NO. COA13-343

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

FIRST BANK,
Plaintiff,

v. Montgomery County
No. 11 CVS 74

S&R GRANDVIEW, L.L.C.; DONALD J. RHINE; JOEL R. RHINE; GORDON P. FRIEZE, JR.; MAXINE GANER; SHARON R. SILVERMAN, EXECUTRIX OF THE ESTATE OF STEVEN S. SILVERMAN; AND MARTIN J. SILVERMAN,
Defendants.

Appeal by Defendant Donald J. Rhine[1] from orders entered 25 June and 7 September 2012 by Judge Vance Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 25 September 2013.

Nexen Pruet, PLLC, by M. Jay DeVaney and Brian T. Pearce, for Plaintiff.

Wilson & Ratledge, PLLC, by Michael A. Ostrander, for Defendant Donald J. Rhine.

[1] As discussed herein, the remaining defendants settled the case and, accordingly, they are not parties to this appeal.

STEPHENS, Judge.

Factual Background and Procedural History

This action arises from the development by Defendant S&R Grandview, L.L.C. ("S&R"), of a Pender County property known as Eagles Watch. In 2006, S&R borrowed $11 million from Cooperative Bank ("the first loan") in connection with the Eagles Watch project. Cooperative Bank required several members of S&R, including Defendant Donald J. Rhine and some of the other named defendants ("the original guarantors"), to personally guarantee portions of the first loan. In March 2008, S&R executed a promissory note in favor of Cooperative Bank in the amount of $500,000. Portions of this loan were also secured by the original guarantors. In 2009, after First Bank ("the Bank") acquired Cooperative Bank, it required S&R and the original guarantors to execute a series of modifications to the first loan. Rhine signed each of the loan modifications.

Ultimately, the Bank declared S&R and the original guarantors in default and commenced this action in February 2011. On 5 December 2011, the parties, including Rhine, attended a mediated settlement conference and reached a

settlement agreement ("the settlement agreement"). The settlement agreement was handwritten, informal, and contingent on ratification by S&R's members. The settlement agreement also provided for the drafting and execution of several additional documents, including a formal version of the agreement, a deed in lieu of foreclosure, a release, confessions of judgment, and assignments. The parties signed the settlement agreement during the settlement conference. Later, the Bank's counsel drafted a formalized, typewritten version of the settlement agreement ("the final agreement"). While all of the other defendants signed the final agreement, ending the Bank's action as to them, Rhine refused to do so. Rhine objected, *inter alia*, to provisions relating to declarant rights.[2]

On 15 February 2012, the Bank moved to enforce the final agreement. Rhine did not appear at a hearing on the motion which was held later that month. The hearing was continued, and the court ordered Rhine to appear with his counsel at the next hearing on 15 March 2012. When Rhine did not appear at the 15 March hearing, the court ordered Rhine to show cause why he had

[2] The declarant rights here involved an option to annex a forty-acre parcel into the Eagles Watch development. If Rhine and the other defendants were to retain these rights, it would in effect continue their involvement in the Eagles Watch development, a consequence to which the Bank was strenuously opposed.

failed to do so. By order filed 5 April 2012, Rhine was held in contempt and fined after being found to have willfully ignored the court's order.

On 28 March 2012, the Bank filed an amended motion to enforce the settlement. At the motion hearing in May 2012, the mediator for the matter testified that the issue of declarant rights had been discussed during the mediated settlement conference. Rhine contended that the issue had not been resolved and noted that the settlement agreement he had signed at the conclusion of the settlement conference did not make any direct reference to declarant rights. On 25 June 2012, the trial court entered an order ("the settlement order") finding, *inter alia*, that there had been no "meeting of the minds" between the Bank and Rhine on the issue of declarant rights, that the matter was material to the settlement agreement, that the settlement agreement was void as between the Bank and Rhine, and that the Bank could continue its pursuit of relief against Rhine.

On 15 August 2012, the Bank moved for summary judgment against Rhine.[3] The motion and notice of hearing to be held 27

[3] The motion and certificate of service are dated 15 August 2012, but the motion is filed-stamped 16 August 2012.

August 2012 were served on Rhine by first-class mail and facsimile on the same day. On 22 August 2012, counsel for Rhine moved for a continuance, noting that he had been hired only two days earlier. The court denied Rhine's motion for continuance. At the summary judgment hearing, Rhine again moved to continue. The court denied the renewed motion, observing that Rhine's new counsel was at least the fourth he had retained during the proceedings. The court entered its written order denying the motion for continuance on 7 September 2012 ("the continuance order"). On the same date, the court entered a money judgment ("the summary judgment order") for the Bank against Rhine. Rhine appeals.

Discussion

Rhine presents four arguments on appeal: that the trial court (1) erred in declaring the settlement agreement void, (2) abused its discretion in denying his motion for a continuance, (3) erred in granting summary judgment in favor of the Bank, and (4) erred in failing to consider additional submissions in opposition to the Bank's summary judgment motion while that motion was under advisement. We dismiss Rhine's first two arguments as not properly before this Court and affirm summary judgment for the Bank.

The Bank's Motion to Dismiss Rhine's Appeal

In its brief, the Bank asks this Court to dismiss Rhine's appeal in its entirety, noting violations of Appellate Rules 3(d), 28(b)(5), and 28(b)(6). We agree in part.

Although compliance with our Rules of Appellate Procedure is mandatory, not every violation of the rules requires dismissal of an appeal or issue. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). However, "[a] jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365. "Moreover, in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2." *Id.* at 198, 657 S.E.2d at 365 (referring to N.C.R. App. P. 2 which permits appellate courts to excuse a party's noncompliance with certain appellate rules and procedures when necessary to "expedite decision in the public interest" or "prevent manifest injustice to a party"). Specifically, Appellate Rule 3(d) "provides that an appellant's notice of appeal shall designate the judgment or order from which appeal is taken. An appellant's failure to designate a particular judgment or order in the notice of appeal generally

divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008) (citation and quotation marks omitted), *cert. denied*, 363 N.C. 260, 677 S.E.2d 461 (2009). However,

> [n]otwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278. Review under [section] 1-278 is permissible if three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Id. at 348, 666 S.E.2d 127, 133 (citations, quotation marks, and brackets omitted). With regard to the first requirement, the Court in *Yorke* observed that,

> [w]ith respect to orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position.

Id. at 349, 666 S.E.2d at 134 (citation, quotation marks, and ellipses omitted).

As to the third requirement, "our Courts have found an interlocutory order to involve the merits and necessarily affect the judgment where the order deprived an appellant of one of her substantive legal claims." *Id.* at 349-50, 666 S.E.2d at 134. In *Yorke*, the interlocutory order in question, a

> protective order[,] did not deny Mr. Yorke any of his substantive legal claims. While the protective order did deny Mr. Yorke access to certain evidence, it did not resolve any substantive legal issues related to Mr. Yorke's negligence claim, nor did it deny Mr. Yorke his right to pursue his negligence claim, or to prove his negligence claim through introduction of other evidence and examination of witnesses.

Id. at 350, 666 S.E.2d at 134. Accordingly, this "Court lack[ed] jurisdiction under either N.C.R. App. P. 3(d) or [section] 1-278 to consider" the appellant's claims regarding the protective order, and those arguments were dismissed. *Id.*

On 2 October 2012, Rhine filed a notice of appeal from the summary judgment order. That notice of appeal makes no reference to the settlement or continuance orders despite Rhine's purported arguments on appeal that the trial court erred in declaring the settlement agreement void as between himself and the Bank and abused its discretion in failing to grant his

motion for a continuance. The Bank urges that we dismiss Rhine's arguments on these two issues, contending that the settlement and continuance orders do not fall into the category of intermediate orders covered by section 1-278. Our review of Rhine's appeal reveals that, while both orders were interlocutory and not immediately appealable, the settlement order does not satisfy the first prong under *Yorke* and the continuance order fails under the third prong.

As noted *supra*, in the settlement order the trial court held that the settlement agreement was void as between Rhine and the Bank because there had been no meeting of the minds between those parties with regard to the issue of declarant rights, "a substantive provision of vital importance to both" parties. The record contains no evidence that Rhine made an explicit and timely objection to the settlement order. Thus, we must consider whether Rhine made "known to the court [his] objection to the action of the court or [made] known the action that [he] desire[d] the court to take and [his] grounds for [that] position." *Id.* at 348, 666 S.E.2d at 134.

As Rhine's counsel stated during the hearing, "the main point of contention is whether or not the transfer of declarant rights to the [B]ank or anyone else was bargained for in the

agreement and . . . whether S&R Grandview should be ordered to do that, whether that was a part of the contract." The Bank contended that extinction of the defendants' declarant rights was part of the agreement, and Rhine contended it was not. The mediator from the settlement conference testified repeatedly that, although the words "declarant rights" do not appear in the handwritten settlement agreement, the parties had discussed that issue as described by the Bank and as provided for in the final agreement. The attorney who represented Rhine during the settlement conference, in contrast, testified that the issue of declarant rights was not discussed or agreed to. Both the Bank and Rhine agreed that the matter of declarant rights was extremely important ("imperative" in the words of Rhine's counsel at the summary judgment hearing). In concluding his argument, counsel for the Bank asked the court "to either require . . . Rhine to execute the [final] agreement everybody else has signed or release the [B]ank and let it foreclose on this property[.]"

At the hearing, Rhine made clear his preference that the court enforce the settlement agreement per Rhine's understanding that it did not extinguish declarant rights (and thus to deny the Bank's motion to enforce the final agreement). However, in

the alternative, Rhine's counsel also agreed that the court could simply refuse to enforce either agreement and let the Bank foreclose, which would result in Rhine retaining his declarant rights:

> THE COURT: It sort of whip [saws] [the Bank], doesn't it? Got an agreement but it doesn't include declarant[] rights but the agreement prevents you from foreclosing on the property, just in case your legal position is right and it does distinguish declarant rights.
>
> [RHINE'S COUNSEL]: They don't — but, Judge, they don't need to foreclose. They're not going to get the declarant rights if they foreclose. They never negotiated to get declarant rights. They didn't negotiate for us to transfer the declarant rights anywhere. *If they foreclose, they're where they ought to be. If you enforce the agreement, where they — where they agree they'd be* [*according to Rhine's understanding of the agreement*] *and right where foreclosure would put them.*

Rhine's trial counsel made repeated references during the lengthy hearing (the transcript of which runs to more than 75 pages) that, while he preferred that the court enforce the agreement according to Rhine's understanding of it, the alternate remedy of allowing foreclosure would be acceptable because his client would thereby retain his declarant rights.

Ultimately, that is exactly what happened: the settlement order entered by the trial court did not permit the Bank to

enforce the final agreement against Rhine and thus did not extinguish Rhine's declarant rights, but rather allowed the Bank to move forward with foreclosure. Thus, while Rhine's arguments at the hearing did "make[] known the action that [he] desire[d] the court to take and [his] grounds for [that] position[,]" *id.* at 349, 666 S.E.2d at 134, those arguments cannot serve as an objection to the court's ruling for the simple reason that Rhine *prevailed, at least on his alternate request for relief*. Accordingly, Rhine's purported appeal from the settlement order is dismissed.

As for the continuance order, Rhine makes no argument in his brief that it falls under the provisions of *Yorke*. Even had he done so, we conclude that the continuance order did not "involve the merits and necessarily affect the [summary] judgment [order]" because it did not deprive Rhine of a substantive legal claim. *Id.* at 349-50, 666 S.E.2d at 134 (citation and quotation marks omitted). Accordingly, Rhine's argument that the trial court abused its discretion in denying his motion for a continuance is also dismissed.

However, as to Rhine's violations of Appellate Rule 28(b)(5) and 28(b)(6), we conclude that they do not require dismissal of his final two arguments on appeal. "[A] party's

failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 198, 657 S.E.2d at 365. Instead, when nonjurisdictional rules are violated, we must consider "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67.

Appellate Rule 28(b), which delineates the required contents of an appellant's brief, is nonjurisdictional. *Id.* at 200, 657 S.E.2d at 367. Specifically, Rule 28(b)(5) requires an appellant to include a "full and complete statement of the facts." N.C.R. App. P. 28(b)(5). "This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." *Id.* Rule 28(b)(6) requires an appellant's argument to "contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue

or under a separate heading placed before the beginning of the discussion of all the issues." N.C.R. App. P. 28(b)(6).

The Bank observes that Rhine's appellate brief includes argumentative allegations which are unsupported by citations to the record, transcripts, or exhibits, and that it also fails to provide the applicable standards of review as to his first, third, and fourth issues on appeal. However, while these violations are certainly an irritation, they do not in this instance impair our ability to review the merits of Rhine's appeal. *See Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 200, 657 S.E.2d at 366-67. Accordingly, we deny the Bank's motion to dismiss Rhine's third and fourth arguments on appeal and address their merits.

Summary Judgment

Rhine argues that the trial court erred in granting summary judgment in favor of the Bank and in failing to consider additional affidavits in opposition to the Bank's summary judgment motion while that motion was under advisement. We disagree.

"[A]ffidavits in opposition to a motion for summary judgment should be served prior to the day of the hearing." *Rockingham Square Shopping Center, Inc. v. Integon Life Ins.*

Co., 52 N.C. App. 633, 641, 279 S.E.2d 918, 924 (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)), *cert. denied*, 304 N.C. 196, 285 S.E.2d 101 (1981). Further, while the trial court has "discretion to allow the late filing of affidavits[,]. . . . absent a showing of excusable neglect, the trial court does not abuse its discretion when it refuses to accept late affidavits." *Id.* However, Rule 56(f) provides that,

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f) (2011). A ruling under Rule 56(f) is also left to the trial court's discretion. *Gillis v. Whitley's Disct. Auto Sales, Inc.*, 70 N.C. App. 270, 274-75, 319 S.E.2d 661, 664 (1984). A matter left to the trial court's discretion "will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. A trial judge's decision only amounts to an abuse of discretion if there is no rational basis for it." *State v. Mutakbbic*, 317 N.C. 264, 273-

74, 345 S.E.2d 154, 158-59 (1986) (citations and quotation marks omitted).

Here, at the summary judgment hearing on 27 August 2012, Rhine's counsel renewed his motion for a continuance, noting that he had only been on the case since 20 August and stating that Rhine wanted counsel to prepare a supplemental affidavit in opposition to the Bank's summary judgment motion. Rhine's counsel handed up an "affidavit"[4] from Rhine which purported to explain why Rhine needed additional time to produce a substantive affidavit. The court expressed puzzlement about the request, asking, "if [Rhine has] had time to file an affidavit to say that he hasn't had time to file an affidavit, why haven't you guys had time to file an affidavit that addresses the substantive issues . . . ?" After arguments from the parties, the court took the matter under advisement briefly before

[4] The "affidavit" discussed at the hearing is labeled as such and appears in the usual form and language of an affidavit, but crucially, this document lacks any evidence of being "confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." *See Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) ("An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.") (citation, quotation marks, and brackets omitted). Accordingly, this unsworn document is not an affidavit.

returning to announce his denial of the motion to continue in open court. In so doing, the court found "that Mr. Rhine consented to prior counsel withdrawing after [prior] counsel was informed of the court date for the summary judgment motion." The court also found that Rhine had repeatedly switched counsel and had "a prior history of not dealing with [the c]ourt in a forthright manner." The court heard brief arguments on the substance of the summary judgment motion and then took that matter under advisement.

In his argument to this Court, Rhine does not argue excusable neglect in connection with his failure to timely present his affidavit in opposition to the Bank's summary judgment motion. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). Rather, he asserts that the trial court's refusal to accept his late affidavits constituted a "deviation" from Rule 56(f). As noted *supra*, such rulings are left to the trial court's discretion. *Gillis*, 70 N.C. App. at 474-75, 319 S.E.2d at 664. Because the record reflects a rational basis for the court's decision not to accept Rhine's late affidavit, to wit, its concern that Rhine was engaging in delay tactics, Rhine cannot show an abuse of discretion. Accordingly, we overrule this argument.

Rhine also argues that the trial court erred in granting the Bank's summary judgment motion. Again, we disagree.

> The principles applicable to summary judgment are well established. The moving party has the burden of clearly establishing the lack of any triable issue of fact. The papers supporting the movant's position are to be closely scrutinized while those of the opposing party are to be regarded indulgently. The motion may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Rockingham Square Shopping Center, Inc., 52 N.C. App. at 642, 279 S.E.2d at 924. "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* As Rhine acknowledges, the party opposing summary judgment "may not rest on the allegations of his pleadings, but must, by affidavits or otherwise, set forth specific facts demonstrating that there is an issue for trial." *Cockerham v. Ward*, 44 N.C.

App. 615, 618, 262 S.E.2d 651, 654 (citations and quotation marks omitted), *cert. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980).

Here, Rhine concedes that he submitted no affidavit or other evidence beyond his pleadings to "set forth specific facts demonstrating that there [wa]s an issue for trial." *Id.* However, he urges that this failure was excusable because the summary judgment hearing was conducted based on "an untimely filed and inadequately noticed motion" and after the trial court denied Rhine's Rule 56(f) motion. As discussed *supra*, the court acted within its discretion in denying Rhine's Rule 56(f) motion and thus he cannot establish that his failure to produce affidavits is excusable on that basis. As to the assertion that the summary judgment motion was untimely or inadequately noticed, Rhine did not raise this issue in his motion for a continuance or during the hearing on 27 August 2012. Accordingly, we do not address it here. *See Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972). This argument is overruled, and the trial court's summary judgment order is affirmed.

DISMISSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).