would satisfy FNMA's claim for damages. In any event, the September 2017 order regarding FNMA's motion for a summary judgment does not direct the entry of a damages award against the Denaults, and the order does not assess a specific amount of compensatory damages, determinable from the face of the judgment. Instead, in regard to FNMA's wrongful-detention claim, the September 2017 order addressing FNMA's summary-judgment motion merely directs the Jefferson Circuit Clerk to

forward to FNMA whatever funds the clerk had received from the Denaults, plus any interest that had accrued on those payments.

Upon review of the record, this court requested letter briefs as to the issue whether the September 2017 order granting FNMA's motion for a summary judgment fully adjudicated FNMA's claim for "money damages for the wrongful retention of said real property" or whether the Denaults' appeal is due to be dismissed as from a nonfinal judgment. FNMA contends in its letter brief that the order is a "'"complete adjudication of all matters in controversy"'" and is "'"conclusive and certain in itself."'" (Quoting Ford Motor Co. v. Tunnell, 641 So. 2d 1238, 1240 (Ala. 1994), quoting in turn Jewell, 331 So. 2d at 625.) FNMA's letter brief also appears to conflate FNMA's claim for possession of the property and its claim for damages for wrongful retention, stating that the September 2017 order grating its summary-judgment motion "complies with the [foregoing requirements for finality] as it adjudicated [FNMA's] ejectment claim conclusively finding that [FNMA] could have immediate possession of the real property, along with all money, plus

interest that had been paid into the clerk of court." Elsewhere in its letter brief, however, "FNMA maintains that the trial court's summary judgment order was final as to its ejectment claim, including a claim for damages." (Emphasis added.) FNMA adds that "the trial court's order conclusively determines a specific amount of money [totaling $14,570.58] awarded to [FNMA] as damages for its claim related to the Denaults' wrongful retention of the real property."

"This Court is limited to a review of the record alone and 'the record cannot be changed, altered or varied on appeal by statements in briefs of counsel, nor by affidavits or other evidence not appearing in the record.'" Green v. Standard Fire Ins. Co. of Alabama, 398 So. 2d 671, 673 (Ala. 1981) (quoting Cooper v. Adams, 295 Ala. 58, 61, 322 So. 2d 706, 708 (1975)). The September 2017 order grating FNMA's summary-judgment motion makes no reference to a specific amount of damages or to the amount that the Denaults had paid into the escrow account with the Jefferson Circuit Clerk as of the date of entry of that order.[5] The Denaults concede in their letter

[5]Assuming the Denaults made all payments required by the escrow order for the 16-month period between June 2016 and September 2017, the escrow account would have contained $8,000.00 (16 months x $500 = $8,000.00), plus interest.

brief that they have continued to make payments to the Jefferson Circuit Clerk after the entry of the September 2017 order, but they argue that the September 2017 order is not a final judgment because the trial court failed to award a specific amount of damages and to adjudicate all claims.[6] According to the Denaults' letter brief, they appealed as a protective matter because the September 2017 order granting

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Thus, it is unclear what the $14,570.58 amount mentioned in FNMA's letter brief is referring to. That amount does not correspond with the amount that the Denaults might have paid from June 1, 2016 (the date mentioned in the escrow order), through February 7, 2019 (the date of FNMA's letter brief) (32 months x $500 = $16,000, plus interest).

[6]The Denaults may have continued to make payments because they did not believe the September 2017 order granting FNMA's summary-judgment motion was a final judgment, and thus the escrow order required them to continue making payments. However, they also may have continued making payments so that FNMA would allow them to remain on the property or as a protective matter for purposes of future litigation (the Denaults provided security for costs without posting a bond). See Ala. Code 1975, § 6-6-293 ("The plaintiff may have judgment against the defendant for the rent of the premises which accrues after judgment and before the delivery of possession by motion in the circuit court where the judgment was entered, on 10 days' notice in writing, unless the judgment is stayed by appeal and bond, in which case the motion may be made after affirmance of the judgment."); Jones v. Regions Bank, 25 So. 3d 427, 440 (Ala. 2009) ("Because the plaintiffs had asserted a claim in the nature of ejectment pursuant to § 6-6-280(b), they were able to seek a judgment for postjudgment rents against Regions Bank and Advanced Realty pursuant to § 6-6-293, Ala. Code 1975.").

FNMA's summary-judgment motion purports to be a "'final order,' and the Circuit Clerk closed the case." In any event, the $14,570.58 amount that FNMA references in its letter brief further demonstrates that the September 2017 order granting FNMA's summary-judgment motion does not "assess [FNMA's damages] with specificity leaving the parties with nothing to determine on their own" or include "a sum certain determinable without resort to extraneous facts." Jewell, 331 So. 2d at 625.

Also, we have considered the issue of waiver. See DuBose v. McAteer, 238 So. 3d 43, 46 (Ala. Civ. App. 2017) ("McAteer has informed this court that she waived any claim for damages by applying only for possession of the property and the mobile home, so the default judgment resolved all the matters in controversy."); cf. Vestavia Country Club v. Armstrong, 271 Ala. 294, 296, 123 So. 2d 130, 133 (1960) ("[D]amages for detention is not essential to an ejectment action, but where such are claimed and a default judgment is entered with leave to prove the damages, such judgment is not final until the damages are either proved or waived."). In this case, the September 2017 order granting FNMA's summary-judgment motion

purports to make a damages award, and FNMA has not waived its claim for damages. Thus, what is at issue in the present case is not whether FNMA has waived its claim for damages, but whether FNMA might have waived a claim for damages in addition to whatever amount the Denaults had paid to the Jefferson Circuit Clerk, plus interest. The framing of that issue, however, highlights the flaw in the September 2017 order granting FNMA's summary-judgment motion, and confirms why no waiver argument can remedy the deficiency in that order. The sum-certain requirement has repeatedly been held to be a prerequisite to a final judgment, and thus a prerequisite to this court's exercise of appellate jurisdiction. See, e.g., Jewell, supra. Because the sum-certain requirement is a jurisdictional prerequisite, we cannot entertain the possibility that that requirement matters only when one of the parties complains about the amount of damages awarded; where the judgment provides a damages award, that judgment must fix damages by "a sum certain determinable without resort to extrinsic facts," regardless of the parties' positions. Id. at 625. Based on the foregoing, we pretermit further discussion of the issues raised by the Denaults on appeal.

The September 2017 order is not a final judgment as to FNMA's claim for damages, and thus no final judgment has been entered in this case. See Grantham v. Vanderzyl, 802 So. 2d 1077, 1079-80 (Ala. 2001) ("If a case involves multiple claims or multiple parties, an order is generally not final unless it disposes of all claims as to all parties. Rule 54(b), Ala. R. Civ. P."). Accordingly we dismiss the Denaults' appeal from the separate September 2017 orders granting summary judgments in favor of FNMA and in favor of Seterus.

APPEAL DISMISSED.

Thompson, P.J., and Donaldson and Hanson, JJ., concur.

Moore, J., concurs in the result, without writing.