

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-159

Filed 05 September 2023

Edgecombe County, No. 15 CVD 51

COLONIAL PLAZA PHASE TWO, LLC, d/b/a Colonial Plaza Mall, Plaintiff,

v.

CHERRY'S ELECTRONIC TAX SERVICES, LLC, Defendant.

Appeal by Defendant from judgment entered 3 October 2022 by Judge Pell C. Cooper in Edgecombe County District Court. Heard in the Court of Appeals 9 August 2023.

Narron & Holdford, P.A., by I. Joe Ivey, for the Plaintiff-Appellee.

Teresa DeLoatch Bryant, for the Defendant-Appellant.

WOOD, Judge.

Cherry's Electronic Tax Services, LLC ("CETS") appeals the trial court's entry of judgment from a jury verdict awarding amounts both to CETS and Colonial Plaza Phase Two, LLC ("Colonial") in a commercial lease dispute. As explained below, CETS failed to establish timely notice of appeal pursuant to N.C. R. App. P. 3(c). We therefore dismiss the appeal for lack of appellate jurisdiction.

I. Factual and Procedural History

This case began with a summary ejectment action in small claims court by Colonial against CETS pursuant to a commercial lease executed 1 January 2007, requiring CETS, as tenant, to pay \$800.00 due on the first of each month. The lease required Colonial, as landlord, to maintain the roof, exterior walls, heating, and air conditioning.

CETS alleges in 2011, Hurricane Irene caused water leaks through the roof. CETS made an insurance claim but was denied by Travelers Insurance because the storm itself caused no damage; rather, upon inspection by the insurance agency, “the roofing material was found to be old and worn, several cracks were found[,] and the roof showed signs of several coatings of tar being applied.” CETS claimed water damages to equipment and work product used in its tax preparation business as well as loss of revenue from being unable to open for business for three months in 2011. CETS also claimed numerous issues with the premises, specifically: the landlord did not properly repair the roof or reimburse CETS’s damages from the water leaks; loss of air conditioning and heating; a short period of no running water; and squirrels or other rodents in the HVAC.

Colonial filed a claim in small claims court for \$3,300.00 on 22 December 2014. CETS paid two months rent after being served with the Complaint, and the small claims court entered judgment against CETS on 5 January 2015 for \$1,700.00. CETS appealed to the District Court and demanded trial by jury.

Opinion of the Court

On 16 March 2015, Colonial filed a motion for summary judgment and calendared it for hearing on 30 March 2015. CETS filed an answer and counterclaim alleging damages of \$52,153.98. The hearing was continued to 20 April 2015. At the hearing, the trial court denied Colonial's motion for summary judgment. In open court, Colonial then moved to transfer the matter to the Superior Court pursuant to N.C. Gen. Stat. § 7A-243 (2022). This section designates the Superior Court as the "proper division" in "civil actions in which the amount in controversy exceeds twenty-five thousand dollars."¹

On 22 April 2015, Colonial filed a written Motion to Transfer to Proper Division pursuant to N.C. Gen. Stat. § 7A-258 (2022). The trial court filed its written denial of Colonial's motion for summary judgment on 21 May 2015. The Record does not indicate whether the trial court entered an order in response to Colonial's oral motion to transfer to Superior Court during open court or its subsequent written motion.² A jury trial was held in District Court on 19 September 2022. The jury awarded

¹ We note that "proper division" as used in N.C. Gen. Stat. § 7A-243 is not related to the jurisdiction of the trial divisions in civil actions, such as this, over which both divisions have original jurisdiction. N.C. Gen. Stat. § 7A-242 (2022) ("For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding.").

² We note, further, that N.C. Gen. Stat. § 7A-258(b) requires that a motion to transfer to the proper division "is heard and determined by a judge of the [S]uperior [C]ourt division whether the case is pending in that division or not." N.C. Gen. Stat. § 7A-258(b) (2022).

Opinion of the Court

\$2,475.00 to Colonial for rent due and \$5,000.00 to CETS for damages due to Colonial's failure to repair the premises. The trial court entered judgment consistent with the jury verdicts, and CETS appealed the judgment.

II. Analysis

As a preliminary matter, we note that although the notice of appeal is dated 19 October 2022, it does not bear a visible file-stamp to demonstrate it was filed with the court. **{R. p. 106}**. "When an appealing party fails to follow the steps necessary to vest this Court with jurisdiction, we cannot review the case on the merits, and the appeal must be dismissed. Generally, violations of Rule 3 are jurisdictional and warrant dismissal of an appeal." *Bradley v. Cumberland Cnty.*, 262 N.C. App. 376, 378, 822 S.E.2d 416, 418 (2018) (citation omitted).

A party must timely file and serve a notice of appeal. *See* N.C. R. App. P. 3(c). "We will not assume the notice was timely filed solely based upon Plaintiff's unverified notice of appeal." *Bradley*, 262 N.C. App. at 382, 822 S.E.2d at 420 (2018). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

For example, in *Bradley*, the court relied on cases in which appeals were dismissed for deficiencies under N.C. R. App. P. 3, and it dismissed the appellant's appeal because the notice of appeal did not bear a file stamp. *Bradley*, 262 N.C. App. at 382–83, 822 S.E.2d at 420–21. Likewise, the notice of appeal here does not bear a

COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERV., LLC

Opinion of the Court

visible file stamp. Therefore, we cannot assume the notice was timely filed and compliant with N.C. R. App. P. 3(c).

CETS argues the trial court erred in failing (1) to transfer the case to the Superior Court and (2) to either record or have a court reporter present at trial. We do not address these arguments, however, because we conclude Defendant's Rule 3 violation deprives this court of subject matter jurisdiction. Accordingly, the appeal is dismissed.

DISMISSED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).