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NO. COA05-1391

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

ROY BURT ENTERPRISES, INC.,
Plaintiff,

v.

Moore County
No. 05 CVS 345

WAYMON MARSH,
Defendant.

Appeal by Defendant from judgment entered 11 July 2005 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 12 September 2006.

P. Wayne Robbins, for plaintiff-appellee.

V. Lane Wharton, Jr., for defendant-appellant.

WYNN, Judge.

Under our appellate rules, a party may not present "for the first time in an appellate brief a question raising issues of law not set out in the assignments of error contained in the record on appeal."¹ Here, Defendant argues that the trial court's judgment was invalid and too vague to be enforceable. Because Defendant made no assignment of error that covers this issue, we must dismiss his first argument. As to Defendant's second argument, we hold

¹*Branch Banking & Trust Co. v. Staples*, 120 N.C. App. 227, 231, 461 S.E.2d 921, 925 (1995) (citation omitted).

that the trial court did not abuse its discretion by allowing Plaintiff to amend its complaint.

At a trial commenced on 13 March 1995, a jury determined Defendant Waymon Marsh owed Plaintiff Roy Burt Enterprises, Inc. \$68,783.12. The record does not show the date on which the trial court announced the judgment in court but does indicate the judgment was filed on 26 April 1995.

On 15 March 2005, Roy Burt Enterprises, Inc. (hereafter Roy Burt) commenced a civil action against Waymon Marsh to renew the prior judgment for an additional ten years. In its complaint, Roy Burt alleged it was awarded a judgment totaling \$68,783.12 on 13 March 1995. Roy Burt alleged Waymon Marsh has since failed to pay any of the judgment, and that the "[j]udgment remains outstanding and unsatisfied."

Defendant Marsh in his answer, conceded that on 13 March 1995, Roy Burt was awarded a judgment against Waymon Marsh totaling \$68,783.12, and that Defendant Marsh made no payments between the date of the judgment and filing his answer. Waymon Marsh then asserted that because the judgment was rendered 13 March 1995 and Roy Burt commenced a civil action to renew the prior judgment on 15 March 2005, Plaintiff Roy Burt did not institute nor file its complaint within the ten-year statutory period allowed to renew the judgment. Waymon Marsh requested that the 1995 judgment not be renewed and that Roy Burt recover nothing.

At the 11 July 2005 hearing on this matter, Plaintiff Roy Burt was present, but Defendant Marsh was not, despite an indication on

the record on appeal that on 29 June 2005, Waymon Marsh filed notice of the hearing. At the hearing, Roy Burt moved to amend its complaint to evidence the 1995 judgment was awarded 22 March 1995. The trial court granted Roy Burt's motion to amend, and then granted judgment in favor of Roy Burt to renew the 1995 judgment for an additional ten years.

Waymon Marsh appeals, arguing (I) the trial court's decision is not a valid judgment because (a) an existing judgment cannot be revived or renewed in North Carolina and (b) the decision is too vague and uncertain to be enforceable, and (II) the trial court erred in allowing Plaintiff Roy Burt to amend its complaint without prior notice to Defendant Waymon Marsh nor allowing an opportunity to respond.

I.

Regarding Waymon Marsh's first argument, we need only summarily point out that it is outside the scope of the following three assignments of error that he makes on appeal:

1. The Court erred in allowing an amendment for which there was no Motion to Amend showing good cause in an attempt to extend the 10 year statute.
2. That the Court erred in not allowing Judgment for Defendant, the 10 year statute of limitations having expired.
3. That the Court erred in allowing Judgment for Plaintiff, the 10 year statute of limitations having expired.

To present a question for appellate review, an appellant must reference an assignment of error pertinent to the question presented. N.C. R. App. P. 28(b)(6) (2005). Under Rule 10, "the

scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal" N.C. R. App. P. 10(a) (2005). Moreover, Rule 28(a) states "[r]eview is limited to questions so presented in the several briefs." N.C. R. App. P. 28(a) (2005). These rules prevent a party from presenting "for the first time in an appellate brief a question raising issues of law not set out in the assignments of error contained in the record on appeal." *Branch Banking & Trust Co. v. Staples*, 120 N.C. App. 227, 231, 461 S.E.2d 921, 925 (1995) (citation omitted). The rules of appellate procedure "are mandatory and failure to follow these [rules] will subject an appeal to dismissal." *N.C. Dep't of Transp. v. Viar*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (citation omitted).

In this case, as it is clear on its face that Waymon Marsh's argument falls outside of the scope of his three assignments of error. Accordingly, we must dismiss his first argument on appeal.

II.

Waymon Marsh next argues the trial court erred in allowing Roy Burt to amend its complaint on the day of the hearing, to the prejudice of Defendant Marsh, without prior notice and an opportunity to respond. We disagree.

Rule 15(a) of the North Carolina Rules of Civil Procedure states that a party may amend his pleading by leave of the court "and leave shall be freely given when justice so requires." N.C. R. Civ. P. Rule 15(a) (2005). This rule "gives the trial court broad discretion in determining whether leave to amend will be

granted after the time for amending as a matter of course has expired." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629, 347 S.E.2d 473, 476 (1986). The trial court's grant of a motion to amend a pleading will not be disturbed absent a clear showing the trial court abused its discretion. *Members Interior Constr., Inc. v. Leader Constr. Co., Inc.*, 124 N.C. App. 121, 124, 476 S.E.2d 399, 402 (1996).

Waymon Marsh argues it was prejudicial error for the trial court to grant Roy Burt's amendment to the complaint without allowing Defendant Marsh an opportunity to respond. Waymon Marsh cites *Turner Halsey Co., Inc. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 248 S.E.2d 342 (1978), where the plaintiff amended its complaint on the same day summary judgment was granted. In *Turner* this Court noted in dicta that "[w]hen the complaint is amended defendant should be entitled to amend his answer to meet the contents of the new complaint" *Id.* at 573, 248 S.E.2d at 345 (citations omitted).

Here, as in *Turner*, Plaintiff Roy Burt moved to amend its complaint on the same day judgment was granted; however, in this case there is no evidence Defendant Marsh was not provided an opportunity to object or to make a request for a reasonable time to respond. Indeed, the record shows that Waymon Marsh filed a notice on 29 June 2005 giving notice of the hearing for this matter. Moreover, in rendering the judgment in this matter, the trial court stated Waymon Marsh had been "sent notice by the Clerk of Superior Court of the setting of the case and [had] informed the Trial Court

Administrator that he was aware of the setting and in fact had set the case." Thus, contrary to Defendant Marsh's assertion, he was provided an opportunity to respond but chose to waive that opportunity by failing to appear. Accordingly, we hold the trial court did not abuse its discretion in granting Roy Burt's motion to amend its complaint.

Dismissed in part, affirmed in part.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).