NO. COA01-1235

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

DORIS BRAKEFIELD CLENDENING

Plaintiff,

v. Gaston County
No. 98 CVS 5102

SEARS, ROEBUCK AND CO.,

Defendant.

Appeal by plaintiff from order entered on 21 May 2001 by Judge Richard D. Boner, Superior Court, Gaston County. Heard in the Court of Appeals 12 June 2002.

Malcolm B. McSpadden for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by W. Clark Goodman for defendant-appellee.

WYNN, Judge.

This appeal arises out of Plaintiff Doris Brakefield Clendening's failure to appear at a court-ordered arbitration hearing which resulted in the dismissal of her personal injury action against Defendant Sears, Roebuck and Co. From the trial court's denial of her motion seeking relief from that judgment, Ms. Clendening appeals to this Court. We affirm.

In brief, the facts show that on 23 March 1999, the trial

court entered an order for civil arbitration requiring arbitration to be conducted within sixty days. The hearing was initially scheduled for 6 May 1999 but it was rescheduled for 20 May 1999. However, on that date Ms. Clendening's attorney was in a domestic case hearing so the matter was rescheduled for 6 July 1999. When neither Ms. Clendening nor her attorney appeared at the scheduled arbitration hearing on 6 July 1999, the arbitrator entered an award against her dismissing the action. On 10 August 1999, the trial court adopted the arbitrator's award as the judgment of the court. On 30 June 2000, Ms. Clendening filed a motion in the cause under Rule 60(b) of the North Carolina Rules of Civil Procedure seeking relief from judgment. After conducting a hearing on Ms. Clendening's motion, the trial court denied the motion. She now appeals to this Court.

On appeal, Ms. Clendening contends that the trial court erroneously found that her Rule 60(b) motion was not made within a reasonable time. We disagree.

"Generally, a motion for setting aside a judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court, and the standard of appellate review is limited to determining whether the court abused its discretion." *McLean v. Mechanic*, 116 N.C. App. 271, 276, 447 S.E.2d 459, 462 (1994), *disc. review denied*, 339 N.C. 738, 454 S.E.2d 653 (1985); *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998). "An abuse of discretion is

a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). "Whether a motion is made within a reasonable time depends upon the circumstances of the individual case." *Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E.2d 577, *cert. denied*, 303 N .C. 545, 281 S.E.2d 392 (1981).

In her appeal, Ms. Clendening relies solely on her assertion that Rule 60(b) creates a presumption that a filing of a motion within one year is a timely filing. However, in *Jenkins v. Richmond County*, 118 N.C. App. 166, 454 S.E.2d 290, *review denied*, 340 N.C. 166, 460 S.E.2d 318 (1995), this Court held that complying with the one year limitation is not necessarily sufficient to make a motion under Rule 60(b) timely. In that case, the plaintiffs filed a Rule 60(b) motion exactly one year from the date of the judgment. The trial court found the motion to be timely and granted the plaintiff relief from the earlier judgment. However, on appeal, our Court concluded that the plaintiffs' motion was not made within a reasonable time and reversed the order of the trial court granting the plaintiffs relief. In so doing, the Court reasoned,

> That which constitutes a reasonable time under Rule 60(b) is determined by examining the circumstances of the individual case. *Brown v. Windhom*, 104 N.C. App. 219, 408 S.E.2d 536 (1991). In *Brown*, the defendant's only explanation for a year-long delay in filing his motion for relief was uncertainty as to his legal rights. This Court held such an explanation to be insufficient justification to award relief after a year's delay

Id. at 169-170, 460 S.E.2d at 292.

Likewise, in this case, plaintiff has offered no explanation for the nearly eleven-month delay in filing her motion for relief. Analogous to the rationale *Jenkins,* under the circumstances of this case, we can find no abuse of discretion by the trial court in finding that the motion was not made within a reasonable time. *See Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980). Accordingly, we reject this assignment of error.

Next, Ms. Clendening contends that the trial court erred by entering a judgment without making findings of facts and conclusions of law. We disagree.

"Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party." *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993). Where the trial court does not make findings of fact in its order denying a motion for relief from judgment, the question on appeal is "'whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion[.]'" G*rant v. Cox*, 106 N.C. 122, 125, 415 S.E.2d 378, 380 (1992) (quoting *Financial Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978)).

In the case *sub judice*, the record on appeal does not reveal that Ms. Clendening requested the trial court to make findings of fact to support its ruling on her motion in the cause.

Accordingly, in light of our Court's holding in *Nations*, we reject Ms. Clendening's argument that the trial court was required to make findings of fact in support of its Rule 60(b) ruling.

Next, Ms. Clendening contends that the trial court committed reversible error by failing to grant her motion to set aside the judgment on the grounds that the arbitration award was void. We disagree.

We note that to the extent that Ms. Clendening submits that the judgment by the trial court was invalid or reversible for errors of law, those contentions are not properly before this Court. *See generally Howell v. Tunstall*, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

> [A] Rule 60(b)(4) motion is only proper where a judgment is 'void' as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered."

Ottway Burton, P.A. v. Blanton, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). An erroneous judgment, by contrast, is one entered according to proper court procedures and practices but is contrary to the law or involves a misapplication of the law. *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987). "As our appellate courts have consistently held, erroneous judgments may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal." *Ottway Burton, P.A. v. Blanton, 107* N.C. App. at 616-617, 421 S.E.2d at 383; *see also*

Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290, *review denied*, 340 N.C. 568, 460 S.E.2d 318 (1995); *Chandak v. Elec. Interconnect Corp.*, 144 N.C. App. 258, 262, 550 S.E.2d 25, 28 (2001). Thus, in order to have obtained relief from any alleged errors of law, Ms. Clendening should have appealed directly from the trial court's judgment; she did not do so. Even if errors of law could be found in the judgment, the judgment is not void because the trial court had jurisdiction and the authority to enter it. *Windham Distrib. Co., Inc., v. Davis*, 72 N.C. App. 179, 182, 323 S.E.2d 506, 508-509 (1984), *review denied*, 313 N.C. 613, 330 S.E.2d 617 (1985).

Nonetheless, Ms. Clendening argues that no finding of an amount in controversy less than $15,000 was made in the arbitration award; therefore, the requirement of mandatory arbitration was entered without statutory or other authority. Additionally, she contends that she was denied the right to engage in arbitration in violation of the equal protection of the law as provided in Article I Section 19 of the Constitution of North Carolina, and the Fourteenth Amendment to the United States Constitution.

In 1989, the North Carolina General Assembly authorized statewide, court-ordered arbitration and further authorized the North Carolina Supreme Court to adopt certain rules governing this procedure; subsequently, our Supreme Court implemented the Rules for Court-Ordered Arbitration. Rule 1(a) states that mandatory court-ordered arbitration applies in all civil actions in which the claims for monetary relief do not exceed $15,000.00, exclusive of

interest, costs and attorney's fees. R. Ct. Ordered Arbitration in N.C., Rule 1(a)(2002). Further, the commentary to Rule 1 explains that the purpose of this program is to "create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000.00." *Id*.

Rule 1 (d) of the Rules of Court-Ordered Arbitration provides that "[t]he court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party made not less than 10 days before the arbitration hearing and a showing that: (I) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Arb. Rule 1(a); or (iii) there is a strong and compelling reason to do so." R. Ct. Ordered Arbitration in N.C., Rule 1(d)(2002). Moreover, Rule 5 provides that "[a]ny party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for a trial *de novo* with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear." R. Ct. Ordered Arbitration in N.C., Rule 5 (2002).

> If the case is not terminated by agreement of the parties, and no party files a demand for a trial *de novo* within 30 days after the award is filed, the clerk or the court shall enter judgment on the award, which shall have the same effect as consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

Id.

In the case *sub judice*, on 1 March 1999, the parties were served with a Notice to Select Among Alternative Dispute Resolution Programs. The notice stated that if the parties did not respond with a preference by 5:00 p.m. on 22 March 1999, they would be "considered to affirmatively agree, and the Court to have approved, the case being ordered into the Civil Arbitration Program regardless of the amount of monetary relief sought pursuant with Rule 1(b) of the Supreme Court's 'Rules for Court Ordered Arbitration in North Carolina.'" Neither party expressed a preference for a particular form of alternative dispute by that date. Therefore, both parties were deemed to have consented and the trial court to have approved the referral of the case to civil arbitration. Additionally, the record fails to show that Ms. Clendening offered objection to participating in the civil arbitration program, or availed herself to the numerous opportunities to move that this matter be withdrawn from civil arbitration.

Moreover, Ms. Clendening does not contend that the trial court was without jurisdiction or authority to enter the arbitration judgment. Since, we can not find that Ms. Clendening specifically objected to the court ordered arbitration as required by Arbitration Rule 1(a)(5), we find that the trial court had jurisdiction to enter the arbitration award.

Ms. Clendening further argues that the judgment should be declared void as being a consent judgment entered without her

express consent. Arbitration Rule 6(b) merely confers upon an arbitration award the "effect" of consent judgment. *See* R. Ct. Ordered Arbitration in N.C., Rule 6(b)(2002). It does not state that an arbitration award becomes a consent judgment or has the same requirements for validity as a consent judgment. *Id.* Moreover, the Rules of Arbitration do not require that the parties expressly consent to the entry of judgment. *See id.*

Rule 6(b) provides that if "no party files a demand for trial *de novo* within thirty days after the award is filed, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action." *Id.* On 10 August 1999, Ms. Clendening filed a request for a trial *de novo*, which is the mechanism to prevent the trial court's adoption of an arbitration award. Since Ms. Clendening exceeded the 30 day limit of Rule 6, and thus failed to timely demand a trial *de novo*, this argument is without merit.

Next, Ms. Clendening argues that the judgment should be declared void as a violation to Ms. Clendening's right to a trial by a jury pursuant to Rules 38 and 39 of the Rules of Civil Procedure, Article I Section 25 of the Constitution of North Carolina, and the Seventh Amendment to the United States Constitution.

The Rules of Arbitration, which were implemented by our Supreme Court, provide in the Comment to Rule 6 that

> demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial *de novo*. There must be a separate, specific, timely demand for trial *de novo*

after the award has been filed.

See R. Ct. Ordered Arbitration in N.C., Comment to Rule 6. In a court-ordered arbitration, the party's right to a jury trial is protected by the provisions of Arbitration Rule 5(a) which allows any party to have a trial *de novo* upon filing a written demand within thirty days after the arbitrator's award has been filed. Furthermore, it is well-established that a party does not preserve her right to trial by jury merely by demanding trial by jury in her pleading; a party may lose her right to a jury trial by failing to prosecute her claim in compliance with applicable rules or requirements. *See e.g.*, N.C. Gen. Stat. § 1A-1, Rules 37 (b)37 (b)(2)(c) and 41(b) (2002).

In the case *sub judice*, as we stated previously, Ms. Clendening failed to file for a trial *de novo* within the required time of Rule 6(b); and thus, failed to timely avail herself of the opportunity to have a trial *de novo* of her claims before a jury. Accordingly, Ms. Clendening effectively consented to have this matter referred to civil arbitration and was thereby governed by the rules applicable to such proceedings.

Next, Ms. Clendening contends that the trial court erred by denying her motion under N.C. Gen. Stat. § 1A-1, Rules 60(b)(1), and (6). We disagree.

In her brief, Ms. Clendening fails to identify how her claim falls under Rule 60(b)(1) and (6) and offers no arguments or evidence to support her contentions. Rule 28(a) of the North Carolina Rules of Appellate Procedure provides that "[a]ssignments

of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5) (2002); *see also State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991); *State v. Thompson*, 110 N.C. App. 217, 429 S.E.2d 590 (1993) (holding that where appellant fails to cite authority in support of an argument, the assignment of error upon which that argument is based is deemed abandoned). Thus, we deem this assignment of error is abandoned.

Affirmed.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).