NO. COA05-1243

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

ROSEWOOD INVESTMENTS, LLC,
TIMOTHY O. JACKSON, and
LEISA JACKSON,
Plaintiffs

v.

Cumberland County
No. 02 CVS 8884

BAXLEY CONSTRUCTION
COMPANY, INC., RUDOLPH L.
BAXLEY, JR., and CONSTANCE
A. BAXLEY,
Defendants

Appeal by defendants from orders entered 14 April 2005 and 2 May 2005 by Judge Gary Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 14 August 2006.

McCoy Weaver Wiggins Cleveland Rose Ray, PLLC, by Richard M. Wiggins and James A. McLean, III, for plaintiff-appellees.

The Yarborough Law Firm, by Garris Neil Yarborough, for defendant-appellants.

HUNTER, Judge.

Baxley Construction Company, Inc., Rudolph L. Baxley, Jr., and Constance A. Baxley (collectively "defendants") appeal from (1) an order of the trial court entitled "Order Denying Relief From Order Granting Judgment Notwithstanding Verdict and Granting Relief From Order Allowing Alternative New Trial" and (2) an order rescinding an earlier order of dismissal. Defendants have also filed a

petition for writ of certiorari asking this Court to review an order of the trial court granting directed verdict in favor of plaintiffs and an order granting judgment notwithstanding the verdict ("JNOV") in favor of plaintiffs. For the reasons stated herein, we affirm the orders of the trial court, but vacate the order granting JNOV.

The procedural history of the instant case is a convoluted one. On 13 November 2002, Rosewood Investments, LLC, Timothy O. Jackson, and Leisa Jackson (collectively "plaintiffs") filed a verified complaint against defendants in Cumberland County Superior Court alleging they were the holders of several promissory notes executed by defendants, and that such promissory notes were past due and in default. The case was heard by a jury on 9 and 10 February 2004. At that time, plaintiffs voluntarily dismissed their claims regarding two of the promissory notes and proceeded solely on their claim of a $35,000.00 promissory note allegedly owed them by defendants. During the trial, plaintiffs introduced into evidence a copy of the promissory note allegedly owed by defendants. Defendants did not object. At the close of plaintiffs' evidence, defendants moved for directed verdict, arguing that plaintiffs had failed to produce the original promissory note allegedly owed to them. The trial court denied defendants' motion, noting that defendants had stipulated at the beginning of trial that the copy of the promissory note produced by plaintiffs was a true and correct copy of the original. At the close of all the evidence, the trial court granted plaintiffs'

motion for a directed verdict as to the liability of defendants on the $35,000.00 promissory note, but denied their motion for directed verdict as to defendants' ability to allege a setoff as a defense to the monies owed. The jury subsequently found that defendants were entitled to a setoff in the amount of $65,615.80, more than the entire amount due and owing on the $35,000.00 promissory note. Although the verdict was announced in open court, a written judgment reflecting the verdict was not entered.

On 17 February 2004, plaintiffs made a motion for JNOV, and alternatively, for a new trial, on the grounds that the trial court improperly submitted the issue of a setoff to the jury. A hearing on the motion was held before the presiding superior court judge, the Honorable Gary L. Locklear, on 29 March 2004. Judge Locklear took the matter under advisement.

On 28 June 2004, another superior court judge, the Honorable Jack Thompson, dismissed the entire case *ex mero motu* pursuant to the local rules of superior court for failure of the parties to timely file an order of judgment in the case. Judge Thompson noted in his order of dismissal that "the parties . . . were given notice of their failure to comply with Rule 10 of the Local Rules of Superior Court and were given additional time to file the necessary closing documents[.]" Despite this notice, "the parties or their attorneys of record . . . failed to file the Order of Judgment or Dismissal or other closing document within the time allowed and have likewise failed to contact the Court to explain why any additional time period may be needed[.]" Accordingly, Judge

Thompson entered an order dismissing the case without prejudice and ordered the clerk of superior court to close the file. Neither the parties nor Judge Locklear were aware of Judge Thompson's order dismissing the case.

On 14 September 2004, Judge Locklear entered an order granting plaintiffs' motion for JNOV. Defendants did not appeal from this order. On 21 October 2004, defendants filed a motion for relief pursuant to Rules 60(b)(1), (3), and (6) requesting the trial court to reconsider its order granting JNOV in favor of plaintiffs. Defendants' Rule 60(b) motion came before Judge Locklear on 14 April 2005. In preparation for the hearing, the parties and the trial court for the first time discovered the earlier 28 June 2004 order dismissing the case. Upon oral motion by plaintiffs, Judge Locklear entered an order on 14 April 2005 pursuant to Rule 60(b), *nunc pro tunc* to 28 June 2004, rescinding Judge Thompson's order of dismissal, and reopened the case and file for further consideration. Judge Locklear then considered defendants' Rule 60(b) motion. After hearing arguments by counsel and reviewing the materials submitted, the trial court determined that the JNOV was "proper, in accordance with the law, and that grounds for relief from judgment under Rule 60(b) have not been shown[.]" The trial court determined, however, that it did not originally intend to grant the alternative motion for a new trial, and reversed that portion of the order. Accordingly, the trial court entered an order on 2 May 2005 denying in part and granting in part defendants' motion for relief. Defendants now appeal from this

order of the trial court, as well as the 14 April 2005 order rescinding the 28 June 2004 order of dismissal.

I. Directed Verdict

By their first three related assignments of error, defendants argue the trial court erred by denying their motion for a directed verdict at the close of plaintiffs' evidence and granting plaintiffs' motion for directed verdict at trial. Defendants contend plaintiffs failed to submit sufficient evidence of the promissory note owed to them at trial, in that they introduced into evidence only a copy of the note, rather than the original document. Appellate review of these arguments is unavailable.

Rule 3 of the North Carolina Rules of Appellate Procedure "requires that a notice of appeal designate the judgment or order from which appeal is taken; this Court is not vested with jurisdiction unless the requirements of this rule are satisfied." *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675 (1996); *Smith v. Insurance Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979). For example, where an appellant appeals only from the denial or granting of a motion for JNOV and does not designate the underlying judgment in the notice of appeal, the appellant does not give notice of appeal from the judgment itself. *See Boger*, 123 N.C. App. at 637, 473 S.E.2d at 675. In such cases, the notice of appeal fails to properly present the underlying judgment for this Court's review. *Id.*; *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990).

In the present case, defendants have failed to give notice of appeal from the underlying judgment entered upon the jury trial of this matter. Indeed, it appears from the record that an underlying judgment was not entered. Judge Thompson dismissed the case for failure to enter a judgment. Defendants' notice of appeal fails to designate any underlying judgment. Defendants' notices of appeal designate only two orders of the trial court: (1) the 14 April 2005 order of the trial court rescinding the order of dismissal; and (2) the 2 May 2005 order of the trial court denying in part and granting in part defendants' motion for relief. Thus, this Court does not have jurisdiction to address the propriety of the trial court's actions at the underlying trial of this matter. *See*, *e.g.*, *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 ("[w]e note that when a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal"), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005); *Boger*, 123 N.C. App. at 637, 473 S.E.2d at 675. We therefore dismiss defendants' first three assignments of error.

In the alternative, defendants ask this Court to review the trial court's grant of directed verdict through a writ of certiorari. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the *judgments and orders of trial tribunals* when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (emphasis added). Rule 58 of the North Carolina Rules of Civil Procedure provides that "a judgment is

entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005). As noted *supra*, judgment has never been entered on the underlying trial. This Court has no ability to review a judgment or order that does not exist or appear in the record. We therefore deny defendants' petition for writ of certiorari to review the trial court's grant of directed verdict at the jury trial in this matter.

II. JNOV

Defendants further argue the trial court erred in its 14 September 2004 order granting JNOV in favor of plaintiffs. As previously noted, however, defendants failed to file notice of appeal from the 14 September 2004 order of the trial court. Alternatively, defendants petition this Court to review the trial court's order through writ of certiorari. Defendants argue the trial court lacked jurisdiction to enter the order granting JNOV to plaintiffs, in that the case was dismissed at the time JNOV was granted. Given the unusual procedural posture of the instant case, we grant defendants' petition for writ of certiorari and examine the 14 September 2004 order of the trial court.

Defendants argue the trial court lacked jurisdiction to enter the 14 September 2004 order granting JNOV to plaintiffs because the case had been dismissed by Judge Thompson for failure to prosecute. Thus, contend defendants, the 14 September 2004 order is void. Defendants acknowledge that the trial court later rescinded the earlier order of dismissal, *nunc pro tunc* to 28 June 2004, but

argue that the trial court erred in entering the order *nunc pro tunc*. Defendants do not challenge the order rescinding the order of dismissal "in and of itself," but object rather to the retroactive nature of the order.[1] Defendants argue that, after the trial court rescinded the order of dismissal, it should have reissued the order granting JNOV, rather than resuscitating the order by making the order rescinding the dismissal retroactive. We agree.

Nunc pro tunc is defined as "now for then." *Black's Law Dictionary* 1097 (7th ed. 1999). It signifies "'a thing is now done which should have been done on the specified date.'" *Id.* (quoting 35A C.J.S. *Federal Civil Procedure* § 370, at 556 (1960)).

> *Nunc pro tunc* orders are allowed *only* when "'a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk . . . provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.'"

Long v. Long, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (emphasis added) (quoting *State Trust Co. v. Toms*, 244 N.C. 645, 650, 94 S.E.2d 806, 810 (1956)). Thus, before a court order or

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[1] We note that the trial court entered its order rescinding Judge Thompson's 28 June 2004 order of dismissal pursuant to Rule 60(b). "A Superior Court judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one Superior Court judge from reviewing the decision of another." *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978) (holding that the trial court had authority pursuant to Rule 60(b) to set aside an earlier order of dismissal entered by another trial judge). Thus, the trial court had the authority to enter an order rescinding the dismissal, although the dismissal was entered by another trial judge.

judgment may be ordered *nunc pro tunc* to take effect on a certain prior date, there must first be an order or judgment actually decreed or signed on that prior date. If such decreed or signed order or judgment is then not entered due to accident, mistake, or neglect of the clerk, and provided that no prejudice has arisen, the order or judgment may be appropriately entered at a later date *nunc pro tunc* to the date when it was decreed or signed. *See id.*; *Hill v. Hill*, 105 N.C. App. 334, 340, 413 S.E.2d 570, 575 (1992), *reversed on other grounds*, 335 N.C. 140, 435 S.E.2d 766 (1993).

There is no evidence in the instant case that the order rescinding the order of dismissal was decreed or signed on 28 June 2004, nor is there evidence that the delay in entering the order was "'"in consequence of accident or mistake or the neglect of the clerk."'" *Long*, 102 N.C. App. at 22, 401 S.E.2d at 403 (citations omitted). Rather, the evidence of record indicates the parties did not learn of the earlier dismissal until 13 April 2005, the day before the hearing on defendants' motion for relief. The trial court's attempt to enter the order rescinding the order of dismissal *nunc pro tunc* to 28 June 2004 was therefore ineffective. *Id.* at 21, 401 S.E.2d at 403 (stating that where the trial court's order was not rendered on 17 October 1988, the trial court's attempt to enter a later order *nunc pro tunc* to that date was ineffective). Thus, the effective date of the trial court's order rescinding the earlier order of dismissal is 14 April 2005, the date on which it was actually rendered and filed. We must now

consider the impact of this new effective date on the 14 September 2004 order granting JNOV.

The trial court entered its 14 September 2004 order granting JNOV after the case was dismissed but before it was reopened. "Where the court dismisses an action, it terminates the same, and no suit is thereafter pending in which the court can make a valid order, nor may the court after dismissing the action give further orders in the judgment." 19 Strong's N.C. Index 4th, *Judgments* § 78 (1992) (footnotes omitted) (citing *Burton v. Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956) ("[w]hen the court allowed the motion to dismiss as in case of nonsuit, it thereby terminated the action, and no suit was thereafter pending in which the court could make a valid order") and *Johnston v. Johnston*, 218 N.C. 706, 709, 12 S.E.2d 248, 250 (1940) (stating that the trial court had no authority to grant or deny certain rights of the parties in a judgment dismissing the action)). Where the trial court is without jurisdiction or authority to enter an order or judgment, such order or judgment is void. *Vaughn v. Vaughn*, 99 N.C. App. 574, 576, 393 S.E.2d 567, 568 (1990). Because the 14 September 2004 order granting JNOV was entered after the case had been dismissed but before it had been revived, the trial court had no authority to render such judgment, and the 14 September 2004 order granting JNOV is therefore void. Accordingly, we vacate the 14 September 2004 order of the trial court.

III. Motion for Relief

By further argument, defendants contend the trial court should have granted their Rule 60(b) motion for relief from the order granting JNOV. Although we have determined that the order granting JNOV is void, we nevertheless address defendants' argument in the interests of judicial economy, given the likelihood of further proceedings in this matter before the trial court.

Defendants based their motion for relief on Rules 60(b)(1), (3), and (6). Rule 60(b) provides in pertinent part as follows:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* -- On 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:
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> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment. . . .

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Defendants' argument before the trial court and on appeal focuses upon the plaintiffs' failure at trial to produce the original promissory note they alleged was owing to them. In their motion for relief, defendants argued that the failure to produce the original promissory note amounted to fraud upon the court. This argument has no merit.

There is no evidence in the record to support defendants' assertion that the underlying judgment was procured by fraud. Plaintiffs introduced into evidence as Plaintiffs' Exhibit No. 1 a copy of the promissory note at trial and presented testimony regarding the note. Defendants did not object to the introduction of the copy of the note. Defendants stipulated at trial that the copy of the promissory note attached to plaintiffs' complaint was a "true and correct copy of the note that the Defendants executed." "An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury." *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971). Judicial admissions "are binding on the pleader as well as the court." *Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181 (1994); *see also Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (1995) (noting that judicial admissions are conclusive upon the parties and the trial judge). As defendants stipulated that the copy of the promissory note produced by plaintiffs was "true and correct," the issue of its authenticity was never in question. Having stipulated to the authenticity of the promissory note, defendants are now precluded from attacking the very subject of their stipulation. The trial court did not err in denying defendants' motion for relief pursuant to Rule 60(b)(3).[2]

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[2] Defendants have made no argument regarding the Rule 60(b)(1) aspect of their motion and we therefore do not address the trial court's denial of defendants' motion pursuant to Rule 60(b)(1).

The trial court also properly denied defendants' motion pursuant to Rule 60(b)(6). Under section 1A-1, Rule 60(b)(6) of our Rules of Civil Procedure, a judgment may be set aside for any reason "justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). "Rule 60(b)(6) is equitable in nature and permits a trial judge to exercise his discretion in granting or withholding the desired relief." *Piedmont Rebar, Inc. v. Sun Constr., Inc.*, 150 N.C. App. 573, 575, 564 S.E.2d 281, 283 (2002). Accordingly, the trial court's ruling "may be reversed on appeal only upon a showing that the decision results in a substantial miscarriage of justice." *Id.*

It is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments. *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994). "'The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8).'" *Id.* (quoting *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988)).

In the present case, defendants based their Rule 60(b)(6) motion for relief on alleged errors of law: namely, the trial court's granting of a directed verdict and JNOV in favor of plaintiffs, despite their failure to produce the original promissory note at trial. Rule 60(b)(6) may not be used as an alternative to appellate review, however. *See id.* As such, the trial court properly denied defendants' motion for relief. We overrule this assignment of error.

In summary, we vacate the 14 September 2004 order of the trial court granting JNOV in favor of plaintiffs. We affirm the 14 April 2005 order of the trial court rescinding the earlier order of dismissal, but we hold that the trial court's attempt to enter the order *nunc pro tunc* to 28 June 2004 is ineffective. The effective date of the order is 14 April 2005. We affirm the 2 May 2005 order of the trial court.

Order of 14 September 2004 - vacated.

Order of 14 April 2005 - affirmed.

Order of 2 May 2005 - affirmed.

Vacated in part; affirmed in part.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).