Rel: March 13, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2190297

Ex parte Slocumb Law Firm, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Raya Greenberger

v.

Slocumb Law Firm, LLC)

(Tuscaloosa Circuit Court, CV-16-900531)

THOMPSON, Presiding Judge.

Slocumb Law Firm, LLC ("Slocumb"), petitions this court for a writ of mandamus directing the Tuscaloosa Circuit Court

("the trial court") to vacate its order compelling it to respond to postjudgment interrogatories propounded by Raya Greenberger for the purpose of aiding in the execution of a default judgment the trial court entered against Slocumb.

The materials before this court indicate the following. Greenberger filed an action against Slocumb in May 2016 alleging that Slocumb had violated the Alabama Legal Services Liability Act, § 6-5-570 et seq., Ala. Code 1975. A default judgment was entered in that action on December 13, 2016. On March 20, 2018, Slocumb filed a motion to set aside the default judgment on the ground that service of the summons and complaint had not been perfected and, therefore, that the trial court never obtained jurisdiction over Slocumb. A hearing was held on the motion, and on October 14, 2018, the trial court entered an order setting aside the default judgment. Greenberger was given 30 days from the date of the order to perfect service.

On March 1, 2019, Greenberger filed a renewed motion for a default judgment. In that motion, Greenberger stated that a process server served an employee at Slocumb's Auburn office on October 18, 2018. According to the affidavit of Catherine

McCown, which was attached as an exhibit to the renewed motion for a default judgment, on October 18, 2018, she served the summons and complaint on Brittany Whitehead, who told McCown she was authorized to receive service for Slocumb. Slocumb has denied that Whitehead was authorized to receive service for it, asserting that she is not an employee of the law firm but of Slocumb Advertising Service, LLC. After a hearing, the trial court entered a new default judgment against Slocumb on March 29, 2019, and scheduled a hearing on the issue of damages for April 18, 2019. In the materials before us, the parties agree that a judgment was entered on April 26, 2019. That judgment is not included in the materials submitted to this court; however, the case-action summary included in the State Judicial Information System indicates that an order for a default judgment was entered on that date. On April 18, 2019, Slocumb filed a "motion to reconsider" the entry of the default judgment. The trial court denied that motion on September 3, 2019. On October 10, 2019, Slocumb filed a notice of appeal in the action.[1]

[1]The appeal of the default judgment is designated as case no. 2190038 in this court. This court requested letter briefs on the issue of the timeliness of the appeal. After consideration of the parties' letter briefs, on February 11,

On September 5, 2019, after the denial of the "motion to reconsider," Greenberger propounded postjudgment interrogatories on Slocumb. The purpose of the interrogatories was to aid in the execution of the judgment and included questions regarding the financial institutions where Slocumb had accounts, the amounts of money in those accounts, real and personal property Slocumb owned, and the identification of insurance carriers that may be obligated to pay the judgment. Slocumb did not respond to the postjudgment discovery, and on November 22, 2019, Greenberger filed a motion to compel responses. That same day, the trial court entered an order directing Slocumb to answer the postjudgment interrogatories within 14 days. On December 5, 2019, Slocumb filed a motion to reconsider the November 22, 2019, order to compel. The trial court denied that motion on December 19, 2019.

Slocumb filed the petition seeking a writ of mandamus to vacate the November 22, 2019, order on January 3, 2020. Rule 21(a), Ala. R. App. P., provides, in pertinent part, that a petition for a writ of mandamus "shall be filed within a

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2020, this court entered an order permitting the appeal to proceed.

reasonable time. The presumptively reasonable time for filing a petition seeking review of an order of a trial court ... shall be the same as the time for taking an appeal." "'The time for taking an appeal' referenced by Rule 21(a) is that established by Rule 4(a)(1), Ala. R. App. P.: 'within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from.'" Ex parte Pelham Tank Lines, Inc., 898 So. 2d 733, 734 (Ala. 2004). Slocumb filed its petition 42 days after the entry of the November 22, 2019, order. Accordingly, the petition is timely.

In its petition, Slocumb argues that the trial court does not have jurisdiction to enter the order compelling it to respond to the postjudgment discovery. In making this argument, Slocumb explicitly states that, in the mandamus petition, it is not seeking to have the issue of the propriety of service decided. That issue is the subject of the appeal of the default judgment pending before this court.

In seeking the writ of mandamus, Slocumb argues that the trial court lacked jurisdiction to enter the November 22, 2019, order to compel postjudgment discovery because Slocumb had already filed its notice of appeal. Slocumb asserts that,

even if the trial court had jurisdiction, the trial court lacked the authority to compel responses to postjudgment discovery because, it says, the discovery "is a collateral matter [to the issues on appeal] under Rule 27, Ala. R. Civ. P."

> "A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right 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) the properly invoked jurisdiction of the court. Ex parte Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000)."

Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001).

> "'The trial court has broad and considerable discretion in controlling the discovery process and has the power to manage its affairs ... to ensure the orderly and expeditious disposition of cases.' Salser v. K.I.W.I., S.A., 591 So. 2d 454, 456 (Ala. 1991). Therefore, this Court will not interfere with a trial court's ruling on a discovery matter unless this Court '"determines, based on all the facts that were before the trial court, that the trial court clearly [exceeded] its discretion."' Ex parte Henry, 770 So. 2d 76, 80 (Ala. 2000) (quoting Ex parte Horton, 711 So. 2d 979, 983 (Ala. 1998)).
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> "'A mandamus petition is a proper means of review to determine whether a trial court has [exceeded] its discretion in discovery matters.' Ex parte Alabama Dep't of Human Res., 719 So. 2d 194, 197 (Ala. 1998). The petitioner seeking a writ of mandamus bears the affirmative burden of proving the existence of the conditions requisite for issuance

> of the writ. See Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003). Mandamus relief is appropriate 'when a discovery order compels the production of patently irrelevant or duplicative documents, such as to clearly constitute harassment or impose a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party.' Id."

Ex parte Vulcan Materials Co., 992 So. 2d 1252, 1259 (Ala. 2008).

Succinctly stated, the issue before us is whether the trial court had the authority to enter an order compelling Slocumb to respond to postjudgment discovery even though an appeal of the underlying judgment is pending. We first note that Slocumb has failed to file a supersedeas bond or a motion for a stay of execution of the judgment in connection with its appeal.

> "'The purpose of requiring a supersedeas bond is to preserve the status quo pending the appeal. Ex parte Spriggs Enterprises, Inc., 376 So. 2d 1088 (Ala. 1979). When one appeals without posting a supersedeas bond, the appellee's right to enforce the judgment is not suspended during the appeal, and, whatever measures are necessary for the execution of the judgment, it is the duty of the trial court to pursue them on application of the party in interest. Ex parte Dekle, 278 Ala. 307, [309,] 178 So. 2d 85[, 86] (1965).'

"Baker v. Bennett, 660 So. 2d 980, 982 (Ala. 1995)."

Davis v. Davis, 221 So. 3d 474, 479–80 (Ala. Civ. App. 2016)(emphasis added); see also Ex parte Curtis, 261 So. 3d 372, 375 (Ala. Civ. App. 2017)(same). Postjudgment discovery for the purpose of aiding the in execution of a judgment is permitted under Rule 69(g), Ala. R. Civ. P., which states: "In aid of the judgment or execution, the judgment creditor ... may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules."

Our Supreme Court has stated:

> "Matters concerning discovery pending appeal are within the trial court's discretion. Rule 27(b), Ala. R. Civ. P. '[R]elief under Rule 27 is discretionary with the trial court, and a trial court's ruling on a Rule 27 petition will not be reversed in the absence of an abuse of discretion.' Ex parte Anderson, 644 So. 2d 961, 964 (Ala. 1994)."

Sharrief v. Gerlach, 798 So. 2d 646, 651 (Ala. 2001).

In Vesta Fire Insurance Corp. v. Liberty National Life Insurance Co., 893 So. 2d 395 (Ala. Civ. App. 2003), this court considered the issue of whether a trial court is permitted to order postjudgment discovery relating to the amount of a supersedeas bond. In answering that question in the affirmative, this court explained:

> "As Vesta correctly points out, a trial court is not permitted to allow postjudgment discovery that 'goes behind the judgment.'
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> > "'[A]fter the appeal is taken, the judgment in the court below can not be vacated and set aside, or opened so as to introduce new matter into the record which was not properly a part of the record at the date of the judgment.... After final judgment and the adjournment of the court, the record, if it speaks the truth, can not be increased or diminished. Such judgment, until it is reversed or new trial granted, is a finality.'
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> "Montevallo Coal Mining Co. v. Reynolds, 44 Ala. 252, 254 (1870) (emphasis added). Any postjudgment discovery is limited by the jurisdiction of the trial court after judgment has been rendered. '[T]he general rule is that a trial court is divested of its jurisdiction during a pending appeal,' but 'a trial court may proceed in matters that are entirely "collateral" to the appeal.' Reynolds v. Colonial Bank, 874 So. 2d 497, 503 (Ala. 2003). 'Collateral' matters are those that 'd[o] not raise any question going behind the [judgment] appealed from, nor [do they] raise any question decided by that [judgment].' Osborn v. Riley, 331 So. 2d 268, 272 (Ala. 1976). More broadly speaking, collateral matters 'd[o] not involve the "rights and equities" relative to the question on appeal.' Colonial Bank, 874 So. 2d at 503 (quoting Osborn, 331 So. 2d at 272)."

Id. at 412.

In the portion of the mandamus petition setting forth the relief requested, Slocumb asks this court to issue a writ ordering the trial court to vacate its order "compelling

[Slocumb] to respond to post-judgment discovery that collaterally relates to issues on appeal." In the argument portion of the petition, Slocumb again acknowledges that "[Greenberger's] Discovery and the trial court's Order compelling a response concerns matters collateral to [Slocumb's] appeal. [Slocumb] agree[s] that the postjudgment discovery is entirely collateral to Slocumb's appeal of the underlying judgment. Greenberger's express goal in issuing post-judgment discovery is to 'execute on the judgment.'" Greenberger's postjudgment discovery relates only to the execution of the judgment. The propounded discovery does not "go behind" the judgment or raise any question decided by the judgment. As was in the case in Vesta Fire Insurance Corp., the postjudgment discovery

> "is designed 'merely [to] protect[] the appellee['s] interest in the trial court's order entered in [its] favor.' [Reynolds v.] Colonial Bank, 874 So. 2d [497] at 503 [(Ala. 2003)]. As such, the discovery motion involves a collateral matter, not a matter directly implicating the judgment. Consequently, the trial court had jurisdiction to grant the Rule 27(b)[, Ala. R. Civ. P.,] motion at issue."

893 So. 2d at 413.

Because the postjudgment discovery at issue involves a collateral matter, we conclude that the trial court did not

abuse its discretion in ordering Slocumb to respond to that discovery.

In a two-sentence argument, Slocumb contends that, if it responds to the postjudgment discovery, it would waive its argument in "the sister appeal" that the trial court lacked jurisdiction over it because of improper service. Slocumb's argument is without merit. As Greenberger points out in her answer to the petition for a writ of mandamus, the Committee Comments on 1973 Adoption of Rule 12, Ala. R. Civ. P., state, in pertinent part:

> "Alabama has had the traditional 'special appearance,' with the required words of limitation in the plea or motion, and the waiver of objections by taking any inconsistent position looking to the merits. This practice is abolished by the third sentence of Rule 12(b).[2] Carlisle v. Loveland Co., 175 F.2d 418 (3rd Cir. 1949). Neither the filing of a general appearance, nor the taking of a position looking to the merits, prevents a party from attacking the jurisdiction of the court or the service of process. E.g., Alford v. Addressograph-Multigraph Corp., 3 F.R.D. 295 (S.D. Cal. 1944); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3rd Cir. 1944), cert. denied 322 U.S. 740, 64 S.Ct. 1057, 88 L.Ed. 1573 [(1944)]. ... As under present Alabama practice, a party can claim on appeal error in overruling his

[2]The third sentence of Rule 12(b) reads: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

> jurisdictional objections even though he went ahead and contested on the merits after those objections were overruled. Vilter Mfg. Co. v. Rolaff, 110 F.2d 491 (8th Cir. 1940)."

In Ex parte Gregory, 947 So. 2d 385, 389-90 (Ala. 2006), our supreme court observed that

> "a defendant might waive his right to object to a lack of jurisdiction over his person 'by appearing and not contesting the court's jurisdiction,' given that Rule 12(h)(1), Ala. R. Civ. P., provides that '"[a] defense of lack of jurisdiction over the person ... is waived (A) if omitted from a motion and the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule or included in a responsive pleading or an amendment thereof...."' [Martin v. Drummond Co.,] 663 So. 2d [937] at 948 [(Ala. 1995)]. Gregory cannot be charged with such a waiver, however, because he timely presented his challenge to the exercise of personal jurisdiction in his answer to the complaint. See also Novak v. Benn, 896 So. 2d 513, 520 (Ala. Civ. App. 2004)."

Likewise, in this case, Slocumb has timely presented its challenge attacking the propriety of the service of process. Accordingly, as in Gregory, it cannot be charged with a waiver of that challenge.

Slocumb has failed to demonstrate that it has a clear legal right to have vacated the order compelling it to respond to the postjudgment discovery. Accordingly, the petition for a writ of mandamus is due to be denied.

PETITION DENIED.

Moore, Edwards, and Hanson, JJ., concur.

Donaldson, J., recuses himself.