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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190324

Brian James Merrick

v.

Brandi Rhodes Merrick

**Appeal from Autauga Circuit Court
(DR-18-900070)**

EDWARDS, Judge.

Brian James Merrick ("the husband") appeals from an order entered by the Autauga Circuit Court ("the trial court") in a divorce proceeding between him and Brandi Rhodes Merrick ("the

2190324

wife"). We dismiss the appeal as being from a nonfinal judgment.

The husband and the wife married on July 17, 2010, and separated in February 2018. On April 11, 2018, the wife filed a petition in the trial court seeking a legal separation from the husband. Thereafter, the husband filed an answer and a counterclaim for a divorce, and the wife filed a reply to the husband's counterclaim. The wife subsequently amended her pleadings to also seek a divorce.

On February 8, 2019, the husband and the wife filed a third-party complaint in the divorce proceeding. The third-party complaint asserted claims against Ben Milam and U Park U Sell, LLC ("UPUS"), an Alabama limited-liability company of which Milam is a member, alleging breach of a purported loan agreement and fraud. Those claims purportedly arose out of a \$33,000 loan or investment that the husband and the wife had made regarding UPUS.

The record includes a civil summons issued to UPUS in conjunction with the third-party complaint. The summons was filed on February 18, 2019, and the return on service in the summons reflects that the summons and a copy of the third-

2190324

party complaint were served on Milam, who is the registered agent for UPUS, on February 15, 2019. The record before us includes no civil summons issued to Milam, individually, and it is unclear whether he was served with process in his individual capacity. The State Judicial Information System case-action-summary sheet includes an entry stating that Milam appeared pro se; there is no indication that UPUS retained counsel. See Progress Indus., Inc. v. Wilson, 52 So. 3d 500, 507-08 (Ala. 2010) (stating that a corporate officer, who is a layperson, may not appear on behalf of the corporation). Neither Milam nor UPUS filed an answer to the third-party complaint.

The trial court conducted ore tenus proceedings on August 6, 2019, and November 6, 2019. During those proceedings, counsel for the husband and counsel for the wife requested that the trial court enter a default judgment regarding their third-party claims; neither Milam nor UPUS appeared at trial. On December 26, 2019, the trial court entered a "Final Decree of Divorce" purporting to divorce the husband and the wife, to divide their marital property, and to award the wife rehabilitative alimony. The December 2019 order also included

2190324

the following: "That the [husband and the wife] have obtained a judgment against Ben Milam in the sum of \$35,000.00 compensatory damage[s] and \$35,000.00 punitive damages." The December 2019 order makes no reference to the purported third-party claims against UPUS.

The husband filed a purported postjudgment motion, which he subsequently amended, requesting that the trial court modify its property division and arguing, in part, that the rehabilitative-alimony award to the wife was not supported by the evidence and exceeded his ability to pay. On January 17, 2020, the husband filed a notice of appeal, and, thereafter, the trial court purported to enter an order on February 11, 2020, regarding the husband's purported postjudgment motion. The February 2020 order purported to make certain adjustments to the property division between the husband and the wife but left the rehabilitative-alimony provision "as originally ordered."

"[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu." Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987). "The question whether a judgment is final is a jurisdictional question, and

2190324

the reviewing court, on a determination that the judgment is not final, has a duty to dismiss the case." Owens v. Owens, 739 So. 2d 511, 513 (Ala. Civ. App. 1999). We directed the husband and the wife to file letter briefs addressing whether a final judgment has been entered in this case in light of the trial court's apparent failure to adjudicate the third-party claims against UPUS. See, e.g., Deutsche Bank Nat'l Tr. Co. v. Karr, [Ms. 1190036, April 17, 2020] ___ So. 3d ___, ___ (Ala. 2020) (stating that a final judgment must leave nothing for further adjudication and that a nonfinal judgment will not support an appeal). They responded by filing a joint letter brief arguing that the trial court's order did adjudicate the claims against UPUS. We disagree.

In their joint letter brief, the husband and the wife argue that the purported adjudication of their claims against Milam was also an adjudication of their claims against UPUS. According to the husband and the wife, Milam and UPUS are "interchangeable third party defendants" because Milam is the registered agent, and allegedly the sole member, of UPUS. However, the third-party complaint clearly asserts claims against two separate defendants, Milam, in his individual

2190324

capacity, and UPUS, a limited-liability company. A limited-liability company is a distinct legal person from its members. See Ala. Code 1975, § 10A-5A-3.01, and the Comment to that Code section. The December 2019 order references only the adjudication of the claims against Milam; UPUS is never mentioned in that order. The third-party complaint includes no allegations that UPUS is a sham entity or that its existence could be ignored for purposes of adjudicating the claims asserted in the third-party complaint. Also, in tension with the interchangeability argument, the husband and the wife insist in their letter brief that it was their intention to obtain a judgment against both Milam and UPUS. Thus, we reject the husband and the wife's interchangeability argument.

The husband and the wife also argue that the trial court adjudicated their claims against UPUS because the February 2020 order purporting to rule on the husband's purported postjudgment motion closes with the statement "All other requests are denied." That argument is equally without merit for two reasons. First, because the December 2019 order failed to adjudicate the claims against UPUS, the husband's

2190324

purported postjudgment motion was not a "motion[] filed pursuant to Rules 50, 52, 55, [or] 59, Alabama Rules of Civil Procedure," Rule 4(a)(5), Ala. R. App. P., and his notice of appeal was thus not held in abeyance pending a ruling on the purported postjudgment motion. After the husband filed his notice of appeal, the trial court lacked jurisdiction to enter the February 2020 order. See, e.g., Johnson v. Willis, 893 So. 2d 1138, 1141 (Ala. 2004). Second, even assuming the trial court had had jurisdiction to enter the February 2020 order, the above-quoted language from that order is preceded (1) by a statement that clearly indicates that the February 2020 order is directed to the husband's purported postjudgment motion, which made no reference to any need to adjudicate the claims against UPUS, and, more importantly, (2) by a six-item list of "issues presented," none of which refers to the claims against UPUS.

In addition to addressing the finality issue, we also take this opportunity to caution the bar about pursuing third-party claims in a divorce proceeding rather than pursuing those claims in a separate action or, assuming it would be proper to bring such claims in the divorce proceeding pursuant

2190324

to Rule 14, Ala. R. Civ. P., severing the third-party claims from the divorce proceeding pursuant to Rule 21, Ala. R. Civ. P.¹ In the present case, for example, the husband and the wife appear to have agreed regarding the value of their third-party claims, and they could have asked the trial court to divide the chose in action as part of the property division rather than potentially complicating the divorce trial with a full trial on their breach-of-contract and tort claims against Milam and UPUS.²

¹We recognize that certain claims within the jurisdiction of the circuit court, particularly some claims between spouses, may be required to be filed as part of a divorce proceeding. See Smith v. Smith, 530 So. 2d 1389, 1391 (Ala. 1988) (discussing circumstances in which the doctrine of res judicata might bar a subsequent civil action between the spouses after a final judgment has been entered in their divorce proceeding). But see Osborne v. Osborne, 216 So. 3d 1237 (Ala. Civ. App. 2016) (holding that the trial court erred by applying the doctrine of res judicata as a bar to an assault claim by the wife against the husband when the issue of assault was asserted as a ground for divorce in the earlier divorce proceeding); Ex parte Harrington, 450 So. 2d 99, 101 (Ala. 1984) (rejecting the argument that the merger of law and equity and Rule 18, Ala. R. Civ. P., required a wife "to join her claim of assault and battery in her divorce action").

²The foregoing should not be read as expressing any opinion regarding whether Rule 14, Ala. R. Civ. P., was properly invoked or applied in the present case. See Ex parte Curry, 157 So. 3d 906, 909 (Ala. Civ. App. 2014).

2190324

Based on the foregoing, we dismiss this appeal as having been taken from a nonfinal judgment.

APPEAL DISMISSED.

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

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