rel: May 17, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180535

Ex parte A.B.

PETITION FOR WRIT OF MANDAMUS

(In re: M.B. and J.B.

v.

A.B. and R.L.D.)

(Madison Juvenile Court, JU-18-23.02)

EDWARDS, Judge.

In January 2018, the Madison County Department of Human Resources ("DHR") filed in the Madison Juvenile Court ("the

juvenile court") a petition seeking a determination that M.D. ("the child") was dependent in the care of A.B. ("the mother") and R.L.D. ("the father"); DHR's action was assigned case number JU-18-23.01 ("DHR's action"). In June 2018, J.B. and M.B. ("the custodians") filed a verified motion to intervene in DHR's action. In that motion, the custodians sought custody of the child, who, they averred, had been placed in their custody by a previous order entered by the juvenile court at DHR's recommendation. In September 2018, the juvenile court entered an order denying the custodians' motion to intervene, determining that the child "remain[ed]" dependent,[1] continuing legal custody in DHR, and ordering that the child remain in the physical custody of the custodians. The custodians did not appeal from the denial of their motion to intervene.

In January 2019, the custodians commenced in the juvenile court a dependency action seeking custody of the child; that action was assigned case number JU-18-23.02 ("the custodians' action"). In March 2019, the custodians filed a motion requesting that the juvenile court consolidate the custodians'

[1]The materials before this court do not contain an earlier order or judgment determining that the child was dependent.

action with DHR's action. The mother and the father filed a joint motion on March 14, 2019, seeking to have the custodians' action dismissed on the ground of res judicata; they supported that motion with a copy of the custodians' motion to intervene that had been filed in DHR's action and the order denying that motion. After a hearing, the juvenile court entered an order on March 29, 2019, consolidating DHR's action and the custodians' action.

The mother filed her petition for the writ of mandamus on April 10, 2019.[2] She argues that the juvenile court erred in denying the "motion to dismiss" filed by her and the father because, she says, the denial of the custodians' motion to intervene in DHR's action was an adjudication on the merits of their request for custody and because, she says, the custodians failed to appeal the denial of their motion to intervene and, therefore, the continuation of the custodians' action is precluded by the doctrine of res judicata. We disagree and deny the mother's petition.

We first note that the "motion to dismiss" filed by the mother and the father was not, in fact, a motion to dismiss.

[2]The father is not a party to this mandamus proceeding.

Our supreme court has explained that "although, '[i]n some instances, res judicata may be properly raised by means of a motion to dismiss ... [it is] more commonly [raised] through a motion for a summary judgment.'" Ex parte Scannelly, 74 So. 3d 432, 439 (Ala. 2011) (quoting Wilger v. State Dep't of Pensions & Sec., 390 So. 2d 656, 657 (Ala. Civ. App. 1980)). The affirmative defense of res judicata typically requires proof of a prior litigation, which is often not clear from the face of a complaint. See 1 Champ Lyons, Jr., & Ally W. Howell, Alabama Rules of Civil Procedure Annotated § 12.7, p. 304 (4th ed. 2004) ("[The defense of res judicata is] generally considered appropriately raised by a motion to dismiss only in a context where the defect appears on the face of the complaint."). In most cases, therefore, a motion to dismiss on the ground of res judicata is supported by attachments, which converts it into a motion for a summary judgment. See Ex parte Webber, 157 So. 3d 887, 891 (Ala. 2014) (treating a motion to dismiss supported by a copy of a prior judgment as a motion for a summary judgment on the affirmative defense of res judicata); Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 792 (Ala. 2007)

(construing a motion to dismiss based on res judicata and collateral-estoppel grounds to be a motion for a summary judgment on those affirmative defenses and noting that "the trial court clearly considered matters outside the pleadings in making its determination, thus converting the Rule 12(b)(6)[, Ala. R. Civ. P.,] motion to dismiss into a Rule 56, Ala. R. Civ. P., summary-judgment motion"); see also Rule 12(b), Ala. R. Civ. P.

The "motion to dismiss" filed by the mother and the father was supported by copies of the custodians' motion to intervene in DHR's action and the order denying that motion. The complaint filed by the custodians did not reference DHR's action or the custodians' motion to intervene in that action. We therefore conclude that the "motion to dismiss" was, in fact, a motion for a summary judgment. See Ex parte Webber, 157 So. 3d at 891.

A petition for the writ of mandamus is a proper vehicle for seeking review of the denial of a motion for a summary judgment asserting the ground of res judicata. Id.

> "'The standard governing our review of an issue presented in a petition for the writ of mandamus is well established:

> "'"[M]andamus is a drastic and extraordinary writ to be issued 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."'"

Ex parte Webber, 157 So. 3d at 891 (quoting Ex parte Cupps, 782 So. 2d 772, 774-75 (Ala. 2000), quoting in turn Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989)).

The mother argues that the denial of the custodians' motion to intervene in DHR's action should have preclusive effect on the custodians' action seeking to have the child declared dependent and seeking an award of the child's custody. She contends that the denial of the custodians' motion to intervene satisfied the elements of the affirmative defense of res judicata, which are: "'(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with the same parties, and (4) with the same subject matter presented in both actions.'" Mars Hill Baptist Church of Anniston, Alabama, Inc. v. Mars Hill Missionary Baptist Church, 761 So. 2d 975, 977-78 (Ala. 1999) (quoting Smith v.

Union Bank & Trust Co., 653 So. 2d 933, 934 (Ala. 1995)). Specifically, the mother argues that the denial of the custodians' motion to intervene was a decision on the merits of the custodians' custody claim in DHR's action, that the juvenile court had exclusive jurisdiction over the parties and the claims presented, that DHR's action and the custodians' action involved the same parties, and that the two actions involved the same subject matter, i.e., the dependency and custody of the child.

However, the denial of the custodians' motion to intervene was a judgment on the merits of that controversy -- the propriety of the request to intervene. See Mars Hill Baptist Church, 761 So. 2d at 978 (discussing whether the denial of a motion to intervene had preclusive effect under the doctrine of res judicata on a second motion seeking intervention in the same action). Our supreme court has also explained that the denial of a motion to intervene that does "not address and dispose of the intervention motion on the merits" of the underlying claim of the prospective intervenor is not a prior adjudication on the merits of the underlying claim. Board of Trs. of Univ. of Alabama ex rel. Univ. of

Alabama Hosp. v. American Res. Ins. Co., 5 So. 3d 521, 533 (Ala. 2008). Furthermore, various federal courts, when considering appeals involving the denial of motion to intervene, have explained that a party whose motion to intervene is denied remains free to file a separate action. See, e.g., R & G Mortg. Corp. v. Federal Home Loan Mortg. Corp., 584 F.3d 1, 10 (1st Cir. 2009) (noting that the potential intervenor would not suffer prejudice if its motion seeking intervention as of right was denied because "[i]t may bring a separate action"); In re Holocaust Victim Assets Litig., 225 F.3d 191, 199 (2d Cir. 2000) (noting that, if the potential intervenors' motion to intervene as of right was denied, they "remain free to file a separate action"); Head v. Jellico Hous. Auth., 870 F.2d 1117, 1124 (6th Cir. 1989) (affirming the denial of a request for permissive intervention when the potential intervenor had since filed a separate action); Worlds v. Department of Health & Rehab. Servs., State of Florida, 929 F.2d 591, 595 (11th 1991) (same); and Korioth v. Brisco, 523 F.2d 1271, 1279 (5th Cir. 1975) (explaining that the denial of a motion to intervene was not an abuse of the district court's discretion, "especially when no barrier

appeared to preclude [the potential intervenor] from bringing a new action in its own name"). We cannot conclude, therefore, that the denial of the custodians' motion to intervene in DHR's action was an adjudication on the merits of the custodians' dependency and custody claims, such that the doctrine of res judicata would apply to bar those claims in the custodians' action.

The mother has failed to establish that she has a clear legal right to the relief she seeks. Accordingly, we deny the petition.

PETITION DENIED.

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