IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Memorandum Order

FILED
September 23, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia ex rel. Heartwood Forestland Fund II LP, Petitioner,

vs.) No. 35555

Honorable Michael Thornsbury, Judge of the Circuit Court of Mingo County, and Eva C. Cox Caudill, as Administratrix of the Estate of Mary Etta Southers, Respondents.

Petition for Writ of Prohibition from the Circuit Court of Mingo County
Civil Action No. 09-C-3

On May 5, 2010, this Court issued a rule to show cause against the respondent, the Honorable Michael Thornsbury, Judge of the Circuit Court of Mingo County, as a result of a petition for writ of prohibition filed by Heartwood Forestland Fund II LP (hereinafter "Heartwood"). The requested writ is based on an order, entered February 12, 2010, by the lower court, which denied Heartwood's motion to set aside default as to liability. Pursuant to a request under Rule 14(b) of the Rules of Appellate Procedure came the respondent, Eva C. Cox Caudill, as administratrix of the estate of Mary Etta Southers (hereinafter "estate") and filed its response. Having thoroughly considered the matters raised in the petition, the response thereto, the oral arguments of counsel, and the applicable law, we agree with the position urged by the estate that the writ of prohibition is not properly before this Court. Therefore, we determine that the rule to show cause was improvidently issued. Accordingly, the petition is dismissed and the writ is denied.

Factually, Ms. Mary Etta Southers died on March 13, 2007, when a tree fell on her car

as she drove on United States Route 52 in Mingo County, West Virginia. It is alleged that the tree fell from property owned by Heartwood. Heartwood is a North Carolina limited partnership and is licensed to do business in West Virginia. Heartwood contracted with American Forest Management (hereinafter "AFM") to maintain and inspect the subject property, which it has done since 1999. Heartwood contends that AFM was required to indemnify it for any claims arising from AFM's failure to properly maintain the property and, further, that AFM was mandated to purchase liability insurance with Heartwood listed as an additional named insured.

The estate filed a lawsuit against Heartwood on January 5, 2009, and Heartwood was served by the West Virginia Secretary of State's Office via its registered agent on January 7, 2009. A legal assistant in the office of Heartwood's corporate counsel[1] sent an electronic email to Heartwood's chief financial officer (hereinafter "CFO") that contained the service of process; summons and complaint; first set of interrogatories; requests for production of documents; and requests for admissions. In addition to emailing the documents to Heartwood's CFO, the legal assistant also copied two of Heartwood's corporate attorneys. Heartwood's answer to the complaint was due February 6, 2009; however, an answer was not filed by that date. Five days later, on February 11, 2009, counsel for the estate made a motion for default judgment on the issue of liability, which was granted by order entered that same day. The lower court set the case for trial on the issue of damages.

[1]Heartwood's corporate counsel is not located in West Virginia.

On February 19, 2009, Heartwood received the entry of default from its corporate counsel. It was at this time that corporate counsel inquired of Heartwood whether it had West Virginia counsel handling the case. Heartwood's insurance company received notice of the claim on February 24, 2009, and retained counsel on behalf of Heartwood on February 27, 2009. Counsel for Heartwood filed a motion to set aside default on March 25, 2009. The lower court heard arguments of the parties on April 13, 2009, and issued its ruling, denying the motion to set aside, on February 12, 2010. It is from this order denying the motion to set aside entry of default that the petitioner seeks a writ of prohibition from this Court.

All parties concede that the order entered was an interlocutory order and is not subject to appeal; however, Heartwood argues that a petition for writ of prohibition is appropriate because of litigation errors that are not correctable on appeal. We disagree and adopt the estate's position that a writ of prohibition is inappropriate.[2]

Generally, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code* 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). However, a writ of

[2]Heartwood argues that its agreement with AFM requires that AFM be a party to the underlying suit and that its absence cannot be corrected on appeal should it be determined to be error. However, it was represented to this Court during oral argument that Heartwood has filed a motion with the lower court for leave to file a third-party complaint against AFM and that it has not been ruled upon. Moreover, even if the eventual ruling is adverse to Heartwood, such an issue can be raised as an assignment of error on appeal for this Court's review.

prohibition is appropriate when the petitioner's rights cannot be protected by the remedy of an appeal. In this regard, we have stated that

> [w]here prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.

Syl. pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973).

Absent a flagrant abuse of a circuit court's powers, writs of prohibition are not proper substitutes for appeal. *See* Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) ("Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari."). While Heartwood avers that AFM is a necessary party to the current lawsuit, such an issue is not before this Court in the current context of the case, which involves a disagreement as to entry of default as to liability. As noted, "[e]ntry of default is interlocutory. It represents a default on liability and until the amount of damages is ascertained there is no final judgment." Franklin D. Cleckley, Robin J. Davis, and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 55(a), at 1096 (3d ed. 2008) (internal footnotes omitted).

For the reasons stated above, we hereby find that the entry of default is an

interlocutory order that is not subject to review by this Court. Moreover, the writ of prohibition is not a proper substitute for an appeal. Therefore, the rule to show cause was improvidently issued, and the writ of prohibition is denied.

Writ Denied.