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NO. COA02-245

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

ROBERT R. DEMPSEY,  
in his own behalf, and  
as Power of Attorney  
for MARGARET M. DEMPSEY  
and CHARLES H. DEMPSEY,  
Plaintiffs,

v.

Polk County  
00 CVS 160

JOHNNY'S MOBILE HOME  
SERVICE OF ASHEVILLE,  
INC., LIBERTY HOMES,  
INC. and CONSECO FINANCE  
SERVICING CORP.,  
Defendants.

Appeal by defendant from Order entered 30 November 2001 by Judge James U. Downs, Superior Court, Polk County. Heard in the Court of Appeals 30 October 2002.

*Sutton & Edmonds, by John R. Sutton, Sr. and April Burt Sutton* for defendant-appellant.

*Baiba Bourbeau* for plaintiff-appellee.

WYNN, Judge.

This appeal presents one issue: Did the trial court abuse its discretion by granting Rule 60(b) relief based on plaintiff's inadvertent voluntary dismissal of Johnny's Mobile Home Service of

Asheville, Inc. We find no abuse of discretion and, therefore, affirm the trial court's order.

The underlying facts of this case tend to show that plaintiff brought an action against three defendants alleging negligence and twelve other causes of action. Plaintiff reached settlement agreements with two defendants, Liberty Homes, Inc. and Conseco Finance Servicing Corporation. Following the settlement agreement with Liberty, plaintiff filed a voluntary dismissal with prejudice on 20 September 2001. However, in the voluntary dismissal, plaintiff failed to specify that the dismissal was *only* operative as to one of the two remaining defendants, Liberty.

Recognizing the error, Johnny's Mobile Home Service made motions to dismiss, to remove from trial calendar, and to withdraw arguing that "the Voluntary Dismissal with Prejudice filed by the Plaintiffs on September 20, 2001, did effectuate a final adjudication of the merits." In response, plaintiff's attorney filed an affidavit noting the intentions of the parties, the history of the negotiations, and that a cover sheet, submitted in conjunction with the voluntary dismissal, clearly specified that the dismissal was against Liberty only. Moreover, during the hearing below, plaintiff made an oral Rule 60(b) motion to have the dismissal set aside, as to Johnny's Mobile Home Service, due to mistake, excusable neglect or inadvertence.

After hearing the arguments, the trial court concluded that:

It appears that negotiations occurred between plaintiff and defendant Liberty as to the dismissal of the action to one defendant. A settlement was reached, monies paid, and

attorney Massagee [Liberty's attorney] prepared a Dismissal with Prejudice that not only failed to identify that the dismissal was to his client only, but also was silent as to whether the dismissal applied to all defendants. That the Court in his discretion finds that the dismissal applied to Liberty Homes, Inc. only and that the remaining defendant was not included.

From this order granting plaintiff relief under Rule 60(b), Johnny's Mobile Home Service appeals.

Rule 60(b) is consistently described as a "grand reservoir of equitable power" through which courts grant relief from judgments whenever extraordinary circumstances exist and justice demands it. *Barnes v. Taylor*, 148 N.C. App. 397, 400, 559 S.E.2d 246, 248-49 (2002). Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: Mistake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001).<sup>1</sup> When reviewing a trial court's equitable discretion under Rule 60(b)(6), "[o]ur Supreme Court has indicated that this Court cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it 'probably amounted to

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<sup>1</sup>Although Rule 60 says the court is to act upon motion, our courts will allow relief under Rule 60 without a motion if such relief is proper. See *Carter v. Clowers*, 102 N.C. App. 247, 253, 401 S.E.2d 662, 665 (1991), (stating "although Rule 60 says that the court is to act 'on motion,' it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion").

a substantial miscarriage of justice.'" *State ex rel. Environmental Management Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117 (1991) (quoting *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982)). Accordingly, when considering an appeal of a Rule 60(b) motion order, "appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

In the case *sub judice*, the trial court ruled that plaintiff's carelessness and negligence was the result of excusable neglect and inadvertence. "Although negligence and carelessness can support Rule 60(b)[] relief, it is only when such neglect or carelessness is excusable." *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 102-03, 515 S.E.2d 30, 37-8 (1999). Moreover,

The determination of whether a particular act of negligence or carelessness is excusable requires consideration of any relevant circumstance, including: (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith.

*Id.* (citations omitted).

The evidence in the record sustains the trial court's findings that plaintiff's negligence was the result of excusable neglect. For instance, plaintiff negotiated a settlement with Liberty; Liberty's counsel prepared the voluntary dismissal; the dismissal was not intended to release Johnny's Mobile Home Service from

liability; and a cover sheet, attached to the voluntary dismissal, specifically supported these propositions. Moreover, evidence in the record indicates that Johnny's Mobile Home Service was not prejudiced by plaintiff's negligence. This lack of prejudice is demonstrated by Johnny's Mobile Home Service's continuation of discovery through 14 November 2001 even though plaintiff filed the voluntary dismissal on 20 September 2001. Finally, the trial court's order is in accord with *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991), where this Court affirmed a trial court's decision to grant a Rule 60(b) motion upon plaintiff's inadvertent voluntary dismissal with respect to one defendant. Accordingly, we hold that the record does not reflect an abuse of discretion and, therefore, we find no error.

No Error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).