Rel: June 30, 2021

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1200332

Ex parte Caterpillar Financial Services Corporation

PETITION FOR WRIT OF MANDAMUS

(In re: Caterpillar Financial Services Corporation

v.

Horton Logging, LLC, and Gary Horton)

(Shelby Circuit Court, CV-19-900689)

SELLERS, Justice.

Caterpillar Financial Services Corporation ("CFS") petitioned this Court for a writ of mandamus directing the Shelby Circuit Court to vacate

an order purporting to grant a motion to set aside a default judgment in favor of CFS in its action against Horton Logging, LLC ("HL"), and Gary Horton ("Horton"). Because the trial court's order purports to grant a successive postjudgment motion, over which the trial court had no jurisdiction, we grant CFS's petition and issue the writ.

In June 2019, CFS commenced its action against HL and Horton, seeking to recover amounts allegedly owed by those parties pursuant to loan documents executed in connection with the financing of the sale of logging equipment to HL. HL and Horton did not answer the complaint, and, on September 6, 2019, the trial court entered a default judgment against them.

On October 4, 2019, HL and Horton moved the trial court for relief from the default judgment. They cited Rule 55(c), Ala. R. Civ. P., which authorizes trial courts to set aside a default judgment on the motion of a party filed within 30 days after the entry of the judgment, and Rule 60(b), Ala. R. Civ. P., which authorizes trial courts to grant relief from a judgment for various reasons. HL and Horton alleged in their motion that they "have meritorious defenses against the claims of [CFS]." They did

not, however, mention the other two factors relevant to motions to set aside a default judgment identified in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600, 604-05 (Ala. 1988), namely, whether the plaintiff will be unfairly prejudiced if the default judgment is set aside and whether the default judgment resulted from the defendant's own culpable conduct.

Nearly a year later, on August 3, 2020, after multiple continuances and after counsel for HL and Horton withdrew from the matter, the trial court held a virtual hearing. However, at some point during that hearing, the trial court rescheduled the matter for another virtual hearing on September 2, 2020. On the day of the rescheduled hearing, the trial court entered an order stating: "[HL and Horton] failed to appear [at the hearing] and therefore the motion [for relief from the default judgment] is denied."

HL and Horton did not appeal from the trial court's September 2, 2020, order. Instead, they filed another motion under Rule 60(b) asking the trial court to reconsider and set aside the September 2020 order and to reset the motion for relief from the default judgment for another

hearing. In support of the second Rule 60(b) motion, Horton submitted an affidavit stating that, after he attended the August 3, 2020, virtual hearing, he attempted to contact his former attorney "multiple times to no avail," that he attempted to contact other attorneys in an effort to retain new counsel, and that he attempted to participate in the September 2, 2020, virtual hearing but "was unable to successfully connect." Finally, Horton averred in his affidavit that he "believe[d] that [he had] multiple meritorious defenses" to CFS's claims and that "neither party would be prejudiced by setting aside the September 2, 2020, order." HL and Horton also filed a motion to stay CFS's efforts at garnishment.

The trial court set the motion to stay garnishment for a hearing. Approximately two weeks after that hearing, on January 27, 2021, the trial court entered an order purporting to grant HL and Horton's second Rule 60(b) motion, without specifying its reasoning. Thereafter, CFS timely filed its mandamus petition. CFS argues that the second Rule 60(b) motion was a successive postjudgment motion that the trial court lacked jurisdiction to grant.

> "A petition for the writ of mandamus is the proper method for securing review of a trial court's order granting a successive postjudgment motion. See Ex parte Keith, 771 So. 2d 1018 (Ala. 1998), and Ex parte Baker, 459 So. 2d 873 (Ala. 1984). 'A writ of mandamus is an extraordinary remedy, and it will be "issued only when there is: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." ' Ex parte P & H Constr. Co., 723 So. 2d 45, 47 (Ala. 1998) (quoting Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993))."

Ex parte Jordan, 779 So. 2d 183, 184 (Ala. 2000). Moreover, this Court will review by petition for the writ of mandamus a trial court's setting aside a default judgment. Ex parte Ward, 264 So. 3d 52, 55 (Ala. 2018).[1]

As noted, HL and Horton's motion for relief from the default judgment cited both Rule 55(c) and Rule 60(b). A Rule 55(c) motion is subject to Rule 59.1, Ala. R. Civ. P., which provides that certain postjudgment motions are deemed denied by operation of law if they

[1]The second Rule 60(b) motion asked the trial court to set aside the September 2, 2020, order denying HL and Horton's motion for relief from the default judgment and to reset that motion for a hearing. The trial court entered an order stating simply that the second Rule 60(b) motion was "granted." The parties, however, have represented to this Court that the default judgment has been set aside and that litigation is proceeding.

remain pending more than 90 days. More than 90 days elapsed without a ruling on HL and Horton's motion for relief from the default judgment. Accordingly, to the extent that the motion relied on Rule 55(c), it was denied by operation of law.[2]

Rule 60(b) is not subject to the 90-day deadline in Rule 59.1., and precedent from this Court indicates that, generally speaking, a party is not necessarily precluded from relying on both Rule 55(c) and Rule 60(b) in requesting a trial court to set aside a default judgment. See Ex parte Lang, 500 So. 2d 3, 4 (Ala. 1986) ("The Alabama Rules of Civil Procedure do not contemplate the filing of a Rule 60(b) motion during the pendency of a Rule 55(c) motion. But while the Rules do not contemplate it, they do not preclude it, either."); Ex parte Vaughan, 539 So. 2d 1060, 1061 (Ala. 1989) ("[T]he Rules [of Civil Procedure] do not, at the present time, preclude the filing of alternative Rule 55(c) and 60(b) motions."); Edwards v. Johnson, 143 So. 3d 691, 694 (Ala. 2013) ("[T]he Alabama Rules of Civil

[2]Rule 59.1 allows the 90-day deadline set out therein to be extended by "the express consent of all the parties, which consent shall appear of record." There is nothing, however, before this Court indicating that CFS expressly consented to an extension of the deadline.

Procedure do not necessarily preclude a defendant from filing alternative Rule 55(c) and Rule 60(b) motions with the trial court." (emphasis omitted)).

However, in Ex parte Haynes, 58 So. 3d 761 (Ala. 2010), this Court noted that the appropriate way to challenge the denial of a Rule 55(c) motion to set aside a default judgment is to appeal from that denial and that a Rule 60(b) motion cannot be used as a substitute for an appeal by asking a trial court to "reconsider" the denial of the Rule 55(c) motion. As in the present case, Haynes involved the denial of a Rule 55(c) motion by operation of law pursuant to Rule 59.1. Thereafter, the trial court in Haynes elected to treat the motion alternatively as a Rule 60(b) motion and purported to grant it. This Court issued a writ of mandamus, concluding that the Rule 55(c) motion, fairly read, could not also have been considered a motion under Rule 60(b). The Court noted that the motion did not cite Rule 60(b) and "lack[ed] ... any distinction in the grounds for relief based on Rule 55(c) as opposed to Rule 60(b)." 58 So. 3d at 766. Alternatively, the Court held that,

> "[e]ven if [the motion] could be deemed a motion asking in the alternative for relief under Rule 60(b), the defendants' motion would in this respect add nothing to the previously denied [by operation of law] Rule 55(c) motion and thus would constitute an improper attempt to use a Rule 60(b) motion as 'a substitute for an appeal of the original judgment.' "

58 So. 3d at 766-67.

Similarly, HL and Horton's original motion for relief from the default judgment, although it cited both Rule 55(c) and Rule 60(b), made no distinction "between the grounds for relief under Rule 55(c) and those for relief under Rule 60(b)." Id. at 765. As was the case in Haynes, "[b]ecause there existed nothing in the motion to distinguish the Rule 55(c) motion from the purported Rule 60(b) motion, any Rule 60(b) aspect to the motion would simply constitute a motion to 'reconsider' the Rule 55(c) motion." Id. Although CFS does not cite Haynes, it points to Rule 59.1 and asserts that "the trial court's jurisdiction terminated ninety (90) days after [the motion to set aside the default judgment was originally filed]." Thus, CFS appears to suggest that, once the Rule 55(c) aspect of the motion was denied by operation of law, HL and Horton's remedy was

to appeal and that the Rule 60(b) aspect of the motion was simply an improper request for the trial court to "reconsider" the denial.

In any event, CFS more succinctly argues that, to the extent that the trial court had jurisdiction to rule on the Rule 60(b) aspect of HL and Horton's initial motion for relief from the default judgment, after the trial court entered the September 2, 2020, order expressly denying the motion, the trial court lacked jurisdiction to grant the second Rule 60(b) motion. CFS points to Ex parte Keith, 771 So. 2d 1018, 1022 (Ala. 1998), for the proposition that, "[a]fter a trial court has denied a postjudgment motion pursuant to Rule 60(b), that court does not have jurisdiction to entertain a successive postjudgment motion to 'reconsider' or otherwise review its order denying the Rule 60(b) motion." As the Court noted in Pinkerton Security & Investigation Services, Inc. v. Chamblee, 961 So. 2d 97, 101-02 (Ala. 2006):

> "Successive Rule 60(b) motions brought on the same grounds are impermissible because they are 'generally considered motions to reconsider the original ruling and are not authorized by Rule 60(b).' Wadsworth v. Markel Ins. Co., 906 So. 2d 179, 182 (Ala. Civ. App. 2005). A motion to reconsider the trial court's denial of a postjudgment motion is barred

> because after the denial the trial court loses jurisdiction over the action."

See also Ex parte Jordan, 779 So. 2d 183 (Ala. 2000) (issuing a writ of mandamus and holding that the trial court lost jurisdiction after it denied a Rule 60(b) motion requesting reinstatement of an action and that the trial court therefore could not grant a second Rule 60(b) motion asking for the same relief).

The second Rule 60(b) motion in this case is essentially the same as the first Rule 60(b) motion. In both motions, HL and Horton sought to set aside the default judgment because, they asserted, they have meritorious defenses to CFS's claims. Because the second Rule 60(b) motion is nothing more than a request for reconsideration of the trial court's denial of the first Rule 60(b) motion, the trial court had no jurisdiction to grant it.[3]

The Court notes that, in responding to CFS's mandamus petition, HL and Horton assert that the default judgment against them is "void"

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[3]Although HL and Horton claim that they had a valid excuse for failing to attend the virtual hearing on September 2, 2020, they do not present the Court with any legal authority indicating that, because of that excuse, the trial court had jurisdiction to "reconsider" the denial of the first Rule 60(b) motion.

because, they claim, CFS failed to properly serve them with the summons and complaint. Under Rule 4(c)(1), Ala. R. Civ. P., an individual may be served by leaving the summons and complaint with a person of suitable age and discretion residing in the individual's dwelling house or usual place of abode or by leaving the summons and complaint with an agent authorized by appointment or law to receive service of process. Under Rule 4(c)(6), an entity may be served by leaving the summons and complaint with "an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." The returns on service and other documents submitted by the process server in this case indicate that the summons and complaint were served on an individual named Blake Horton at an address in Columbiana and that Blake informed the process server that he lived with Horton and was authorized to accept service for HL. HL and Horton, however, suggest to this Court that Blake was not an employee or "registered agent" of HL and that he did not in fact live with Horton at the time of service.

HL and Horton do not clearly discuss whether the trial court, after denying HL and Horton's initial motion to set aside the default judgment, would have had jurisdiction to consider a Rule 60(b) motion asserting failure of proper service. In any event, HL and Horton's second Rule 60(b) motion did not actually assert that ground for relief. Although HL and Horton claim that they argued lack of proper service during the hearing on their motion to stay CFS's garnishment efforts, there is no transcript of that hearing or other materials before this Court to verify that averment. Thus, nothing before the Court establishes that HL and Horton ever challenged the sufficiency of service in the trial court.[4] Finally, as CFS points out, lack of proper service was omitted not only from HL and Horton's second Rule 60(b) motion, but also from their initial motion for relief from the default judgment. The Court of Civil Appeals, in Klaeser

[4]HL and Horton attached certain exhibits to their response to CFS's mandamus petition, which are aimed at establishing that Blake Horton was not authorized to accept service for HL and Horton. It appears, however, that those exhibits were not submitted to the trial court. In ruling on a mandamus petition, this Court is limited to consideration of the evidence that was presented to the trial court. Ex parte McDaniel, 291 So. 3d 847, 852 (Ala. 2019).

v. Milton, 47 So. 3d 817, 821 (Ala. Civ. App. 2010), noted precedent indicating that "a defendant waives the defense of improper service of process if that defendant does not raise the issue in his or her first appearance following the entry of a default judgment." The court in Klaeser held that the defendant in a custody-modification proceeding had waived insufficiency of service because she had failed to raise it in her first appearance following the entry of a default judgment against her. In support, the court pointed to Pridgen v. Head, 282 Ala. 193, 198, 210 So. 2d 426, 430 (1968), in which this Court held that a defendant, who argued that a default judgment should have been set aside based on lack of proper service, had waived that argument when he "appeared generally and filed [a] motion to dismiss and quash ... garnishment, which motion contained no grounds challenging the sufficiency of the service upon the defendant." See also Aetna Ins. Co. v. Earnest, 215 Ala. 557, 558, 112 So. 145, 145 (1927) (" 'Where a judgment has been rendered by the court without jurisdiction of the person, a general appearance after such judgment waives all objection to the jurisdiction of the court over the person. Thus a general appearance by defendant after final judgment waives any and

all defects and irregularities in the service of process and return, just as fully as it does where such appearance is entered before final judgment.' " (quoting 4 Corpus Juris, Appearances § 64, p. 1364)). HL and Horton have not addressed the fact that they did not argue lack of proper service upon initially appearing and challenging the default judgment in this case.

In sum, the trial court erred in granting HL and Horton's second Rule 60(b) motion. Accordingly, we grant CFS's petition for a writ of mandamus and direct the trial court to vacate the January 27, 2021, order.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Bryan, J., concurs in the result.