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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Timothy Wayne Johnson

v.

Walter Cox and General Auto and Truck Repair, Inc.

Appeal from Jefferson Circuit Court, Bessemer Division
(CV-16-98)

THOMAS, Judge.

In December 2016, Timothy Wayne Johnson filed a complaint in the Jefferson Circuit Court, Bessemer Division ("the trial court"), against Walter Cox and General Auto and Truck Repair, Inc. (hereinafter collectively referred to as "Cox"), seeking

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damages for conversion, fraud, and unjust enrichment. Cox moved to dismiss Johnson's complaint, arguing that Johnson's claims were barred by the doctrine of res judicata, the Statute of Frauds, the two-year statute of limitations, and the failure to plead fraud with particularity; Cox attached to the motion the complaint and the judgment in a prior action brought by Johnson against Cox. Johnson responded to Cox's motion to dismiss, asserting that Cox was estopped from relying on the Statute of Frauds defense and requesting permission to amend the complaint to more particularly plead the circumstances of the alleged fraud. Johnson attached to his response an affidavit of Vernard Green.

On July 7, 2017, after a hearing, the trial court entered an order indicating that Johnson's complaint was dismissed. The order did not explain the ground upon which the trial court had determined the complaint was due to be "dismissed." Because, as noted above, the motion to dismiss and the response to that motion each had attachments, the trial court's order in favor of Cox could have been, in effect, a summary judgment. See, e.g., Regions Bank v. BP P.L.C., 200 So. 3d 1, 4 (Ala. 2016) (holding that a trial court

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considering a motion seeking dismissal of a complaint on the ground of res judicata "necessarily considered materials outside the pleadings" when considering that defense and therefore that the motion to dismiss was converted to a motion for a summary judgment). We recognize that, in Ex parte Price, 244 So. 3d 949, 954 (Ala. 2017), our supreme court indicated that an appellate court is not required to assume that a trial court considering a motion to dismiss considered extraneous attachments in reaching its conclusions, thus resulting in conversion of a motion to dismiss to a motion for a summary judgment. However, because one basis of the motion to dismiss was the applicability of the doctrine of res judicata, because the previous pleading and judgment were attached to the motion, and because Johnson, in his postjudgment motion, as amended, indicated that the trial court had entertained a motion for a summary judgment, we conclude that the trial court's July 7, 2017, judgment was a summary judgment.

On August 4, 2017, Johnson filed a timely postjudgment motion, in which he argued that he had presented substantial evidence demonstrating that Cox had made false statements and

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that Cox had converted Johnson's automobile. Johnson also again asserted that Cox was estopped from relying on the Statute of Frauds defense and that, as to the conversion claim, a six-year statute of limitations applied. The trial court set a hearing on the postjudgment motion to be held on October 4, 2017, but then continued the hearing to October 18, 2017. On October 18, 2017, the trial court entered an order denying a "motion to continue" that does not appear in the record; however, later that same day, the trial court entered an order "in accordance with counsel for the parties in open court," continuing the hearing to November 2, 2017, which was the 90th day after the motion was filed. On November 1, 2017, Johnson's counsel moved to continue "the cause," indicating in his motion that Cox's counsel had "given sanction" to the motion. The trial court granted that motion, stating in its order that the parties' counsel were to coordinate with each other to determine a date on which to reset the hearing.

Nothing further occurred in the action until January 5, 2018, when Johnson filed an amended postjudgment motion. In his amended motion, Johnson again argued that the doctrine of res judicata did not apply and that Cox was estopped from

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relying on the Statute of Frauds defense; Johnson, for the first time, also discussed the theory of bailment. Johnson filed an addendum to his amended motion on February 21, 2018. On May 1, 2018, the trial court denied Johnson's motion, as amended. Johnson then appealed to our supreme court, which transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

Neither party has raised the issue of this court's jurisdiction over this appeal. However, because jurisdictional matters are of such magnitude, this court is permitted to notice a lack of jurisdiction *ex mero motu*. See Williams v. Williams, 70 So. 3d 332 (Ala. Civ. App. 2009); Reeves v. State, 882 So. 2d 872, 874 (Ala. Civ. App. 2003). Our review of the record convinces us that Johnson's appeal is untimely.

Johnson's postjudgment motion was subject to Rule 59.1, Ala. R. Civ. P., which requires a trial court to rule on a postjudgment motion within 90 days of its filing. Parties may agree to extend the 90-day period, but any agreement to extend the time for ruling on a postjudgment motion must be express and must appear in the record. See Rule 59.1. An express

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consent of the parties, one evidenced by "positive steps to express [an agreement to extend the 90-day period] in a direct and unequivocal manner," is required to extend the 90-day period under Rule 59.1. Personnel Bd. for Mobile Cty. v. Bronstein, 354 So. 2d 8, 11 (Ala. Civ. App. 1977). Mere assent or agreement to continue a hearing on a postjudgment motion is not sufficient to extend the 90-day period. Bronstein, 354 So. 2d at 10-11. The record indicates only that Johnson's November 1 motion to continue stated that Cox's counsel had "given sanction" to the motion and that the trial court granted what it described as an "unopposed" motion to continue. Caselaw supports the conclusion that such action is not enough to effect a continuation of the 90-day period for ruling on the motion. See State v. Redtop Market, Inc., 937 So. 2d 1013, 1014 (Ala. 2006) (holding that an entry on the case-action-summary sheet that the "[c]ase is passed by agreement of the parties. Motion for new trial or rehearing is reset to [specific date]" was insufficient to indicate the parties' express consent to extend the pendency of the motion); Ex parte Bodenhamer, 904 So. 2d 294, 295 (Ala. 2004) (holding that the wife's consent, by letter, "to extend the

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ninety (90) day period for the hearing on [the husband's postjudgment] motion'" was insufficient to extend the time for ruling on that motion); and Harrison v. Alabama Power Co., 371 So. 2d 19, 20-21 (Ala. 1979) (quoting Bronstein, 354 So. 2d at 11) (holding that an agreement of the parties to a continuance of a postjudgment motion was not sufficient to extend the time to rule on that motion and noting that "'counsel for appellee did not take positive steps to express in a direct and unequivocal manner that he was willing to extend the 90 day period'").

No agreement to extend the 90-day period exists in this case. At best, the record contains Cox's assent to a continuance, and even that is not entirely clear. See Fulgham Fibres, Inc. v. Stokes, 186 So. 3d 970, 973-74 (Ala. Civ. App. 2015) (concluding that the failure to acquire the express consent of all parties to the case renders any attempt to extend the 90-day period a nullity); Brown v. Brown, 808 So. 2d 40 (Ala. Civ. App. 2001) (concluding that the signature of counsel for only one party on a motion seeking to extend the 90-day period was insufficient because it did not reflect the consent of all parties of record). Accordingly, Johnson's

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postjudgment motion was deemed denied by operation of law on the 90th day -- November 2, 2017 -- and the trial court's May 1, 2018, denial of that motion is a nullity. Johnson's appeal, which was filed well more than 42 days after the denial of his postjudgment motion by operation of law, is therefore dismissed.

APPEAL DISMISSED.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ.,
concur.