REL: November 19, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200509

Mikka Johnson and Sadai Johnson

v.

Portia Coleman Brown and Samuel Bernard Brown

Appeal from Lowndes Circuit Court
(CV-20-900059)

HANSON, Judge.

Mikka Johnson and Sadai Johnson appeal from a judgment entered by the Lowndes Circuit Court ("the trial court") in favor of Portia Coleman

Brown and Samuel Bernard Brown on the Browns' claim to redeem certain real property located in Lowndes County. For the following reasons, the judgment of the trial court is affirmed.

The property at issue is certain real property located in Lowndes County that includes a mobile home located thereon ("the property"). Before the property was owned by the Browns, the property was owned by Glenn Rush and Janie Rush, who had mortgaged the property to Greenpoint Credit, LLC ("Greenpoint"), as security for a loan made by Greenpoint to the Rushes. In 2018, Glenn Rush conveyed the property to the Browns subject to the Greenpoint Mortgage.[1] On December 11, 2019, Greenpoint's successor in interest foreclosed on the property. Thereafter, the Johnsons purchased the property subject to the Browns' statutory right of redemption. See §6-5-248, Ala. Code 1975. At the time of the Johnsons' purchase, the property had apparently been vacant for a number of years, and, according to the Johnsons, they began making

[1]The record indicates that Janie Rush had died before 2018.

certain repairs and improvements to restore the property to a "livable" condition.

On November 12, 2020, the Browns sent the Johnsons a letter indicating their intent to redeem the property and requesting a written, itemized statement of lawful charges pursuant to § 6-5-252, Ala. Code 1975. On December 1, 2020, the Johnsons responded to the Browns, asserting that they had incurred $14,025 in lawful charges related to repairs or improvements that they had allegedly made to the property and demanding that, to redeem the property, the Browns pay to the Johnsons $46,107.40, which, they alleged, represented their purchase price together with interest and the alleged lawful charges.

On December 10, 2020, the Browns, acting through their counsel, Jerry Thornton, filed in the trial court a "complaint for redemption" and paid $46,107.40 into court. As part of their complaint, the Browns averred that the Johnsons' purported lawful charges, as well as the Johnsons' proposed interest calculation, were in dispute, and the Browns requested that the trial court determine the amount of lawful charges and other

costs required for redemption and to refund any excess to the Browns from the money paid into court.

On January 6, 2021, the Johnsons, acting pro se, filed a "request for extension" to allow them time to obtain legal counsel. In that request, the Johnsons claimed that they had initially consulted with Thornton about the matter before he had been retained by the Browns to commence the redemption action. On January 12, 2021, the trial court entered an order setting the redemption action for a February 22, 2021, "final hearing." On January 14, 2021, the Johnsons filed a motion to dismiss the redemption action. The trial court initially directed that a hearing on that motion would be conducted on March 3, 2021, but, shortly thereafter, it reset that hearing to coincide with the previously scheduled February 22, 2021, "final hearing".

The case was called for trial as scheduled on February 22, 2021, and the Johnsons, still acting pro se, appeared and participated. Mikka Johnson cross-examined Portia Brown, the Browns' only witness, and also testified concerning the lawful charges the Johnsons had allegedly incurred. The Johnsons raised no objections before or during the

February 22, 2021, trial concerning the notice of the trial setting or any alleged deficiency in the notice. At the close of trial, the trial court stated that it would allow several days for the Johnsons to submit further relevant documentary evidence, including photographs of the property; however, no such further evidence appears in the record. On March 1, 2021, well after the trial had concluded, the Johnsons filed a "motion for extension of time," claiming for the first time that they had not had sufficient time to prepare for the February 22, 2021, trial. On March 2, 2021, the Johnsons retained counsel, who entered a notice of appearance and filed a motion to disqualify Thornton from serving as the Browns' lawyer.

On March 13, 2021, the trial court entered a final judgment. The trial court noted in its judgment that, at the outset of trial, "[e]ach side [had] announced as ready." The trial court concluded that the Browns were entitled to redeem the property and ordered that ownership of the property be transferred from the Johnsons to the Browns. The trial court also concluded that the Johnsons were not entitled to lawful charges related to the alleged repairs and improvements to the property because

they had not provided the Browns with an itemized statement of lawful charges within 10 days of the demand for such a statement, as required by § 6-5-252, and, alternatively, because they had not met their burden to establish the value of the alleged repairs and improvements to the property. Finally, the trial court denied the motion to disqualify Thornton as the Browns' attorney.

The Johnsons filed a postjudgment motion in which they argued, in part, that they had not had adequate time to retain counsel before the trial date. That motion did not specifically refer to Rule 40, Ala. R. Civ. P., which generally requires 60 days' notice of a trial setting; the Johnsons did, however, raise Rule 40 for the first time in a separate brief filed on the morning of the hearing on the postjudgment motion. The postjudgment motion was denied by order of the trial court on April 14, 2021, and the Johnsons timely appealed; the appeal was transferred to this court pursuant to § 12-2-7(6), Ala. Code 1975.

On appeal, the Johnsons do not challenge the merits of the judgment. Rather, they contend that they were not given adequate time to prepare for trial. Specifically, they contend that, because they were not

given 60 days' notice of the trial setting, the trial setting violated Rule 40 and, consequently, their due-process rights.

Rule 40 provides, in pertinent part:

> "(a) Setting of Cases. The trial of actions shall be set by entry on a trial docket or by written order at least sixty (60) days before the date set for trial subject to the following exceptions: (1) where, when the interests of justice require, the court continues the trial to a date that is less than sixty (60) days from a previously set trial date that was set in compliance with this rule; (2) where a shorter period of time is available under the provisions of Rule 55 [,Ala. R. Civ. P.] ('Default'); (3) where a shorter period of time is available under the provisions of Rule 65 [,Ala. R. Civ. P.] ('Injunctions'); (4) where a shorter period of time serves the ends of justice in domestic relations cases; (5) where a shorter period of time serves the ends of justice in a habeas corpus or other similar proceeding where the liberty interest of an individual is at issue; (6) where an action has been appealed to the circuit court for de novo review, in which event the time period between setting and trial date shall be at least thirty (30) days; and (7) where a shorter period of time is otherwise provided by law or these rules or agreed to by all of the parties."

This court has, on several occasions, reversed judgments of lower courts for the failure to comply with the notice provisions of Rule 40. In those cases, however, a party has either made a specific pretrial objection regarding the trial notice at issue and then sought immediate mandamus

review, see Ex parte Plumbline Constr., Inc., 992 So. 2d 746, 748 (Ala. Civ. App. 2008), and Ex parte A.D.W., 192 So. 3d 405, 407-08 (Ala. Civ. App. 2015), or the offending notice failed to sufficiently apprise a party that the noticed hearing was actually a trial, see Isler v. Isler, 870 So. 2d 730, 735 (Ala. Civ. App. 2003), PC & All, Inc. v. Maxie, 66 So. 3d 796 (Ala. Civ. App. 2011), and Ex parte Plumbline, 992 So. 2d at 748. Furthermore, we note that the notice requirement of Rule 40(a) is akin to the 10-day notice provision of Rule 56(c), Ala. R. Civ. P., which our supreme court has recognized may be waived if not timely asserted. See, e.g., Van Knight v. Smoker, 778 So. 2d 801, 805 (Ala. 2000) (stating that a nonmoving party "may waive the requirements of notice and hearing" otherwise required by Rule 56(c)); Holleman v. Elmwood Cemetery Corp., 295 Ala. 267, 273, 327 So. 2d 716, 720 (1976) (holding that the 10-day notice requirement of Rule 56(c) was waived because no objection to lack of notice was made at the summary-judgment hearing).

In this case, we agree with the Johnsons that the trial setting did not comply with the 60-day notice provision of Rule 40(a).[2] Nevertheless, here, unlike in Isler, Maxie, and Ex parte Plumbline, the Johnsons had notice that the February 22, 2021, setting was for a "final hearing," i.e., that it was a trial setting. Furthermore, unlike A.D.W. and Ex parte Plumbline, the Johnsons did not make a pretrial objection to the February 22, 2021, trial setting based on lack of proper notice and did not move to continue the trial setting. Rather, on February 22, 2021, the Johnsons appeared and, according to the trial court, indicated that they were ready to proceed with a trial on the merits. Indeed, the Johnsons thereafter

[2]We disagree with the Browns' contention that their redemption action constituted an action under Alabama's Declaratory Judgment Act, Ala. Code 1975, § 6-6-220 et seq., such that it was excepted from the 60-day notice provision of Rule 40. See Ex parte Medical Assurance Co., 862 So. 2d 645, 650 (Ala. 2003) (holding that the provision of Rule 57, Ala. R. Civ. P., that permits a declaratory-judgment action brought pursuant to Ala. Code 1975, §§ 6-6-220 through 6-6-232, to be set for a "speedy hearing" and "advance[d] ... on the calendar" constitutes an exception under Rule 40(a)(7), Ala. R. Civ. P., to the 60-day notice requirement). The Browns' action was brought pursuant to Alabama's redemption statutes, see Ala. Code 1975, § 6-5-247 et seq., not the Declaratory Judgment Act. Accordingly, Rule 57 does not apply in this case.

proceeded to present argument, to cross-examine the witness called by the Browns, and to present their own testimony.

We conclude that, by proceeding to trial without objecting, the Johnsons waived any error based on the lack of proper notice under Rule 40. See Holleman, 295 Ala. at 273, 327 So. 2d at 720 ("The failure to raise the question [of notice] constitutes a waiver."). Furthermore, we note that Rule 40(a)(7) permits parties to agree to a shorter notice period than that set forth in Rule 40(a). Thus, we also conclude that, by appearing and participating in a trial, without objection, on less than 60 days' notice, the parties effectively consented to a shorter notice period. See Garrett v. City of Vestavia Hills, 739 So. 2d 46, 49 (Ala. Civ. App. 1998) (failure to object to summary-judgment hearing held after less than the 10 days' notice required by Rule 56(c) was "tantamount to consent" to hear the motion on less than 10 days' notice). Accordingly, the Johnsons waived the notice and related due-process issues.

Finally, the Johnsons argue that the trial court erred in denying their motion to disqualify the Browns' attorney. Again, however, that issue was not raised by the Johnsons until after the trial.

> " 'The right of a former client to object to his attorney's subsequent representation of an adverse interest may be expressly or tacitly waived. The right of a former client to urge disqualification of an opposing counsel may be waived by the former client's failure to raise the issue early in the proceedings.' "

Hall v. Hall, 421 So. 2d 1270, 1271 (Ala. Civ. App. 1982) (quoting 7 Am. Jur. 2d Attorneys at Law § 187 (1980)). "One should file a motion to disqualify within a reasonable time after discovering the facts constituting the basis for the motion." Ex parte Intergraph Corp., 670 So. 2d 858, 860 (Ala. 1995). Furthermore, our supreme court has held that "review of a lower court's ruling on a motion to disqualify an attorney ... is by a petition for writ of mandamus only." Ex parte Central States Health & Life Co. of Omaha, 594 So. 2d 80, 81 (Ala. 1992).

In this case, even assuming that there had ever been an attorney-client relationship between Thornton and the Johnsons, the Johnsons were aware of Thornton's representation of the Browns at the time they were served with the Browns' complaint for redemption. The Johnsons, however, waited until after the trial to seek Thornton's disqualification. We conclude that the Johnsons waived their objection to Thornton's

representation of the Browns by failing to timely move to disqualify Thornton. See Hall, 421 So. 2d at 1271 (holding that party waived right to seek disqualification of opposing counsel when the motion to disqualify was not filed until after trial).

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Thompson, P.J., and Moore and Fridy, JJ., concur.

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