NO. COA02-64

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

LIANE M. CLAIBORNE,
Plaintiff,

v.

Mecklenburg County
No. 00-CVS-020023

DAVID G. KOONS,
Defendant.

Appeal by defendant from orders entered 10 July 2001 and 4 October 2001 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2002.

Koehler & Cordes, PLLC, by Stephen D. Koehler, for plaintiff appellee.

David Q. Burgess for defendant appellant.

McCULLOUGH, Judge.

This case arises out of a monetary arrangement between plaintiff Liane Claiborne and defendant David Koons in relation to the organization and start up of a business. On 27 December 2000, plaintiff filed a complaint alleging that defendant owed her over $33,000.00 for money she loaned to him between September 1999 and May 2000. On 23 January 2001, defendant filed a *pro se* answer denying plaintiff's allegations and asserted what defendant later attempted to characterize as a counterclaim. The "counterclaim," which purported to establish setoff, alleged that on 23 May 2000,

plaintiff entered defendant's place of business and removed office equipment, banking records, data, customer lists, files, and other materials necessary to the operation of defendant's business. Defendant's answer also contained the following statement: "Further, Defendant asks the court to dismiss this action as frivolous. Defendant reserves his right to counter sue plaintiff pending location of her exact residence, of which defendant requests plaintiff's attorney forward to him."

On 16 March 2001, plaintiff served her First Request for Admissions upon defendant, but he failed to respond. Thereafter, on 12 June 2001, plaintiff moved for summary judgment and presented a supporting affidavit. The summary judgment motion was scheduled for hearing on 10 July 2001 at 10:00 a.m. Defendant was apprised of the hearing date about one month in advance, but failed to retain counsel until 9 July 2001 at 4:00 p.m., when he hired Attorney David Burgess. Neither Mr. Burgess nor defendant filed any affidavits prior to the summary judgment hearing. At the hearing, plaintiff's counsel was present, but neither defendant nor his attorney appeared. After the hearing began, defendant entered the courtroom. The trial court allowed defendant to respond to plaintiff's arguments, and defendant stated his belief that summary judgment was improper because of an alleged counterclaim he had against plaintiff. After reviewing the pleadings and hearing the parties' arguments, Judge Timothy Kincaid granted summary judgment in favor of plaintiff on all claims and ruled in open court that there was no counterclaim to be ruled upon. At the conclusion of

the hearing, plaintiff's attorney handed Judge Kincaid an Order for Summary Judgment which had been prepared prior to the hearing. The Order did not mention Judge Kincaid's ruling that defendant did not have a counterclaim.

Ten minutes after Judge Kincaid granted summary judgment for plaintiff, defendant filed an affidavit on his own behalf. Later that day, defendant's attorney sent an *ex parte* letter to Judge Kincaid apologizing for his absence at the hearing that morning. Also on 10 July, defendant filed a Motion for Reconsideration of Summary Judgment and a Notice of Hearing of the Motion for Reconsideration of Summary Judgment. Thereafter, on 13 July 2001, defendant filed a document entitled "Motion to Construe Defendant's Answer as Including a Counterclaim or, in the Alternative, to Allow Defendant to Amend His Answer to Clarify His Counterclaim and Motion to Amend Response to Requests for Admission." On 28 August 2001, Judge Forrest Bridges entered an order which denied defendant's Motion for Reconsideration. The order also determined that defendant's answer included a counterclaim and allowed amendment of the counterclaim. Defendant filed his Amended Counterclaim on 6 September 2001.

On 25 September 2001, plaintiff filed a Reply to Counterclaim, as well as Motions to Reconsider and to Correct Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 54 and 60 (2001). Plaintiff's motions requested the following types of relief:

> 1. An Order, after Reconsideration, Denying Defendant's Motion to Construe Defendant's Answer as Including a

> Counterclaim or, in the Alternative, to Allow Defendant to Amend His Answer to Clarify His Counterclaim, and
>
> 2. An Order correcting the Summary Judgment to include a ruling that there was no counterclaim and that, there being no just reason for delay, the judgment [is] final, and
>
> 3. Any other order that the Court may deem just and proper.

On 4 October 2001, Judge Kincaid considered plaintiff's motions and entered an order which made the following conclusions of law:

> 1. The Summary Judgment of July 10, 2001 was not a Partial Summary Judgment as contended by Defendant, but was rather a Final Judgment which resolved all issues presented in the pleadings and was the final determination of the rights of the parties pursuant to Rule 54(a) of the Rules of Civil Procedure.
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> 2. The Motions and Amended Counterclaim and all other pleadings after July 10, 2001 are moot and were barred by the final judgment of July 10, 2001.
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Summary Judgment of July 10, 2001 was a final judgment pursuant to Rule 54(a) and the Amended Counterclaim is void ab initio.

On 27 September 2001, defendant filed a notice of appeal from Judge Kincaid's 10 July 2001 order granting summary judgment for plaintiff. On 2 November 2001, defendant appealed from Judge Kincaid's 4 October 2001 order stating that the 10 July 2001 order was a final judgment and determining that all pleadings after that date were moot. Defendant contends the trial court erred by (I) failing to construe his answer as including a counterclaim; and

(II) granting summary judgment for plaintiff as to defendant's counterclaim when plaintiff did not present affidavits or other evidence to negate defendant's counterclaim. For the reasons set forth herein, we disagree with defendant's arguments and dismiss both his appeals.

Defendant first notes that his answer was filed *pro se*, and as such it "'is held to less stringent standards than one drafted by an attorney[.]'" *Loren v. Jackson*, 57 N.C. App. 216, 225, 291 S.E.2d 310, 315-16 (1982) (quoting *Hurney v. Carver*, 602 F.2d 993, 995 (1st Cir. 1979)). Defendant argues his answer and the affirmative allegations contained therein put plaintiff on notice of the type of claim being brought and was sufficient under North Carolina's notice pleading theories to properly assert a counterclaim. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Specifically, defendant believes he successfully alleged a counterclaim for setoff, as well as facts to support claims for trespass to chattels and conversion.

Additionally, defendant contends the trial court should not have granted summary judgment as to his counterclaim because plaintiff did not present affidavits or other evidence to rebut the counterclaim's allegations. Thus, defendant argues, the burden never shifted to him to present evidence showing the existence of a genuine issue of material fact. *See Edwards v. Bank*, 39 N.C. App. 261, 269, 250 S.E.2d 651, 657 (1979). Moreover, though summary judgment may have been appropriate as to plaintiff's claim, it does not necessarily follow that summary judgment was proper as

to defendant's counterclaim. "[A] counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim[.]" *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984).

Generally, a litigant asserts a counterclaim when he "seeks affirmative relief, which has been defined as 'that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action . . . .'" *McCarley v. McCarley*, 289 N.C. 109, 113-14, 221 S.E.2d 490, 493-94 (1976) (quoting *Rhein v. Rhein*, 244 Minn. 260, 262, 69 N.W.2d 657, 659 (1955)). "Neither does defendant's failure to allege affirmatively facts within his pleading preclude the pleading from being treated as a counterclaim." *McCarley*, 289 N.C. at 114, 221 S.E.2d at 494. Defendant contends that, even though his pleading was labeled an "answer," such does not preclude its treatment as a counterclaim, so long as it sought affirmative relief. *See City of Greensboro v. Pearce*, 121 N.C. App. 582, 588, 468 S.E.2d 416, 420, *disc. review allowed*, 343 N.C. 510, 471 S.E.2d 633 (1996).

Were we to assume that defendant's answer successfully presented a counterclaim, the legal principles discussed above would have merit. The last sentence of defendant's answer, however, negates his imperfect counterclaim and establishes that defendant intended to "counter sue" at some future time. At the time Judge Kincaid ruled upon plaintiff's summary judgment motion, he stated in open court that defendant's answer contained no

counterclaim. Judge Kincaid's order ended the case by granting summary judgment for plaintiff and rendered all pleadings (including defendant's appeal from the 4 October 2001 order), hearings, and orders after 10 July 2001 void.

Defendant contends any errors by Judge Bridges (in finding a counterclaim and in ruling that Judge Kincaid had not ruled upon that counterclaim) were mistakes of law, which are not the kind of "mistakes" that provide a basis for setting aside an order under N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001). Defendant therefore believes the trial court erred in setting aside Judge Bridges' 27 August 2001 order pursuant to Rule 60(b) because doing so constituted an impermissible substitute for appellate review. "It is settled law that erroneous judgments may be corrected only by appeal, and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review." *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed, disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981) (citations omitted).

In the present case, however, there was no mistake of law rendering use of Rule 60(b) improper. Judge Kincaid had previously decided that there was no counterclaim, and Judge Bridges had no authority to overrule him, as "[one] superior court judge may not overrule the order of another superior court judge." *Charns v. Brown*, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 701 (1998). Judge Kincaid's 4 October 2001 order was proper under Rule 60(b) because it was not

based on a mistake of law, but rather was a clarification of the nature, force and effect of the 10 July 2001 order. "A 60(b) order does not overrule a prior order but, consistent with statutory authority, relieves parties from the effect of an order." *Charns*, 129 N.C. App. at 639, 502 S.E.2d at 10. We also note that, because the 4 October 2001 order merely clarified the 10 July 2001 order, defendant's appeal of the 4 October 2001 order is dismissed as moot, as he cannot appeal from the same order twice.

Plaintiff correctly argues defendant's appeal from the 10 July 2001 order should be dismissed because it was untimely under N.C.R. App. P. 3(c) (2002), which requires an appeal from a judgment or order in a civil action to be taken within thirty days of its entry. Plaintiff concedes there are exceptions to the thirty-day rule, where a party makes a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b) (judgment notwithstanding the verdict), Rule 52(b) (motion to amend or make additional findings of fact), or Rule 59 (motion to alter or amend a judgment or motion for new trial). Notwithstanding these exceptions, plaintiff argues that defendant failed to include in the record any motion that tolls the time for appealing the 10 July 2001 order. We agree. While some documents in the record reference defendant's Motion for Reconsideration (which requested relief under Rules 59(a)(1), 59(e), 50(b) and 60(b)), this motion was denied by Judge Bridges' 28 August 2001 order.

Where a party files a motion which it is not entitled to file, the period for appeal is not tolled. *See Middleton v. Middleton*,

98 N.C. App. 217, 390 S.E.2d 453, *disc. review denied*, 327 N.C. 637, 399 S.E.2d 123 (1990). Here, defendant was not entitled to relief under Rule 50(b), Rule 59(a)(1), or Rule 59(e); these rules apply to motions made at trial or post-trial, and this case concluded at the summary judgment stage. Furthermore, under N.C.R. App. P. 3, a Rule 60(b) motion does not toll the time for filing a notice of appeal. There was no tolling of the time defendant had to file his notice of appeal. Defendant had until 10 August 2001 to appeal the order entered 10 July 2001. Having failed to do so, his appeal is untimely and subject to dismissal, as this Court does not acquire jurisdiction. "Where the appeal is taken more than ten days [now thirty days] after the 'entry' of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in Rule 3 of the N.C. Rules of Appellate Procedure and in G.S. 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed." *Cochrane v. Sea Gate Inc.*, 42 N.C. App. 375, 377, 256 S.E.2d 504, 505 (1979). "[U]nder Rule 3, notice of appeal is timely if filed after judgment is rendered in court, and before the expiration of the 30-day period after judgment is entered." *Darcy v. Osborne*, 101 N.C. App. 546, 548, 400 S.E.2d 95, 96 (1991).

After careful review of the proceedings below and the arguments presented by the parties, we conclude the trial court's 10 July 2001 order settled all issues between the parties and rendered any filings beyond that point void *ab initio*. Accordingly, defendant's appeal from the 4 October 2001 order is dismissed as

moot, and his appeal from the 10 July 2001 order is dismissed as untimely.

Appeals dismissed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).