Rel: November 3, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0287

McMurray Contracting, LLC

v.

Kenneth Hardy and Helen Hardy

Appeal from Baldwin Circuit Court
(CV-22-901301)

MENDHEIM, Justice.

McMurray Contracting, LLC ("McMurray"), appeals from the Baldwin Circuit Court's order denying its second motion to compel

arbitration of this action commenced by Kenneth Hardy and his wife Helen Hardy. We dismiss the appeal.

I. Facts

The Hardys commenced this action on December 6, 2022, by filing a complaint against McMurray in the Baldwin Circuit Court. The Hardys alleged that on September 16, 2020, their house was damaged by Hurricane Sally and that, in October of the same year, they "retained" McMurray "to provide restoration work" to their house. The Hardys specifically alleged that McMurray "did not complete all restoration work in a good and workmanlike manner, and has refused to correct numerous deficiencies through [the Hardys'] property," and that McMurray "performed work and charged for materials that were never approved." The Hardys asserted claims alleging breach of contract, breach of warranty, negligence, and a violation of the Alabama Deceptive Trade Practices Act, Ala. Code 1975, § 8-19-1 et seq. The Hardys' original complaint did not request a jury trial.

On January 31, 2023, McMurray filed a "Motion to Dismiss" in which it asserted:

> "3. The Contract at issue requires that disputes between the parties be resolved 'under the Construction Mediation

> Rules of the American Arbitration Association' within 30 days of service of a written demand for mediation. The Contract further states that if 'the mediation does not result in settlement of the disputes, then any unresolved controversy or claim arising or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association….'
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> "4. [The Hardys] have never made a demand to [McMurray] for mediation and[,] by filing [their] Complaint with this Court, have failed to abide by the Arbitration clause of the Contract [they] allege[] has been breached.
>
> "5. The Contract that [the Hardys] allege has been breached requires that this matter be mediated before the American Arbitration Association[;] therefore, the [Hardys'] Complaint is due to be dismissed or, in the alternative, the parties should be ordered to arbitration before the American Arbitration Association, as required by the Contract.
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> "Wherefore, premises considered, [McMurray] prays that the [Hardys'] Complaint will be dismissed or in the alternative that the parties be ordered to arbitration pursuant to the terms of the attached Contract."

McMurray attached as an exhibit to its motion to dismiss/compel arbitration a copy of the contract that it asserted required the parties to submit disputes to mediation and then to arbitration. That contract was titled "Authorization Agreement," and it provided that it was a contract between McMurray and Kenneth Hardy. The Authorization Agreement stated that the "Contracted Service" was for "Mitigation" and "Restoration Work." The Authorization Agreement primarily purported

to give McMurray the authority to work with the Hardys' homeowners' insurer on the claim to repair their house by allowing McMurray to be "a payee on all drafts issued for the repairs of this claim" and to be "[t]he main contact for the property repair process." Additionally, the Authorization Agreement contained the following paragraph:

> "Except as to the collection of delinquent payments, any controversy, claim, defense of counterclaim arising out of or relating to this contract or breach thereof, shall be settled by mediation under the Construction Industry Mediation Rules of the American Arbitration Association. If within 30 days after service of a written demand for mediation, the mediation does not result in settlement of the dispute, then any unresolved controversy or claim arising or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

McMurray refers to that paragraph as "the arbitration provision," and, for ease of reference, we will do so as well.

On February 8, 2023, the circuit court entered an order that provided: "Motion to Dismiss pursuant to Rule 12(b)[, Ala. R. Civ. P.,]

filed by McMurray Contracting, LLC, is hereby denied. Motion to Compel Arbitration is denied."[1]

On February 27, 2023, McMurray filed an answer to the Hardys' complaint. McMurray's first affirmative defense in that answer asserted that, "[p]ursuant to this contract [entered into by the parties,] all claims arising from the subject restoration/construction work are subject to a binding arbitration agreement." The answer then quoted the arbitration provision in the Authorization Agreement, and it stated: "This case is an arbitrable dispute and thus should be sent to arbitration to be administered by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules."

On March 1, 2023, the Hardys filed their "First Amended Complaint." In all respects, the Hardys' amended complaint was identical to their original complaint except that, at the conclusion of the amended complaint, the Hardys included a demand for a jury trial.

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[1]In their brief to this Court, the Hardys state -- without contradiction from McMurray -- that they "filed an opposition to the First Arbitration Motion, but said opposition was not included in the record." Hardys' brief, p. 2. A notation on the case-action summary submitted in the record on appeal indicates that a response to McMurray's first motion to compel arbitration was filed on February 7, 2023.

In response to the amended complaint, on March 9, 2023, McMurray filed a "Motion to Compel Arbitration and Stay All Proceedings." McMurray's second motion to compel arbitration was much more detailed than its first motion to compel arbitration, and McMurray attached three exhibits to that motion: a copy of the Authorization Agreement; an affidavit from Ben McMurray, the owner of McMurray; and two invoices for construction materials McMurray had ordered from different vendors for use in the restoration of the Hardys' house.

Also on March 9, 2023, the circuit court entered an order stating: "Motion to Compel filed by McMurray Contracting, LLC is hereby Pending. Opposing party is granted 7 days to file a response. Response shall be submitted as a supplement to the pending motion." (Emphasis in original.)

On March 16, 2023, the Hardys filed a response in opposition to McMurray's second motion to compel arbitration that they titled "Response to [McMurray's] Improper Second Motion to Compel Arbitration." In that response, the Hardys argued, among other things, that the circuit court had already decided the issue whether arbitration

was appropriate and that the previous order denying McMurray's first motion seeking to compel arbitration was "the law of the case."

On March 20, 2023, the circuit court entered an order denying McMurray's second motion to compel arbitration. That order did not provide reasons for the circuit court's decision. On April 4, 2023, McMurray filed an answer to the Hardys' amended complaint. On April 25, 2023, McMurray appealed.

II. Standard of Review

This Court's standard of review of an order denying a motion to compel arbitration is well settled:

> "'"This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995) (opinion on application for rehearing)."'"

Hoover Gen. Contractors-Homewood, Inc. v. Key, 201 So. 3d 550, 552 (Ala. 2016) (quoting Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313,

315 (Ala. 2003), quoting in turn Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).

III. Analysis

Before we may address any of McMurray's arguments as to why it believes that the circuit court erred in denying its second motion to compel arbitration, we must confront an issue that implicates this Court's appellate jurisdiction. Specifically, the Hardys argue that McMurray's notice of appeal was not timely filed. The Hardys observe that the circuit court denied McMurray's first motion to compel arbitration on February 8, 2023, and that, under Rule 4(d), Ala. R. App. P., that order was a final, appealable judgment.[2] However, instead of appealing the circuit court's February 8, 2023, order, McMurray chose to file an answer to the Hardys' original complaint. The Hardys subsequently filed an amended complaint, and McMurray then filed its

[2]Rule 4(d), Ala. R. App. P., provides:

> "An order granting or denying a motion to compel arbitration is appealable as a matter of right, and any appeal from such an order must be taken within 42 days (6 weeks) of the date of the entry of the order, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure."

second motion to compel arbitration on March 9, 2023. On March 20, 2023, the circuit court denied McMurray's second motion to compel arbitration. McMurray then filed an answer to the Hardys' amended complaint. Finally, on April 25, 2023, McMurray appealed from the circuit court's order denying its second motion to compel arbitration. The Hardys note that the basis for McMurray's second motion to compel arbitration was the same as the basis for its first motion: the arbitration provision in the Authorization Agreement. The Hardys contend that McMurray's appeal was well outside the 42-day filing period provided in Rule 4(d) for appealing the circuit court's February 8, 2023, order, and so, they say, McMurray's appeal must be dismissed.

In response, McMurray argues that its appeal is not untimely because it clearly is appealing the circuit court's order denying its second motion to compel arbitration. McMurray contends that its second motion to compel arbitration was necessary because the Hardys had filed an amended complaint and that complaint superseded the previous complaint. See McMurray's reply brief, p. 2.

> "Here, the Hardys' Amended Complaint became the operative pleading and required a response from McMurray. In response to not only the new Amended Complaint, but also to the jury demand, McMurray timely moved the circuit court

> to compel arbitration and stay all proceedings. McMurray's [second] Motion to Compel Arbitration was extensive and contained additional evidence which was obtained by McMurray during the pendency of the case."

Id. (record citation omitted). McMurray further contends that "the Hardys' request for a jury trial substantially changed the scope and nature of the case." Id., p. 3. McMurray insists that the circuit court understood that to be true, which is why it entered an order allowing the Hardys to respond to McMurray's second motion to compel arbitration.

> "[I]t is clear that the circuit court asserted its discretion in reevaluating the arbitrability issue in light of the new evidence and facts presented in McMurray's second motion. Had the circuit court decided not to take up the arbitrability issue for the second time, the court most certainly would have entered an order denying the motion as moot. Instead, the circuit court decided to take the issue of arbitrability under consideration and allow the Hardys to submit a response to the new evidence and arguments submitted by McMurray."

Id., pp. 3-4 (footnote omitted).

The problem with McMurray's argument is that it overlooks the fact that, under Rule 4(d), the circuit court's February 8, 2023, order denying its first motion to compel arbitration was a final, appealable judgment. That rule unequivocally provides that "any appeal from such an order must be taken within 42 days (6 weeks) of the date of the entry of the order, or within the time allowed by an extension pursuant to

Rule 77(d), Alabama Rules of Civil Procedure." "An order granting a motion to compel arbitration is a final judgment, Bowater, Inc. v. Zager, 901 So. 2d 658, 667 (Ala. 2004), and 'failure to take an appeal from it within the 42-day time period forecloses later appellate review.' 901 So. 2d at 664." Alabama Psychiatric Servs., P.C. v. Lazenby, 292 So. 3d 295, 299 (Ala. 2019). In Bowater, this Court explained that

> "an order granting or denying arbitration is no longer interlocutory in the sense that it remains 'within the breast of the court' subject to revision at any time before final judgment, because it is now established that unless an appeal is timely taken from the order, the order is final."

Bowater Inc. v. Zager, 901 So. 2d 658, 666 (Ala. 2004). Thus, McMurray's contention that the circuit court had the discretion to reassess the issue of arbitrability at any time after the entry of its February 8, 2023, order is incorrect.[3]

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[3]McMurray's citations to cases in which a party filed more than one motion to compel arbitration are inapposite. See McMurray's brief, p. 26 n.2 (citing Equity Tr. Co. v. Morris, [Ms. 1200551, Aug. 19, 2022] ___ So. 3d ___ (Ala. 2022); Hoover Gen. Contractors-Homewood, Inc. v. Key, 201 So. 3d 550, 552 (Ala. 2016); Stevens v. Phillips, 852 So. 2d 123, 127 (Ala. 2002); Eastern Dredging & Constr., Inc. v. Parliament House, L.L.C., 698 So. 2d 102, 104 (Ala. 1997)). In all of those cases, except Stevens, the circuit courts never ruled on the first-filed motions to compel arbitration, and so the finality of a circuit court's order and the time for taking an appeal were not at issue in those cases. In Stevens, the defendant filed a postjudgment motion and a second motion to compel arbitration within

The only exception, as the Bowater Court also concluded, would be if a party files a timely postjudgment motion, which would toll the time for filing an appeal. See Bowater, 901 So. 2d at 667 ("We hold that Bowater's Rule 59(e)[, Ala. R. Civ. P.,] motion to alter, amend, or vacate that portion of the trial court's September 17, 2003, order requiring that the arbitrators be duly licensed attorneys served, under Rule 4(a)(3), Ala. R. App. P., to suspend the running of the time for filing a notice of appeal from that order."); see generally Deutsche Bank Nat'l Tr. Co. v. Karr, 306 So. 3d 882, 886 (Ala. 2020) ("Postjudgment motions filed pursuant to Rule 59(e)[, Ala. R. Civ. P.,] 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."). But it is undisputed that McMurray did not file a postjudgment motion in response to the circuit court's February 8, 2023, order denying its first motion to compel arbitration. Instead, it filed an answer to the Hardys' complaint.

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30 days of the entry of the circuit court's order denying the first motion to compel arbitration, and the circuit court granted the second motion to compel arbitration, causing the plaintiff to appeal the second order. Thus, the issue of the timeliness of appealing the order that denied the first motion to compel arbitration never arose.

Moreover, McMurray has not argued that we should construe its second motion to compel arbitration as a postjudgment motion that tolled the time for taking an appeal from the circuit court's February 8, 2023, order. "'[I]t is not the function of this Court … to make and address legal arguments for a party....'" Penick v. Most Worshipful Prince Hall Grand Lodge F & A M of Alabama, Inc., 46 So. 3d 416, 430 (Ala. 2010) (quoting Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)). In fact, McMurray argues exactly the opposite by insisting that the Hardys' amended complaint that included a demand for a jury trial "changed the scope and nature of the case," which, it says, necessitated the filing of a new motion to compel arbitration.[4] McMurray's reply brief, p. 3. Moreover, McMurray argues that the other reason the circuit court even considered McMurray's second motion to compel arbitration was because of "new evidence and facts presented in McMurray's second motion." Id., pp. 3-4. Indeed, McMurray attached new exhibits to its second motion to compel arbitration that sought to demonstrate: (1) that Kenneth Hardy

[4]We note the dubious nature of this argument given that McMurray filed its first motion to compel arbitration in response to a complaint that did not contain a demand for a jury trial from the Hardys and that arbitration seeks to avoid all court litigation, not just jury trials.

had signed the Authorization Agreement and (2) that the Authorization Agreement involved a transaction that affected interstate commerce. But "[a] motion to reconsider is generally a request that the trial court take a second look at what has already come before it; such a motion generally does not encompass a movant's presentation of new facts or new evidence not previously presented to the trial court." Ex parte Ward, 46 So. 3d 888, 893 (Ala. 2007). Thus, even if McMurray had argued that its second motion to compel arbitration was, in substance, a postjudgment motion, it simply is not plausible to construe the motion that way in light of the facts in the record and McMurray's arguments to this Court.

In sum, on February 8, 2023, the circuit court entered an order denying McMurray's first motion to compel arbitration, which was based on the arbitration provision in the Authorization Agreement. On April 25, 2023, McMurray appealed the circuit court's order denying McMurray's second motion to compel arbitration, which also was based on the arbitration provision in the Authorization Agreement. McMurray did not appeal the circuit court's February 8, 2023, order within 42 days of the entry of the order, and McMurray did not file a postjudgment motion that would have tolled the time for taking an appeal of the

February 8, 2023, order. "An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court." Rule 2(a)(1), Ala. R. App. P. Thus, we are compelled to dismiss McMurray's appeal.

IV. Conclusion

Based on the foregoing, we conclude that McMurray's notice of appeal was not timely filed so as to invoke the jurisdiction of this Court. Accordingly, we dismiss McMurray's appeal. See Rule 2(a)(1), Ala. R. App. P.

APPEAL DISMISSED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., concurs in the result, with opinion, which Cook, J., joins.

MITCHELL, Justice (concurring in the result).

The majority dismisses this appeal for lack of jurisdiction, concluding that the notice of appeal filed by McMurray Contracting, LLC ("McMurray"), was untimely. I am not fully persuaded that we lack jurisdiction, but because McMurray has not adequately responded to the jurisdictional issues presented in this case, I concur in the decision to dismiss the appeal. See Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008) (plurality opinion) ("The burden of establishing the existence of subject-matter jurisdiction falls on the party invoking that jurisdiction."); see also America's Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1073 (7th Cir. 1992) (holding that, when a court or an opposing party "sounds the alarm" by raising a jurisdictional question, the party claiming jurisdiction must "precise[ly]" explain why jurisdiction exists).

In my view, whether we have jurisdiction over this appeal turns on the effect of the amended complaint filed by Kenneth Hardy and Helen Hardy on McMurray's prior motion to compel arbitration and the trial court's denial of that motion. Ordinarily, "[a]n amended complaint supersedes the previously filed complaint and becomes the operative pleading." Ex parte Puccio, 923 So. 2d 1069, 1072 (Ala. 2005). For that

reason, "'any subsequent motion made by an opposing party should be directed at the amended pleading'" because "'the original pleading no longer performs any function in the case.'" Holley v. St. Paul Fire & Marine Ins. Co., 396 So. 2d 75, 79 (Ala. 1981) (plurality opinion) (quoting 6 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1476 (1971)). Thus, if the Hardys' amended complaint "reset" the proceeding such that McMurray was entitled to file a second motion to compel arbitration in response, then its appeal from the order denying that second motion would be permissible and timely.

To my knowledge, we have never considered the effect of an amended complaint on an earlier motion to compel arbitration. But in other contexts, we have indicated that whether an amended complaint moots the opposing party's prior motions -- and any appeals from the trial courts' rulings on those motions -- hinges on whether the change in the amended complaint is "clearly relevant to the pending dispositive motion."[5] Meadows v. Shaver, 327 So. 3d 213, 222 (Ala. 2020) (plurality

[5]See, e.g., Ex parte Puccio, 923 So. 2d 1069 (Ala. 2005) (holding that a plaintiff's amended complaint mooted the defendant's original motion to dismiss); Grayson v. Hanson, 843 So. 2d 146 (Ala. 2002) (dismissing an appeal from summary judgment as moot because of the plaintiff's intervening amended complaint).

opinion), overruled on other grounds, Ex parte Pinkard, [Ms. 1200658, May 27, 2022] __ So. 3d __ (Ala. 2022). In other words, "an amendment of a pleading moots an opponent's pending motion only to the extent that the substance of the amendment moots the substance of the motion." Id.

As I see it, a key question here is the extent to which the Hardys' demand for a jury trial -- which is the only difference between their initial complaint and their amended complaint -- "moots the substance" of McMurray's first motion to compel arbitration. Id. McMurray, however, fails to meaningfully address this issue; it asserts in conclusory fashion that "the Hardys' request for a jury trial substantially changed the scope and nature of the case," but it does not elaborate further. McMurray's reply brief at 3.

When "parties have not provided sufficient legal or factual justification for this Court's jurisdiction, this Court is not obligated to embark on its own expedition beyond the parties' arguments in pursuit of a reason to exercise jurisdiction." Crutcher, 12 So. 3d at 635. That burden "falls on the party invoking the jurisdiction." Id. Because McMurray has not met its burden, I concur in the decision to dismiss the appeal.

Cook, J., concurs.