

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00747 COA

JOHNNIE CALDWELL, A/K/A

JOHN EARL CALDWELL AND

MAGGIE CALDWELL, A/K/A MAGGIE J. CALDWELL

APPELLANTS

v.

COVINGTON LAND DEVELOPMENTS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RAY H. MONTGOMERY

COURT FROM WHICH APPEALED: CHANCERY COURT OF MADISON COUNTY

ATTORNEY FOR APPELLANT:

CHARLES P. LEGER

ATTORNEY FOR APPELLEE: ALBERT B. WHITE

NATURE OF THE CASE: CIVIL: CONTEMPT

TRIAL COURT DISPOSITION: CONTEMPT CITATION ISSUED

BEFORE THOMAS, P.J., MCMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Covington Land Developments (Covington) and Johnnie and Maggie Caldwell entered into an agreed

judgment on March 8, 1994, in which the Caldwelles agreed to remove a trailer from their property. A show cause hearing was held on June 28, 1994, based on a failure to remove the trailer. The chancellor found the Caldwelles in contempt. The Caldwelles on appeal do not contest the facts that underlay the finding of contempt, but argue they should have been allowed to testify about defenses, affirmative defenses, and counterclaims to the original agreed judgment that required them to remove the trailer. We affirm.

FACTS

The Caldwelles purchased a subdivision lot from Covington in 1989. A restrictive covenant prohibited the placement of any house trailer or mobile home on the property. Despite this, the Caldwelles placed a trailer on the property. Covington brought suit in 1994 to force the removal of the trailer. The suit ended with an agreed judgment on March 8, 1994, whereby the Caldwelles with the advice of counsel, agreed to remove the trailer within sixty days. The judgment provided that the Caldwelles "shall remove said house trailer from said Lot and Block at their expense within sixty (60) days from the date of the Judgment." Because the Caldwelles failed to remove the trailer within sixty days, Covington filed and properly served a motion for contempt on June 17. An order had been entered on June 17, scheduling "the Motion for Contempt and Writ of Assistance . . . for Hearing" on June 28.

On the morning of the contempt hearing, the Caldwelles' attorney informed the court that he had an answer to the motion for contempt, and his answer included a motion to set aside the agreed judgment. That answer does not appear in the record, but a copy is attached to the Caldwelles' record excerpts, stamped as being filed on the day of the hearing. The court held that no answer was necessary, and then said the purpose of the hearing was solely to determine the issue of contempt, not to address the underlying judgment. As the Caldwelles' attorney phrased it at the hearing, "my understanding [is] that you are not allowing us to go forward at this time on our Motion to Set Aside that Judgment?" The chancellor said "Yes, sir, because it has not been properly noticed."

Johnnie and Maggie Caldwell separately testified regarding their health and financial problems, and how these problems prevented them from complying with the agreed judgment. Johnnie Caldwell testified that he suffered from lung cancer and thyroid problems, and was taking ibuprofen, sleeping pills, and thyroid medication. Maggie Caldwell testified that she suffered from breast cancer and was also taking medication. As a result of their respective illnesses, the Caldwelles testified that they were physically unable to move the trailer themselves. However, both Johnnie and Maggie Caldwell testified that they understood the court's order to have the trailer moved off the property by May 8, 1994. Counsel for the Caldwelles was aware at the time that the agreed judgment was signed that the Caldwelles had been treated for cancer. After considering all the evidence, the court ultimately found the Caldwelles in contempt and issued a writ of assistance for the sheriff to remove the trailer.

DISCUSSION

An agreed judgment is presumed valid and enforceable, and cannot be set aside except on a clear showing of fraud, mistake, accident, or surprise which must have been the controlling factors in the effectuation of the judgment. *See Hinds County Bd. of Supervisors. v. Common Cause of*

Mississippi, 551 So. 2d 107, 118-19 (Miss. 1989); *Wray v. Langston*, 380 So. 2d 1262, 1263 (Miss. 1980). The trial court concluded that the show cause hearing was not the time and place for presenting those arguments because the motion to set aside the underlying judgment had not been noticed, and had been raised on the morning of the show cause hearing. The Caldwelles were not barred from ever making those arguments. The Caldwelles' attorney understood that the chancellor was "not allowing us to go forward *at this time*," but never ruled the issue foreclosed. The trial court was within its discretion in refusing to allow arguments regarding the motion on the day of the contempt hearing.

The Caldwelles had a remedy. Even after the court's order, the Caldwelles could have noticed their Rule 60(b) motion for relief from judgment, based on the allegations they wanted to raise at the contempt hearing. Such a motion does not suspend the time for filing an appeal, but had the trial court granted the motion, the appeal would have been terminated. Since Rule 60 does not suspend the time for filing a notice of appeal, a notice of appeal may be filed before a ruling has been made on the motion. Only if "the record has been transmitted to the appellate court" does "[l]eave to make the motion" need to be obtained from the supreme court. M.R.C.P. 60. The record was designated five weeks after the hearing, and was not completed by the chancery clerk until more than seven months later. The chancellor had full authority to consider and rule on a Rule 60 motion prior to that time. The timely *filing* of a Rule 59 motion for a new trial does toll the time for filing an appeal, and if an appeal notice had already been filed, the notice "simply self-destructs." *Bruce v. Bruce*, 587 So. 2d 898, 901 (Miss. 1991). The *granting* of a Rule 60 motion after a notice of appeal has been filed, at least if granted before the record is transmitted to the supreme court, likewise will destroy the appeal. *See generally Collins v. Acree*, 614 So. 2d 391, 392-93 (Miss. 1993).

There may have been additional problems with the Caldwelles' motion, but these were never addressed below by the trial court. We merely note them since they were raised by Covington. Movants who wait to file a Rule 60(b) motion for relief from a judgment until they are cited for contempt have not timely pursued their remedy. *Common Cause of Mississippi*, 551 So. 2d at 118. The court considered this to be an unreasonable delay under Rule 60(b). *Id.* Here, counsel for the Caldwelles not only waited until a contempt motion was filed, they waited until the day of the contempt hearing. "Invalidity of a defied court order is ordinarily no defense to a charge of contempt." *Id.* at 118 (citations omitted). "[T]he person who disobeys the order of the court of general jurisdiction does so at his peril. It is no answer that the order was improvidently or erroneously granted." *Id.* (alteration in original) (citation omitted).

We find the chancellor to have been within the bounds of his discretion, and affirm.

THE JUDGMENT OF THE MADISON COUNTY CHANCERY COURT OF CONTEMPT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.J.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.