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NO. COA01-1396

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

JEAN C. CLEMMONS, MARCUS O.  
BARR, KAREN Y. CLEMMONS,  
M. ANTWAUN CLEMMONS and  
MARSHALL TUCKER,  
Plaintiffs-Appellants,

v.

Forsyth County  
No. 00 CVS 9113

SAMMY LEE CLEMMONS, JR. and  
THE CHURCH OF PHILADELPHIA  
APOSTOLIC,  
Defendants-Appellees.

Appeal by plaintiffs from judgment entered 14 August 2001 by Judge Judson D. DeRamus, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 26 August 2002.

*William M. Speaks, Jr., for plaintiff-appellants.*

*No brief filed for defendant-appellees.*

WYNN, Judge.

Plaintiffs appeal from judgment dismissing their claims against defendants for, among other things, constructive fraud, conversion and unjust enrichment.

On 12 September 2001, plaintiffs filed a complaint alleging defendant Sammy Lee Clemmons, Jr. used fraudulent tactics to seize control of defendant Church and its assets. Defendants answered

and denied the material allegations of the complaint. Neither party having requested a jury trial, the case was heard by Judge Judson D. DeRamus sitting without a jury. After the close of plaintiffs' evidence, defendants moved for a directed verdict. The trial court entered a judgment granting defendants' motion and ordering "the plaintiffs take nothing from the defendants and that this action be dismissed with prejudice at the costs to the plaintiffs." Plaintiffs appeal.

Plaintiffs contend that the trial court erred by failing to make specific findings and separate conclusions pursuant to Rule 52 (a) of the North Carolina Rules of Civil Procedure. We agree.

We first note that in the present case, the trial court allowed defendants' motion for "directed verdict" even though there was a trial by the court without a jury. The appropriate motion would have been one for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. See *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 561-62, 402 S.E.2d 860, 861 (1991). The difference between a motion for a directed verdict and a motion for involuntary dismissal "is more than a mere formality, as a different test is to be applied to determine the sufficiency of the evidence." *Id.* at 562, 402 S.E.2d at 861. Nonetheless, we will treat defendants' motion as one for involuntary dismissal to address the merits. See *Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797, 800 (1999) (treating a motion for directed verdict made pursuant to Rule 50(a) as a Rule 41(b) motion in order to pass upon the merits of the case).

Rule 41(b) provides that "[i]f the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2001) (emphasis added). Rule 52(a) provides as follows:

(a) Findings.--

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

N.C. Gen. Stat. § 1A-1, Rule 52(a) (2001). Such findings are designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980).

The judgment entered in the present case does not contain separate findings of fact and conclusions of law, and therefore, does not comport with the requirements of Rules 41(b) and 52(a). This Court is unable to determine the propriety of the order without findings of fact explaining the reasoning of the trial court. Accordingly, the failure of the trial court to make findings of fact was error and we vacate the order of dismissal and remand for a further disposition.

Vacated and remanded.

Judges MCGEE and CAMPBELL concur.

Report per Rule 30(e).