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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Ex parte Tom Milton Rankin, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: Jennifer Rebecca Rankin

v.

Tom Milton Rankin, Jr.)

(Elmore Circuit Court, DR-18-900258)

EDWARDS, Judge.

In October 2018, Jennifer Rebecca Rankin ("the wife") filed in the Elmore Circuit Court ("the trial court") a

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complaint seeking a divorce from Tom Milton Rankin, Jr. ("the husband"). The husband filed a motion to dismiss the wife's complaint, arguing that the trial court lacked subject-matter jurisdiction over the wife's divorce action because the wife had failed to aver in her complaint that she had been a resident of Alabama for the six months preceding the filing of her complaint as required by Ala. Code 1975, § 30-2-5, and because the pendency of a divorce action initiated by the husband in Tennessee ("the Tennessee divorce action") precluded the continuation of the wife's divorce action. The husband attached to his motion certain pleadings and orders from the Tennessee divorce action.¹

At a hearing, the trial court "partially addressed" the motion to dismiss; in its order entered after that hearing on

¹We note that, unlike in situations involving motions to dismiss for failure to state a claim under Rule 12(b)(6), Ala. R. Civ. P., "[e]videntiary matters may be freely submitted on a motion to dismiss that attacks jurisdiction." Williams v. Skysite Commc'ns Corp., 781 So. 2d 241, 245 (Ala. Civ. App. 2000). Thus, the inclusion of documents relating to the Tennessee divorce action did not serve to convert the motion to dismiss into a motion for a summary judgment. See Williams, 781 So. 2d at 245 (explaining the concept of "speaking motions" under Rule 12(b)).

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January 9, 2019, the trial court stated that the wife would have 30 days to amend her complaint. The wife amended her complaint on January 29, 2019, after which the husband filed a renewed motion to dismiss, in which he reasserted his earlier arguments and contended that, because the wife's complaint did not properly invoke the subject-matter jurisdiction of the trial court, the wife's amendment to her complaint did not cure the lack of subject-matter jurisdiction. The trial court denied the husband's motion to dismiss on February 15, 2019. The husband filed this petition for the writ of mandamus on February 25, 2019.

"A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court.'

"Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001). 'A petition for a writ of mandamus is a proper means by which to seek review of a question of subject-matter jurisdiction.' Ex parte Williford, 902 So. 2d 658, 662 (Ala. 2004)."

Ex parte Ferguson, 15 So. 3d 520, 521 (Ala. Civ. App. 2008).

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The husband first argues that the wife's failure to allege in her initial complaint that she had been a resident of Alabama for the six months immediately preceding the filing of her complaint is a jurisdictional defect that prevented the trial court from obtaining jurisdiction over the wife's divorce action. The wife alleged that she lived in Wetumpka, Elmore County, that the parties had been married in Wetumpka in May 2014, and that the parties had separated while both were residents of Elmore County; however, she did not specifically allege that she had been a resident of Alabama for the six months preceding her filing of the complaint for a divorce.

Section 30-2-5 reads: "When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint, which must be alleged in the complaint and proved." The husband relies on § 30-2-5 and Wright v. Wright, 200 Ala. 489, 76 So. 431 (1917). As the husband contends, Wright states that "[t]he failure of the [complaint] to show complainant's residence, as required by the statute, was a defect of substance, of jurisdiction, not

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of mere form." Wright, 200 Ala. at 489, 76 So. at 431. Based on that language, the husband contends that the failure of the wife to allege that she had been an Alabama resident for the six months preceding the filing of her October 2018 complaint prevented the trial court from assuming subject-matter jurisdiction over the wife's divorce action.

The husband further argues that, because the wife failed to properly invoke the subject-matter jurisdiction of the trial court, the trial court was required to dismiss her action, and, he contends, the wife was not able to cure the defect in her complaint by amendment. The husband relies on Redtop Market, Inc., ex rel. Bolton v. State ex rel. Green, 66 So. 3d 204, 206 (Ala. 2010), and State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999) ("Rainbow Drive"), in support of his argument that the wife's amendment to her complaint to correct her averment regarding residency cannot cure the defect in the divorce action. Certainly, when a trial court lacks subject-matter jurisdiction over an action, a trial court must dismiss that action. Green, 66 So. 3d at 206. However, "[s]ubject-matter jurisdiction concerns a court's power to decide certain types of cases," Ex parte

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Seymour, 946 So. 2d 536, 538 (Ala. 2006), and a circuit court has subject-matter jurisdiction over a divorce action. See Ala. Code 1975, § 30-2-1. Furthermore, although the husband is correct that Rainbow Drive stands for the proposition that "a pleading purporting to amend a complaint, which complaint was filed by a party without standing, cannot relate back to the filing of the original complaint, because there is nothing 'back' to which to relate," Rainbow Drive, 740 So. 2d at 1028 (emphasis added), the continued viability of that holding is in question. Our supreme court has explained that the concept of standing should be confined to public-law cases. Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 46 (Ala. 2013).

We cannot agree that the cases relied upon by the husband support a conclusion that the wife was not permitted to amend her divorce complaint to more specifically allege that she had been an Alabama resident for the six months preceding the filing of her complaint. Furthermore, we note that, although the plaintiff wife in Wright had omitted language about being a resident of the state for the year² preceding the filing of

²At the time Wright was decided, the relevant statute, Ala. Code 1907, § 3802, required that, when the defendant in a divorce action was a nonresident, the plaintiff must allege and prove that he or she had been a resident of Alabama "for one year next before the filing" of the divorce complaint.

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her complaint, our supreme court reversed the judgment of divorce and remanded the cause, directing that the plaintiff wife "may have an opportunity to amend" her complaint. 200 Ala. at 489, 76 So. at 431. Thus, although Wright indicates that the failure to allege residency for the required period is "jurisdictional," it also indicates that the filing of an amendment to correct the omission is not precluded. Id.

The husband next argues that the trial court erred in failing to dismiss the wife's divorce action on the basis of the existence of the Tennessee divorce action. He relies on Attenta, Inc. v. Calhoun, 97 So. 3d 140, 146 (Ala. 2012), and Grimes v. Liberty National Life Insurance Co., 726 So. 2d 615, 617 (Ala. 1998) (quoting Ex parte Burch, 236 Ala. 662, 665, 184 So. 694, 697 (1938)), to support his argument that "'where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgments or decrees.'" However, both of those cases apply the doctrine to two courts that possess concurrent jurisdiction in the State of Alabama.

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As our supreme court explained in Ex parte Buck, 291 Ala. 689, 691, 287 So. 2d 441, 443 (1973):

"This Court has long been committed to the proposition that the pendency of a suit upon the same cause of action in another state is no cause of abatement of a suit instituted in this state. In Humphries v. Dawson, 38 Ala. 199 [(1861)], this Court stated:

"'If there be any reason which renders this principle [concurrent jurisdiction] inapplicable in the present case, a fatal objection to the plea is found in the other principle, that the pendency of a suit in another State is no cause of abatement of a suit instituted in this State.'

"This holding is in accord with the weight of authority and is equally applicable to actions for divorce. See 24 Am. Jur. 2d, Divorce and Separation, § 188; 27A C.J.S. Divorce § 99; Cox v. Cox, 234 Miss. 885, 108 So. 2d 422 [(1959)]."

Thus, we reject the husband's argument that the trial court was required to dismiss the wife's divorce complaint based on the existence of the Tennessee divorce action.

Because the husband has failed to demonstrate that he has a clear, legal right to a writ directing the trial court to dismiss the wife's divorce action, we deny the petition.

PETITION DENIED.

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