

REL: June 14, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180189

Joseph Machen, individually and
d/b/a Complete Roofing Exterior

v.

SCI Funeral Services, LLC, d/b/a Collier-Butler Funeral Home

Appeal from Etowah Circuit Court
(CV-16-900063)

MOORE, Judge.

Joseph Machen, individually and doing business as Complete Roofing Exterior ("Machen"), appeals from a judgment of the Etowah Circuit Court ("the trial court") in favor of SCI Funeral Services, LLC, doing business as Collier-Butler

2180189

Funeral Home ("SCI"). We dismiss the appeal as being from a nonfinal judgment.

Procedural History

On January 29, 2016, Machen filed a complaint against SCI, asserting, among other things, that SCI had contracted with Machen to install a metal roof "and [for] other carpentry services"; that, pursuant to the written contract between the parties, Machen was to be paid \$63,900; that Machen had performed the work and services at SCI's business until May 2010, at which time Machen discontinued his work and services because of a payment dispute; and that Machen had not been paid for the work that he had performed. Machen asserted claims against SCI of "open account," "stated account," "work and services provided," breach of contract, unjust enrichment, and fraudulent misrepresentation. SCI filed an answer to the complaint on December 19, 2016.

On April 19, 2018, SCI filed a motion for a summary judgment, asserting that it was entitled to a summary judgment on all of Machen's claims because Machen was not a licensed contractor at the time he entered into the contract to perform work for SCI. Machen filed an opposition to SCI's motion for

2180189

a summary judgment on July 13, 2018. Machen asserted in his opposition, among other things, that SCI had represented to Machen that Machen would be paid in three installments, with the first payment of \$21,000 being due "at the beginning"; that Machen had relied on that promise and began ordering materials and supplies needed for him to perform the job for SCI; that SCI had given to Machen a check in the amount of \$21,000 that was later returned for insufficient funds; that the initial payment was never reissued by SCI to Machen; that Machen had discontinued working on the project based on the failure of SCI to make the initial payment as agreed upon; that SCI had issued a check to Machen on November 2, 2009, in the amount of \$21,666.66 and another check to Machen on July 3, 2010, in the amount of \$7,020.30; that SCI had indicated that those funds had been paid to the Alabama State Treasurer as unclaimed funds; that, upon inquiry, Machen was informed that those funds had not been paid to the Alabama State Treasurer; and that SCI had informed Machen that the funds were being held for the benefit of Machen in an escheatment account. Machen argued that SCI was estopped from relying on the fact that Machen was unlicensed because, he said, SCI had

2180189

been aware of that fact from the outset of their contract. Machen also argued that, even if he is prevented from recovering pursuant to the contract, he is entitled to the funds being held in SCI's escheatment account and that his fraudulent-misrepresentation claim with regard to SCI's initial payment to Machen is not reliant on the contract. SCI filed a reply to Machen's opposition on July 16, 2018.

On July 19, 2018, the trial court entered a judgment that states, in pertinent part:

"There being no genuine issue as to any material fact put before the Court, [SCI] is hereby entitled to, and IS GRANTED, a partial judgment as a matter of law on part of [Machen's] claims.

"Therefore, summary judgment is granted as to all claims made by [Machen] that are in addition to the amount he claims may be escheated, paid to a third entity, or paid by [SCI] but refused due to insufficient funds. Only those claims, totaling \$28,000, remain.

"This is an adjudication as to fewer than all claims; therefore, this is an express determination that there is no just reason for delay and an express direction for entry of judgment pursuant to [Rule] 54(b), Ala. R. Civ. P."

Machen filed a motion to alter, amend, or vacate the judgment on August 17, 2018. On September 25, 2018, SCI filed a response in opposition to Machen's postjudgment motion and a

2180189

supplement to its motion for a summary judgment. Machen filed an objection to that portion of SCI's motion supplementing its motion for a summary judgment, asserting that the submission of additional evidence by SCI was untimely; the trial court granted Machen's objection. Following a hearing on Machen's postjudgment motion, the trial court entered an order on September 27, 2018, denying that motion.

On October 16, 2018, SCI filed a renewed motion for a summary judgment on Machen's remaining claims. On November 8, 2018, Machen filed his notice of appeal to the Alabama Supreme Court; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Analysis

Machen first argues on appeal that the trial court erred in certifying its judgment as final, pursuant to Rule 54(b), Ala. R. Civ. P. Rule 54(b) provides, in pertinent part:

"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 express direction for the entry of judgment."

2180189

Machen asserts that the trial court did not fully dispose of any one of his claims, and, thus, he says, the Rule 54(b) certification was improper.

In Scrushy v. Tucker, 955 So. 2d 988, 996 (Ala. 2006), our supreme court outlined our standard of review with regard to the propriety of a Rule 54(b) certification:

"Whether the action involves separate claims and whether there is a final decision as to at least one of the claims are questions of law to which we will apply a de novo standard of review. Whether there was 'no just reason for delay' is an inquiry committed to the sound discretion of the trial court, and, as to that issue, we must determine whether the trial court exceeded its discretion."

SCI cites Scrushy in support of its assertion that the trial court did not err in certifying its judgment as final, pursuant to Rule 54(b). In Scrushy, Wade Tucker alleged against Richard M. Scrushy and others claims of insider open-market trading, fraud, breach of fiduciary duty by corporate directors, professional negligence by auditors, aiding and abetting or civil conspiracy by an investment banking firm, and breach of contract. 955 So. 2d at 991. Tucker also asserted that Scrushy "was unjustly enriched when he accepted bonuses as a result of overvalued financial statements that misstated [the] net income" of HealthSouth Corporation, in

2180189

which Tucker was a shareholder and for which Scrusby had been chief executive officer from 1984 until March 2003. Id.

The circuit court in Scrusby concluded that Scrusby had been unjustly enriched by bonus payments that had been paid to him between 1997 and 2002 and that Tucker was entitled to a summary judgment on the unjust-enrichment claim; it entered a judgment against Scrusby in an amount representing the bonuses paid for those years plus prejudgment interest, and it certified that judgment as final, pursuant to Rule 54(b). 955 So. 2d at 994-95. On appeal, our supreme court considered whether the judgment was appropriate for certification as a final judgment pursuant to Rule 54(b). Id. at 996. It concluded that Tucker's claims were not all variations on a single theme, that Scrusby's alleged breach of duty in accepting bonuses that HealthSouth Corporation was not legally obligated to pay was a sufficiently separate breach not alleged elsewhere in the complaint, that the unjust-enrichment claim was a separate claim that could be reviewed separate and apart from the other claims in the complaint, and that that claim would support Rule 54(b) certification. Id. at 998-99.

2180189

In the present case, SCI argues that the trial court recognized Machen's claims as falling into two categories: "(1) direct payment from SCI for the unpaid amount of the contract; and (2) recovery of amounts that were allegedly escheated or possibly held by a third party," and, it says, the trial court granted SCI's summary-judgment motion in favor of SCI on the first category of claims but denied it as to the second. Citing Scrushy, SCI asserts that the two categories of claims are discrete enough to be considered separate for purposes of Rule 54(b). We disagree.

In White v. Miller, 718 So. 2d 88 (Ala. Civ. App. 1998), Donald Miller filed a complaint against a contractor who had filed a lien against Miller's property in an attempt to recover moneys in addition to those that had already been paid to the contractor pursuant to a construction agreement; Miller asserted claims for declaratory and injunctive relief and sought damages for breach of contract and fraud. 718 So. 2d at 89. The contractor filed a counterclaim, seeking enforcement of the lien. Id. Miller learned during discovery that the contractor was unlicensed and moved for a summary judgment based on the illegality of the contract. Id. The

2180189

contractor amended his counterclaim to assert additional claims of promissory fraud and deceit. Id. The circuit court entered a partial summary judgment in favor of Miller on his claims for declaratory and injunctive relief and on all claims asserted by the contractor, and it certified its judgment as final, pursuant to Rule 54(b). Id. The contractor appealed to this court. Id.

On appeal, the contractor argued that the licensing statute did not bar recovery because, he said, his claims were based on theories of fraud, rather than contract. Id. at 90. This court concluded that the amount of damages being sought by the contractor on his fraud claim was the same amount that he was seeking on his breach-of-contract claim. Id. Concluding that the "damages that the contractor [sought] for fraud and deceit [were] measured by the value of the work and labor performed under the contract," this court determined that the contractor's claims of fraud and deceit were "intrinsically founded on, and ... intertwined with, the facts surrounding the underlying contract." Id. Thus, this court concluded that, because the facts surrounding the contractor's claims of fraud and deceit were grounded in contract, the

2180189

contractor could not circumvent the licensing statute barring his relief. Id.

In the present case, although Machen presented his fraudulent-misrepresentation claim against SCI in his original complaint, Machen claimed the same amount of damages for SCI's purported fraudulent misrepresentation as he did for the remainder of his claims; that amount was equal to the amount owed pursuant to the written contract between the parties. Machen asserts in his brief on appeal, however, that White does not apply in the present case to bar recovery based on his fraud claim because, he argues, that claim is premised upon representations concerning SCI's initial payment. In his opposition to SCI's summary-judgment motion, Machen cited our supreme court's decision in Fausnight v. Perkins, 994 So. 2d 912 (Ala. 2008), in support of his argument that the funds allegedly being held in an escheatment account are due to be paid to Machen. In Fausnight, our supreme court determined that payments that had already been made to an unlicensed home builder for construction of a house could not be recovered by the payor based solely on the unlicensed status of the home builder. 994 So. 2d at 921. Our supreme court concluded that

2180189

§ 34-14A-14, Ala. Code 1975, "expressly deprives the unlicensed home builder of the right to use Alabama courts to collect unpaid moneys otherwise owed it; it does not purport to provide homeowners with a cause of action to obtain refunds of amounts paid to unlicensed home builders." Id.

It is clear that the trial court relied on Machen's theory of recovery pursuant to Fausnight in reserving jurisdiction to consider those claims by Machen that he argued "may be escheated, paid to a third entity, or paid by [SCI] but refused due to insufficient funds." We note, however, that the amount of the funds that Machen claims had been escheated, paid to a third entity, or paid by SCI but refused due to insufficient funds, totaling \$28,000, represent a portion of the full contract amount entered into by the parties. Thus, Machen's claim to those funds cannot be removed or categorized separately from Machen's claims for payment pursuant to the contract for purposes of Rule 54(b) certification. Unlike in Scrushy, in which the unjust-enrichment claim could be considered separately from the remaining claims, Machen's claim to a portion of the contract amount in the present case is a variation on a single theme --

2180189

recovery of the funds owed to him pursuant to the contract. Machen's attempt to recover pursuant to an alternative legal theory does not allow for the separation of that claim such that Rule 54(b) certification is proper. See Scrushy, 955 So. 2d at 997 (quoting Samaad v. City of Dallas, 940 F.2d 925, 931 (5th Cir. 1991), quoting in turn Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978)) ("'[I]t is clear that a claimant who presents a number of alternative legal theories, but whose recovery is limited to only one of them, has only a single claim of relief for purposes of Rule 54(b).'""). Accordingly, we conclude that the trial court erred in certifying its judgment as final, pursuant to Rule 54(b), because that judgment failed to fully dispose of any single claim for relief.

Because the trial court's certification of finality under Rule 54(b) is ineffective, there is no final judgment from which to appeal. See Fuller v. Birmingham-Jefferson Cty. Transit Auth., 147 So. 3d 907, 913 (Ala. 2013). Accordingly, we dismiss Machen's appeal for lack of jurisdiction. Id.

APPEAL DISMISSED.

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