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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2009-2010

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James D. Moore

v.

Michael S. Strickland

Appeal from Tuscaloosa Circuit Court
(CV-07-177)

THOMPSON, Presiding Judge.

James D. Moore appeals from an order of the Tuscaloosa Circuit Court granting Michael S. Strickland's motion to set

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aside a default judgment entered against Strickland. For the reasons stated herein, this court dismisses Moore's appeal.

On February 12, 2007, Moore filed an action against Strickland in which he asserted a claim of malicious prosecution. Strickland filed an answer in which he denied the material allegations of the complaint. On March 2, 2009, Strickland's attorney filed a motion to withdraw from the action, which the trial court granted.

The trial court set the case for a jury trial on July 6, 2009. On the day scheduled for trial, Strickland failed to appear, and the trial court, after hearing testimony from Moore, entered a default judgment against Strickland, awarding damages to Moore in the amount of \$150,000.

On July 15, 2009, Strickland, represented by new counsel, filed a motion to set aside the default judgment. In his motion, Strickland asserted that he had not received notice from the trial court regarding the trial date and that the first notice he had of the trial setting was on July 11, 2009, when he received a copy of the default judgment the trial court had entered against him. Following a hearing at which Strickland apparently testified, the trial court, on August

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18, 2009, entered an order granting Strickland's motion and setting aside the default judgment. Moore filed an appeal to the supreme court from the trial court's order setting aside the default judgment. That court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Moore contends that the trial court erred when it set aside the default judgment. We do not reach the merits of that contention, however, because this court lacks appellate jurisdiction in this matter. Although neither party raises the issue of appellate jurisdiction, that issue is one that this court is obligated to consider *ex mero motu*. See Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 211 (Ala. Civ. App. 1997).

"Generally, an appeal will lie only from a final judgment, and if there is not a final judgment then this court is without jurisdiction to hear the appeal." Sexton v. Sexton, [Ms. 2080852, Feb. 5, 2010] ___ So. 3d ___, ___ (Ala. Civ. App. 2010). "[A] final judgment is a 'terminal decision which demonstrates there has been a complete adjudication of all matters in controversy between the litigants.'" Dees v. State, 563 So. 2d 1059, 1061 (Ala. Civ. App. 1990) (quoting

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Tidwell v. Tidwell, 496 So. 2d 91, 92 (Ala. Civ. App. 1986)). An order granting a motion to set aside a default judgment is not a final judgment because it revives the matters in controversy between the parties; thus, "an order granting a motion to set aside a default judgment and proceed to trial is interlocutory and not appealable." Fisher v. Bush, 377 So. 2d 968, 968 (Ala. 1979).

In the present case, the trial court's order granting Strickland's motion to set aside the default judgment is not a final judgment because it does not demonstrate an adjudication of the matters in controversy between Moore and Strickland. As a result, that order cannot serve as a basis for appellate jurisdiction. "'When it is determined that an order appealed from is not a final judgment, it is the duty of the Court to dismiss the appeal ex mero motu.'" Young v. Sandlin, 703 So. 2d 1005, 1008 (Ala. Civ. App. 1997) (quoting Powell v. Republic Nat'l Life Ins. Co., 293 Ala. 101, 102, 300 So. 2d 359, 360 (1974)).

This court has the discretion to treat an appeal from an unappealable order as a petition for a writ of mandamus. See Fowler v. Merkle, 564 So. 2d 960, 961 (Ala. Civ. App. 1989).

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However, to be entitled to the issuance of a writ of mandamus, a petitioner must demonstrate, among other things, a clear legal right to the order sought. Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990). In the present case, the trial court held a hearing at which Strickland apparently testified. Despite the fact that both parties reference testimony at that hearing, the record does not contain a copy of the transcript of the hearing. Without knowing what evidence was presented to the trial court relative to Strickland's motion to set aside the default judgment, this court is unable to conclude that Moore has a clear legal right to the issuance of a writ of mandamus from this court directing the trial court to reinstate the default judgment in Moore's favor. Cf. Zaden v. Elkus, 881 So. 2d 993, 1009 (Ala. 2003) ("The law is settled that it is the appellant's duty to ensure that the appellate court has a record from which it can conduct a review. ... Further, in the absence of evidence in the record, this Court will not assume error of the part of the trial court."). As a result, this court will not treat the appeal as a petition for a writ of mandamus.

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For the foregoing reasons, this court lacks jurisdiction over Moore's appeal. As a result, the appeal is due to be, and is hereby, dismissed.

APPEAL DISMISSED.

Pittman, Bryan, Thomas, and Moore, JJ., concur.