

Rel: April 17, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1190036

Deutsche Bank National Trust Company

v.

Dortha Karr and Randy Karr

Appeal from Marshall Circuit Court
(CV-16-900016)

BRYAN, Justice.

Deutsche Bank National Trust Company ("Deutsche Bank") seeks appellate review of an order entered by the Marshall Circuit Court ("the circuit court"). Because we conclude that the order appealed from is not a final judgment, we dismiss

1190036

the appeal.

Background

In January 2016, Deutsche Bank filed a complaint seeking possession of certain property ("the property") to which it claimed title by virtue of purchase at a foreclosure sale. According to Deutsche Bank, Dortha Karr granted a mortgage in the property to Ameriquest Mortgage Company ("the mortgage"), which thereafter "transferred and assigned" the mortgage to Deutsche Bank, as trustee, under the terms of a "Pooling and Servicing Agreement." Deutsche Bank alleged that, after the foreclosure sale, it served a written demand for possession of the property on Dortha, but she refused to vacate the property.

Dortha answered Deutsche Bank's complaint, denying, among other things, that Deutsche Bank possessed a valid mortgage interest in the property and enumerating several "affirmative defenses," including the doctrine of res judicata. In addition, Dortha asserted two counterclaims against Deutsche Bank: the tort of outrage and slander of title. Deutsche Bank answered Dortha's counterclaims, denying several allegations and asserting a number of "affirmative defenses."

1190036

Deutsche Bank thereafter amended its complaint, referencing Randy Karr as an additional defendant and including allegations that Randy had "initialed every page of the mortgage and signed it immediately after the signature of" Dortha. Deutsche Bank's amended complaint also asserted specific counts for ejectment, "default under promissory note," and "equitable relief." In relevant part, the amended complaint also set forth additional allegations regarding the creation of a promissory note that was secured by the mortgage ("the promissory note"), including an allegation that the promissory note had been "properly" assigned to Deutsche Bank and that Deutsche Bank was the holder of the promissory note and was entitled to the debt owed under the terms of the promissory note. Dortha answered the amended complaint, denying Deutsche Bank's material allegations.

Deutsche Bank later filed an amended answer in response to Dortha's counterclaims, asserting that she lacked "standing" to "attack" the mortgage and that the mortgage should not be vacated because Dortha and Randy (hereinafter collectively referred to as "the Karrs") had not "offered to do equity by restoring the \$317,625.00 of value they received

1190036

under the" promissory note.

Deutsche Bank thereafter moved for leave to file a second amended complaint, seeking to formally add Randy as a defendant to the action, to assert additional allegations pertaining to him, and to assert a specific count seeking also his ejectment from the property. The Karrs moved to "strike [Deutsche Bank]'s motion for leave to file the second amended complaint and a claim against Randy," contending that the second amended complaint was "too late" because it was filed three years after the complaint was filed and was filed after discovery was "substantially complete." They also asserted that Randy was not a proper party to the action, that Randy's "right to possession" of the property had already been adjudicated in a separate action -- case no. CV-2012-900434 -- and that Deutsche Bank lacked "standing to prosecute an ejectment action against Randy." Deutsche Bank filed a response to the Karrs' motion, arguing, among other things, that Dortha lacked "standing to prosecute her" counterclaims.

On April 11, 2019, the circuit court entered an order that provided, in its entirety:

"Motion to Strike is hereby GRANTED for Mr. Randy Karr.

1190036

"The Court notes that all claims in this case were previously litigated in case number CV-2012-900434 between Dortha Karr, Shane Wilks, and Susan Wilks.^[1] Said case was heard by [another judge in this circuit court], and it involved the same real estate.

"Costs taxed to [Deutsche Bank]."

(Capitalization in original; emphasis added.)

The case-action summary in the State Judicial Information System ("SJIS") contains five entries on April 15, 2019, that respectively reflect the following:

"Case Assigned Status of Disposed

"Court Action Judge: Tim Riley

"Disposed on 04/11/2019 by (Other)

"C001 Disposed by (Other) on 04/11/2019

"D001 Disposed by (Other) on 04/11/2019."

Earlier case-action-summary entries indicate that "C001" referred to Deutsche Bank and that and "D001" referred to Dortha. The "(Other)" noted in the foregoing entries appears to be a reference to the circuit court's April 11, 2019, order, which is the only action taken by the circuit court on that date that is reflected on the case-action summary.

¹Case no. CV-2012-900434 was styled Ocwen Loan Servicing LLC v. Dortha Karr, Randy Karr, Shane Wilks, and Susan Wilks.

1190036

On April 17, 2019, Deutsche Bank filed a "motion to reconsider" the April 11, 2019, order, arguing, among other things, that it had shown good cause for amending its complaint and that the judgment entered in case no. CV-2012-900434 did not preclude Deutsche Bank, under the doctrine of res judicata, from maintaining the instant action. The Karrs filed a response to Deutsche Bank's motion, and Deutsche Bank later filed a "supplement" to its motion.

On September 4, 2019, the circuit court entered an order denying Deutsche Bank's motion that provided, in relevant part:

"The Court, after duly considering the arguments of the parties, both written and oral, pertaining to [Deutsche Bank]'s Motion to Reconsider this Court's Order of April 11, 2019, wherein [Deutsche Bank]'s Motion for Leave to Amend the Complaint was denied, and this action was dismissed by operation of res judicata, this Court finds as follows:

". . . .

"With regard to [Deutsche Bank]'s Motion to Reconsider the dismissal of this action, this Court has reviewed all pleadings and orders in Ocwen Loan Servicing, LLC v. Dortha Karr, [case no.] CV-2012-900434, and determines that the Plaintiff in said action [is the party] from whom [Deutsche Bank] derives its standing by virtue of assignment. It is noted that Ocwen Loan Servicing, LLC, represented itself to the Court in the afore-referenced action to be the ultimate assignee of the mortgage which is

1190036

the subject matter of the instant action.^[2] Upon its sua sponte review of [case no.] CV-2012-900434, the Court recognizes that the asserted claims of Ocwen Loan Servicing, LLC, are of such degree of similarity against ... Dortha ... as the claims asserted herein by [Deutsche Bank], that [Deutsche Bank]'s claims against [Dortha] are hereby barred by operation of res judicata. This Court finds that despite dismissal of the substantially similar claims without prejudice, there exists a judgment on the merits [in case no.] CV-2012-900434, in which rights under the subject mortgage were represented as belonging to the ultimate assignee, Ocwen Loan Servicing, LLC. As the currently plead[ed] claims were presented in the previous action, and could have been adjudicated in said action, said claims are now barred. Accordingly, [Deutsche Bank]'s Motion to Reconsider this Court's Order dismissing this action, is hereby DENIED."

(Capitalization in original.) Deutsche Bank thereafter filed a document entitled "Supplement to Record," attaching pleadings and orders from case no. CV-2012-900434.

On October 16, 2019, Deutsche Bank filed a notice of appeal to this Court, naming the Karrs as appellees. On the same day, Deutsche Bank filed, in the alternative, a petition for the writ of mandamus in this Court, noting that the circuit court's September 4, 2019, order did not address Dortha's counterclaims (no. 1190033). On October 31, 2019,

²The record indicates that, in case no. CV-2012-900434, Ocwen Loan Servicing, LLC, alleged that it was "the ultimate assignee of Ameriquest" Mortgage Company.

1190036

this Court issued an order denying Deutsche Bank's mandamus petition.

Analysis

The Karrs have filed a motion to dismiss Deutsche Bank's appeal, arguing that it was not timely filed under Rule 4(a)(1), Ala. R. App. P. Rule 4(a)(1) provides, in pertinent part:

"[I]n all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from"

(Emphasis added.) The Karrs contend that the circuit court's April 11, 2019, order constituted a final judgment and that Deutsche Bank's October 16, 2019, notice of appeal was, therefore, untimely.

The Karrs acknowledge that, following the entry of the circuit court's April 11, 2019, order, Deutsche Bank filed a "motion to reconsider" on April 17, 2019, and that, if the circuit court's April 11, 2019, order was a final judgment, Deutsche Bank's "motion to reconsider" could be construed as a postjudgment motion filed pursuant to Rule 59(e), Ala. R. Civ. P. See Evans v. Waddell, 689 So. 2d 23, 26-27 (Ala.

1190036

1997) ("While the Alabama Rules of Civil Procedure do not speak of a 'motion to reconsider,' this Court has repeatedly construed motions so styled, when they have been filed within 30 days after the entry of a final judgment, to be Rule 59(e) motions.").

Postjudgment motions filed pursuant to Rule 59(e) within 30 days of the entry of a final judgment "suspend the running of the time for filing a notice of appeal." Rule 4(a)(3), Ala. R. App. P. However, the Karrs note that, if not ruled upon, such motions generally remain pending for only 90 days, after which time they are deemed denied by operation of law. Rule 59.1, Ala. R. Civ. P.³ Under such circumstances, "the

³In pertinent part, Rule 59.1 provides:

"No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59 shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to render an order disposing of any pending postjudgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period."

(Emphasis added.) In this case, the parties did not expressly consent to extending the 90-day period provided by Rule 59.1,

1190036

time for filing a notice of appeal shall be computed from the date of denial of such motion by operation of law, as provided for in Rule 59.1." Rule 4(a)(3).

The Karrs note that, if Deutsche Bank's April 17, 2019, "motion to reconsider" is construed as a postjudgment motion filed pursuant to Rule 59(e), it was deemed denied by operation of law 90 days later, on July 16, 2019, and Deutsche Bank filed its notice of appeal on October 16, 2019, which was more than 42 days after July 16, 2019. Therefore, the Karrs argue, Deutsche Bank's notice of appeal was untimely if Deutsche Bank's April 17, 2019, "motion to reconsider" is construed as a postjudgment motion filed pursuant to Rule 59(e).

The Karrs also argue that, insofar as Deutsche Bank's "motion to reconsider" can alternatively be construed as a postjudgment motion filed pursuant to Rule 60, Ala. R. Civ. P., as opposed to a postjudgment motion filed pursuant to Rule 59(e), Deutsche Bank's notice of appeal was untimely. In support of their argument, they cite Coosa Marble Co. v. Whetstone, 294 Ala. 408, 411, 318 So. 2d 271, 273 (1975) ("A

and this Court did not order such an extension. Therefore, those provisions of Rule 59.1 are not at issue here.

1190036

Rule 60(b)] motion neither affects the finality of a judgment nor tolls the time for appeal."). See also Graves v. Golthy, 21 So. 3d 720, 722 (Ala. 2009) ("[A] Rule 60 motion is not included in Rule 4(a)(3) ... as one of the motions that toll the time in which to file an appeal.").

Thus, in order to decide whether the Karrs' motion to dismiss Deutsche Bank's appeal should be granted, we must determine whether the circuit court's April 11, 2019, order constituted a final judgment, such that Deutsche Bank's time for filing a notice of appeal began to run on that date, unless otherwise tolled.

I. The April 11, 2019, Order

As noted above, the circuit court's April 11, 2019, order provided, in its entirety:

"Motion to Strike is hereby GRANTED for Mr. Randy Karr.

"The Court notes that all claims in this case were previously litigated in case number CV-2012-900434 between Dortha Karr, Shane Wilks, and Susan Wilks. Said case was heard by [another judge in this circuit court], and it involved the same real estate.

"Costs taxed to [Deutsche Bank]."

(Capitalization in original.)

1190036

The Karrs argue that the foregoing sufficiently reflects entry of a final judgment by the circuit court on April 11, 2019. We disagree.

"A final judgment that will support an appeal is one that puts an end to the proceedings between the parties to a case and leaves nothing for further adjudication. See City of Birmingham v. City of Fairfield, 396 So. 2d 692 (Ala. 1981). ... Without a final judgment, this Court is without jurisdiction to hear an appeal. Cates v. Bush, 293 Ala. 535, 307 So. 2d 6 (1975)."

Ex parte Wharfhouse Rest. & Oyster Bar, Inc., 796 So. 2d 316, 320 (Ala. 2001). Moreover, "[i]n order to terminate a civil action filed in an Alabama court, the [circuit] court must enter a final judgment in that action," i.e., one that complies with the requirements of Rule 58(b), Ala. R. Civ. P. Ex parte Wharfhouse, 796 So. 2d at 320.

In pertinent part, Rule 58(b) provides:

"(b) Sufficiency of Order or Judgment. An order or a judgment need not be phrased in formal language nor bear particular words of adjudication. A written order or a judgment will be sufficient if it is signed or initialed by the judge ... and indicates an intention to adjudicate, considering the whole record, and if it indicates the substance of the adjudication."

Because the circuit-court judge signed the written April 11, 2019, order, only two of the requirements of Rule 58(b) are at

1190036

issue concerning the order: (1) whether the record indicates that the circuit court intended for the April 11, 2019, order to adjudicate all the claims and counterclaims pending in this action and, if so, (2) whether the April 11, 2019, order indicated the substance of the circuit court's adjudication.

Regarding the first requirement, we note that Rule 58(b) directs consideration of "the whole record" in determining whether a particular order or judgment indicates an intention to adjudicate. See also Hayden v. Harris, 437 So. 2d 1283, 1286 (Ala. 1983). In addition to the April 11, 2019, order itself, we again note that the record contains five April 15, 2019, SJIS case-action-summary entries that respectively reflected the following:

"Case Assigned Status of Disposed
"Court Action Judge: Tim Riley
"Disposed on 04/11/2019 by (Other)
"C001 Disposed by (Other) on 04/11/2019
"D001 Disposed by (Other) on 04/11/2019."

As previously noted, earlier case-action-summary entries indicate that "C001" referred to Deutsche Bank and that and "D001" referred to Dortha. The "(Other)" noted in the

1190036

foregoing entries appears to be a reference to the circuit court's April 11, 2019, order, which is the only action taken by the circuit court on that date that is reflected on the case-action summary. The foregoing entries sufficiently indicate that the circuit court intended for the April 11, 2019, order to terminate the action -- both Deutsche Bank's claims and Dortha's counterclaims.

Therefore, we turn to the second requirement of Rule 58(b) noted above, i.e., whether the April 11, 2019, order indicated the substance of the circuit court's adjudication. In Hayden, 437 So. 2d at 1285, this Court stated:

"[U]nder the doctrines of our cases the test of finality of a judgment to support an appeal is not whether the cause remains in fieri awaiting further proceedings to entitle the parties to their acquired rights, but whether the judgment ascertains and declares such rights embracing the substantial merits of the controversy and the material issues litigated are necessarily involved. If these rights are ascertained, the decree is final and will support an appeal."

(Quoting Alabama Pub. Serv. Comm'n v. Redwing, Inc., 281 Ala. 111, 116, 199 So. 2d 653, 657 (1967) (emphasis added).)

In interpreting the substance of the April 11, 2019, order, we must examine the language used in that order. "Judgments and decrees are to be construed like other written

1190036

instruments. Schwab v. Schwab, 255 Ala. 218, 50 So. 2d 435 [(1951)]; Johnson v. Harrison, 272 Ala. 210, 130 So. 2d 35 [(1961)]. The legal effect must be declared in the light of the literal meaning of the language used." Wise v. Watson, 286 Ala. 22, 27, 236 So. 2d 681, 686 (1970).

When the literal meaning of the language used in the April 11, 2019, order is considered, it is apparent that the reason for the order was to dispose of the Karrs' pending motion to "strike [Deutsche Bank]'s motion for leave to file the second amended complaint and a claim against Randy," which motion the April 11, 2019, order clearly granted. As the Karrs' note in their appellate brief, they "had not filed a motion to dismiss [or] a motion for summary judgment." Karrs' brief, at 9 (emphasis added). In its response to a show-cause order issued by this Court regarding the Karrs' motion to dismiss Deutsche Bank's appeal, Deutsche Bank also states that "[n]o party had filed a dispositive motion." Deutsche Bank's response to show-cause order, at 5 (emphasis added).

The April 11, 2019, order went on to "note[] that all claims in this case were previously litigated in case number CV-2012-900434." (Emphasis added.) In relevant part,

1190036

Merriam-Webster's Collegiate Dictionary 848 (11th ed. 2003) defines "note" as "to make special mention of or remark on." Thus, the literal meaning of the language set out in the April 11, 2019, order clearly reflected a desire by the circuit-court judge to make special mention of or remark on the fact that a judge in the same circuit court had presided over case no. CV-2012-900434 and to express his view that all the claims pending in the underlying action had been previously litigated in case no. CV-2012-900434. Although Rule 58(b) does not require a circuit court to use "particular words of adjudication," the words used must nevertheless adequately ascertain and declare the substance of the circuit court's adjudication, and the parties' respective rights must be clear from the language used. See Hayden, 437 So. 2d at 1285.

Simply "not[ing]" facts that the circuit-court judge believes are legally significant does not amount to a declaration by the circuit court regarding how the existence of those facts results in a particular disposition, such that the parties' respective rights could be adequately ascertained, especially in the absence of any pending motion to dismiss filed by either party. Moreover, although the April

1190036

15, 2019, SJIS case-action-summary entries evinced an intent to terminate the action, those entries simply stated "disposed" and, like the April 11, 2019, order, did not adequately declare the substance of the circuit court's adjudication regarding Deutsche Bank's claims and Dortha's counterclaims, such that the parties' respective rights could be adequately ascertained.

Admittedly, the circuit court's September 4, 2019, order finally clarified its view that Deutsche Bank's claims were due to be "dismissed by operation of res judicata." However, we conclude that the explanation set out in the circuit court's September 4, 2019, order should not be retrospectively considered to determine the substance of the April 11, 2019, order. Because neither the literal meaning of the language of the April 11, 2019, order itself nor the SJIS case-action-summary entries made four days later reflected the substance of the circuit court's adjudication regarding Deutsche Bank's claims and Dortha's counterclaims, we conclude that the April 11, 2019, order did not constitute a sufficient final judgment within the meaning of Rule 58(b), such that the time for filing a notice of appeal began to run. Therefore, the Karrs'

1190036

motion to dismiss Deutsche Bank's appeal as untimely filed is denied.

II. The September 4, 2019, Order

Because the April 11, 2019, order was not a sufficient final judgment, the claims and counterclaims asserted by the parties in this action were still pending when the circuit court entered the September 4, 2019, order clarifying the substance of its adjudication. If the September 4, 2019, order was a sufficient final judgment, Deutsche Bank's October 16, 2019, notice of appeal was timely filed. Thus, we must determine whether the September 4, 2019, order constituted a sufficient final judgment capable of supporting Deutsche Bank's appeal.

The circuit-court judge signed the September 4, 2019, order, and, as explained above, unlike the April 11, 2019, order, the September 4, 2019, order clearly communicated the circuit court's determination that Deutsche Bank's claims were barred by the doctrine of res judicata and were dismissed.⁴ Thus, once the September 4, 2019, order was entered, the

⁴As noted above, the September 4, 2019, order indicates that the circuit court reached this conclusion after a sua sponte review of the record in case no. CV-2012-900434.

1190036

pertinent requirements of Rule 58(b) were satisfied regarding Deutsche Bank's claims.

However, as Deutsche Bank notes in its brief, the September 4, 2019, order did not address Dortha's counterclaims against Deutsche Bank alleging the tort of outrage and slander of title. Deutsche Bank's brief, at 3 n.2. Although certain parts of the September 4, 2019, order appear to indicate that the circuit court concluded that the entire "action" was due to be dismissed, the substantive language of the order reflects only a determination that Deutsche Bank's claims were barred by the doctrine of res judicata; it did not adequately ascertain and declare Deutsche Bank's rights as they pertained to Dortha's counterclaims. See Hayden, 437 So. 2d at 1285. Thus, the September 4, 2019, order did not meet the requirements of Rule 58(b) as to Dortha's counterclaims.

As explained above, "[a] final judgment that will support an appeal is one that puts an end to the proceedings between the parties to a case and leaves nothing for further adjudication." Ex parte Wharfhouse, 796 So. 2d at 320. Because Dortha's counterclaims have not been sufficiently

1190036

adjudicated, a final judgment has not been entered in this action.⁵

"When it is determined that an order appealed from is not a final judgment, it is the duty of the Court to dismiss the appeal ex mero motu." Powell v. Republic Nat'l Life Ins. Co., 293 Ala. 101, 102, 300 So. 2d 359, 360 (1974). Therefore, although we deny the Karrs' motion to dismiss Deutsche Bank's appeal as untimely filed, we must nevertheless dismiss Deutsche Bank's appeal because it was taken from a nonfinal judgment.⁶ Because we dismiss Deutsche Bank's appeal, we do not consider the merits of the parties' substantive arguments, and we express no opinion concerning those issues.

⁵We note that the circuit court did not certify its September 4, 2019, order as final pursuant to Rule 54(b), Ala. R Civ. P.

⁶As noted above, on the same day Deutsche Bank filed its notice of appeal, it also filed a petition for the writ of mandamus, in the alternative, which this Court denied on October 31, 2019. Put simply, mandamus relief is not warranted in this case because Deutsche Bank has failed to demonstrate that an appeal taken from a final judgment, once entered by the circuit court, will not provide an adequate remedy for review of the errors alleged by Deutsche Bank. See Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 814 (Ala. 2003) ("The burden rests on the petitioner to demonstrate that its petition presents such an exceptional case -- that is, one in which an appeal is not an adequate remedy.").

1190036

APPEAL DISMISSED.

Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ.,
concur.