

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-322
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

GEORGE L. PETTY and
STEVEN L. PETTY,
Plaintiffs,

v.

Cabarrus County
No. 09-CVD-4765
09-CVS-4765

CITY OF KANNAPOLIS and
INVESTORS TITLE INSURANCE CO.,
Defendants.

Appeal by plaintiffs from orders entered 17 December 2009 by Judge Tanya T. Wallace in District Court, Cabarrus County, 27 July 2010 by Judge Joseph N. Crosswhite, and 12 October 2010 by Judge Theodore S. Royster in Superior Court, Cabarrus County. Heard in the Court of Appeals 15 September 2011.

George L. Petty and Steven L. Petty, pro se.

Hamilton Stephens Steele & Martin, PLLC, by Rebecca K. Cheney, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal trial court orders transferring their case from district court to superior court, allowing defendant City of Kannapolis to withdraw a motion for summary judgment,

and granting summary judgment in favor of defendant City of Kannapolis. For the following reasons, we affirm.

I. Background

Plaintiff George Petty is the owner of property located at 1200 Daybrook Drive, Kannapolis, North Carolina ("property").¹ Plaintiffs' claims arise from the presence of a "six-inch water main" located "under the Plaintiffs' driveway, some ten to fifteen feet inside the property line" which prevents plaintiffs from making "planned, necessary improvements" to prevent "flood[ing] in the crawlspace of the house." On 27 October 2009, plaintiffs filed a complaint in District Court, Cabarrus County against defendant City of Kannapolis because it claims to have an easement for the water main.² Plaintiffs requested a declaratory judgment stating that defendant does not have an easement on plaintiffs' property, attorney's fees, and punitive damages.

¹ According to the complaint, plaintiff Steven Petty is George Petty's son. The property at issue is solely owned by George Petty. Due to our resolution of this case, we need not address whether Steven Petty has any legal or equitable interest in the property and for convenience only we refer to the property as belonging to both plaintiffs.

² Plaintiffs voluntarily dismissed with prejudice defendant Investors Title Insurance Co. ("Investors") from the case, and Investors is not a party to this appeal. Therefore, "defendant" refers only to the City of Kannapolis.

On 18 November 2009, defendant filed a motion to transfer this case to Superior Court, Cabarrus County. On 17 December 2009, the motion for transfer to Superior Court was granted. On 23 December 2009, defendant answered plaintiffs' complaint and raised several affirmative defenses. On 21 June 2010, defendant filed a motion for summary judgment ("first summary judgment motion"). On 27 July 2010, the trial court "ordered that the Motion for Summary Judgment filed by the City is WITHDRAWN and the City is permitted to refile a motion for summary judgment" "in order to allow Plaintiffs additional time to respond to a motion for summary judgment." On 11 August 2010, defendant filed a second motion for summary judgment. ("second summary judgment motion") On 12 October 2010, the trial court granted defendant's motion for summary judgment and dismissed plaintiffs' claims. Plaintiffs appeal the 17 December 2009 order which transferred their case to Superior Court, the 27 July 2010 order which allowed defendant to withdraw its first summary judgment motion, and the 12 October 2010 order which granted defendant's second summary judgment motion.

II. 17 December 2009 Order

Plaintiffs first argue that "the trial court erred in transferring this matter from District to Superior Court[.]"

(Original in all caps.) N.C. Gen. Stat. § 7A-260 provides:

Orders transferring or refusing to transfer are not immediately appealable, even for abuse of discretion. Such orders are reviewable only by the appellate division on appeal from a final judgment. *If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown.* If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto.

N.C. Gen. Stat. § 7A-260 (2009) (emphasis added). Plaintiffs have failed to state any way in which the transfer prejudiced them; accordingly, this argument is overruled. *See id.*

III. 27 July 2010 Order

Plaintiffs next argue that "the trial court erred [in] allowing defendant City of Kannapolis to withdraw and re-file [a] defective motion for summary judgment." (Original in all caps.) Plaintiffs contend that "the Trial Court erred, it should have instead dismissed the Defendant's Motion for Summary Judgment." We disagree.

According to the transcript for 26 and 27 July 2010, a motion to dismiss and defendant's first summary judgment motion were scheduled for hearing on 26 July 2010. Before the trial

court, defendant stated they had served plaintiffs "with a brief and affidavit" on Wednesday, 21 July 2010 by email. The trial court heard the statements of both defendant and plaintiff Steven Petty as to whether the court should proceed to hear both or either of the motions. The trial court noted the absence of plaintiff George Petty, as plaintiff Steven Petty claimed he was in the hospital, and also noted that plaintiff Steven Petty could not represent his father; thus, plaintiff George Petty's interests were not represented. Ultimately, based in part on plaintiff Steven Petty's statements that he had not received the brief and affidavit in a timely manner as well as the absence of plaintiff George Petty, the trial court determined

[t]he most economical thing for the Court to do is just have both these motions heard at a time when [plaintiff George Petty] can be here, so what I'll do is I'll move them both back, ask them both to be heard at the same time, and certainly, understanding you can't represent your dad, but I would ask you to talk to him, make a decision on what he wants to do, particularly about an attorney, because it's - without me getting involved in it any more than I am, it sounds like you're sort of on the outside of this matter and if you're either dismissed or let go from some way or the other, then there's going to be nobody here standing here on behalf of your dad, and that's what I want to try to avoid. So just talk to him and make whatever decision's right for you, but we'll put both these matters on in September.

It is not clear why the trial court's order entered as a result of this hearing was phrased as an order permitting defendant to withdraw its motion for summary judgment "in order to allow Plaintiffs additional time to respond to a motion for summary judgment[,] " instead of simply an order continuing the hearing. In any event, defendant filed a second motion for summary judgment on 11 August 2010 which was heard on 4 October 2010.

Plaintiffs argue that the trial court should have "dismissed the Defendant's [first] Motion For Summary Judgment" instead of allowing defendant to withdraw it. However, we note that dismissal of defendant's first motion for summary judgment would accomplish exactly the same thing as withdrawal of the motion: the motion for summary judgment would be eliminated. A motion for summary judgment may be filed at any point in the litigation. See N.C. Gen. Stat. § 1A-1, Rule 56(b) (2009). N.C. Gen. Stat. § 1A-1, Rule 56(b) provides that "[a] party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." *Id.* As the first summary judgment motion never came on for hearing and was never considered by the trial court, defendant was free to withdraw

its motion and file a new motion for summary judgment, even without permission of the trial court. This argument is overruled.

IV. 12 October 2010

Plaintiffs next argue that "the trial court erred in granting defendant's second motion for summary judgment."

(Original in all caps.) Here,

the standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008) (citations and quotation marks omitted).

Once a party satisfies his burden in moving for summary judgment, the party who opposes the motion must either assume the burden of showing that a genuine issue of material fact does exist or provide an excuse for not doing so. The opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case. The opposing party may not rest solely upon the allegations or denials in his pleadings.

Hotel Corp. v. Taylor and Fletcher, 301 N.C. 200, 204, 271 S.E.2d 54, 57 (1980) (citations omitted).

Though plaintiffs make numerous arguments on appeal, they do not contest the trial court's nor this Court's consideration of the affidavit submitted by Edward Dehlin, "the Assistant Public Works Director for the City of Kannapolis[.]" Mr. Dehlin's affidavit states that "[t]he City currently has and maintains an easement across property described generally as Lot 34, Woodacre, also known as 1200 Daybrook Drive, Kannapolis, North Carolina (the "Easement"). The Easement is used by the City to maintain a six (6) inch waterline." Plaintiffs did not present any opposing affidavits before the trial court. While plaintiff's brief implies that there is evidence that an easement does not exist, no such evidence is present in the record. *See generally State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008) (stating that "[i]t is the duty of the appellant to ensure that all documents and exhibits necessary for an appellate court to consider his assignments of error are part of the record or exhibits"). Plaintiffs' entire case in opposition to defendant's summary judgment motion consists of plaintiffs' complaint. Even plaintiffs' responses to interrogatories and requests for production, which were filed by

defendant in support of their summary judgment motion, only state repeatedly in response to various questions that "[t]here is no easement." As defendant has presented evidence that it has an easement, and plaintiffs have not presented any evidence which raises "any genuine issue of material fact" regarding the existence of the easement across their property, we conclude that the trial court properly granted summary judgment in favor of defendant. See *S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 163-64, 665 S.E.2d at 152. Accordingly, this argument is overruled.

V. Standing of Plaintiff Steven Petty

Plaintiffs' last two arguments on appeal are regarding plaintiff Steven Petty's standing to bring this lawsuit. As we affirm the trial court's grant of summary judgment in favor of defendant and dismissal of plaintiffs' case, we need not address this issue on appeal.

VI. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges GEER and THIGPEN concur.

Report per Rule 30(e).