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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2110342

Kenneth Smith

v.

Connie Butler-Austin and John Reynolds

Appeal from Baldwin Circuit Court
(CV-11-900208)

THOMPSON, Presiding Judge.

On February 9, 2011, Kenneth Smith filed a pro se complaint in the Baldwin Circuit Court seeking to eject Connie Butler-Austin from certain real property. In his complaint against Butler-Austin, Smith alleged that John Reynolds had

improperly leased the property to Butler-Austin. Smith's action against Butler-Austin was assigned case number CV-11-900208. On February 28, 2011, Butler-Austin answered Smith's complaint, denying that Smith had the right to eject her from the property.

Also on February 28, 2011, Butler-Austin filed in case number CV-11-900208 a third-party complaint naming Reynolds as a third-party defendant. In that third-party complaint, Butler-Austin asserted various claims against Reynolds in the event the trial court determined that Reynolds was not the owner of the property Reynolds had contracted to lease to her. In support of that third-party complaint, Butler-Austin submitted a copy of a May 16, 1997, lease document naming Reynolds and Butler-Austin as parties to the lease agreement.

On March 14, 2011, the trial court entered an order in case number CV-11-900208 scheduling a bench trial for July 26, 2011. Butler-Austin later moved to consolidate case number CV-11-900208 with a separate action Smith had initiated against Reynolds, which she alleged was designated as case number CV-11-900209 and which is hereinafter referred to as "the Reynolds action." The record on appeal contains no

pleadings or orders pertaining to the Reynolds action. However, in a postjudgment motion discussed later in this opinion, Smith alleged that he had filed that action against Reynolds when he discovered that Reynolds had executed an agreement purporting to lease the property to Butler-Austin. On March 25, 2011, the trial court granted Butler-Austin's motion to consolidate the two actions.

On July 26, 2011, the date of the scheduled bench trial, Butler-Austin filed a motion for an award of an attorney fee pursuant to the Alabama Litigation Accountability Act ("ALAA"), § 12-19-270 et seq., Ala. Code 1975. As a basis for her ALAA claim, Butler-Austin alleged that the trial court had scheduled Smith's claims against her for a bench trial on July 26, 2011, and that Smith had failed to appear at the scheduled trial.

On July 28, 2011, the trial court entered the following order (hereinafter "the July 28, 2011, order") in case number CV-11-900208:

> "This matter comes before the Court for bench trial final hearing [sic] this 26th day of July 2011; present in Court was the defendant, Connie Butler-Austin, represented by her attorney of record ..., and the defendant, John Reynolds, represented by .... The plaintiff, Kenneth Smith, or any

> representatives on behalf, failed to appear. The Court, upon [Butler-Austin's] oral motion to dismiss [Smith's] complaint against defendant Connie Butler-Austin for his failure to appear, together with [Butler-Austin's] motion for an attorney fee, made verbal findings on the record which are incorporated within this order by reference; and, further, the Court hereby does:
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> "ORDER, ADJUDGE and DECREE as follows:
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> "1. That [Smith's] complaint as to defendant Connie Butler-Austin is hereby due to be, and is, dismissed with prejudice.
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> "2. That defendant Connie Butler-Austin's third-party complaint/cross-claim against defendant John Reynolds is hereby due to be and is dismissed without prejudice.
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> "3. That defendant Connie Butler-Austin's motion for an attorney fee pursuant to the [ALAA] is hereby due to be, and is GRANTED. Judgment is hereby entered in favor of defendant Connie Butler-Austin, and against plaintiff Kenneth Smith, for her attorney fees in defending this cause of action, in the amount of $1,500, for which execution [shall] issue."

(Capitalization in original.) Also on July 28, 2011, the trial court entered another order that is substantially the same as the order quoted above; that order stated: "Trial held on 7/26/2011. Plaintiff failed to appear. Case is dismissed and third-party complaint is dismissed without prejudice."[1]

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[1]On August 2, 2011, Butler-Austin filed a motion seeking an award of an attorney fee under the ALAA. In response, on

On August 26, 2011, Smith, who had by that time retained counsel, filed in case number CV-11-900208 a purported postjudgment motion in which he sought to set aside the July 28, 2011, order.[2] See SCI Alabama Funeral Servs., Inc. v. Hester, 984 So. 2d 1207, 1208 n.1 (Ala. Civ. App. 2007) ("A valid postjudgment motion may only be taken in reference to a final judgment."). Smith submitted certain exhibits in support of his August 26, 2011, motion. On August 29, 2011, the trial court entered an order denying Smith's August 26, 2011, motion to set aside the July 28, 2011, order. Smith appealed to our supreme court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.[3] Smith

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August 11, 2011, the trial court entered an order identical to the July 28, 2011, order quoted above; the only differences between the July 28, 2011, order and the August 2, 2011, postjudgment order are the dates on those documents.

[2]The parties refer to the July 28, 2011, order as a "default judgment." We conclude that that order was one dismissing the claims in case number CV-11-900208 pursuant to Rule 41(b), Ala. R. Civ. P. Blake v. Stinson, 5 So. 3d 615 (Ala. Civ. App. 2008).

[3]In his notice of appeal, Smith named both Butler-Austin and Reynolds as appellees. None of the parties has asserted on appeal any arguments regarding Butler-Austin's third-party claims against Reynolds. However, Reynolds has filed a brief on appeal adopting the arguments asserted by Butler-Austin and a motion to strike Smith's appellate brief.

contends that the trial court erred in failing to set aside the July 28, 2011, order in case number CV-11-900208.

However, as an initial matter, we take notice of a jurisdictional issue. See Bryant v. Flagstar Enters., Inc., 717 So. 2d 400, 401 (Ala. Civ. App. 1998) ("[W]e must consider whether we have jurisdiction over this appeal, because 'jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.'" (quoting Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987))). A nonfinal order cannot support an appeal. See Shwarb v. Lee, 955 So. 2d 418, 420 (Ala. 2006).

In Hanner v. Metro Bank & Protective Life Insurance Co., 952 So. 2d 1056 (Ala. 2006), the judgment entered in Hanner's divorce action required that she and her former husband maintain life-insurance policies for the benefit of their minor child. Shortly before his death, the former husband assigned a portion of his life-insurance benefits to Metro Bank as security for indebtedness, and he assigned the remainder of those benefits to his new wife. After the former husband's death, a dispute arose concerning the proceeds of the life-insurance policy. The insurance company filed a

declaratory-judgment action against Metro Bank and Hanner. Hanner counterclaimed against the insurance company and filed a cross-claim against Metro Bank. In addition, Hanner filed a separate action against the former husband's estate and his widow. Hanner's action was consolidated with the insurance company's declaratory-judgment action.

In Hanner, supra, the trial court entered a judgment in favor of Metro Bank on all the claims pending between the parties to the declaratory-judgment action. Our supreme court concluded, however, that, because the two actions had been consolidated and no judgment had been entered in Hanner's action against the estate and the widow, the order in the declaratory-judgment action was nonfinal. Hanner, 952 So. 2d at 1060. In so holding, the court explained:

> "According to Wright and Miller:
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> > "'Although federal courts usually have said that consolidated actions do not lose their separate identity, some courts have reasoned persuasively that they should be treated as a single action for purposes of review by way of Rule 54(b), and that a judgment in the consolidated case that does not dispose of all claims and all parties is appealable only if certified as that rule requires.'

> "9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2386 (2d ed. 1995) (footnote omitted). The United States Court of Appeals for the Ninth Circuit has said:
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> > "'In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court. This leaves the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action.'
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> "Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984). See, also, Trinity Broad. Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987) ('To obtain review of one part of a consolidated action, appellant must obtain certification under Fed. R. Civ. P. 54(b).'); and Spraytex, Inc. v. DJS&T, 96 F.3d 1377, 1382 (Fed. Cir. 1996) ('We now extend this approach to join the Ninth and Tenth Circuits in adopting the rule that, absent Rule 54(b) certification, there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case.'). We find persuasive the holdings of these decisions interpreting the Federal Rules of Civil Procedure, on which our own Rules of Civil Procedure are based. Accordingly, we hold that a trial court must certify a judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., before a judgment on fewer than all the claims in a consolidated action can be appealed."

Hanner, 952 So. 2d at 1060-61 (emphasis added).

In this case, Smith filed his claim in case number CV-11-900208 seeking to eject Butler-Austin from certain real

property. In his purported postjudgment motion filed in case number CV-11-900208, Smith alleged that he had filed the Reynolds action to assert claims related to Reynolds's allowing Butler-Austin to lease that property. The trial court ordered the two actions consolidated, and there is no indication in the record on appeal that the consolidation of the actions was only for the purposes of discovery or trial. See Rule 42(a), Ala. R. Civ. P. ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (emphasis added)). The record on appeal contains no indication that a judgment or order disposing of the claims Smith asserted against Reynolds has been entered in the Reynolds action, which was consolidated with case number CV-11-900208. We conclude that, given the facts and procedural history of this case, the July 28, 2011, order in case number CV-11-900208 was not sufficiently final to support this appeal.

Accordingly, we remand this cause for 14 days for the trial court (1) to enter a final judgment in the consolidated action, (2) to determine whether a certification of the July 28, 2011, order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., would be appropriate, given the facts, see Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263-64 (Ala. 2010) (discussing whether claims are too intertwined for a Rule 54(b) certification to be appropriate), or (3) to take no action, which will result in a dismissal of the appeal. If the trial court enters a final judgment or determines that a Rule 54(b) certification would be appropriate in this matter,

> "a supplemental record reflecting such action should be prepared and forwarded to this Court within 14 days from the date this opinion is released. ... If no supplemental record is forwarded to this Court within 14 days of the date this opinion is released, this appeal will be dismissed."

Hanner v. Metro Bank & Protective Life Ins. Co., 952 So. 2d at 1062.

The motion to strike Smith's brief is denied as moot.

REMANDED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.