Rel: September 18, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190237

Michael Dunkin

v.

Bobby Schrimsher & Sons, Inc.

Appeal from Madison Circuit Court
(CV-16-901325)

THOMPSON, Presiding Judge.

On August 10, 2016, Bobby Schrimsher & Sons, Inc. ("Schrimsher & Sons"), filed in the Madison Circuit Court ("the trial court") a complaint against Michael Dunkin and Bank of America, N.A. In that complaint, Schrimsher & Sons

alleged that the defendants owed it $26,659.15 plus interest and costs in connection with materials Schrimsher & Sons provided Dunkin to make improvements and repairs on certain real property he owned that had been damaged in a structural fire. In its complaint, Schrimsher & Sons sought the imposition of a materialman's lien, and it attached to its complaint a verified statement of lien. The record contains no indication that Bank of America, N.A., was served with process of the action, and, therefore, it never became a party to the action.

Dunkin answered Schrimsher & Sons' complaint, denying liability. On August 14, 2018, while the action remained pending, Dunkin filed in the trial court a suggestion of bankruptcy in which he notified the trial court that on August 10, 2018, he and his wife had filed for Chapter 13 bankruptcy protection in the United States Bankruptcy Court for the Northern District of Alabama ("the bankruptcy court").[1] The bankruptcy court designated Dunkin's action as case number 18-82392. Schrimsher & Sons' action in the trial court was

[1]Dunkin's wife is not a party to the action below or to this appeal.

removed to the bankruptcy court.

On December 28, 2018, the bankruptcy court entered an order in case number 18-82392 remanding Schrimsher & Sons' action to the trial court; that bankruptcy-court order was filed in the trial court on January 15, 2019, by Schrimsher & Sons. On January 22, 2019, Schrimsher & Sons moved the trial court for a summary judgment on its claims.

On February 12, 2019, Dunkin filed in the trial court another suggestion of bankruptcy; in that filing, Dunkin stated that he had filed a new Chapter 13 bankruptcy action on January 30, 2019, and that the bankruptcy court had issued an automatic stay pursuant to 11 U.S.C. § 362, a part of the bankruptcy code. We note that the record does not indicate the nature of the disposition of the earlier bankruptcy action, i.e., case number 18-82392. The bankruptcy court designated Dunkin's new, 2019 bankruptcy action as case number 19-80275. Dunkin subsequently submitted a May 30, 2019, bankruptcy-court order entered in bankruptcy case number 19-80275 in which the bankruptcy court lifted the automatic stay to allow Schrimsher & Sons' claim to be litigated in the trial court. The May 30, 2019, bankruptcy-court order stated:

"This case came before the Court on May 30, 2019, for Evidentiary Hearing on Objection to Claim #4 of Bobby Schrimsher & Sons, Inc. (hereinafter 'Schrimsher & Sons'). ... On February 27, 2019, Schrimsher & Sons filed a secured claim in this case for $32,867.27. The Debtors[2] filed an Objection to the Claim, arguing that the claim is not secured.

"Prior to the hearing, the parties filed a Joint Stipulation of Facts pursuant to which the parties stipulated, for purposes of the evidentiary hearing, that Schrimsher & Sons timely provided notice to [Dunkin] regarding its claim, filed a verified statement of lien in the probate office of the county where the real property is located, and filed a complaint to enforce its lien in the [trial court], styled Bobby Schrimsher & Sons, Inc. v. Dunkin, et al., CV-16-901325. During the hearing, the parties agreed that Schrimsher & Sons perfected its lien under Alabama law. The only remaining issue is the amount of [Schrimsher & Sons'] claim for the work performed which is an issue pending before the [trial court]. Accordingly, the Court finds that good cause exists to lift the stay to allow the parties to proceed in the [trial court] to determine the amount of Schrimsher & Sons' claim. The Court having considered the Objection to Claim, and based on the agreement of the parties, it is hereby

"ORDERED, ADJUDGED AND DECREED as follows:

"1. The stay is hereby lifted pursuant to 11 U.S.C. § 362(d)(1) to allow the parties to proceed in the [trial court] in the case styled Bobby Schrimsher & Sons, Inc. v. Dunkin, et al., 47-CV-2016-901325 for the limited purpose of determining the amount of Schrimsher & Sons' claim.

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[2]Dunkin's wife is listed as a co-debtor in case number 19-80275.

> "2. This Court will continue the Objection to Claim generally pending a determination by the [trial court] regarding the amount of Schrimsher & Sons' claim.
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> "3. After the [trial court] issues a ruling determining the amount of the claim, the parties are directed to either submit an Agreed Order on Objection to Claim in conformity with the [trial court's] ruling or to file a Joint Report to the Court requesting a hearing on the Objection to Claim."

After the filing in the trial court of the May 30, 2019, bankruptcy-court order entered in bankruptcy case number 19-80275, Schrimsher & Sons renewed its motion for a summary judgment. Dunkin filed a response in opposition to that summary-judgment motion.

On October 28, 2019, the trial court entered a summary judgment in favor of Schrimsher & Sons. The trial court determined that Dunkin owed Schrimsher & Sons a total of $32,413.14, plus interest. In its summary judgment, the trial court noted that the bankruptcy court had already determined, based on a stipulation of the parties, that Schrimsher & Sons had taken all steps necessary for the imposition of a materialman's lien and that the bankruptcy court had concluded that Schrimsher & Sons' claim was secured.

On December 4, 2019, Dunkin filed a notice of appeal to

this court from the trial court's October 28, 2019, summary judgment.[3] This court entered a December 30, 2019, order noting that the docketing statement indicated that a bankruptcy action was pending, ordering the parties to provide information regarding that bankruptcy action, and requiring that a suggestion of bankruptcy be filed. Schrimsher & Sons filed a motion to dismiss the appeal on the basis that it was filed in contravention of a bankruptcy stay and is taken from a nonfinal order.[4] Schrimsher & Sons has renewed that motion twice during the time the appeal has been pending.

On January 23, 2020, this court entered an order staying

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[3]The trial court's judgment is within the original jurisdiction of this court. See § 12-3-10, Ala. Code 1975 (providing that the Court of Civil Appeals has "exclusive appellate jurisdiction of all civil cases where the amount involved, exclusive of interest and costs, does not exceed $50,000 ....").

[4]Schrimsher & Sons moved this court to dismiss this appeal, arguing that the trial court's judgment was not final because the trial court had not ordered that the property subject to the materialman's lien be sold. This court rejected that argument, and on January 23, 2020, we entered an order denying that motion to dismiss. Subsequently, on February 13, 2020, this court requested letter briefs on the issue whether Dunkin's notice of appeal invoked the jurisdiction of this court, and we have reexamined the issue in this opinion. As is explained later in this opinion, we have again concluded that the October 28, 2019, summary judgment was sufficiently final to support the appeal.

this appeal because of the pending bankruptcy proceedings. Thereafter, Dunkin filed in the bankruptcy court a motion to clarify its May 30, 2019, order that lifted the automatic stay so the trial court could resolve the parties' dispute. Dunkin did not submit to this court a copy of the 2020 motion he filed in the bankruptcy court. On February 5, 2020, Dunkin filed in this court a February 3, 2020, order of the bankruptcy court in which that court stated:

> "Before the Court is the Debtors' Motion to Revise and Clarify Order entered on May 30, 2019, lifting the Automatic Stay to allow the parties to proceed in the [trial court] to determine the amount of Schrimsher & Sons, Inc.'s claim ('Motion to Clarify Order'). For good cause shown, it is hereby
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> "ORDERED, ADJUDGED AND DECREED as follows:
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> "1. The Motion to Clarify Order is APPROVED.
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> "2. The stay is hereby lifted pursuant to 11 U.S.C. § 362(d)(1) to allow the parties to proceed in the Alabama Supreme Court with the appeal of any Order entered by the [trial court] regarding the claim of Schrimsher & Sons, Inc., and extends to any appellate review of any Order of the [trial court] entered in case number CV-16-901325."

On February 13, 2020, this court entered an order requesting that the parties submit letter briefs to this court

on the jurisdictional issues regarding whether the trial court's October 28, 2019, order was sufficiently final to support the appeal and whether Dunkin's notice of appeal filed during the pendency of bankruptcy case number 19-80275 was void pursuant to the holding of Alt v. Alt, 257 So. 3d 873 (Ala. Civ. App. 2017). The parties submitted their letter briefs to this court, arguing their respective positions on those issues.

To invoke the jurisdiction of an appellate court, a party must file a valid and timely notice of appeal. Blevins v. Thomas R. Boller, P.C., 257 So. 3d 859, 863 (Ala. Civ. App. 2017) ("'The timely filing of the notice of appeal is a jurisdictional act.'" (quoting Thompson v. Keith, 365 So. 2d 971, 972 (Ala. 1978))). A valid notice of appeal, however, must be taken from a final judgment: "This court can obtain jurisdiction over an appeal only after a timely notice of appeal from a final judgment has been filed with the clerk of the trial court." Gamble v. First Alabama Bank, 404 So. 2d 688, 689 (Ala. Civ. App. 1981). See also Deal v. Deal, 899 So. 2d 1010, 1011 (Ala. Civ. App. 2004) ("The question whether a judgment is final is a jurisdictional question, and the

reviewing court, on a determination that the judgment is not final, has a duty to dismiss the case.").

In Kyles v. Kyles, 202 So. 3d 684 (Ala. Civ. App. 2016), the wife in that case filed an appeal of an April 8, 2013, divorce order, but this court dismissed her appeal for want of prosecution. On January 28, 2015, the trial court in that case entered a judgment that resolved the last of the pending issues between the parties, and the wife timely appealed from that judgment. As an initial matter, this court determined that the April 8, 2013, order had not been a final judgment that would support the wife's first appeal. We concluded, among other things, that the January 28, 2015, judgment was a final judgment and that the wife's appeal of that judgment was valid and timely. Kyles v. Kyles, 202 So. 3d at 686.

Accordingly, the determination of whether the trial court's October 28, 2019, order was a final judgment that will support an appeal is a threshold question. Kyles v. Kyles, supra. In its complaint in this action, Schrimsher & Sons sought a determination of the amount owed to it and the imposition of a materialman's lien for the amount of its claim; it also requested that the trial court order that the

property subject to that materialman's lien be sold to satisfy the lien. The bankruptcy court's May 30, 2019, order specifically states that the parties agreed that Schrimsher & Sons had properly filed the verified statement of lien and that it had timely filed a complaint in the trial court seeking to enforce its claimed lien. The bankruptcy court's May 30, 2019, order clearly provides that the only remaining issue between the parties with regard to Schrimsher & Sons' claim is the amount of that claim.[5] In its October 28, 2019, judgment, the trial court determined the amount it concluded should be awarded to Schrimsher & Sons. In addition, the trial court granted the other remedies requested by Schrimsher & Sons, i.e., the lien and the sale of the property, by stating that it would issue orders to effect that relief if Dunkin failed to comply with the terms of any order of the bankruptcy court that might pertain to those issues.

A final judgment is one that adjudicates all of the parties' claims. Wilson v. Wilson, 736 So. 2d 633, 634 (Ala.

[5]As is explained later in this opinion, the parties dispute whether the bankruptcy court's May 30, 2019, order established Dunkin's liability to Schrimsher & Sons. The resolution of that issue is not pertinent to the determination of whether this court has jurisdiction over the appeal.

Civ. App. 1999). In this case, the trial court ruled on all of the parties' claims, i.e., it found that the parties had agreed that Schrimsher & Sons had taken appropriate action to pursue its claim for a materialman's lien; it determined Dunkin's liability and the amount of damages and imposed the lien; and it ordered that the property could be sold to satisfy the lien if Dunkin did not comply with the terms of the bankruptcy-court orders or if the bankruptcy-court orders did not provide that relief to Schrimsher & Sons.

The language in the trial court's October 28, 2019, summary judgment specifying that it retained jurisdiction to enforce its judgment did not affect the finality of that judgment.

> "There is no question that a trial court is empowered to interpret, clarify, and ensure compliance with its judgments.
>
> > "'A trial court has inherent authority to interpret, clarify, and enforce its own final judgments. See Helms v. Helms' Kennels, Inc., 646 So. 2d 1343, 1347 (Ala. 1994) ("a trial court does have residual jurisdiction or authority to take certain actions necessary to enforce or interpret a final judgment"); Gild v. Holmes, 680 So. 2d 326, 329 (Ala. Civ. App. 1996) ("A trial court possesses an inherent power over its own judgments that authorizes it to interpret, clarify, implement, or enforce

> those judgments."). Thus, even after this Court, on the direct appeal, affirm[s] the trial court's ... judgment, [the trial] court retain[s] jurisdiction to interpret and clarify that judgment.'
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> "State Pers. Bd. v. Akers, 797 So. 2d [422] at 424 [(Ala. 2000)]."

Thornton v. Elmore Cty. Bd. of Educ., 882 So. 2d 855, 858-59 (Ala. Civ. App. 2003). See also McCarron v. McCarron, 168 So. 3d 68, 80 n.4 (Ala. Civ. App. 2014) (noting that a provision of a divorce judgment that reserved the method by which a husband would pay part of a property settlement did not "affect the finality of the judgment because the trial court did not reserve the right to change its property division; rather, it retained jurisdiction solely over the enforcement of the property division"); and Boyd v. Boyd, 447 So. 2d 790, 793 (Ala. Civ. App. 1984) ("The trial court, by operation of law, retained jurisdiction so that any future orders or judgments could be entered as might be prudent in order to enforce, implement, or finally dispose of the entire case by effecting a sale of the home of the parties."). This court has explained that "[w]hile a trial court retains the authority to interpret, clarify, and enforce its judgments, this does not give it the authority to cause a final judgment to state

something other than that which was proclaimed in that judgment and thereby modify the vested rights of the parties." Williams v. Williams, 905 So. 2d 820, 831 (Ala. Civ. App. 2004).

The trial court had the authority, without expressly reserving that power for itself, to enter any orders necessary to implement its October 28, 2019, judgment. Boyd v. Boyd, supra. In this case, the trial court expressly stated the existence of that power by reminding the parties that it could enforce its judgment if its ruling was not effectuated in the bankruptcy court. We conclude that the October 28, 2019, judgment was final and capable of supporting Dunkin's appeal and that the trial court's reservation of jurisdiction to itself was merely to implement and enforce that judgment if it became necessary to do so.

The next issue addressed by the parties in their letter briefs regarding this court's jurisdiction is the validity of Dunkin's notice of appeal. The filing of a bankruptcy action, among other things, triggers an automatic stay of other litigation such as the trial-court action initiated by Schrimsher & Sons against Dunkin.

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of --
>
> > "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > "...."
> >
> > "(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> >
> > "...."

11 U.S.C. § 362.

In Alt v. Alt, 257 So. 3d 873 (Ala. Civ. App. 2017), the husband in that case appealed a divorce judgment on February 24, 2017. The wife in that case notified this court that on February 2, 2017, i.e., before the husband had filed his notice of appeal, the husband filed for bankruptcy protection. The wife later submitted to this court evidence indicating that the bankruptcy court in that case had terminated the

automatic stay on April 4, 2017. The wife argued that the husband's notice of appeal was a nullity because it was filed during the time the automatic stay was in effect. This court agreed, explaining:

> "The commencement of a bankruptcy action 'operates as a stay' of, among other things, 'the commencement or continuation ... of a judicial ... action or proceeding against the debtor....' 11 U.S.C. § 362(a)(1). The filing of a notice of appeal has been held to be a continuation of a judicial proceeding that is subject to the automatic-stay provision of § 362. AmMed Surgical Equip., LLC v. Professional Med. Billing Specialists, LLC, 162 So. 3d 209, 211 (Fla. Dist. Ct. App. 2015); In re Capgro Leasing Assocs., 169 B.R. 305, 310-11 (Bankr. E.D. N.Y. 1994). Accordingly, a notice of appeal, filed after a petition is filed in the bankruptcy court, is considered 'void and of null effect.' In re Capgro Leasing Assocs., 169 B.R. at 313; AmMed Surgical Equip., LLC v. Professional Med. Billing Specialists, LLC, 162 So. 3d at 211 ('A notice of appeal filed in a federal appellate court following the filing of a bankruptcy petition is ineffective to confer jurisdiction on the court.'). Thus, the husband's February 24, 2017, notice of appeal, because it was filed after the husband filed for bankruptcy protection, was not effective."

Alt v. Alt, 257 So. 3d at 875. Thus, in Alt v. Alt, supra, this court held that, because the husband had filed a notice of appeal while the automatic stay issued by the bankruptcy court was in place, the notice of appeal was a nullity that did not confer jurisdiction in this court. Alt v. Alt, 257

So. 3d at 876.

Similarly, in Hewett v. Wells Fargo Bank, N.A., 197 So. 3d 1105 (Fla. Dist. Ct. App. 2016), which is cited in Alt v. Alt, supra, a Florida appellate court held that a notice of appeal filed after an appellant had sought bankruptcy protection was a nullity. In that case, the Florida trial court entered a judgment foreclosing on property owned by Hewett. Hewett filed for bankruptcy protection after a foreclosure judgment had been entered but before he filed a notice of appeal of that foreclosure judgment. The Florida appellate court stated that any action taken in violation of an automatic-stay order in a bankruptcy action is void. Hewett v. Wells Fargo Bank, N.A., 197 So. 3d at 1106. The Florida appellate court concluded that Hewett's notice of appeal, filed after he sought bankruptcy protection, was a nullity and, therefore, that the Florida appellate court lacked jurisdiction to consider the appeal. 197 So. 3d at 1106–07.

The facts of this case, however, are somewhat different from those of Alt v. Alt, supra, and Hewett v. Wells Fargo Bank, N.A., supra. In this case, Dunkin filed for bankruptcy protection during the course of the litigation in the trial

court. The bankruptcy court entered the May 30, 2019, order lifting the automatic stay so that the amount of Schrimsher & Sons' claim could be determined. In other words, the bankruptcy court's May 30, 2019, order granting relief from the automatic stay allowed Schrimsher & Sons' claim to proceed to a judgment in the trial court.

Dunkin filed his December 4, 2019, notice of appeal from the trial court's October 28, 2019, judgment. In its February 3, 2020, order, the bankruptcy court "clarified" that it intended its May 30, 2019, order to allow "appellate review" of the trial court's judgment. The issue before this court is whether the bankruptcy court's February 3, 2020, order was effective to clarify the May 30, 2019, order and, therefore, to render Dunkin's December 4, 2019, notice of appeal valid and sufficient to invoke this court's jurisdiction.

Dunkin argues before this court that, under the bankruptcy code, his notice of appeal to this court constituted a "continuation" of the trial-court action. We agree that, generally, an appeal of a judgment entered in a legal action constitutes a continuation of that action for the purposes of the automatic-stay provision of the bankruptcy

code. See AmMed Surgical Equip., LLC v. Professional Med. Billing Specialists, LLC, 162 So. 3d 209, 211 (Fla. Dist. Ct. App. 2015) ("We conclude that the filing of a notice of appeal in state court should be considered the 'continuation ... of a judicial ... proceeding against' the appellant [i.e., the debtor]. 11 U.S.C. § 362(a)(1)." (footnote omitted)); Equity Title LLC v. Schulte, 126 Nev. 709, 367 P.3d 767 (2010) (table) (unpublished order) ("An appeal, for purposes of the automatic bankruptcy stay, is considered a continuation of the action in the trial court."); and Ingersoll-Rand Fin. Corp. v. Miller Min. Co., 817 F.2d 1424, 1426 (9th Cir. 1987) ("Although the instant appeal is clearly a continuation of a judicial proceeding, a question arises in the interpretation of the phrase 'against the debtor.'").

Schrimsher & Sons argues, however, that the May 30, 2019, bankruptcy-court order was specifically limited to the determination of the amount of Schrimsher & Sons' claim and that, by requiring additional filings in the bankruptcy court, the May 30, 2019, order did not authorize an appeal to this court. Schrimsher & Sons contends that, given the limited scope of the May 30, 2019, bankruptcy-court order, the

automatic stay had been lifted only for the purpose of determining the amount of its claim and that any further action, including Dunkin's December 4, 2019, notice of appeal, was void because, it says, that notice of appeal was filed when the automatic stay was in place. See, generally, Alt v. Alt, supra. In essence, Schrimsher & Sons contends that the relief from the automatic stay ended upon the entry of the October 28, 2019, judgment and that, therefore, that the action in the trial court could not "continue" after that date.

Given the language of the bankruptcy court's orders, we must determine whether this appeal is a continuation of the matter the bankruptcy court permitted the trial court to resolve. In its February 3, 2020, order, the bankruptcy court explicitly stated that it was "clarify[ing]" its earlier, May 30, 2019, order lifting the automatic stay "to allow the parties to proceed in the Alabama Supreme Court with the appeal of any [trial court] order ... and extends to any appellate review of any [trial court] order." In their letter briefs submitted to this court, the parties do not address the bankruptcy court's authority to clarify or modify its orders

enforcing or granting relief from the automatic stay. This issue, however, is jurisdictional, and, therefore, we must address it.

This court's research has revealed a Pennsylvania case that is somewhat similar to this one. In Graziani v. Randolph, 887 A.2d 1244, 1248 (Pa. Super. Ct. 2005), on March 22, 2002, the plaintiff sued the defendants for injuries she allegedly sustained in a November 25, 2000, motor-vehicle accident. At the time she filed her complaint, the plaintiff had no knowledge that on July 9, 2001, one of the defendants had filed for bankruptcy protection and had obtained an automatic stay of any claims against it. The plaintiff obtained a default judgment, and, subsequently, in January 2003, she obtained an order from the bankruptcy court in that case that allowed the continuation of the litigation. The defendants argued before the trial court in that case that the plaintiff's complaint was void because it had been filed in violation of the automatic stay, and the trial court rejected that argument. 887 A.2d at 1246. The Superior Court of Pennsylvania affirmed. 887 A.2d at 1247. Later, the bankruptcy court entered a 2005 order clarifying its earlier

2003 order, stating that it had provided retroactive relief from the automatic stay so as to allow the plaintiff's complaint to stand but not authorize the default judgment, and the defendants sought, and were awarded, a reconsideration of their appeal. In reconsidering the arguments as framed by that state's supreme court, the Superior Court of Pennsylvania stated:

> "We acknowledge that the bankruptcy court has jurisdiction to determine the extent and terms of the automatic stay under 11 U.S.C. § 362. See Diaz v. State of Texas (In re Gandy), 327 B.R. 796, 801 (Bankr. S.D. Tex. 2005) (noting that 'state courts lack authority to terminate the stay when it in fact does apply. The bankruptcy court alone has authority to modify the automatic stay.'); Mirzai v. Kolbe Foods, Inc., 271 B.R. 647, 654 (C.D. Cal. 2001) ('The longstanding rule is that a state court judgment entered in a case which falls within the federal courts' exclusive jurisdiction is subject to collateral attack in federal courts') (citation and quotations omitted); In re Raboin, 135 B.R. 682, 684 (Bankr. D. Kan. 1991) ('[a bankruptcy court] has exclusive jurisdiction to determine the extent and effect of the stay, and the state court's ruling to the contrary does not bar the debtor's present motion.'). We find that it is well-established that a bankruptcy court has the right to modify or clarify its orders relating to the scope of a stay."

Graziani v. Randolph, 887 A.2d at 1248.

Similarly, the Court of Appeals of Indiana has stated:

> "The bankruptcy court has exclusive jurisdiction to interpret the application and scope of the automatic

> stay. Reich v. Reich (1993) Ind. App., 605 N.E.2d 1178, 1182. Furthermore, Section 362(d) of the Bankruptcy Code provides that the bankruptcy court has authority to grant relief from the automatic stay 'by terminating, annulling, modifying, or conditioning such stay....' 11 U.S.C. § 362(d). The ability of the bankruptcy court 'to modify its own injunction fits with the Code's policy of maintaining control over a bankruptcy discharge....' Hammes v. Brumley (1995) Ind., 659 N.E.2d 1021, 1027 (quoting In the Matter of Shondel (1991) 7th Cir., 950 F.2d 1301, 1309)."

Zollman v. Gregory, 744 N.E.2d 497, 499 (Ind. Ct. App. 2001). In that case, Zollman, the appellant and the defendant below, argued that a bankruptcy-court order granting relief from an automatic stay so that the Gregorys, the appellees and the plaintiffs below, could proceed in the trial court had only prospective application; therefore, Zollman contended, the statute of limitations barred the Gregorys' claims below and the trial court had erred in denying his motion to dismiss. The Indiana Court of Appeals rejected that argument, explaining:

> "Here, the bankruptcy court's November 19, 1999, modification order specifically and expressly authorized the Gregorys to proceed with the original complaint they filed against Zollman. The bankruptcy court also specifically mentioned that the Gregorys' medical malpractice claim was 'currently pending before medical review panels' when it ordered that the Gregorys be allowed to proceed. ...

> "Thus, we believe it is sufficiently clear that even though the bankruptcy court's order did not specifically state that the modification would operate nunc pro tunc, the order did represent the bankruptcy court's intent to retroactively modify the automatic stay. Clearly, the bankruptcy court has exclusive jurisdiction to interpret the application and scope of the automatic stay and to make a retroactive modification of the stay. In light of the bankruptcy court's retroactive modification of the automatic stay, the trial court had jurisdiction over this case. Accordingly, we find no error in denying Zollman's motion to dismiss."

Zollman v. Gregory, 744 N.E.2d at 501-02 (footnotes omitted).

In other cases, courts have recognized the exclusive authority of a bankruptcy court to clarify or modify its orders pertaining to the applicability of the automatic stay. See, e.g., U.S. Bank Nat'l Ass'n v. Crawford, 333 Conn. 731, 755 n.17, 219 A.3d 744, 759 n.17 (2019) (noting that the bankruptcy court has exclusive jurisdiction over questions regarding the automatic stay and relief from that stay); Island Ins. Co. v. Santos, 86 Haw. 363, 367, 949 P.2d 203, 207 (Ct. App. 1997) ("We agree with the court in Schulz [v. Holmes Transportation, Inc., 149 B.R. 251 (Bankr. D. Mass. 1993),] that it is within the power of the bankruptcy courts to retroactively annul a bankruptcy automatic stay so as to validate action previously taken in violation of the automatic

stay. However, we also agree with the court in Schulz 'that any exercise by the bankruptcy court of its power to annul and thereby validate acts taken in violation of the stay must be explicit.' Schulz at 258."); Hendrix v. Page, 640 N.E.2d 1081, 1083 (Ind. Ct. App. 1994) ("We agree with the dissent's contention that the bankruptcy court has exclusive jurisdiction to interpret the stay, including the exclusive power to grant relief from the stay."); Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686, 695 (Tenn. 2011) ("The bankruptcy court has exclusive jurisdiction to determine the nature of the claims and the extent of the automatic stay."); and York v. State, 373 S.W.3d 32, 40 (Tex. 2012) ("No one doubts that the bankruptcy court can retroactively grant relief from the stay."). Contra Raikes v. Langford, 701 S.W.2d 142, 145 (Ky. Ct. App. 1985) (decided much earlier than the previously cited cases, reaching the opposite conclusion and determining that a bankruptcy-court order did not retroactively vest jurisdiction in a trial court and that, therefore, the complaint filed during an automatic stay was void); but see Huskey v. Allen Cty. Farmers Servs., Inc., (Civil Action No. 1:04 CV-066-M, Sept. 5, 2006) (W.D. Ky.

2006) (not published in F. Supp.) (refusing to follow Raikes, as is more consistent with the recent caselaw cited above).

It is clear that the bankruptcy court has exclusive jurisdiction to allow and determine relief from an automatic stay and that the bankruptcy court may grant retroactive relief. Graziani v. Randolph, supra; Zollman v. Gregory, supra. In this case, the bankruptcy court determined in its February 3, 2020, order that its May 30, 2019, order that lifted the automatic stay also included, as a part of the relief from the automatic stay, the allowance of an appeal of the trial court's October 28, 2019, summary judgment. Thus, we conclude that, based on the bankruptcy court's February 3, 2020, order, the automatic stay was not in place when Dunkin filed his notice of appeal of the October 28, 2019, summary judgment and that, therefore, this court has jurisdiction to consider Dunkin's appeal. On April 20, 2020, this court entered an order specifying that the appeal was to proceed. For the reasons set forth above, we reaffirm this court's April 20, 2020, order.

In his brief on appeal, Dunkin raises a number of challenges to the propriety of the trial court's October 28,

2019, summary judgment. As an initial matter, we note that the parties have differing interpretations of that part of the bankruptcy court's May 30, 2019, order that states: "[T]he parties agreed that Schrimsher & Sons perfected its lien under Alabama law. The only remaining issue is the amount of [Schrimsher & Sons'] claim for the work performed which is an issue pending before the [trial court]." Schrimsher & Sons interprets the bankruptcy court's determination that its lien has been perfected as a determination of Dunkin's liability. Dunkin contends that that provision means that the trial court must determine his liability, if any, for the amounts claimed by Schrimsher & Sons under the lien.

With regard to a materialman's lien, this court has explained:

> "To perfect an unpaid-balance lien, a materialman must: (1) provide written notice of the claimed lien to the owner; (2) file a verified statement of lien in the probate court in the county where the subject real property is located, and (3) file suit to enforce the lien and obtain a money judgment against the materialman's direct debtor."

Valley Joist, Inc. v. CVS Corp., 954 So. 2d 1115, 1117 (Ala. Civ. App. 2006) (citing § 35-11-210, Ala. Code 1975, and

Grubbs v. Jenkins Brick Co., 571 So. 2d 1119, 1120 (Ala. 1990)).

The parties do not dispute, and the bankruptcy court's May 30, 2019, order establishes, that Schrimsher & Sons provided timely notice to Dunkin of its claim, that it filed a statement of lien in the probate court, and that it then filed a complaint seeking to enforce that lien. See § 35-11-210; Valley Joist, Inc. v. CVS Corp., supra. However, the bankruptcy court's finding that the lien was "perfected" in the absence of a determination of liability and any amount due to Schrimsher & Sons was not in accord with the law concerning the perfection of liens. Schrimsher & Sons' materialman's lien could not be "perfected" in the absence of the entry of a judgment assessing damages. Grubbs v. Jenkins Brick Co., supra; Valley Joist, Inc. v. CVS Corp., supra. Although it is clear that, by enumerating the actions taken by Schrimsher & Sons, the bankruptcy court determined that Schrimsher & Sons was properly pursuing its claim, the May 30, 2019, bankruptcy-court order did not establish Dunkin's liability on Schrimsher & Sons' claim. Instead, the bankruptcy court lifted the automatic stay, allowing the trial court to determine the

issues of liability and damages as to Schrimsher & Sons' claim.

Dunkin argues that the trial court erred in ruling on Schrimsher & Sons' summary-judgment motion instead of granting his motion for a continuance filed pursuant to Rule 56(f), Ala. R. Civ. P. In his opposition to Schrimsher & Sons' summary-judgment motion, Dunkin requested, as alternative relief, that the trial court stay its consideration of the summary-judgment motion until the trial court ruled on his pending motion to compel additional or supplemental responses to discovery from Schrimsher & Sons. Dunkin also filed a separate, February 8, 2019, motion pursuant to Rule 56(f) seeking to continue the consideration of the summary-judgment motion; at that time, a hearing on the summary-judgment motion was scheduled for February 22, 2019. For ease of reference in this opinion, we refer to both of Dunkin's requests for relief pursuant to Rule 56(f) collectively as a "Rule 56(f) motion."

The trial court did not expressly rule on Dunkin's Rule 56(f) motion. However, the trial court's entry of the summary judgment in favor of Schrimsher & Sons constituted an implicit denial of Dunkin's Rule 56(f) motion. Tell v. Terex Corp.,

962 So. 2d 174, 182 (Ala. 2007); Brown v. First Fed. Bank, 95 So. 3d 803, 810 (Ala. Civ. App. 2012). Accordingly, we may address Dunkin's argument that the trial court erred in not staying or continuing its consideration of the summary-judgment motion.

Dunkin's Rule 56(f) motion was based on his contention that necessary discovery was still outstanding. We note that "'[a] typical situation for the application of Rule 56(f) is where the opposing party cannot present by affidavits facts essential to justify his opposition because knowledge of those facts is exclusively with, or largely under the control of, the moving party.'" Harris v. Health Care Auth. of Huntsville, 6 So. 3d 468, 476 (Ala. 2008) (quoting Griffin v. American Bank, 628 So. 2d 540, 542 (Ala. 1993)). Dunkin alleged such a situation in his Rule 56(f) motion.

The record indicates that the parties had several discovery disputes and that Dunkin had filed three motions to compel discovery from Schrimsher & Sons. The essence of Dunkin's position in his Rule 56(f) motion was that Schrimsher & Sons had failed or refused to provide specific discovery materials, such as a demonstration of its calculations of the

amounts it claimed it was owed or the receipts or invoices that would support those calculations. In his third motion to compel, Dunkin acknowledged that he had received several hundred pages of discovery responses from Schrimsher & Sons, but he alleged that those discovery responses were not complete and had not included calculations, receipts, or invoices. As evidence that some discovery was still outstanding, Dunkin cited certain portions of a deposition of Dan Schrimsher ("Schrimsher") in which Schrimsher testified that Schrimsher & Sons would have been provided such receipts by its vendors or subcontractors.

In opposition to Dunkin's third motion to compel, Schrimsher & Sons filed a July 19, 2019, response in which it asserted that it had "responded and provided documentation available to it as requested in the Request for Production." Schrimsher & Sons stated that it had again attached its discovery responses to its July 19, 2019, response. The record contains none of the documents purportedly attached to that response. See Rule 10(a), Ala. R. App. P. (governing the composition of the record on appeal). Dunkin did not attempt to supplement the record on appeal to include the discovery materials provided by Schrimsher & Sons. See Rule 10(f), Ala.

R. App. P.; Metcalf v. Pentagon Fed. Credit Union, 155 So. 3d 256, 261 (Ala. Civ. App. 2014).

Also, subject to some exceptions, see McGhee v. Martin, 892 So. 2d 398, 405 (Ala. Civ. App. 2004), a party is required to submit an affidavit in support of a Rule 56(f) motion to explain why the requested discovery is needed to respond to a summary-judgment motion.[6]

> "Rule 56(f) allows a party opposing a summary-judgment motion to file an affidavit alerting the trial court that it is presently unable to present 'facts essential to justify the party's opposition.' The Committee Comments to August 1, 1992, Amendment to Rule 56(c) and Rule 56(f) state that '[s]uch an affidavit should state with specificity why the opposing evidence is not presently available and should state, as specifically as possible, what future actions are contemplated to discover and present the opposing evidence.' The disposition of a request made pursuant to Rule 56(f) is discretionary with the trial court. Because Scrushy's affidavit did not meet the specificity requirements of Rule 56(f), we

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[6]Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

> cannot say that the trial court exceeded its discretion in denying Scrushy's request for a continuance before it entered the judgment on the bonus issue. As the Court of Civil Appeals stated in McGhee v. Martin[, 892 So. 2d 398 (Ala. Civ. App. 2004):
>
> > "'In addition, it would be prudent for the party moving for the continuance to be certain that the affidavit contained more than vague assertions that more discovery is needed. Our supreme court has indicated that it requires something more than a conclusory affidavit in the typical Rule 56(f) case. See, e.g., Stallworth [v. AmSouth Bank of Alabama], 709 So. 2d [458] at 469 [(Ala. 1997)] ("[The Rule 56(f) movant's] conclusory affidavit fails even to identify what crucial evidence pertaining to his ... claim discovery might disclose.").'
>
> "892 So. 2d at 405."

Scrushy v. Tucker, 955 So. 2d 988, 1007 (Ala. 2006).

Dunkin did not submit an affidavit to the trial court in support of his Rule 56(f) motion to support his contention that certain documents he contended were necessary in order for him to respond adequately to the summary-judgment motion had not been produced by Schrimsher & Sons. Moreover, Dunkin did not submit into evidence, and, therefore, into the record, the discovery documents he had received so that this court could determine their adequacy and whether further discovery

was, in fact, necessary. "[I]t is well settled that the appellant has the burden of ensuring that the record on appeal contains sufficient evidence to warrant a reversal ...." Goree v. Shirley, 765 So. 2d 661, 662 (Ala. Civ. App. 2000); see also Gotlieb v. Collat, 567 So. 2d 1302, 1304 (Ala. 1990) (same). Given the foregoing, we cannot say that Dunkin has demonstrated error with regard to this issue.

We next turn to Dunkin's arguments concerning the propriety of the summary judgment. The standard by which this court reviews summary judgments is well settled.

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[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 Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Schrimsher & Sons first moved for a summary judgment on January 22, 2019, arguing only that it was entitled to a summary judgment because Dunkin had listed it as a possible creditor in seeking bankruptcy protection. As evidentiary support, Schrimsher & Sons submitted only Dunkin's petition for bankruptcy protection filed in bankruptcy case number 18-82392. Later, Dunkin again moved for bankruptcy protection in bankruptcy case number 19-80275. After the automatic stay in case number 19-80275 was lifted, on June 26, 2019, Schrimsher & Sons again moved for a summary judgment. That June 26, 2019, summary-judgment motion stated, in its entirety:

> "[Schrimsher & Sons] moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, summary judgment in [Schrimsher & Sons'] favor for the relief demanded in [Schrimsher & Sons'] complaint, and for grounds thereto states that there is no genuine issue as to any material fact and that [Schrimsher & Sons] is entitled to a judgment as a matter of law:

"This motion is based upon the affidavits of Dan Schrimsher and Donnie Bean and attachments thereto, and the following statement of undisputed facts:

"1. [Schrimsher & Sons] agreed to repair certain fire damage to [Dunkin's] real estate in accordance with estimates worked up through Xactimate and with the concurrence of USAA Insurance, the insurer of [Dunkin's] property.

"2. In addition to the repair work authorized by USAA, [Dunkin] requested certain additional work and changes in certain materials, fixtures and design/layout of the dwelling.

"3. [Schrimsher & Sons] priced both the initial work and the additional work using a computer program pricing tool that is commonly used to price such work in Madison County, Alabama, and which is used by [Schrimsher & Sons], as well as USAA, known as Xactimate. The same pricing tool was utilized in determining the final cost for repairs and improvements provided by [Schrimsher & Sons] to [Dunkin].

"4. The work required by USAA and the work requested by [Dunkin] was performed by employees and sub-contractors of [Schrimsher & Sons] using materials from Xactimate, except where different materials were requested by [Dunkin]. On some fixtures and/or materials which were requested or selected by [Dunkin] (or even supplied by [Dunkin]), [Schrimsher & Sons] made appropriate adjustments to the costs. That is to say, in instances where there were 'allowances' (such as lighting, plumbing fixtures, etc.), the adjustment was made, either increasing by the additional cost or, in the case of purchases by [Dunkin], decreasing by either the allowance or the price indicated by Xactimate pricing.

"5. All of the work performed by [Schrimsher & Sons] was done in a workmanlike manner and in keeping with the standard for such work in Madison County, Alabama, or, in many instances, of a higher standard. The materials that were used were the quality set forth in the Xactimate pricing or greater.

"6. After the work was complete, Dan Schrimsher, the supervisor on the job, met with Donnie Bean of [Schrimsher & Sons] (who was in charge of preparing pricing) to complete the final costs of the project. In doing that, [Schrimsher & Sons] added the pricing for Xactimate, added in the additional costs over the 'allowances' and any additional labor not originally included and any additional material costs not originally included and gave credits for the amounts received from USAA Insurance, a small amount that was paid directly by [Dunkin], 'allowance' amounts for materials or fixtures (including cabinets) that had been provided by [Dunkin] and certain other credits after reviewing the statements and bills from sub-contractors and material suppliers.

"7. The final result of the amount due, based upon those calculations, was $26,659.15 and a statement for that amount was presented to [Dunkin] on February 23, 2016, which was payable at that time. Since that time, no payment has been received. A copy of that statement is attached to the Affidavit of Donnie Bean and to the Affidavit of Dan Schrimsher, which are attached to and incorporated into this motion.

"8. By stipulation of the parties, it was agreed and the United States Bankruptcy Court for the Northern District of Alabama concluded that [Schrimsher & Sons] had taken all steps required for the perfection of a mechanic's and materialman's lien, including the filing of the lien after notice

> being provided to [Dunkin] and the timely filing of suit (this particular lawsuit) to enforce said lien.
>
> "9. The Bankruptcy Court has concluded that the entire claim of [Schrimsher & Sons] is 'secured' (that is, there is sufficient equity in the property to pay that amount over and above the amount due for other secured claims, primarily the Bank of America mortgage) and that all that remains is for the Circuit Court of Madison County, Alabama, to determine the amount due and to establish the lien and provide for its execution, subject to a stay pending payment of the amount through the Chapter 13 bankruptcy proceeding of [Dunkin]. A copy of the Bankruptcy Court order is attached.
>
> "10. Attached hereto are the Affidavits of Dan Schrimsher and Donnie Bean, as well as the attachments to such Affidavits.
>
> "WHEREFORE, [Schrimsher & Sons] respectfully requests the Court enter summary judgment in its favor pursuant to the complaint filed in this matter."

Attached to the summary-judgment motion were the affidavits of Donnie Bean, an employee of Schrimsher & Sons and Schrimsher stating that Schrimsher & Sons had calculated all amounts due using the "Xactimate" program and that, in calculating the amount due, each affiant had reviewed statements and bills from Schrimsher & Sons' subcontractors and suppliers. Those statements and bills are not part of Schrimsher & Sons' evidentiary submission in support of its summary-judgment motion. Also attached to the summary-judgment

motion was a "statement" from Schrimsher & Sons to Dunkin setting forth the total amount of its claim of $187,747.94, plus "additional repairs" of $5,046.36, and "additional repairs and upgrades per [Dunkin and his wife] of $32,496.80." Subtracted from those amounts were six payments from Dunkin's insurer, a payment from Dunkin, and several "customer credits" for materials supplied by Dunkin. The statement indicates that Schrimsher & Sons claimed that it was owed $26,659.15, plus interest.[7]

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[7]The description and amounts on the February 23, 2016, "statement" submitted by Schrimsher & Sons in support of its summary-judgment motion and that was attached to the affidavits of Schrimsher and Bean, in its entirety, reads as follows:

"Repairs per USAA estimate	187,747.94
"Additional repairs	5,046.36
"Payment # 1 Bank of America Ck#0000749760	-62,582.65
"Payment #2 Bank of America Ck#0001378442	-32,924.07
"Payment #3 Bank of America Ck#0001423220	-43,412.14
"Payment Michael A. Dunkin Ck#0000995087	-1,090.00
"Payment #4 Bank of America Ck#0001481054	-34,729.72
"Payment USAA (partial recoverable depreciation) Ck#0013560046	-12,273.72
"Payment USAA (partial recoverable depreciation & partial supplement for exterior lights)	-2,469.24

Dunkin argues that the trial court erred in failing to strike those parts of Schrimsher's and Bean's affidavits in which Schrimsher and Bean reference their reliance on the Xactimate program's calculation of the amounts of Schrimsher & Sons' claim.[8] Dunkin points out that Rule 56(e), Ala. R.

"Additional repairs and upgrades per Michael & Kasey Dunkin	32,496.80
"Supplement (exterior lights & fans)	3,077.26
"Customer credits from USAA original repair estimate	-5,027.12
"Customer credit plumbing	-1,080.54
"Customer credit cabinets	-4,200.71
"Customer credit flooring	-1,919.30
TOTAL	$26,659.15"

[8]Schrimsher's June 25, 2019, affidavit states, in pertinent part:

> "5. [Schrimsher & Sons] priced both the initial work and the additional work [that] was done using a computer program pricing tool that is commonly used to price such work in Madison County, Alabama and is what [Schrimsher & Sons] uses. It is known as Xactimate. It is the same pricing tool that is, and was used, by USAA Insurance in pricing the payment for repair of the fire damage. This is the same program that was utilized in determining the final cost for the repairs and improvements provided to [Dunkin].
>
> "6. The work required by USAA and requested by [Dunkin] was performed by employees and subcontractors of [Schrimsher & Sons] using the materials from Xactimate, except where different

materials were requested by [Dunkin]. On some fixtures/ materials which were requested or selected by [Dunkin] (or even supplied by [Dunkin]), appropriate adjustments to the cost were made. That is to say, in instances where there were 'allowances' (such as lighting, plumbing fixtures, etc.), the adjustment was made, either increasing by the additional cost or, in the case of purchases by [Dunkin], decreasing by either the 'allowance' or the price indicated by Xactimate pricing.

"....

"8. After the work was complete, I got with Donnie Bean of [Schrimsher & Sons] to finish the final cost of the project. In doing that, we added the pricing from Xactimate, added any additional costs over 'allowances' and additional labor not originally included and additional material costs not originally included. Then we gave credit for amounts received from USAA, a small amount paid by [Dunkin] directly, 'allowance' amounts for material or fixtures (including cabinets) that had been provided by [Dunkin] and certain other credits. In making that calculation, Donnie Bean had reviewed the statements and bills from subcontractors and material suppliers."

Bean's June 25, 2019, affidavit states, in pertinent part:

"After the work was complete, I got with Dan Schrimsher of [Schrimsher & Sons] to finish the final costs of the project. In doing that, we added the pricing from Xactimate, the pricing tool which we used and which is standard and customary in Madison County, Alabama, and, in addition, used by USAA Insurance in this matter. Taking the pricing from Xactimate on the work that was requested and was done, we added any additional costs over

Civ. P., provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

(Emphasis added.)

"[A]n affiant must submit with his or her affidavit documents that he or she has relied upon in rendering the opinion expressed in the affidavit." Johnson v. Layton, 72 So. 3d 1195, 1201 (Ala. 2011). See also Oliver v. Brock, 342 So. 2d 1, 4-5 (Ala. 1976) ("[Rule 56(e), Ala. R. Civ. P.,] requires that sworn or certified copies of all papers or parts thereof referred to in an affidavit (in support of or in opposition to a motion for summary judgment) shall be attached thereto or served therewith. '... This means that if written

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> 'allowances' and any additional labor not originally included and any additional material costs not originally included. Then we gave credit for the amounts received from USAA, a small amount paid by [Dunkin] directly (although this was not the amount that was agreed to be paid initially up front), 'allowance' amounts for material or fixtures (including cabinets) that had been provided by [Dunkin] and certain other credits. In making the calculation, I reviewed the statements and bills from subcontractors and material suppliers."

documents are relied upon they actually must be exhibited; affidavits that purport to describe a document's substance or an interpretation of its contents are insufficient. ...' Wright & Miller, Federal Practice and Procedure: Civil § 2722.").

Dunkin repeatedly argued in his oppositions to the summary-judgment motion that that motion did not include references to any invoices, statements, or bills to substantiate the Xactimate estimate. In fact, Schrimsher & Sons did not submit the Xactimate calculations in support of the summary-judgment motion. Rather, Schrimsher & Sons submitted only a statement that sets forth a generalized summary of the calculations it claims to have performed using Xactimate based upon the bills, invoices, and other documents it received from its suppliers and subcontractors but which were not submitted in support of the summary-judgment motion. Thus, the affidavits Schrimsher & Sons submitted in support of its summary-judgment motion did not comply with Rule 56(e), Ala. R. Civ. P., and the cases cited above because the affidavits submitted by Schrimsher and Bean were not supported by the documents and evidence upon which Schrimsher and Bean

purported to rely in calculating the amounts Schrimsher & Sons claims are owed. For that reason, we hold that the trial court erred in considering those affidavits, and those affidavits do not support the summary judgment entered in favor of Schrimsher & Sons. Schroeder v. Vellianitis, 570 So. 2d 1220, 1223 (Ala. 1990). See also Tanksley v. ProSoft Automation, Inc., 982 So. 2d 1046, 1053 (Ala. 2007) ("Because the preliminary report is not sworn, not certified, and does not comply with Rule 56(e), Ala. R. Civ. P., we will not consider it in our de novo review.").

Dunkin also argues that Schrimsher & Sons did not comply with the requirements of Rule 56(c)(1), Ala. R. Civ. P., in drafting its summary-judgment motion and that, therefore, the burden of opposing that summary-judgment motion never shifted to him. See Dow v. Alabama Democratic Party, supra; and Bass v. SouthTrust Bank of Baldwin Cty., 538 So. 2d 794, 797-98 (Ala. 1989). Rule 56(c)(1) provides, in pertinent part:

> "The [summary-judgment] motion shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative summary may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings, portions of discovery materials, or affidavits and may include citations to legal authority. Any

> supporting documents that are not on file shall be attached as exhibits."

(Emphasis added.)

Dunkin contends that Schrimsher & Sons did not set forth a narrative summary of undisputed facts supported by "specific references to pleadings, portions of discovery materials, or affidavits." Rule 56(c)(1). He also points out that Schrimsher & Sons' summary-judgment motion does not contain a legal argument or set forth any citations to legal authority.

In support of that argument, Dunkin relies on Northwest Florida Truss, Inc. v. Baldwin County Commission, 782 So. 2d 274 (Ala. 2000). In that case, the summary-judgment movants did not include in their summary-judgment motion a narrative statement of undisputed facts, and, in reversing the summary judgment in that case, our supreme court stated:

> "Rule 56(c)(1), Ala. R. Civ. P., requires that a motion for summary judgment 'be supported by a narrative summary of what the movant contends to be the undisputed material facts.' Although it may be included in the motion or may be separately attached as an exhibit, the rule clearly requires that a narrative summary be included with any motion for summary judgment. The narrative summary must include specific references to pleadings, portions of discovery materials, or affidavits for the court to rely on in determining whether a genuine issue of material fact exists."

Northwest Florida Truss, Inc. v. Baldwin Cty. Comm'n, 782 So. 2d at 276-77. In that case, our supreme court then concluded that Rule 56(c) "does not allow a party to file a simplistic motion devoid of a narrative summary and specific references to those portions of the record demonstrating that no genuine issue of material fact exists." 782 So. 2d at 277. See also Rule 56(c)(3), Ala. R. Civ. P. ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

In Stokes v. Ferguson, 952 So. 2d 355, 357 (Ala. 2006), a summary-judgment movant submitted to the trial court in that case a summary-judgment motion that contained only "a memorandum summary of the facts unsupported by any evidence in the record and a legal argument." Our supreme court held that the summary-judgment motion in that case did not comply with the requirements of Rule 56(c)(1) because that motion "did include a narrative summary of the facts" and "failed to comply with the mandate of Rule 56(c)(1) that the narrative

summary 'be supported by specific references to pleadings, portions of discovery materials, or affidavits ....'" Stokes v. Ferguson, 952 So. 2d at 358.

In another case, our supreme court explained:

> "The role of this Court in reviewing a summary judgment is well established -- we review a summary judgment de novo, '"apply[ing] the same standard of review as the trial court applied."' Stokes v. Ferguson, 952 So. 2d 355, 357 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004)). 'In order to grant the [summary-judgment] motion, the court must find clearly [1] that there is no genuine issue of material fact and [2] that the movant is entitled to a judgment as a matter of law.... The movant bears the burden initially of showing the two prongs of the standard.' Maharry v. City of Gadsden, 587 So. 2d 966, 968 (Ala. 1991) (second emphasis added). 'If the movant meets [its] burden of production by making a prima facie showing that he is entitled to a summary judgment, "then the burden shifts to the nonmovant to rebut the prima facie showing of the movant."' American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807, 811-12 (Ala. 2004) (quoting Lucas v. Alfa Mut. Ins. Co., 622 So. 2d 907, 909 (Ala. 1993)).
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> "However, 'the 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 defense to an insufficient showing is required.' Ray v. Midfield Park, Inc., 293 Ala. 609, 612, 308 So. 2d 686, 688 (1975) (emphasis added). See also Watts v. Watts, 943 So. 2d 115 (Ala. 2006); Legg v. Kelly, 412 So. 2d 1202 (Ala. 1982)."

Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d 63, 69 (Ala. 2007).

In Horn, supra, our supreme court concluded that the purported narrative statement of undisputed facts contained only "conclusory allegations," and it noted that the movant had made no attempt to support its motion for a summary judgment with any legal argument. "Having filed no memorandum of law, Fadal filed no narrative summary of undisputed facts as required by Rule 56(c)." Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d at 70. Accordingly, the supreme court held that, because the movant's summary-judgment motion did not comply with the requirements of Rule 56, the burden had not shifted to the nonmovant, Horn, to oppose the summary-judgment motion; the supreme court therefore reversed the trial court's summary judgment. Id.

In this case, Schrimsher & Sons, unlike the movants in Northwest Florida Truss, Inc. v. Baldwin County Commission, supra, did more than simply assert in a conclusory manner that there were no disputed issues of material fact. Schrimsher & Sons set forth a short narrative of facts that it contended were undisputed. However, that statement of facts

contains only a general reference to an order of the bankruptcy court and to the affidavits submitted by Schrimsher and Bean. As we have already concluded in this opinion, supra, the trial court could not properly rely on those affidavits. Further, Schrimsher & Sons' summary-judgment motion contained no legal argument in which it attempted to apply the law to what it contended were the undisputed facts. The summary-judgment motion set forth no citations to legal authority in support of Schrimsher & Sons' contention that it is entitled to a judgment as a matter of law. Thus, given the foregoing precedent, we conclude that Dunkin is correct that Schrimsher & Sons' summary-judgment motion was not sufficient under Rule 56(c)(1) to make a prima facie showing that Schrimsher & Sons was entitled to a judgment as a matter of law, and, therefore, the burden of defending that motion did not shift to Dunkin. Northwest Florida Truss, Inc. v. Baldwin County Comm'n, supra; and Horn v. Fadal Machining Ctrs., LLC, supra. As we have already held, that motion was not supported by admissible evidence. Accordingly, we reverse the trial court's summary judgment entered in favor of Schrimsher and Sons, and we remand the cause for further proceedings.

Lastly, we note that, after this court issued its April 20, 2020, order denying Schrimsher & Sons' motion to dismiss, Schrimsher & Sons, on June 5, 2020, again moved this court to dismiss the appeal. In that June 5, 2020, motion, Schrimsher & Sons argued that Dunkin was estopped from asserting his arguments on appeal; it cited a recent consent order entered in the bankruptcy court shortly after the entry of the trial court's October 28, 2019, summary judgment. However, Schrimsher & Sons does not appear to have attempted to file that recent bankruptcy-court order in the trial court. The recent bankruptcy-court order is not contained in the record on appeal, and no attempt was made by the parties to supplement the record with that order. An appellate court is confined to matters in the record on appeal. Construction Servs. Grp., LLC v. MS Elec., LLC, 292 So. 3d 643, 649 (Ala. Civ. App. 2019); Van Houten v. Van Houten, 895 So. 2d 982, 989 (Ala. Civ. App. 2004). For that reason, this court may not consider documents or evidence not before the trial court but attached to a party's appellate brief or submitted in support of a motion. Petrey v. Petrey, 989 So. 2d 1128, 1130 n. 1 (Ala. Civ. App. 2008); Goree v. Shirley, 765 So. 2d at 662.

Accordingly, this court may not consider the bankruptcy-court order submitted in support of Schrimsher & Sons' June 5, 2020, motion to dismiss filed in this court.

Schrimsher & Sons' motions to dismiss, filed on June 5, 2020, and June 30, 2020, are denied.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, Edwards, and Hanson, JJ., concur.

Donaldson, J., dissents, with writing.

DONALDSON, Judge, dissenting.

On December 4, 2019, Michael Dunkin filed a notice of appeal to this court from a judgment entered on October 28, 2019, by the Madison Circuit Court ("the trial court") in favor of Bobby Schrimsher & Sons, Inc. ("Schrimsher & Sons"). At the time Dunkin filed the notice of appeal, he was under the protection of the United States Bankruptcy Court for the Northern District of Alabama ("the bankruptcy court"). On April 20, 2020, this court entered an order denying a motion to dismiss this appeal. I dissented from the April 20, 2020, order because I believe the appeal must be dismissed, and, accordingly, I respectfully dissent from the main opinion for the following reasons.

Schrimsher & Sons filed a complaint in the trial court seeking damages against Dunkin and to establish a materialman's lien on certain property owned by Dunkin. While the case was pending in the trial court, Dunkin filed a petition in the bankruptcy court seeking protection under the United States Bankruptcy Code. It is undisputed that, under the provisions of 11 U.S.C. § 362 ("the automatic stay"), all

proceedings in the trial court were stayed upon the filing of the petition in the bankruptcy court.

On May 30, 2019, the bankruptcy court entered an order that lifted the automatic stay in part as follows:

> "1. The stay is hereby lifted pursuant to 11 U.S.C. § 362(d)(1) to allow the parties to proceed in the [trial court] in the case styled Bobby Schrimsher & Sons, Inc. v. Dunkin, et al., 47-CV-2016-901325 for the limited purpose of determining the amount of Schrimsher & Sons' claim.
>
> "2. This Court will continue the Objection to Claim generally pending a determination by the [trial court] regarding the amount of Schrimsher & Sons' claim.
>
> "3. After the [trial court] issues a ruling determining the amount of the claim, the parties are directed to either submit an Agreed Order on Objection to Claim in conformity with the [trial court's] ruling or to file a Joint Report to the Court requesting a hearing on the Objection to Claim."

The order provided for a continuation of the proceedings in the bankruptcy court after the trial court entered a judgment. The May 30, 2019, order of the bankruptcy court did not address any appeal from any ruling of the trial court in our appellate courts.

The trial court proceeded to determine the issues that could be adjudicated, pursuant to § 6-7-30, Ala. Code 1975, which provides, in part:

> "In any civil action in any court in this state in which the defendant has been adjudicated a bankrupt, in which a defendant has filed a petition in bankruptcy or against whom a petition in bankruptcy has been filed, it shall be the duty of the court in which such civil action is pending to proceed with the trial of such action, if leave to do so is granted by the bankruptcy court, and to enter judgment in accordance with the law and the evidence in the case. ..."

On October 28, 2019, the trial court entered a judgment favorable to Schrimsher & Sons. To invoke the appellate jurisdiction of this court to review the judgment, a notice of appeal had to be filed within 42 days of October 28, 2019. Rule 4(a)(1), Ala. R. App. P. Dunkin filed a notice of appeal to this court on December 4, 2019. Dunkin did not, however, obtain permission from the bankruptcy court to appeal from the October 28, 2019, judgment. In Alt v. Alt, 257 So. 3d 873, 875 (Ala. Civ. App. 2017), this court stated:

> "The commencement of a bankruptcy action 'operates as a stay' of, among other things, 'the commencement or continuation ... of a judicial ... action or proceeding against the debtor....' 11 U.S.C. § 362(a)(1). The filing of a notice of appeal has been held to be a continuation of a judicial proceeding that is subject to the automatic-stay

> provision of § 362. AmMed Surgical Equip., LLC v. Professional Med. Billing Specialists, LLC, 162 So. 3d 209, 211 (Fla. Dist. Ct. App. 2015); In re Capgro Leasing Assocs., 169 B.R. 305, 310-11 (Bankr. E.D. N.Y. 1994). Accordingly, a notice of appeal, filed after a petition is filed in the bankruptcy court, is considered 'void and of null effect.' In re Capgro Leasing Assocs., 169 B.R. at 313; AmMed Surgical Equip., LLC v. Professional Med. Billing Specialists, LLC, 162 So. 3d at 211 ('A notice of appeal filed in a federal appellate court following the filing of a bankruptcy petition is ineffective to confer jurisdiction on the court.')."

"A void thing is no thing. It has no legal effect whatsoever, and no rights whatever can be obtained under it or grow out of it." Mobile Cty. v. Williams, 180 Ala. 639, 646, 61 So. 963, 965 (1913). Therefore, applying the holding of Alt v. Alt,[9] a notice of appeal was not filed within 42 days of the entry of the judgment because the December 4, 2019, filing was void.

On February 3, 2020, the bankruptcy court entered an order to "clarify" its May 30, 2019, order that had partially

[9]We have not been asked to modify, amend, clarify, or overrule any portion of Alt v. Alt, and "I would consider doing so only within the adversarial appellate-advocacy process." Bittick v. Bittick, 297 So. 3d 397, 409 (Ala. Civ. App. 2019) (Donaldson, J., concurring in part and dissenting in part).

lifted the automatic stay.[10] The February 3, 2020, order of the bankruptcy court provides, in part, that "[t]he stay is hereby lifted pursuant to 11 U.S.C. § 362(d)(1) to allow the parties to proceed in the Alabama Supreme Court with the appeal of any Order entered by the [trial court] regarding the claim of Schrimsher & Sons ..., and extends to any appellate review of any Order of the [trial court]...." (Emphasis added.) Had the bankruptcy court said that the automatic stay was retroactively lifted going back to a time before the expiration of the 42-day period following the entry of the October 28, 2019, judgment of the trial court, we could then consider whether our legal authorities would permit a void notice of appeal to be made effective through later events.[11]

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[10]No party to this appeal mentions the provisions of 11 U.S.C. 108(c). The effect of that subsection on the issue presented by this appeal, if any, is not before us.

[11]The reasoning of some of the cases from other jurisdictions addressing the effect of a nunc pro tunc or retroactive lifting of the automatic stay on state-court proceedings is persuasive; however, based on the holding in Alt v. Alt that a notice of appeal filed in contravention of the automatic stay is void, it is questionable whether any subsequent action would retroactively cause something void to become effective under our legal authorities. See Cottingham v. Smith, 152 Ala. 664, 44 So. 864 (1907) (holding that a nullity cannot be revived).

But that is not what the order of the bankruptcy court says. Read plainly and without amplification or modification, the bankruptcy-court order says the automatic stay is "hereby lifted" as of February 3, 2020. It makes no mention of having any nunc pro tunc or retroactive application. We have authority to interpret the true intent and meaning of an order from one of our own state trial courts when the language is ambiguous or does not directly address a question presented, but I am unwilling to go beyond the plain language of a federal bankruptcy-court order and draw any inferences or meanings not expressed therein. In my view, the February 3, 2020, bankruptcy-court order did not change the facts that the automatic stay was in effect during the 42 days following the entry of the October 28, 2019, judgment of the trial court and that an effective notice of appeal was not filed within the applicable time. Therefore, I think that we do not have jurisdiction over the appeal and that the appeal must be dismissed.