

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1463
NO. COA05-1464

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

ROBERT S. RUTTER,
Plaintiff

v.

Mecklenburg County
No. 05-CVD-8869

CITIBUSINESS CARD,
Defendant

ROBERT S. RUTTER,
Plaintiff

v.

Mecklenburg County
No. 05-CVD-8870

CITI CARD,
Defendant

Appeals by plaintiff from an order entered in 05-CVD-8869 5 August 2005 and an order entered in 05-CVD-8870 5 August 2005 by Judge Thomas F. Moore in Mecklenburg County District Court. Heard in the Court of Appeals 7 June 2006.

Prince, Youngblood & Massagee, PLLC, by Richard J. Tanker, for plaintiff-appellant.

Nexsen Pruet Adams Kleemeier, PLLC, by Patrick D. Sarsfield II, for defendant-appellees.

HUNTER, Judge.

Robert S. Rutter ("plaintiff") appeals from an order dismissing plaintiff's petition to confirm arbitration award and

vacating arbitration award entered in 05-CVD-8869 on 5 August 2005 and an order dismissing plaintiff's petition to confirm arbitration award and vacating arbitration award entered in 05-CVD-8870 on 5 August 2005. These cases have been consolidated for review by this Court. For the reasons stated herein, we vacate the orders of the trial court.

Plaintiff entered into credit card agreements with Citibusiness Card and Citi Card (collectively "defendants"). Disputes arose over the terms of the agreements. Plaintiff submitted to Blue Ridge Arbitration ("Blue Ridge") the disputes for arbitration. Defendants objected, in a letter dated 26 March 2004, that the terms of the credit card agreements did not permit plaintiff to submit the claims to Blue Ridge. Blue Ridge entered arbitration awards in favor of plaintiff on 8 December 2004.

Plaintiff sought enforcement of the arbitration awards in identical claims filed 11 May 2005. Defendants filed identical responses to plaintiff's complaints on 22 June 2005, requesting dismissal of the petitions with prejudice on the grounds that the arbitration awards were neither binding nor enforceable against defendants. Defendants requested in the alternative that the trial court vacate and set aside the awards as procured by corruption and fraud.

On 13 July 2005, plaintiff filed a notice of voluntary dismissal without prejudice as to both claims. On 5 August 2005, the trial court entered orders dismissing plaintiff's complaints with prejudice. Plaintiff appeals from these orders.

Plaintiff first contends that the trial court lacked jurisdiction to enter the 5 August 2005 orders as plaintiff had already taken voluntary dismissals. We agree.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2005) governing voluntary dismissals states:

Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice[.]

Id. "[A] Rule 41(a)(1) notice of dismissal is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect." *Carter v. Clowers*, 102 N.C. App. 247, 251, 401 S.E.2d 662, 664 (1991) (citation omitted). Our Supreme Court has held that, pursuant to Rule 41, "'plaintiff has an absolute right to a voluntary, non-prejudicial dismissal up to the time he rests his case[,]'" and that such dismissal constitutes "a 'final termination' of the action" after which the trial court is "without authority to enter further orders therein." *Massey v. Massey*, 121 N.C. App. 263, 268, 465 S.E.2d 313, 316 (1996) (citations omitted).

Here, plaintiff properly filed notices of voluntary dismissal on 13 July 2005, before any hearing on the matter. The trial court, however, heard arguments from defendants on 18 July 2005 on the merits of the action without notice of the hearing to

plaintiff. The trial court subsequently entered an order dismissing plaintiff's claims with prejudice without setting aside plaintiff's voluntary dismissals.

There is no evidence in the record that plaintiff received notice that the trial court intended to hear the matter during the 18 July 2005 session after the voluntary dismissal was filed. The trial court erred in proceeding in the matter when plaintiff had no notice of the hearing. *See generally*, N.C. Gen. Stat. § 1A-1, Rule 55 (2005); *Strauss v. Hunt*, 140 N.C. App. 345, 351-52, 536 S.E.2d 636, 640-41 (2000) (reversing and vacating an order allowing a motion for default judgment when no notice was given as to when the hearing on the motion for default judgment would be held and the party had previously appeared in the action).

Nonetheless, defendants contend the trial court properly retained jurisdiction over the claims on the grounds that defendants' responses were appropriate counterclaims which barred plaintiff's voluntary dismissals without defendants' consent.

"[I]f no counterclaim is pending, or if the counterclaim is independent and does not arise of the same transaction as the complaint, a party may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal." *Gillikin v. Pierce*, 98 N.C. App. 484, 487, 391 S.E.2d 198, 199 (1990). However, "in situations '[w]here defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under Rule 41 without the consent of

defendant.'" *Lafferty v. Lafferty*, 125 N.C. App. 611, 613, 481 S.E.2d 401, 402 (1997) (citations omitted). Defendants contend that, although not denominated as a counterclaim, the responses to plaintiff's petitions that the trial court vacate the awards as obtained by fraud and undue means pursuant to 9 U.S.C. § 10(a) (2005) provide claims for alternative relief which bar plaintiff's voluntary dismissals without defendants' consent. However, as discussed *supra*, a review of the records shows that defendants did not make a motion to set aside plaintiff's voluntary dismissals on these grounds, and that the trial court did not set aside plaintiff's voluntary dismissals in the orders entered 5 August 2005. We therefore do not reach the question of whether defendants' responses were counterclaims, as defendants did not challenge plaintiff's voluntary dismissals, and the trial court made no ruling to set aside the voluntary dismissals.

As no notice was provided to plaintiff of further proceedings following plaintiff's entry of voluntary dismissals, the trial court erred in proceeding on defendants' alleged counterclaims and entering an order dismissing plaintiff's claims with prejudice. We therefore do not reach plaintiff's second assignment of error. The orders of the trial court are vacated.

Vacated.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).