Rel: April 5, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171174

Ex parte William T. Harrington

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: William T. Harrington

v.

Big Sky Environmental, LLC, Gabriel Kim, and Clayton "Lanny" Young)

(Jefferson Circuit Court, CV-16-904776; Court of Civil Appeals, 2170566)

BOLIN, Justice.

William T. Harrington petitioned this Court for certiorari review of the Court of Civil Appeals' order dismissing his appeal as untimely.

Procedural History

On December 23, 2016, Harrington sued Big Sky Environmental, LLC, Gabriel Kim, and Clayton "Lanny" Young, seeking compensatory and punitive damages resulting from a dispute over an employment agreement. Harrington alleged breach of contract, negligence, wantonness, fraud, suppression, and deceit. On March 10, 2017, Big Sky and Kim filed a motion to dismiss pursuant to Rule 12(b)(6), Ala. R. Civ. P.

On April 5, 2017, Harrington filed an amended complaint. Harrington again named Big Sky, Kim, and Young as defendants. He added as defendants Exoro Global, LLC ("Exoro Global"), and Exoro Global Capital, LLC ("Exoro Capital"). He once again alleged breach of contract, negligence, wantonness, fraud, suppression, and deceit. Harrington listed Kim as the "agent for service" of process for both Exoro Global and Exoro Capital. Harrington filed a notice to serve Exoro Global and Exoro Capital by certified mail. It appears that Exoro Global and Exoro Capital have a business interest in Big Sky. On April 10, 2017, Big Sky and Kim filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6), Ala. R. Civ. P.

In their motion to dismiss, Big Sky and Kim stated in a footnote that neither Exoro Global nor Exoro Capital had been served.

On April 28, 2017, Harrington filed a second amended complaint in which he named Big Sky, Kim, Young, Exoro Global, and Exoro Capital as defendants, again alleging breach of contract, negligence, wantonness, fraud, suppression, and deceit. Kim was again listed as the "agent for service" for Exoro Global and Exoro Capital. On May 12, 2017, Big Sky and Kim filed a motion to dismiss Harrington's second amended complaint for failure to state a claim upon which relief could be granted under Rule 12(b)(6).[1]

On September 28, 2017, the trial court entered an order dismissing the claims against Big Sky and Kim with prejudice on the ground that there was no valid employment contract. The trial court then set the case for a status review on November 7, 2017. On October 26, 2017, Harrington filed a motion purportedly seeking to "alter, amend, or vacate the judgment," arguing that a valid employment contract existed.

[1]In their motion, Big Sky and Kim stated that Big Sky was Harrington's sole employer and that Harrington had not been employed by Kim, Exoro Global, or Exoro Capital.

On December 20, 2017, the trial court denied Harrington's motion.

On January 26, 2018, the trial court entered the following order:

> "The Court has been made aware that the parties are in disagreement over whether or not its order of September 28, 2017 is final and in accordance with Rule 54(b) of the Ala. R. Civ. P.
>
> "After reviewing the Plaintiff's Second Amended Complaint and the aforementioned order, the Court finds that the granting of the Defendants' [Rule] 12(b)(6) motion dismissed any and all claims asserted by the Defendant.[2]
>
> "It is therefore ORDERED, ADJUDGED, and decreed that this Court's order dated September 28, 2017 is hereby made FINAL. Any and all claims against the Defendant(s) are hereby DISMISSED, without prejudice."

(Capitalization in original.)

On March 7, 2018, Harrington filed a notice of appeal. On March 15, 2018, this Court transferred the case to the Court of Civil Appeals pursuant to § 12-2-7(6), Ala. Code 1975. On July 19, 2018, the Court of Civil Appeals entered an order requesting that the parties file letter briefs addressing whether there was a final judgment from which to

[2]Presumably the trial court meant to state "claims asserted by the Plaintiff."

appeal and, if so, whether the appeal was timely filed. The parties responded, and on July 31, 2018, the Court of Civil Appeals, by order, dismissed Harrington's appeal as untimely. Harrington sought rehearing of the dismissal, but his application for rehearing was overruled. On September 19, 2018, Harrington petitioned this Court for certiorari review of the Court of Civil Appeals' decision.

Discussion

At the outset of our discussion, we recognize that

> "'[t]he filing of a timely notice of appeal is a jurisdictional act.' Painter v. McWane Cast Iron Pipe Co., 987 So. 2d 522, 529 (Ala. 2007)(citing Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985)). '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. See also Ex parte Alabama Dep't of Human Res., 999 So. 2d [891] at 895 [(Ala. 2008)] ('[W]e are obligated to dismiss an appeal if, for any reason, [subject-matter] jurisdiction does not exist.' (citing Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983)))."

Williamson v. Fourth Ave. Supermarket, Inc., 12 So. 3d 1200, 1202 (Ala. 2009). However, in the present case, we must first address whether there is a final judgment from which an appeal can properly be taken.

"The general rule is that a trial court's order is not final unless it disposes of all claims as to all parties." Dickerson v. Alabama State Univ., 852 So. 2d 704, 705 (Ala. 2002)(citing Rule 54(b), Ala. R. Civ. P.). "For a judgment to be final, it must put an end to the proceedings and leave nothing for further adjudication. Ex parte Wharfhouse Rest. & Oyster Bar, Inc., 796 So. 2d 316, 320 (Ala. 2001). '[W]ithout a final judgment, this Court is without jurisdiction to hear an appeal.' Cates v. Bush, 293 Ala. 535, 537, 307 So. 2d 6, 8 (1975)." Hamilton v. Connally, 959 So. 2d 640, 642 (Ala. 2006).

The trial court's September 28, 2017, order dismissed Harrington's claims against Big Sky and Kim with prejudice. However, that order was not a final, appealable order. Harrington's claims against Young (who was served with notice) had not been adjudicated, nor had he been dismissed from the case. In its order, the trial court set the case for a status hearing in November. This indicates that the trial court did not consider the order to be a final judgment. Except as otherwise provided by law, appeals lie only from final judgments. Gilbert v. Nicholson, 845 So. 2d 785, 790 (Ala.

2002)("It is well settled that '[a]n appeal will not lie from an order or judgment which is not final.'" (quoting Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978))). Accordingly, the trial court's order of September 28, 2017, was not appealable.[3]

An exception to the rule of finality of judgments, for purposes of appellate review, occurs when a trial court directs the entry of a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. Rule 54(b) provides:

> "(b) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an

[3]The Rule 54(b) certification in the January 26, 2018, order was timely brought within the jurisdiction of this Court when the underlying judgment upon which it purported to operate was appealed to this Court in a timely manner. Fuller v. Birmingham-Jefferson Cty. Transit Auth., 147 So. 3d 907, 914 (Ala. 2013)(Murdock, J., concurring specially). See also Wallace v. Belleview, 120 So. 3d 485 (Ala. 2012)("When the trial court enters a Rule 54(b) certification, there is a facially valid order from which the time for filing a notice of appeal starts to run."). Nevertheless, not every Rule 54(b) certification is valid. The trial court may make an erroneous Rule 54(b) certification leading to the dismissal of an appeal as being from a nonfinal judgment.

> express direction for the entry of judgment. Except where judgment is entered as to defendants who have been served pursuant to Rule 4(f), [Ala. R. Civ. P.,] in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

This Court looks with some disfavor upon certifications under Rule 54(b):

> "It bears repeating, here, that '"[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely."' State v. Lawhorn, 830 So. 2d 720, 725 (Ala. 2002)(quoting Baker v. Bennett, 644 So. 2d 901, 903 (Ala. 1994), citing in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373 (Ala. 1987)). '"'Appellate review in a piecemeal fashion is not favored.'"' Goldome Credit Corp. [v. Player, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)](quoting Harper Sales Co. v. Brown, Stagner, Richardson, Inc., 742 So. 2d 190, 192 (Ala. Civ. App. 1999), quoting in turn Brown v. Whitaker Contracting Corp., 681 So. 2d 226, 229 (Ala. Civ. App. 1996))(emphasis added)."

Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004).

A Rule 54(b) certification should not be entered if the issues in the claim being certified and a claim that will

remain pending in the trial court "'are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.'" Clarke-Mobile Ctys. Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002)(quoting Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987)). See also Banyan Corp. v. Leithead, 41 So. 3d 51 (Ala. 2009)(holding that the trial court's partial-summary-judgment order determining that subsidiary was a mere instrumentality or alter ego of parent corporation, that any liability attributable to subsidiary would also be borne by parent corporation, and that parent corporation was a party to employee's employment contract could not be certified as final under Rule 54(b) when order did not dispose of all claims as to at least one party); Smith v. Slack Alost Dev. Servs. of Alabama, LLC, 32 So. 3d 556 (Ala. 2009)(holding that the trial court exceeded its discretion in certifying as final a summary judgment against a prospective condominium purchaser in the seller's action for failing to complete purchase because the court had not entered judgment on a similar claim the seller was asserting against another purchaser in the same action,

which claim was based upon essentially the same facts and raised many of the same issues).

A trial court's order certifying a judgment as final pursuant to Rule 54(b) must clearly indicate an intent to do so. In Brown v. Whitaker Contracting Corp., 681 So. 2d 226 (Ala. Civ. App. 1996), the Court of Civil Appeals determined that the trial court certifying a judgment as final pursuant to Rule 54(b) had to state its reason for finding no just reason for delay. In Schneider National Carriers, Inc. v. Tinney, 776 So. 2d 753, 754 (Ala. 2000), this Court overruled Brown. In Schneider, this Court held that the trial court had validly certified a judgment as final pursuant to Rule 54(b) by stating that the judgment was "'expressly made a final judgment'" and citing Rule 54(b). The Court held that, although it generally did not approve of the omission of the Rule 54(b) language, the trial court had made "'an express determination that there is no just reason for delay,' because Rule 54(b) explicitly calls for such a determination" and to say that the determination was absent would exalt form over substance. 776 So. 2d at 755.

In Hanner v. Metro Bank & Protective Life Insurance Co., 952 So. 2d 1056, 1061 (Ala. 2006), this Court concluded that, although the trial court had stated that the judgment "'resolves all controversies pending in this case with prejudice and is final in accordance with the Alabama Rules of Civil Procedure,'" the trial court's failure either to cite Rule 54(b) or to quote the language of that rule rendered the purported Rule 54(b) certification invalid. Id. The Court also stated that the trial court failed to recognize in its order that the action in which it was entered had previously been consolidated with a related action.[4]

In the present case, the trial court's January 26, 2018, order states that the parties were unclear as to whether its September 28, 2017, order was final under Rule 54(b). However, we note that there is nothing in the trial court's September 28, 2017, order indicating an intent to certify that order as a final order in accordance with Rule 54(b).

[4]In Nettles v. Rumberger, Kirk & Caldwell P.C., [Ms. 1170162, August 31, 2018] ___ So. 3d ___ (Ala. 2018), this Court overruled its rule established in Hanner to hold that once a final judgment has been entered in a case, it is immediately appealable, regardless of whether the case has been consolidated with another case that remains pending.

Presumably, the parties' concern regarding finality was because Harrington's claims against Young had not been adjudicated.[5] The trial court's January 26, 2018, order then states that its order of September 28, 2017, dismissed any and all claims against Big Sky and Kim, because the court granted their Rule 12(b)(6) motion to dismiss. Next, the trial court states that its September 28, 2017, order is now final,[6] but the trial court then takes a different action than it did in its September 28, 2017, order in that it dismisses Harrington's claims against Big Sky and Kim without

[5]It does not appear that Exoro Global and Exoro Capital were served with notice of Harrington's second amended complaint. Rule 54(b) references Rule 4(f), Ala. R. Civ. P., in regard to a judgment against one or more defendants when other defendants have not been served with process. A judgment that disposes of fewer than all the defendants is final when the defendants as to whom there has been no judgment have not yet been served with notice. See Owens v. National Sec. of Alabama, Inc., 454 So. 2d 1387 (Ala. 1984)(denying the motion to dismiss the appeal on the ground that the case below was still pending as to other defendants when service had been attempted but not completed and, under Rule 4(f), service on the other defendants must be completed before it can be said that the pending action involves other active defendants).

[6]Although the trial court refers to "Defendant[s]" in the last paragraph, it is unclear to which defendants the court is referring, because the court never references Young anywhere in the order.

prejudice.[7] Without sufficient clarity, the trial court's purported certification under Rule 54(b) is invalid; therefore, the September 28, 2017, judgment is not final. A nonfinal judgment will not support an appeal. Schlarb v. Lee, 955 So. 2d 418 (Ala. 2006). Accordingly, although we agree with the Court of Civil Appeals that this appeal is due to be dismissed, it is due to be dismissed as being from a nonfinal judgment, not because the appeal was untimely filed. For that reason, we reverse the judgment of the Court of Civil Appeals and instruct that court to dismiss the appeal, not based on timeliness, but as being from a nonfinal judgment.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Shaw, Sellers, and Mendheim, JJ., concur in the result.

[7]A dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) is with prejudice to plaintiff's right to file another action against that defendant.