Rel: March 29, 2024

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0352 and CL-2023-0697

Redbud Remedies, LLC

v.

Alabama Medical Cannabis Commission

Appeals from Montgomery Circuit Court
(CV-23-110)

PER CURIAM.

In appeal number CL-2023-0352, Redbud Remedies, LLC ("Redbud"), appeals from a judgment entered by the Montgomery Circuit Court ("the trial court") denying its request for declaratory and injunctive relief in an action against the Alabama Medical Cannabis Commission ("the AMCC"). In appeal number CL-2023-0697, Redbud appeals from

the denial of its Rule 60(b), Ala. R. Civ. P., motion for relief from that same judgment. We dismiss these appeals with instructions.

Background

The dispute between the parties arises out of Redbud's failure to file a timely application for a medical-cannabis dispensary license under the Darren Wesley "Ato" Hall Compassion Act ("the Act"), Ala. Code 1975, § 20-2A-1 et seq., and the subsequent refusal of the AMCC to allow Redbud to file a tardy application. The Act established the AMCC as a state agency and vested the AMCC with the authority to administer and enforce the Act and all rules adopted pursuant to the Act, see Ala. Code 1975, § 20-2A-20 and § 20-2A-22(b), including the laws and rules regulating the licensing of medical-cannabis dispensaries. See Ala. Code 1975, § 20-2A-50(a). Pursuant to its rulemaking powers, see Ala. Code 1975, § 20-2A-53(a), the AMCC adopted a rule requiring all applications for the "initial offering" of medical-cannabis dispensary licenses to be filed electronically through its website by 4:00 p.m. on December 30, 2022. See Ala. Admin. Code (AMCC), r. 538-X-3-.04(13). Redbud did not file its application before the deadline, and the AMCC denied all of Redbud's requests to file its application after the deadline.

On March 21, 2023, Redbud filed in the trial court a complaint against the AMCC, pursuant to Ala. Code 1975, § 41-22-10, a part of the Alabama Administrative Procedure Act ("the AAPA"), Ala. Code 1975, § 41-22-1 et seq., seeking declaratory and injunctive relief to require the AMCC to accept its application. In both the caption of the complaint and the body of the complaint, Redbud identified the "State of Alabama Medical Cannabis Commission" as the sole defendant. At the end of the complaint, Redbud directed the clerk of the trial court to serve "Defendant" by certified mail addressed to "The Alabama Medical Cannabis Commission c/o John McMillan Director." After receiving service, an attorney appeared for the "defendant," which the attorney identified as the "Alabama Medical Cannabis Commission, a State Agency." The case proceeded to its conclusion without Redbud amending its complaint to name any other defendant and without the AMCC raising any jurisdictional objection.

In its complaint as last amended, Redbud alleged that it had been prevented from filing its application for a medical-cannabis dispensary license on December 30, 2022, because the electronic-application portal used by the AMCC would not accept Redbud's exhibits to its application

that exceeded 10 megabytes ("10 MB") in size. Redbud further alleged that, unknown to Redbud, the AMCC had allowed applicants with similar problems to "workaround" the 10 MB protocol by filing an incomplete application on or before the filing deadline, without penalty, and subsequently filing their oversized exhibits separately on a USB drive. Redbud maintained that the 10 MB protocol and the "workaround" solution were administrative rules that had been adopted in violation of the notice and other requirements set forth in Ala. Code 1975, § 41-22-5. Redbud sought a judgment declaring those two alleged rules to be invalid and ordering the AMCC to accept Redbud's tardy application. On April 7, 2023, after a trial, the trial court entered a final judgment denying Redbud any relief.

On May 19, 2023, Redbud filed a notice of appeal from the April 7, 2023, judgment; that appeal was docketed in this court as appeal number CL-2023-0352. On August 17, 2023, Redbud filed a motion for leave to file in the trial court a Rule 60(b) motion seeking relief from the April 7, 2023, judgment; on August 18, 2023, this court granted the motion for

leave, and Redbud filed a Rule 60(b) motion in the trial court.[1] The trial court denied the Rule 60(b) motion on September 22, 2023. On September 25, 2023, Redbud filed a notice of appeal from the judgment denying its Rule 60(b) motion; that appeal was docketed in this court as appeal number CL-2023-0697. This court granted Redbud's motion to consolidate the appeals.

On February 28, 2024, this court ordered the parties to file letter briefs addressing the effect of this court's decision in Alabama Department of Public Health v. Noland Health Services, Inc., 267 So. 3d 873 (Ala. Civ. App. 2018), on our jurisdiction over these appeals. The AMCC filed a letter brief arguing that the appeals should be dismissed with instructions to the trial court to vacate its judgments as void. Redbud filed a letter brief arguing that the appeals should not be

[1]On August 31, 2023, while the Rule 60(b) proceeding was before the trial court, Redbud purported to file more pleadings, but those pleadings are nullities. See Faith Props., LLC v. First Com. Bank, 988 So. 2d 485, 490 (Ala. 2008) (quoting Greene v. Eighth Jud. Dist. Ct. of Nevada, 115 Nev. 391, 393, 990 P.2d 184, 185 (1999)) ("[A] trial court has no jurisdiction to entertain a motion to amend a complaint to add new claims or new parties after a final judgment has been entered, unless that 'judgment is first set aside or vacated' pursuant to the state's rules of civil procedure.").

dismissed because, it said, Alabama Department of Public Health can be distinguished from this case.

Discussion

In Alabama Department of Public Health, Noland Health Services, Inc. ("Noland"), the operator of an adult day-care facility, brought a declaratory-judgment action against the Alabama Department of Public Health ("the department"), asserting, among other things, that the department lacked authority to apply and enforce certain administrative licensing rules against Noland. The Montgomery Circuit Court granted Noland declaratory and injunctive relief. On appeal, the department argued that the circuit court had lacked subject-matter jurisdiction because, it said, the department was immune from suit under Article I, § 14, of the Alabama Constitution of 1901 (Off. Recomp.), which provided: "The State of Alabama shall never be made a defendant in any court of law or equity."[2]

[2]Alabama Department of Public Health was decided when the Alabama Constitution of 1901 was in effect. However, § 14 of the Alabama Constitution of 2022, which is the current constitution in effect, contains the same language.

Relying on Alabama Department of Conservation & Natural Resources v. Kellar, 227 So. 3d 1199, 1201 (Ala. 2017), this court held that the department was absolutely immune from suit because a declaratory-judgment action can be brought only against a state officer named in his or her official capacity and not against the state agency itself. As explained in Kellar:

> "In Ex parte Alabama Department of Finance, 991 So.2d 1254, 1257 (Ala. 2008), this Court noted the six general categories of actions that do not come within the prohibition of § 14 [of the Alabama Constitution of 1901], one of which is 'actions brought against State officials under the Declaratory Judgments Act, Ala. Code 1975, § 6-6-220 et seq., seeking construction of a statute and its application in a given situation,' and stated that those 'exceptions' 'apply only to actions brought against State officials; they do not apply to actions against the State or against State agencies.' (Emphasis added.)"

227 So. 3d at 1200. This court in Alabama Department of Public Health determined that, because Noland had named the department as the sole defendant in its declaratory-judgment action, the circuit court had lacked subject-matter jurisdiction over the case and, therefore, its resulting judgment was void. We dismissed Noland's appeal with instructions for the circuit court to vacate its judgment because "'[a] void judgment will

not support an appeal.'" Alabama Dep't of Pub. Health, 267 So. 3d at 875 (quoting Kellar, 227 So. 3d at 1201).

In a special concurrence, Judge Donaldson noted that, because Noland was challenging the applicability and enforceability of certain administrative rules adopted by the department, its declaratory-judgment action arose under § 41-22-10, Ala. Code 1975, which provides, in pertinent part:

> "The validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action."

(Emphasis added.) Judge Donaldson explained that, "[a]lthough § 41-22-10[, Ala. Code 1975,] mandates that the [d]epartment be named as a party in the type of action filed by Noland, the legislature cannot waive sovereign immunity. Druid City Hosp. Bd. v. Epperson, 378 So. 2d 696 (Ala. 1979)." Alabama Dep't of Pub. Health, 276 So. 3d at 876 (Donaldson, J., concurring specially).

In the underlying case, Redbud commenced a declaratory-judgment action, expressly pursuant to § 41-22-10, challenging the validity of two

alleged administrative rules. Redbud sought injunctive relief as part of its complaint, but that did not change the nature of the case as a declaratory-judgment action because injunctive relief generally may be awarded in a declaratory-judgment action, see Ala. Code 1975, § 6-6-230, and is specifically authorized in § 41-22-10. At any rate, in Ex parte Moulton, 116 So. 3d 1119, 1141 (Ala. 2013), the supreme court recognized that state agencies are immune from suits seeking injunctive relief; only state officials acting in their representative capacities may be sued in actions for injunctions. Redbud named solely the AMCC as the defendant in both the body and the caption of its complaint; Redbud did not name any state official as a defendant in the case. See Rule 10(a), Ala. R. Civ. P. ("In the complaint the title of the action shall include the names of all the parties ...."). Redbud nevertheless argues that the complaint should be treated in substance as a complaint against the director of the AMCC or the AMCC's commissioners for various reasons, which we address below.

First, Redbud argues that it served the complaint upon the AMCC director and, by proxy, the AMCC's commissioners, thereby making them parties to the case. Redbud addressed service to "The Alabama Medical

Cannabis Commission c/o John McMillan Director," but that address did not make the director a party to the case. "[The term] 'c/o,' ... most often means 'care of' and is 'used esp[ecially] in addressing mail to a person reached through another person, a firm, or other agency.' Webster's New Intl. Dictionary (2nd ed., unabridged)." Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 301, 387 S.E.2d 898, 909 (1989). By using the "c/o" designation, Redbud did not serve the director in his individual or official capacity; Redbud served the director only as an intermediary for delivery of the service to the designated and intended recipient, the AMCC. For the purposes of service of process, Rule 4(a)(4), Ala. R. Civ. P., defines "defendant" as "any party upon whom service of summons or other process is sought." The record shows that Redbud sought service only upon the AMCC and that only the AMCC could be considered a defendant.

Redbud argues that it intended to serve the director under Ala. Code 1975, § 20-2A-20(l), which provides:

> "In any action or suit brought against the members of the commission in their official capacity in a court of competent jurisdiction, to review any decision or order issued by the commission, service of process issued against the commission may be lawfully served or accepted by the director on behalf

> of the commission as though the members of the commission were personally served with process."

However, Redbud does not explain why it did not name the director or any individual commissioner as a defendant in any of its pleadings or motions and why it did not address service to any individual commissioner, or to "the members of the commission c/o the director of the State of Alabama Medical Cannabis Association," which would have been the appropriate wording if that was its intent. Contrary to Redbud's contention, § 20-2A-20(l) does not treat the AMCC and its members as equivalent. Service upon the director on behalf of the AMCC may be treated as service upon the commissioners only in one instance -- when an action has been "brought against the members of the commission in their official capacity," which did not occur in this case.

Rule 4(c)(7), Ala. R. Civ. P., requires a party serving the state or a state agency to serve both "the officer responsible for the administration of the ... agency" and the attorney general. Redbud did not attempt to serve the attorney general in this case. Redbud argues that its omission to serve the attorney general indicates that it intended to serve the director as a representative of the individual commissioners. Again, nothing in the record substantiates that Redbud intended to name the

director or the commissioners as defendants in any capacity. Instead, it appears that Redbud simply failed to serve the attorney general in a case in which it named the AMCC as the lone defendant. We cannot accept the circular reasoning that the failure to perfect service on the attorney general transforms the identity of the defendant specifically named by Redbud in its complaint.

Redbud next argues that the AMCC basically waived its immunity by participating in the case to its conclusion without raising any jurisdictional objection.

> "It is familiar law in this state that § 14 [of the Alabama Constitution of 1901] 'wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state.' Dunn Construction Co. v. State Board of Adjustment, 234 Ala. 372, 376, 175 So. 383, 386 (1937)."

Alabama State Docks v. Saxon, 631 So. 2d 943, 946 (Ala. 1994) (emphasis added). In Atkinson v. State, 986 So. 2d 408, 410 (Ala. 2007), the supreme court held that the state could not waive its immunity even by waiting five years into litigation to raise it because sovereign immunity "'cannot be waived for purposes of a given suit.'" (Quoting Alabama Dep't of Env't Mgmt. v. Town of Lowndesboro, 950 So. 2d 1180, 1188 (Ala. Civ. App. 2005), aff'd, Ex parte Town of Lowndesboro, 950 So. 2d 1203 (Ala. 2006).).

"Such [an action against the State within the meaning of § 14 of the Alabama Constitution of 1901] presents a question of subject-matter jurisdiction, which cannot be waived or conferred by consent." Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002). Lack of subject-matter jurisdiction based on sovereign immunity can be raised at any point in the litigation, even for the first time on appeal and even ex mero motu. See Alabama Dep't of Pub. Health, 267 So. 3d at 875.

Lastly, Redbud argues that this court should follow Drummond Co. v. Alabama Department of Transportation, 937 So. 2d 56 (Ala. 2007), overruled on other grounds, Ex parte Moulton, 116 So. 3d 1119 (Ala. 2013), and formally substitute the proper parties for the AMCC. In Drummond, two plaintiffs filed an inverse-condemnation action against the Alabama Department of Transportation ("ADOT"). ADOT filed a motion to dismiss based on sovereign immunity, which was denied, prompting the filing of a petition for a writ of mandamus to our supreme court by ADOT. In reviewing the order denying the motion to dismiss, the supreme court noted that the proper defendant was the director of ADOT, not ADOT itself, and that, in ADOT's motion to dismiss, ADOT stated that its director "'submits himself to the jurisdiction of this court

for the purpose of answering this lawsuit.'" 937 So. 2d at 58. ADOT explained in its petition for a writ of mandamus that it had "'voluntarily substituted the proper party -- the Director. In this posture the plaintiff can get all the relief to which it may be entitled, without offense to the constitution.'" Id. at 58-59. Based on the procedural posture of the case, the supreme court denied the mandamus petition, agreeing that the case could proceed with the proper party substituted.

In this case, neither party attempted to substitute the director or the commissioners of the AMCC as defendants, and the director and the commissioners did not submit themselves to the jurisdiction of the trial court. Redbud has requested that this court enter an order of substitution to, in effect, revise the record to reflect the proper defendants. Under Rule 43(b), Ala. R. App. P., this court may enter an order of substitution regarding a public officer who is no longer in office to assure that the proper party to the judgment is represented on appeal, but Rule 43 does not give this court the power to reshape the litigation below to substitute a proper party for an improper party to cure a jurisdictional defect in the underlying proceedings. We also find no authority allowing this court to issue a writ of mandamus to the trial

court to direct it to substitute the proper parties when no such relief was timely and properly requested below pursuant to Rule 25, Ala. R. Civ. P., Drummond, or otherwise.

Without the substitution of the proper parties in the proceedings below, as occurred in Drummond, the complaint remained at all times "a complaint filed solely against the State or one of its agencies[, which] is a nullity and is void ab initio." Alabama Dep't of Corr. v. Montgomery Cnty. Comm'n, 11 So. 3d 189, 192 (Ala. 2008). Redbud did not invoke the subject-matter jurisdiction of the trial court because it filed its complaint solely against the AMCC. Id. The trial court could take no action on the complaint except to dismiss it. 11 So. 3d at 191. All subsequent proceedings in the case were therefore void, including the entry of the April 7, 2023, and September 22, 2023, judgments. See Ex parte Jefferson Cnty. Bd. of Educ., 348 So. 3d 397, 400 (Ala. 2021) (recognizing that any action taken by a court without subject-matter jurisdiction, other than dismissing the action, is void).

Conclusion

After reviewing the briefs and the records on appeal, we conclude that the judgments entered by the trial court from which Redbud has

appealed are void. "[A]n appellate court must dismiss an attempted appeal from ... a void judgment." Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008). Based on the foregoing, we dismiss these appeals as arising from void judgments, albeit with instructions to the trial court to vacate the void judgments.

CL-2023-0352 -- APPEAL DISMISSED WITH INSTRUCTIONS.

CL-2023-0697 -- APPEAL DISMISSED WITH INSTRUCTIONS.

All the judges concur.