REL: November 5, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200527

Gayla Michelle Heald

v.

Craig Lloyd Heald

Appeal from Etowah Circuit Court
(DR-11-820)

PER CURIAM.

Gayla Michelle Heald ("the wife") appeals from an order denying her motion, filed pursuant to Rule 60(b)(4), Ala. R. Civ. P., seeking to set aside

a default judgment entered by the Etowah Circuit Court ("the trial court") in August 2012 that divorced the wife from Craig Lloyd Heald ("the husband").

The husband, who was born in August 1958, and the wife, who was born in August 1965, married on June 25, 2006. On October 7, 2011, the husband filed a complaint for a divorce in the trial court, and he requested the entry of a pendente lite order, which was issued a few days later. That order granted the husband temporary possession of the marital residence and required the parties to preserve their assets, to avoid harassing or threatening one another, and to exchange a list of all assets that they knew were owned by either party, including the "relative fair market value" of such assets. The pendente lite order also set a "pendente lite hearing" for December 13, 2011, and instructed the parties to bring financial information to that hearing. There is no indication in the record, however, that any such hearing was held, that any discovery was exchanged, or that the wife received the pendente lite order before the trial court issued its August 2012 judgment.

According to the divorce complaint, the parties "lived together as husband and wife until on or about [September 10, 2011,]" and were continuing to "reside together." However, the complaint also stated "that the parties jointly own[ed] certain real property and that the [wife] has voluntarily moved from the residence." The complaint further alleged that "the parties have accumulated automobiles" and "various debts."

On October 19, 2011, the summons and complaint were purportedly served on the wife by leaving a copy of the same with the husband at the marital residence, where the wife also purportedly resided; it is undisputed that the husband accepted service of the summons and complaint from the process server and that the husband signed the return copy of process. The wife filed no answer and made no appearance in the divorce action, which was set for trial on August 27, 2012.

On August 27, 2012, the trial court entered a judgment that stated, in pertinent part:

> "This action came on the motion of the [husband] for a default judgment pursuant to Rule 55(b)(2) of the Alabama Rules of Civil Procedure, and the [wife] having been duly served with summons and complaint on 10/19/11 and ... having failed to plead or otherwise defend, and her default having

> been duly entered and the [wife] having taken no proceedings since default was entered ...."

Nothing in the record indicates that a default had been entered by the clerk against the wife before the entry of the August 2012 judgment or that the husband had filed any motion seeking a default judgment. The August 2012 judgment also does not indicate that any evidence was presented at trial, as required by Rule 55(e), Ala. R. Civ. P. The August 2012 judgment purported to divorce the parties, to award the husband the marital residence (which included all or part of 10 separate lots), to require the husband to hold the wife harmless for the mortgage on the martial residence, to award each party the personal property in his or her respective possession, to award the husband four automobiles, and to require each party to be responsible for his or her respective debts.

After the entry of the August 2012 judgment, the parties apparently briefly continued to reside together in the marital residence. The wife testified that she resided at a different residence for approximately one and one-half years beginning in December 2012; she stated that she had moved out of the marital residence at that time because the husband

allegedly had been texting the 18-year-old mother of the wife's grandson, of whom the husband and the wife had custody. According to the wife, she had eventually resumed living off and on with the husband at the marital residence, and it is undisputed that she and the husband resided together at the marital residence during the Rule 60(b) proceedings, discussed infra. According to the wife, she first learned of the divorce in 2016, and, she said, she had assumed it was legal based on the husband's representations to her.

On September 23, 2020, the wife filed a motion, pursuant to Rule 60(b), Ala. R. Civ. P., seeking to set aside the August 2012 judgment on the ground that that judgment was void for lack of personal jurisdiction because she had not been served with process pursuant to Rule 4, Ala. R. Civ. P. In addition to citing Rule 60(b)(4), the wife noted that "[t]he certificate of service ... clearly shows that [the husband] was served with process instead of [the wife]. The [husband] served himself and tried to make that count as good process." Thus, according to the wife, she "was never given notice of the pending divorce and a divorce was entered without [her] knowledge." The wife also alleged that the husband

"frauded the court by [giving] default judgment testimony knowing that he was the one who was served in the case"; she also argued that the judgment should be set aside based on Rule 60(b)(6), Ala. R. Civ. P., for the husband's "fraudulently representing to the court that there had been good service on the [wife]." The wife further alleged that the husband had not filed a motion for a default judgment before the entry of the August 2012 judgment, and she alleged that the parties were still living together when she filed her Rule 60(b) motion. Among the exhibits attached to the wife's Rule 60(b) motion was her affidavit, in which she averred that she "was never served with a divorce by [the process server]," that she was "still living with [the husband] as husband and wife," and that she "did not see divorce papers until 2016."

The trial court set the wife's Rule 60(b) motion for a hearing to be held on November 3, 2020. At the November 2020 hearing, the trial court did not take testimony. Instead, the wife, through her counsel, argued that she intended to show that she was never served with process, that the husband had served himself, and that the August 2012 judgment was void. The wife's counsel also referenced the lack of any motion seeking a

default judgment, noted that Rule 55(e) required the submission of evidence or testimony to support a default judgment in a divorce case, and affirmed that the wife and the husband were still residing together. According to the wife's counsel, the wife did not find out about the divorce until 2016, after a fire had occurred at the marital residence and a check for insurance proceeds had been made out solely to the husband. The wife's counsel also noted that the wife was "still on [the husband's] [United States Department of Veterans Affairs disability] benefits ... as his wife."

The husband, through his counsel, responded by stating:

> "[T]he husband and the wife] have lived off and on together. But we had a hearing, and at the time, I think some testimony was taken, and the [wife] was not here. The paperwork, I think, would show that .... And our testimony would be she talked to him about it that very night. The day the order was entered, it was her birthday. ..."

Further, the husband's counsel asserted that, since the entry of the August 2012 judgment, the wife had filed for bankruptcy and had represented that she was not married in that proceeding. The husband's

counsel also asserted that the parties had not "filed taxes together" since the entry of the August 2012 judgment.

After the November 2020 hearing, the wife filed a "Motion to Immediately Set Aside Divorce and Enter [a] Pendente Lite Order," again alleging that the August 2012 judgment was due to be set aside as void for lack of personal jurisdiction due to the failure of service of process. Thereafter, the husband filed a response "denying every allegation" made by the wife, and the trial court set the matter for another hearing on March 12, 2021.

Unlike at the November 2020 hearing, the wife and the husband gave evidence ore tenus at the March 2021 hearing. As noted above, it was undisputed that the husband had purportedly accepted service of process of his complaint for a divorce on behalf of the wife. At the March 2021 hearing, the wife testified that she and the husband were residing at the marital residence at the time the husband filed the divorce complaint and that they had had no discussions about divorce. The wife also stated that she "did end up moving, but it had nothing to do with [the divorce action] at all .... It was because ... we had custody of my grandson

that we had gotten less"; the wife was then interrupted by the trial court, which was conducting the examination: "Okay. I don't need to go into all that." The wife later discussed the husband's texting the 18-year-old mother of the wife's grandson. The wife testified that she had first learned of the divorce in 2016 and stated that she had waited until 2020 to file her Rule 60(b) motion "because at first, I believed it to be true, to be legal, and I couldn't figure out how I could be divorced and not know it, but he had assured me it was true and that he could put me out if he wanted to."

At the March 2021 hearing, a bankruptcy form that was purportedly electronically executed by the wife on March 10, 2016, was admitted into evidence by the husband. That form, entitled "Statement of Financial Affairs for Individuals Filing for Bankruptcy," indicates that the wife was "[n]ot married." An additional form also indicated that the wife owned no valuable real estate. Also admitted were several documents regarding the wife's claim for Social Security disability benefits and associated medical records, all of which had been prepared by third parties. Among those records was an entry indicating that, as of September 22, 2014, the wife

was living at a residence located on "Walker Drive" (which was not the street where the marital residence was located) and that she had "never married or ... had no previous marriages that lasted 10 years or more or ended in death." The husband argued that that was a representation that the wife knew she was not married. However, based on statements on the forms regarding the wife's previous names and the names of her children, she clearly appears to have indicated that she had been married before, and nothing indicates the foregoing statements were inaccurate, namely, that any of her previous marriages had lasted 10 years or more or had ended in death. Nevertheless, also included among the documentation were documents from a law firm that purported to represent the wife for purposes of her claim for Social Security disability benefits in June 2016; the wife stated at the March 2021 hearing that she had been pro se as to those proceedings. Those documents include a physician's note on a medical record from June 25, 2015, that states that the wife "is a Medicaid patient" and that "she is in the process of getting married in the near future and acquir[ing] a new type of insurance." Likewise, a physician's note from April 9, 2015, states that the wife was "thinking of getting

married to her former husband which will give her some insurance." Further, those law-firm documents include reports indicating that, in October 27, 2015, the wife was not currently married and that she had never been married, despite the fact that immediately above those marital-information entries are the wife's several different names from previous marriages.

As to the foregoing, the wife stated that she "would never [have] put" that she had "never been married, no. And I've got four kids." When asked further about several pages that included entries stating that the wife was "never married," the wife stated: "I have no idea. I mean, I would not have just said I was never married. I was married at the time." We note that, at the March 2021 hearing, the trial court acknowledged that the documents at issue were prepared by third parties, that it would consider that when weighing the evidence, and that mistakes might have been made. The trial court also asked the wife whether she was aware of the penalty for perjury.

The husband testified briefly at the end of the March 2021 hearing. He admitted that he probably had claimed the wife as his wife for

purposes of an additional $100 per month in disability benefits from the United States Department of Veterans Affairs ("the VA") and also stated that "[s]ince 2012 she remained on my VA Disability up until 2017." He provided no testimony as to whether he had informed the wife about the divorce proceedings after he had purportedly received service of process for her in October 2011 or when he might have informed her about those proceedings or the entry of the August 2012 judgment. Nevertheless, as his counsel had done at the November 2020 hearing, the husband's counsel argued that the husband had informed the wife about the divorce proceedings either after the husband purportedly received service of process for her or on the evening after the August 2012 judgment was entered; however, those statements are not evidence. See Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005) ("The unsworn statements, factual assertions, and arguments of counsel are not evidence.").

On April 7, 2021, the trial court entered an order denying the wife's Rule 60(b) motion. The wife timely appealed to this court.

The wife argues that the August 2012 judgment was void because of the inadequacy of service of process as to the complaint and because the husband did not file a motion for a default judgment and presented no evidence in support of the August 2012 judgment. Because we conclude that the first issue is dispositive, we pretermit any discussion regarding the second issue.

Rule 4(c)(1), Ala. R. Civ. P., provides, in pertinent part, that

> "[s]ervice of process ... shall be made ... [u]pon an individual, other than a minor or an incompetent person, by serving the individual or by leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein ...."

"[S]trict compliance with the rules regarding service of process is required." Ex parte Pate, 673 So. 2d 427, 429 (Ala. 1995); see also Committee Comments to August 1, 1992, Amendment to Rule 4(c)(1) ("The committee notes that courts should be vigilant to protect the rights of defendants when default judgments are entered on the basis of service upon an agent of the defendant. On motion to set aside a default or on motion for relief from a default, where service has been attempted on a

person alleged to be or purporting to be an agent, no presumption of agency should be indulged in with respect to such service and the court should be satisfied that the person upon whom service was attempted was in fact the authorized agent of the defendant before refusing to grant relief from a default judgment.").

"A judgment is void if the court rendering the judgment lacked personal jurisdiction over the parties." Ex parte Full Circle Distrib., L.L.C., 883 So. 2d 638, 644 (Ala. 2003). "The existence of personal jurisdiction depends on the presence of ... perfected service of process giving notice to defendant of the suit being brought ...." Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983). Thus,

> "'"'"[f]ailure of proper service under Rule 4[, Ala. R. Civ. P.,] deprives a court of jurisdiction and renders its judgment void."'"' Kingvision Pay-Per-View, Ltd. v. Ayers, 886 So. 2d 45, 52 (Ala. 2003) (quoting Russell Coal Co. v. Smith, 845 So. 2d 781, 783 (Ala. 2002), quoting in turn Northbrook Indem. Co. v. Westgate, Ltd., 769 So. 2d 890, 893 (Ala. 2000), quoting in turn Ex parte Pate, 673 So. 2d 427, 428-29 (Ala. 1995)). In reviewing a trial court's ruling on a motion to vacate a default judgment on the ground that the judgment was void, this court applies a de novo standard of review. Kingvision, 886 So. 2d at 51."

Johnson v. Hall, 10 So. 3d 1031, 1033-34 (Ala. Civ. App. 2008); see also Ex parte Pate, 673 So. 2d 427, 429 (Ala. 1995) ("If a court lacks jurisdiction of a particular person, or if it denied that person due process, then the court's judgment is void."). "The rationale for being able to vacate a void judgment at any time is that 'a void court order is a complete nullity.' Hodges v. Archer, 286 Ala. 457, 459, 241 So. 2d 324, 326 (1970). As a nullity, a void judgment has no effect and is subject to attack at any time. Id." Ex parte Full Circle Distrib., L.L.C., 883 So. 2d at 643.

The rules of civil procedure are to "be construed and administered to secure the just ... determination of every action," Rule 1(c), Ala. R. Civ. P., and the issue whether the husband is a "person of suitable ... discretion" under Rule 4(c)(1) for purposes of receipt of service of process for the wife in the divorce action is a question of law. Interpreting the rules for service of process so as to allow the husband, who was the opposing party to the wife in the divorce proceedings, to accept service of process for her would in no way secure the just determination of the divorce action. As the opposing party in the divorce action, he simply is not a "person of suitable ... discretion" who is permitted to accept service

of process for the wife. To read Rule 4(c)(1) as authorizing such a practice would be absurd. See Darby v. Darby, 135 N.C. App. 627, 628-29, 521 S.E.2d 741, 742 (1999) ("[T]he courts in reading our [service-of-process] statutes must import common sense to the meaning of the legislature's words to avoid an absurdity. ... [T]he statute does not allow a plaintiff to accept -- on the behalf of the defendant -- service of her own complaint."); see also Community Sch. Dist. No. 13 v. Goodman, 127 A.D.2d 837, 511 N.Y.S.2d 945, 946 (1987)(concluding that, when the person who received service of process had interests "adverse to those of the respondent, ... it would be inappropriate for him to act as the recipient of service for [the respondent]"); City of New York v. Chemical Bank, 122 Misc. 2d 104, 110, 470 N.Y.S.2d 280, 286 (Sup. Ct. 1983) ("It is of no moment here that the recipient of the summons is of suitable age, and ordinarily may be of suitable discretion; the question is whether he has suitable discretion in the specific circumstances presented here. Based only on the moving papers, [the husband at issue] cannot be considered a person of suitable age and discretion; his inherent conflict of interest [with the wife] must be presumed to deprive him of the probity and mature concern that the law

presupposes." (footnote omitted)); cf. Rule 4(i)(1)(B), Ala. R. Civ. P. (stating that a specially designated process server may not be "a party" or "related within the third degree by blood or marriage to the party seeking service of process").[1]

Based on the foregoing, we conclude that the August 2012 judgment is void and is due to be set aside. Nevertheless, the husband argues that

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[1]As noted, the husband presented no evidence or testimony that would support the conclusion that he provided the wife with actual notice of the divorce proceedings before the entry of the August 2012 judgment. Thus, we do not address that issue, though we question whether defective service of process of the nature at issue could have been cured merely based on actual notice to the wife before the entry of the August 2012 judgment. See Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."); see also Chemical Bank, 122 Misc. 2d at 106, 470 N.Y.S.2d at 283 ("If an individual is to be subjected to sovereign power, whether by the government or by a private person, the assertion of that power requires a tangible, overt and verifiable act directed toward the individual being called to account. It is for this reason that actual notice alone, unaccompanied by a valid jurisdiction-acquiring act, is legally insufficient to permit the court to exercise its power over the defendant."). To allow a plaintiff's self-serving statements about providing actual notice to a defendant to substitute for compliance with the requirements for service of process would undermine the very purpose for those requirements.

the wife should be judicially estopped from asserting the trial court's lack of jurisdiction as to the August 2012 judgment because of the representations she subsequently made that she was "not married." The husband never mentioned estoppel or judicial estoppel to the trial court, and he did not raise that affirmative defense in his response to the wife's Rule 60(b) motion. Middleton v. Caterpillar Indus., Inc., 979 So. 2d 53, 57 (Ala. 2007) ("Judicial estoppel ... is an affirmative defense ...."). Instead, he argued in the trial court that the bankruptcy filings confirmed that the wife knew she was not married on March 10, 2016, and that that was evidence indicating that "[s]he's obviously divorced in her mind, and she's divorced in knowledge." He also argued that that was supported by the fact that the bankruptcy filings indicated she was residing in a residence other than the marital residence. The closest the husband came to making any type of estoppel argument was stating, through counsel, that

> "what I'm about to discuss with this Court is the fact that she acquiesced to the idea that she had been served with the divorce and the divorce was made final.
>
> "I think my client testified the last time that the divorce was made final on her birthday, and she made the comment to him about thank you for giving me my divorce on my birthday,

> number one. But, Judge, what's more important than that is that after the divorce had been entered by this Court, she moved from the ... [marital] residence at Russeldale Street, Avenue, whatever it is, over to a mobile home that her parents had the land on, on Walker Drive over in Glencoe."

The husband then proceeded to discuss that move as being confirmed by the wife's representations for purposes of obtaining Social Security disability benefits and that such filings supported the conclusion that she knew she was divorced from the husband before 2016.

It is apparent that both the husband and the wife have made misstatements, to their respective benefit, regarding the events leading up to and following the entry of the August 2012 judgment, and we note that the few precedents that the husband cites in his appellate brief regarding judicial estoppel do not discuss whether that doctrine may be applied in the context of a void judgment or whether that doctrine may be applied when the person asserting it has made misrepresentations for his or her own benefit. See Ex parte First Alabama Bank, 883 So. 2d 1236, 1244-45 (Ala. 2003) (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001), for the proposition that one factor to consider in determining whether judicial estoppel is applicable is whether "the party seeking to

assert an inconsistent position [has] 'derive[d] an unfair advantage or impose[d] an unfair detriment on the opposing party if not estopped' "). Nevertheless, we do not reach the merits of the issue whether judicial estoppel might apply because the record is inadequate to support the conclusion that the husband adequately raised that affirmative defense. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) (noting that an appellate court may not affirm a judgment on a ground "where due-process constraints require some notice at the trial level, which was omitted [as to that ground]"). Thus, we reject the husband's judicial-estoppel argument. Likewise, we reject his attempt to convert a plaintiff's purported acceptance of service on behalf of a defendant from raising a jurisdictional issue under Rule 60(b)(4) to raising an issue involving a mistake under Rule 60(b)(1), misconduct or fraud under Rule 60(b)(3), or another reason justifying relief under Rule 60(b)(6). That argument is merely a subterfuge to invoke the time limits applicable to nonjurisdictional grounds under Rule 60(b).

Based on the foregoing, the April 2021 order is reversed and the cause is remanded to the trial court for it to enter a judgment setting aside the August 2012 judgment as void.

REVERSED AND REMANDED WITH INSTRUCTIONS.

All the judges concur.