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NO. COA02-54

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

BURTON LUMBER CORPORATION,
Plaintiff

v.

Beaufort County
No. 99 CVD 326

MATTHEW G. TANERCAN and
MARY JEAN TANERCAN,
Defendants

Appeal by defendants from judgment entered 3 November 2000 by Judge James W. Hardison in Beaufort County District Court. Heard in the Court of Appeals 19 September 2002.

Ward & Smith, P.A., by J. Michael Fields, for plaintiff-appellee.

Wilkinson & Rader, P.A., by Steven P. Rader, for defendant-appellants.

CAMPBELL, Judge.

Defendants appeal from an order denying their motion for new trial. Defendants argue that the trial court erred in: (1) finding that defendants' attorney was informed of the continuance of the case; and (2) denying defendants' motion for new trial on the grounds that defendants were not properly notified of the trial date. We find no error in the trial court's rulings.

Background

Burton Lumber Corporation ("plaintiff") filed an action on 5 April 1999 to recover money owed for windows sold on credit by plaintiff to defendants. The action was first set for trial during the court session beginning 20 March 2000. As a result of not being reached during that session and subsequent court sessions, the case was rescheduled for trial numerous times between March 2000 and September 2000. One of the sessions at which the case was scheduled for trial was 28 August 2000. On 30 August 2000, defendants' counsel was in the courtroom attending to a matter other than the one involving defendants. When the court concluded the other matter, the presiding trial judge, Judge Michael A. Paul ("Judge Paul"), and defendants' counsel discussed the present case. Judge Paul and defendants' counsel agreed that the trial would be reset to the court session beginning 18 September 2000.

At the agreed upon session, on 18 September 2000, defendants' counsel was present when the trial calender was called. The following day, the trial court informed counsel for both parties that the case would be reached for trial on 20 September 2000. When the case was called on the morning of 20 September 2000, plaintiff's counsel appeared in court with plaintiff's witnesses, but defendants' counsel informed the court that he was unable to reach defendants regarding the trial date, even though he had attempted to reach them and left a message with their son. Defendants' counsel then asked to be allowed to withdraw from the case due to defendants' lack of cooperation throughout the lawsuit. The court allowed defendants' counsel to withdraw, but then

proceeded with the trial of the case. After hearing plaintiff’s evidence, the court entered a money judgment in favor of plaintiff.

On 2 October 2000, defendants’ counsel filed an unverified motion for new trial on defendants’ behalf, alleging that defendants did not receive proper notice of the trial. At the 30 October 2000 hearing, Judge Hardison reviewed the record and entered an order denying defendants’ motion for new trial.

Standard of Review

As to defendants’ first assignment of error, a “trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings.” *Static Control Components, Inc. v. Vogler*, ___ N.C.App. ___, ___, 568 S.E.2d 305, 308 (2002) (citation omitted).

In reviewing the lower court’s denial of the defendants’ motion for new trial, this Court must decide whether the record “affirmatively demonstrates an abuse of discretion.” *Whaley v. White Consolidated Industries*, Inc., 144 N.C. App. 88, 92, 548 S.E.2d 177, 180 (2001), *review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001).

Argument I. Defendant’s knowledge of the continuance

Defendant first argues that the trial court erred in finding as a fact that defendants’ attorney was specifically informed by Judge Paul of the continuance of the case to the session beginning 18 September 2001 on the grounds that there is no evidence to support such a finding. Our review of the record shows that the

following evidence supports the trial court's finding: (1) the transcript of the 30 August 2000 conversation between Judge Paul and Mr. Rader along with a notation of "C 9-18" on the court calender for the 28 August 2000 civil non-jury session; (2) notice to defendants' counsel was imputed to defendants; and (3) defendants' counsel did not move for a continuance when the case was called on 18 September 2000 or at any time prior to the trial on 20 September 2000.

First, the notation of "C 9-18" on the August court calendar clearly represents that the case was continued until the court session beginning 18 September 2000. This notation was made during the 28 August 2000 session. When defendants' counsel, Stephen Rader ("Mr. Rader"), was in court attending to another matter on 30 August 2000, the following colloquy took place between Judge Paul and Mr. Rader:

> Judge Michael A. Paul: Before you leave, I want to make sure I'm understood on some – Burton Lumber Corporation, is that – versus Tanercan – is that –
>
> Steve Rader: That's one I guess we just need to re-set. What court do we set it? [sic]
>
> Judge Michael A. Paul: Next – we can set it for next session as far as I know, there's nothing else set – nothing special set is there?
>
> Steve Rader: Let's see . . . probably the 18th or 25th would be better.
>
> Judge Michael A. Paul: September 18th? That is a date isn't it?
>
> Courtroom Clerk: That's a date.
>
> Judge Michael A. Paul: Eighteenth or 25th? . . . 18th?

> Steve Rader: Yeah, either one.
>
> Judge Michael A. Paul: All right, September 18th then for that case.

This evidence is sufficient to support the trial court's finding that Mr. Rader had notice of the continuance of this case to the 18 September 2000 session.

Secondly, the notice given to Mr. Rader on 30 August 2000 that the case would be continued to 18 September 2000 is imputed to defendants. N.C. Gen. Stat. § 1A-1 provides:

> (b) *Service - How made*. - A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted *or on the party's attorney* of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, *upon the party's attorney* of record. . . .

N.C. Gen. Stat. § 1A-1, Rule 5(b) (2001) (emphasis added). The notice provided by the pleading is deemed to be provided to the person named in the action, if the pleadings or other papers are delivered to his/her attorney. The notice is imputed through the attorney to the client. We draw an analogy between this rule of service and information given to an attorney on behalf of his client. Personal notice given to an attorney in open court regarding the date of a hearing concerning an attorney's client is imputed to that client for which the hearing is scheduled. If an attorney neglects to inform his client of any information or

neglects his client's case in any manner, our Supreme Court has held that the attorney's negligence can be imputed to his client. *Briley v. Farabow*, 348 N.C. 537, 546-47, 501 S.E.2d 649, 655 (1998), *rev'g*, 127 N.C. App. 281, 488 S.E.2d 621 (1997); *see also Parris v. Light*, 146 N.C. App. 515, 553 S.E.2d 96 (2001), *review denied*, 355 N.C. 349, 562 S.E.2d 283 (2002). In the case *sub judice*, the notice of the continuance of defendants' trial to the 18 September 2000 session is imputed to defendants through their attorney, who agreed to the continuance on 30 August 2000.

Finally, Mr. Rader should have protected his clients by moving to continue the case, rather than withdrawing at the 20 September 2000 hearing. Judge Hardison, who presided over the trial on 20 September 2000, allowed Mr. Rader to withdraw on the representation that the clients were not cooperating, and then allowed plaintiff's counsel to proceed on the merits of the case. On 22 September 2000, Judge Hardison entered an order finding as a fact that Mr. Rader appeared on behalf of defendants and "[b]ased on his inability to contact [d]efendants, and his representation to the [c]ourt that [d]efendants had been uncooperative throughout the lawsuit, the [c]ourt allowed Wilk[in]son & Rader's [m]otion to [w]ithdraw before calling the case for trial."

Mr. Rader contends that his motion to withdraw had been filed and served on his clients and was to be heard during the 25 September 2000 session, the session after the case was called for trial. We do not find this motion to withdraw in the record on appeal. Nor do we find evidence that defendants had notice of this

motion. Even if they did have notice, there is nothing to put them on notice that they should appear at the 18 September 2000 session. In order to protect his clients, Mr. Rader could have moved for a continuance when the case was called during the 18 September 2000 session. Instead, Mr. Rader withdrew.[1]

Argument II. Denying defendant's motion for new trial

After withdrawing from the case, Mr. Rader filed an unverified motion for new trial. Mr. Rader represented defendants on this motion, heard 30 October 2000. At the hearing, Judge Hardison stated to Mr. Rader:

> [E]verybody's entitled to notice, but . . . when you come in and tell me that your clients won't cooperate with you . . . they haven't answered any of your questions, they won't contact you, they won't get in touch with you and you want to withdraw, and I believed at the time that they had been notified . . . and without going into the fine details of the law of notice, it appears to me that everybody knew what was going on and they just didn't show – choose to show up. And your motion to withdraw, backs that up.

At the end of the hearing on the motion for new trial, Judge Hardison stated that he needed time to think about the case. In his order denying defendants' motion for new trial, Judge Hardison stated in his findings of fact:

> This case was set for trial at the August 28, 2000 Beaufort County Civil District Court Session. On Monday, August 28, 2000, counsel for [d]efendants (Steven P. Rader. . .)

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[1] We call attention to Rule 1.16(b) of the Revised Rules of Professional Conduct, which states, with exceptions, that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client[.]" 2002 State Bar Lawyer's Handbook.

> appeared at the calendar call for the August 28, 2000 Session before the Honorable Michael A. Paul. On said date, Judge Paul continued the trial of this case to the September 18, 2000 Beaufort County Civil District Session. At the time, Steven P. Rader was specifically informed by Judge Paul of the continuance of the case to September 18, 2000.
>
> Steven P. Rader continued to represent [d]efendants until the morning of September 20, 2000, at which time this Court allowed his Motion to Withdraw.

We note that Judge Hardison's finding is incorrect with respect to the actual date on which Mr. Rader agreed to the setting of the case for trial. According to the transcript, it was actually on 30 August 2000 that Judge Paul and Mr. Rader agreed to the 18 September 2000 session. We do not find, however, that the lower court's ruling was an abuse of its discretion. Because Mr. Rader chose not to move to continue the case and argued only that he had no notice of the trial date where there is evidence in the record to support that he did, this Court has no grounds to overturn the trial court's ruling under *Briley*, 348 N.C. 537, 501 S.E.2d 649, despite the possibility of no actual notice to defendants.

No error.

Judge HUDSON concurs.

Judge TIMMONS-GOODSON concurs in the result only.

Report per Rule 30(e).