REL: September 25, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190452

Arthur Brennan Malloy

v.

Kenneth N. Peters, DeWayne Estes, Alabama Department of Corrections, and Alabama Board of Adjustment

Appeal from Montgomery Circuit Court
(CV-17-709)

MOORE, Judge.

Arthur Brennan Malloy appeals from a judgment entered by the Montgomery Circuit Court ("the trial court") dismissing his complaint against Kenneth N. Peters, DeWayne Estes, the

Alabama Department of Corrections ("the ADOC"), and the Alabama Board of Adjustment ("the ABOA"). We affirm the trial court's judgment.

Procedural History

On August 18, 2017, Malloy filed a complaint in the St. Clair Circuit Court against Peters, Estes, the ADOC, and the ABOA seeking money damages for the alleged destruction of his personal property. On October 5, 2017, the ABOA moved to dismiss the complaint on the ground that, as an agency of the State, it was entitled to sovereign immunity, which is sometimes referred to in our caselaw as State immunity; it also asserted that venue was improper. On October 24, 2017, the St. Clair Circuit Court dismissed the complaint against the ABOA based on the doctrine of sovereign immunity. On November 6, 2017, Malloy moved to transfer the action to the trial court; that motion was granted on December 19, 2017.

After the action was transferred to the trial court, Malloy moved the trial court to reinstate the ABOA as a defendant. On February 5, 2018, the trial court entered an order in which it concluded that the ABOA was still a party but that the St. Clair Circuit Court had been correct in its

determination that the ABOA was immune from Malloy's claims, and it granted the ABOA's motion to dismiss.

Thereafter, Malloy filed a motion seeking to amend his complaint regarding the amount of damages he was requesting, a motion requesting a jury trial, a motion seeking to serve requests for admissions on Estes, and a motion for a summary judgment. All of those motions were denied on November 19, 2018. On February 26, 2019, Malloy filed a motion for a judgment on the pleadings. On March 13, 2019, Estes filed a motion to dismiss the complaint against him based on the doctrines of sovereign immunity and qualified immunity. On April 30, 2019, Malloy filed a motion requesting that the trial-court judge recuse himself; that motion was denied that same day. Malloy thereafter filed an affidavit of "uncontested facts," an offer of settlement, and a petition for a writ of habeas corpus ad testificandum. On January 31, 2020, the trial court entered a judgment in which it dismissed, with prejudice, all claims against "all defendants." The trial court stated, in pertinent part:

> "This matter came before the Court for a hearing on January 28, 2020, for consideration of the Motion to Dismiss filed by ... Estes. Upon consideration of the pleadings and argument of counsel, it is hereby

> ORDERED, ADJUDGED, and DECREED that [Malloy's] claims against ALL DEFENDANTS are DISMISSED, in their entirety, WITH PREJUDICE."

(Capitalization in original.)

On February 25, 2020, Malloy filed his notice of appeal to this court. On February 28, 2020, this court entered an order requiring Malloy to file an amended notice of appeal including the names of all the parties as required by Rule 3(c), Ala. R. App. P., as amended on January 1, 2017. Malloy filed an amended notice of appeal on March 10, 2020, naming Peters, Estes, the ADOC, and the ABOA as appellees. This court subsequently transferred the appeal to the Alabama Supreme Court for lack of appellate jurisdiction; that court transferred the appeal back to this court, pursuant to Ala. Code 1975, § 12-2-7.

Discussion

On appeal, Malloy argues that the trial-court judge erred in denying the motion to recuse.

> "'A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See Borders v. City of Huntsville, 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the "totality of the facts" and circumstances in each case. [Ex parte City of] Dothan Pers. Bd., 831

> So. 2d [1,] 2 [(Ala. 2002)]. The test is whether "'facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge.'" In re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984) (quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982)).'"

Ex parte Parr, 20 So. 3d 1266, 1269 (Ala. 2009) (quoting Ex parte George, 962 So. 2d 789, 791 (Ala. 2006)).

Malloy argues that the trial-court judge in this case "has exemplified a mind-set, through his ruling(s) in this case, showing a total lack of impartiality and an expressed favoritism to the defendant(s)" and that "[t]he action(s) of the trial[-court judge], whether knowingly with malicious intent to injure or due to ignorance and lack of knowledge of law, warrants [the trial-court judge's] removal." Our supreme court has recognized, however:

> "It is well-settled that '[a]dverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice.' Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837, 841 (Ala. 1983). '[R]ulings on issues of law or attitudes concerning legal issues' do not establish bias or prejudice requiring recusal unless those rulings or attitudes are the product of bias and prejudice of an extra-judicial source. Thode, [The Code of Judicial Conduct -- The First Five Years in the Courts, 1977 Utah L. Rev. 395,] 405."

In re Sheffield, 465 So. 2d 350, 357 (Ala. 1984). Because Malloy's arguments on this issue all relate to the trial-court judge's adverse rulings, we conclude that the trial-court judge did not exceed his discretion in denying the motion to recuse.

Malloy also argues that the trial court erred in granting the motion to dismiss filed by the ABOA and in dismissing all the defendants in response to the motion to dismiss filed by Estes. Both the ABOA and Estes relied on the doctrine of sovereign immunity as a basis of their motions to dismiss; Estes additionally relied on the doctrine of qualified immunity. We note that, in his brief to this court, Malloy has failed to present an argument with citations to relevant authority relating to those immunity defenses.

> "'"... [T]he failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. [Fogarty v. Stallworth, 953 So. 2d 1225, 1232 (Ala. 2006)]. That is so, because 'this court will not presume such error on the part of the trial court.' Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added). See also Young v. Southern Life & Health Ins. Co., 495 So. 2d 601 (Ala. 1986)."'

> "Scrushy v. Tucker, 70 So. 3d 289, 307 (Ala. 2011) (quoting Soutullo v. Mobile Cty., 58 So. 3d 733, 739 (Ala. 2010)) ...."

Forbes v. Brawley, 295 So. 3d 1101, 1106 (Ala. Civ. App. 2019) (some emphasis omitted) (recognizing the application of the above-quoted principle in the context of an appeal from a judgment granting a motion to dismiss). In the present case, because Malloy has not developed an argument with regard to the immunity defenses presented in the respective motions to dismiss, we must affirm the judgment of the trial court to the extent that it granted the motions to dismiss filed by the ABOA and Estes.

With regard to the remaining defendants, Peters and the ADOC, we note that it appears that they were not served. "When a plaintiff has sued multiple defendants and one or more of the defendants has not been served, the plaintiff may proceed to judgment against the defendants who have been served. Rule 4(f), Ala. R. Civ. P. Such a judgment is a final judgment for the purposes of appeal." Harris v. Preskitt, 911 So. 2d 8, 14 (Ala. Civ. App. 2005). The trial court's judgment stated that it was dismissing "all defendants." However, because Peters and the ADOC had not

been served, they were not parties to this action. Harris, 911 So. 2d at 14. "Accordingly, there is no judgment dismissing [Peters and the ADOC,] and this court has nothing to address with regard to [Malloy's] argument on this issue." Id.

Finally, we note that, although Malloy challenges the trial court's denial of his motion to amend his complaint, his motion for a jury trial, his motion seeking to serve requests for admissions on Estes, and his summary-judgment motion, those rulings are all moot in light of the dismissal of the complaint with regard to Estes and the ABOA. Because we have affirmed the trial court's judgment as to the dismissal of those two defendants, any error committed by the trial court in denying the aforementioned motions is harmless. See Rule 45, Ala. R. App. P.

Conclusion

Based on the foregoing, we affirm the trial court's judgment.

AFFIRMED.

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