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NO. COA06-1018

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

ELSIE M. LEE,
Plaintiff,

v.

Wake County
No. 04 CVD 6748

SPRING PINES HOMEOWNERS
ASSOCIATION,
Defendant.

Appeal by Plaintiff from order entered 24 March 2006 by Judge Shelley Desvousges in Wake County District Court. Heard in the Court of Appeals 8 March 2007.

Elsie M. Lee, pro se, Plaintiff-Appellant.

Larcade, Heiskell & Askew, PLLC, by Margaret P. Eagles and Christopher N. Heiskell, for Defendant-Appellee.

STEPHENS, Judge.

By Complaint filed 17 May 2004, Plaintiff, *pro se*, sought damages in an amount greater than \$4,000 but not exceeding \$10,000 because Defendant had allegedly caused storm-water runoff to flood her property. After answering Plaintiff's Complaint and proceeding through various stages of the discovery process, Defendant filed a Motion for Summary Judgment on 18 April 2005. On 19 April 2005, Plaintiff filed a Motion in Opposition to Defendant's Motion for Summary Judgment (the "Motion in Opposition"). At a hearing on

Defendant's Motion for Summary Judgment held 28 November 2005, the trial court rendered judgment in favor of Defendant on all claims.¹

On 29 November 2005, and pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, Plaintiff filed a Motion for Relief from Summary Judgment (the "Rule 60(b) Motion"). On 12 December 2005, Plaintiff filed a Memorandum of Law in Support of Motion for Relief from Summary Judgment (the "Memorandum of Law"). At a hearing on the Rule 60(b) Motion held 15 February 2006, the trial court rendered judgment denying Plaintiff relief.² On 24 February 2006, Plaintiff filed notice of appeal "from the denial of relief from summary judgment and the oral judgment and order entered on February 15, 2006[.]" We affirm.

By her first assignment of error, Plaintiff argues that the trial court erred in denying the Rule 60(b) Motion because she "demonstrated Appellee's Motion for Summary Judgment was contrary to law and based on flawed argument and should not be granted[.]" We disagree.

"A trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (citation omitted), *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998). "An abuse of discretion is a decision manifestly unsupported by reason or one so

¹The court reduced this judgment to writing and entered it by order filed 2 December 2005.

²The court's written order as to this judgment was filed on 24 March 2006.

arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). "[A]bsent a showing that the trial court abused its discretion in denying a motion for relief from judgment, this Court will not disturb the decision of the trial court" *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 84, 598 S.E.2d 396, 407 (citation omitted), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004).

Pursuant to Rule 60(b), a trial court may grant relief from a final judgment for any of the following six reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). "The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b) (6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands

that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987) (citation omitted).

Plaintiff acknowledged at the hearing on the Rule 60(b) Motion that she was seeking relief pursuant to Rule 60(b)(6), as evidenced by the following exchange:

THE COURT: Under what subsection are you proceeding under Rule 60(b)? There are six subsections under Rule 60(b) --

MS. LEE: I believe that --

THE COURT: -- upon which to file a Rule 60(b) motion. And your Rule 60(b) motion has to be based on one of those grounds under Rule 60(b).

MS. LEE: Well, among other things, it says for the Rule 60(b) motion, "any other," "any other reason."

THE COURT: All right. Are you proceeding under Rule 60(b)(6)? Is that right?

MS. LEE: "For any other reason."

When pressed as to what "other reason" would justify relief from the order granting summary judgment, Plaintiff acknowledged that she sought relief because the trial court "entered the wrong judgment[.]" Plaintiff echoes this argument in her brief, stating that "the trial court erred in denying relief from the judgment based on conclusions of law." Plaintiff's arguments neither support a conclusion that extraordinary circumstances existed nor show that justice demanded relief. The transcript, on the other hand, clearly indicates that the trial court gave Plaintiff every opportunity to fully explain her positions and thoroughly considered all of Plaintiff's arguments. The trial court did not

abuse its discretion in denying Plaintiff's Motion for Relief under Rule 60(b)(6).

Although it seems apparent to this Court that Plaintiff sought relief solely under Rule 60(b)(6), Plaintiff twice hints that relief would be proper under Rule 60(b)(4) in that the judgment was void. In her Memorandum of Law, Plaintiff argues that she "did not have proper notice of [Defendant's] motion for summary judgment." At the hearing, Plaintiff stated that Defendant "[d]id not re-serve [the summary judgment] motion within the proper ten-day or whatever length of time that he was required to do so." Assuming *arguendo* that Plaintiff properly sought relief under Rule 60(b)(4), the record does not support the contention that the judgment was void because of improper service. Importantly, Plaintiff filed her Motion in Opposition the day after Defendant filed the summary judgment motion. Furthermore, neither the Motion in Opposition nor the Rule 60(b) Motion allege defective process. Plaintiff's first assignment of error is overruled.

In each of her remaining assignments of error, Plaintiff states that relief is sought because, for separate reasons, "[t]he trial court erred in granting defendant's motion for summary judgment[.]" We do not reach Plaintiff's arguments and these assignments of error are dismissed.

A party has thirty days from entry of judgment to file notice of appeal. N.C. R. App. P. 3(c)(1). A proper notice of appeal "shall designate the judgment or order from which appeal is

taken[.]” N.C. R. App. P. 3(d). “Without proper notice of appeal, this Court acquires no jurisdiction.” *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (citations omitted). “Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.” *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citations omitted).

Plaintiff’s notice of appeal states that appeal is taken only “from the denial of relief from summary judgment and the oral judgment and order entered on February 15, 2006[,] in the District Court of Wake County by the Honorable District Court Judge Shelly [sic] H. Desvousges, which dismissed plaintiff’s action.” Because Plaintiff’s notice of appeal does not properly present the underlying entry of judgment for our review, this Court will not review the trial court’s order which granted summary judgment in favor of Defendant. Plaintiff’s remaining assignments of error are therefore dismissed, and the order of the trial court is AFFIRMED.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).