NO. COA06-1531

NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2007

OZIE L. HALL,
Plaintiff,

v. Pitt County
No. 02 CVS 1382

STEVEN I. COHEN (d/b/a:
HOMESTEAD MOBILE HOME PARK),
Defendant.

Appeal by plaintiff from judgment entered 6 September 2006 by Judge William C. Griffin in Pitt County Superior Court. Heard in the Court of Appeals 21 August 2007.

Ozie L. Hall, plaintiff-appellant, pro se.

Mills & Economos, L.L.P., by Larry C. Economos, for defendant-appellee.

BRYANT, Judge.

Ozie L. Hall (plaintiff) appeals from an order entered 6 September 2006, granting a motion under Rule 60(b) in favor of Steven I. Cohen, d/b/a Homestead Mobile Home Park (defendant). For the reasons stated herein, we affirm the trial court's order.

Facts and Procedural History

Defendant owns a mobile home park. In November 1998 plaintiff and defendant entered into an agreement whereby plaintiff would perform various services related to the development for sale and daily operations of the mobile home park in return for a percentage

of proceeds upon the sale of the park or a security interest in the park. Despite performing some of those services, plaintiff received only partial payment according to the terms of the original agreement. Plaintiff brought a civil suit claiming breach of contract, specific performance, fraudulent misrepresentation, and deceptive trade practice.

In a jury trial on this matter before the Honorable W. Russell Duke, Jr., beginning on 15 March 2004, plaintiff offered into evidence a document that he claimed to be the original agreement. This document was noticeably torn, with a section measuring approximately one and three-quarter inches missing from the bottom of pages one and two. Plaintiff offered as explanation that a phone number had been inadvertently written on the document and that he had torn off the portion with the number. Defendant claimed he had no memory of the contract or its specific terms, though he did acknowledge that the signature appeared to be his own. On 18 March 2004, the jury returned a verdict finding defendant liable for breach of contract and awarding plaintiff $41,000 in compensatory damages plus costs and interest. A judgment was entered to that effect on 7 April 2004.

Defendant appealed the judgment on 13 April 2004. On 18 May 2004, defendant filed a motion in this Court that the case be remanded back to the trial court for consideration under Rule 60(b) for relief from the judgment on the basis of fraud or misrepresentation. Prior to filing this motion, but after the trial, defendant discovered in an old box of files another copy of

the contract at issue that had a paragraph seven, which appeared to be in the portion of the contract torn off of the exhibit admitted at trial. Paragraph seven states "This agreement shall be formalized by a written contract to be executed by the parties within ten (10) days of this memorandum of agreement." This Court entered an Order on 5 October 2004 remanding the matter to the trial court for a hearing on the Rule 60(b) motion and directed the trial court to enter an indication of how it would rule on the motion, notwithstanding the pending appeal.

A hearing on the Rule 60(b) motion was heard in the trial court on 13 December 2004 before the Honorable William C. Griffin, due to Judge Duke having recused himself from the matter. In that hearing, plaintiff admitted to having torn off the portion of the contract that contained paragraph seven and to have erased the number "8." from in front of the final paragraph on the second page. Plaintiff claimed the paragraph and number had been scratched out by someone prior to signing and that he merely removed them coincidentally prior to trial. On 18 February 2005, the trial court entered "Evidentiary Findings, Conclusions of Law and Inclination to Rule" in favor of defendant. Based on the Inclination to Rule, this Court dismissed the appeal on 2 May 2006. *Hall v. Cohen*, 177 N.C. App. 456, 628 S.E.2d 469 (2006). The trial court entered judgment on the Rule 60(b) motion on 31 August 2006. Plaintiff appeals.

In his appeal, plaintiff raises the issues of whether the trial court: (I) abused its discretion in granting defendant's Rule 60(b) motion; (II) erred in granting defendant's Rule 60(b) motion because the subject of the motion was immaterial to the original case; and (III) erred in making several evidentiary rulings and based its findings of fact on biased testimony.

Standard of Review and Interlocutory Appeal

The standard of review for Rule 60(b) determinations is abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). Generally a party may not appeal an interlocutory order, defined as an order which does not dispose of a pendant action and instead leaves the matter open for the trial court to determine. *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568-69 (2007). A trial court's order on a Rule 60(b) motion may be interlocutory because the order may not affect the finality of the decision and may not affect the power of the court to entertain an independent action; in other words, the case may be tried anew if the Rule 60(b) motion is granted. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). However, an appeal from an interlocutory order may be heard if it (1) affects a substantial right and (2) will result in injury to the appealing party if not corrected before final judgment. N.C. Gen. Stat. § 7A-27(d) (2005); *Goldston v. American Motors Corp.*, 326 N.C. 723, 725-26, 392 S.E.2d 735, 736 (1990). The right to avoid two trials on the same issue is considered a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). Because in this case the trial court's

order results in a second trial on the merits, this Court properly considers plaintiff's appeal from the trial court's interlocutory Rule 60(b) Order.

I

Plaintiff first contends that the trial court abused its discretion in granting the Rule 60(b) motion because (1) judgments may not be reversed due to perjured testimony, (2) defendant did not exercise due diligence to expose the perjury at trial, and (3) defendant could not claim that his condition of Attention Deficit Hyperactivity Disorder (ADHD) explained his inability to dispute the document earlier because defendant had voluntarily refused to take medication. We disagree.

Plaintiff misapprehends the case he cites in support of his contention that judgments may not be set aside due to perjured testimony. This Court has held that a judgment will not be set aside "on the grounds of perjured testimony or for any other matter that was presented and considered in the judgment[.]" *Hooks v. Eckman*, 159 N.C. App. 681, 686, 587 S.E.2d 352, 355 (2003). However, a closer reading of *Hooks* reveals a distinction between extrinsic and intrinsic fraud. Extrinsic fraud "'deprives the unsuccessful party of an opportunity to present his case to the court.'" *Id.* at 684, 587 S.E.2d at 354 (quoting *Stokley v. Hughes*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976)). Intrinsic fraud describes matters that are involved in the determination of a cause on its merits, specifically "when a party (1) has proper notice of an action, (2) has not been prevented from full

participation in the action, and (3) has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary." *Id.* When the fraud is characterized as intrinsic, then relief is possible only through Rule 60(b)(3). *Id.* at 685, 587 S.E.2d at 354.

In the case at bar, defendant was able to fully participate in the trial after proper notice and was able to present evidence and defend himself against any possible fraud. However, the issue of the missing paragraph goes directly to the heart of the merits, i.e., whether an enforceable contract between the parties was breached. Furthermore, due to the fraud on the court perpetrated by plaintiff in offering an altered document, the matter was not fully presented to the jury. The trial court was within its discretion to conclude that the omission of the paragraph so affected the merits as to constitute intrinsic fraud and thus judgment under Rule 60(b)(3) was proper.

Plaintiff also contends that defendant did not exercise due diligence to expose the perjury at trial, and therefore should not now be allowed to contest evidence that was available to him at the time of trial. Because this position relies on a portion of Rule 60(b) not implicated in the trial court's judgment, we disagree.

Rule 60(b)(2) does in fact refer to "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." N.C. Gen. Stat. § 1A-1, Rule 60(b)(2) (2005). Plaintiff contends that defendant should have been able to discover the copy that he had in his

possession in time to present evidence on its authenticity at the time of trial. However, the trial court granted relief based solely on Rule 60(b)(3), which describes fraud, misrepresentation or misconduct of an adverse party. N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2005). Essentially the trial court granted relief based on the fraud upon the court committed by plaintiff, irrespective of the contents of any newly discovered evidence, and therefore was within its discretion to grant the motion under Rule 60(b)(3).

Plaintiff next contends that defendant could not claim that his condition of ADHD explained his inability to dispute the document earlier because defendant had voluntarily refused to take medication. This argument would only be applicable to a ruling under the newly discovered evidence provision of Rule 60(b)(2). Since in the instant case relief was granted based on Rule 60(b)(3) fraud, defendant's inaction, whatever its underlying reason, is irrelevant. This assignment of error is overruled.

II

Plaintiff contends that the Rule 60(b) relief was improperly granted because the subject of the inquiry was immaterial to the original case. Plaintiff's contention that the disputed paragraph was superfluous to the original contract rests on the assumption that execution of a later document is not required to render a memorandum of agreement enforceable. Because this requirement depends on the language of the document, we disagree.

Where a memorandum of agreement contains language that states the preliminary nature of the document by wording that indicates it

is either incomplete or subject to revision, then the document's efficacy as a contract is destroyed. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). If the document states explicitly that it will serve as a contract until another document is executed, then it can be considered a valid contract. *N.C. Nat'l Bank v. Wallens*, 26 N.C. App. 580, 217 S.E.2d 12 (1975). Here, the paragraph at issue states that the agreement "shall be formalized by a written contract to be executed by the parties." Such wording is not an explicit statement that the document is to serve as a contract. In fact, the wording indicates the opposite, that the document was strictly temporary and, during the process of formalization, subject to changes by the parties. Because the trial court was within its discretion to determine that the disputed document did not reflect finality, this assignment of error is overruled.

III

Plaintiff finally contends: (1) the trial court erred in allowing plaintiff's twenty-six-year-old conviction for assault, armed robbery and conspiracy to be used for impeachment purposes; (2) the trial court erred in refusing to compel the testimony of the judge in the original jury trial; (3) the witnesses were biased; and (4) the expert testimony was inapposite to the question before the trial court because the witness could not tell if the passage in question had been scratched out before it was torn from the original. Because plaintiff failed to properly assign error to any of these arguments, this Court declines to consider them.

The Rules of Appellate Procedure require that the complaining party set forth assignments of error that direct the attention of the Court to the specific issue on appeal. N.C. R. App. P. 10(c)(1). "[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) (citations omitted). Plaintiff's assignments of error allege only that the trial court abused its discretion in granting the motion and made reversible errors of law and fact. The assignments of error include no references to the specific exceptions mentioned in these arguments. The assignments of error are so broad and vague they fail to correspond to the specific arguments set forth in plaintiff's brief; thus they are not sufficient to meet the standard required by Rule 10(c)(1). Because these arguments do not comport with any other assignment of error, the subject of those arguments falls outside the scope of review. These assignments of error are not properly before this Court.

Affirmed.

Judges WYNN and Judge HUNTER concur.

Report per Rule 30(e).