NO. COA06-512

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

CABLE CO.,
A NORTH CAROLINA CORPORATION,
Plaintiff,

v.

Johnston County
No. 05 CVD 327

HIGHLANDS CABLE GROUP,
LIMITED PARTNERSHIP, AND
CABLE GROUP, L.L.C.,
Defendants.

Appeal by defendants from order entered 4 January 2006 by Judge Albert A. Corbett, Jr., in Johnston County District Court. Heard in the Court of Appeals 15 November 2006.

Levinson Law Firm, P.A., by James R. Levinson, for plaintiff appellee.

Creighton W. Sossomon for defendant appellant.

McCULLOUGH, Judge.

Highlands Cable Group and Cable Group, L.L.C. ("defendants") appeal the denial of their motions under Rules 59 and 60 for amendment of and relief from entry of summary judgment in favor of Cable Co., Inc. ("plaintiff") and denial of their motion for change of venue. We conclude that the trial court did not abuse its discretion in denying relief under Rules 59 and 60 where defendants failed to show that venue was improper and further failed to

present sufficient evidence that there was a genuine issue of material fact. Thus, we affirm the order of the trial court.

Plaintiff filed a verified complaint against defendants to recover monies unpaid by defendants on a lease between the parties. Defendants subsequently filed an unverified answer and motion for change of venue alleging that venue in Johnston County was improper and raising as an affirmative defense the statute of limitations. Plaintiff then filed a motion for summary judgment and submitted plaintiff's requests for admissions, which defendants had failed to answer, in support of their motion. The requests for admissions stated:

> 1. The plaintiff is the fee simple owner of the real property which is the subject of this Complaint.
>
> 2. That the defendant presently occupies the real property which is the subject of this Complaint.
>
> 3 There is no other written lease between the parties other [than] that recorded in Macon County Book U-28, Page 1106-1111.
>
> 4. That the parties entered into a lease recorded book in U-28, page 1106-111[1] Macon County Registry.
>
> 5. The defendants have made no payments for rent of the real property in question except for a $1,000.00 payment in the year of 2003.
>
> 6. That by letter dated 1-6-2005, plaintiff made demand upon the defendant for the payment of the amount due and the defendant made no payment following said date.

The trial judge subsequently denied defendants' motion for change of venue and granted plaintiff's motion for summary judgment. Thereafter, defendants motioned the court under Rules 59 and 60 for a new trial and to have the judgments set aside. On 3 January 2006 defendants' motions were denied. Defendants appeal.

While we note that defendants' brief on appeal fails to comply with the standards set forth in the Rules of Appellate Procedure, namely, Rule 26(g)(1) (2005) (requiring double spacing between each line of text), we nonetheless will consider the substance of defendants' argument.

Defendants attempt to argue on appeal that the trial court erred in granting plaintiff's motion for summary judgment and in denying defendants' motion for change of venue. However, defendants failed to file a notice of appeal with respect to the aforementioned orders. Instead, defendants only filed a notice of appeal as to the order of the trial court denying defendants' motions under Rules 59 and 60 of the North Carolina Rules of Civil Procedure. Therefore, any error claimed by defendants as to the motions for summary judgment and change of venue are thereby waived and will not be discussed by this Court.

Defendants contend that the trial court erred in denying defendants' motion under Rule 59 where there was no evidence to support venue in Johnston County. We disagree.

"'Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion.'" *Griffis v.*

Lazarovich, 161 N.C. App. 434, 443, 588 S.E.2d 918, 924-25 (2003), *disc. review denied,* 358 N.C. 375, 598 S.E.2d 135 (2004) (citation omitted).

Venue is proper if, at the commencement of the action, any of the parties reside in the county in which the action was filed. N.C. Gen. Stat. § 1-82 (2005). For purposes of suing or being sued the residence of a domestic corporation is: (1) where the registered or principal office is located; (2) where the corporation maintains a place of business; (3) if there is no principal office and no place of business can reasonably be found, any place the corporation regularly engages in carrying on business. N.C. Gen Stat. § 1-79(a)(2005).

In the instant case, plaintiff filed a verified complaint alleging that they were a North Carolina corporation doing business throughout North Carolina. Defendants then filed an unverified answer and motion for change of venue in which they alleged that plaintiff's principal place of business and registered office were located in Macon County, North Carolina; that plaintiff did not conduct business in Johnston County; and that all allegations pertaining to the action at hand related to transactions which occurred in Macon County and therefore the only proper venue for the action was Macon County, North Carolina. However, "[t]he unverified motion did not prove the matters alleged therein and is not evidence thereof." *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 511, 181 S.E.2d 794, 798 (1971). No affidavit or other evidence appears in the record to support the unverified motion.

While generally verified pleadings are not required when making a motion for change of venue, where there is a verified pleading filed by the opposing party, an affidavit or verified pleading must be submitted by the motioning party to prove the assertions otherwise. *See Swift and Co. v. Dan-Cleve Corp.,* 26 N.C. App. 494, 495-96, 216 S.E.2d 464, 465-66 (1975). Where a party fails to prove the matters alleged by affidavit or verified motion, as here, and the opposing party has otherwise submitted verified evidence before the court proving venue, it cannot be said that the trial judge abused his discretion in denying the motion for amendment of judgment on the denial of the motion for change of venue. Therefore, this assignment of error is overruled.

Next defendants contend that the trial court erred in denying defendants' motions under Rules 59 and 60 for a new trial on defendants' motion for summary judgment and to have summary judgment set aside. We disagree.

Plaintiff moved the court for summary judgment on the grounds that the pleadings and answers to requests for admissions showed that there was no genuine issue of material fact and the trial court thereafter granted the motion. In addition to the fact that defendants failed to file any affidavits or verified pleadings, defendants also failed to answer or object to plaintiff's requests for admissions and therefore they were deemed admitted. *See Barclays American v. Haywood*, 65 N.C. App. 387, 388, 308 S.E.2d 921, 922 (1983). As stated *supra*, we review the trial court's

denial of the motions under Rules 59 and 60 for an abuse of discretion.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). A moving party "has the burden of establishing the lack of any triable issue of fact[,]" and its supporting materials are carefully scrutinized, with all inferences resolved against it. *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

Defendants claim that the action by plaintiff was barred by the statute of limitations where it was filed more than three years after the date of the first missed lease payment. However, this contention has no merit. "Where suit is brought more than three years after the claim arises on an account or other contractual debt, the bar of the statute of limitations may be avoided if the debtor has acknowledged his obligation within three years prior to the date the action is filed." *Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 505, 238 S.E.2d 607, 612 (1977). "A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance." *Id.*

In the instant case, defendants admitted to making a payment of $1,000.00 thereby tolling the statute of limitations and therefore barring the assertion of such defense in the action.

Moreover, in deciding whether summary judgment is proper, a court may consider verified pleadings; however, unverified pleadings will not be considered and do not create a genuine issue of material fact. Where the requests for admissions were deemed admitted by defendants for failure to answer or object and defendants failed to file affidavits or verified pleadings in the instant case, it cannot be said that the trial court abused its discretion in denying the motions under Rules 59 and 60. Therefore, this assignment of error is overruled.

Lastly, defendants contend on appeal that the trial court erred in failing to grant defendants' motion to set aside summary judgment where the trial court ruled on the summary judgment motion while a pending motion for change of venue had not yet been ruled upon. We disagree.

Where a motion asserting improper venue is made in writing and in apt time "'the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon.'" *Capital Corp. v. Enterprises, Inc.*, 10 N.C. App. 519, 521, 179 S.E.2d 190, 192 (1971).

Defendants contend that, where the order denying summary judgment was entered on 18 October 2005 before the entry of the order denying the motion for change of venue was entered on 24

October 2005, the court was without jurisdiction to enter the summary judgment order where the motion for change of venue was still pending. However, the record reveals that a hearing was held on the motion for change of venue on 22 August 2005 in which defendants failed to appear. The record does not contain a transcript from the hearing; however, plaintiff submitted an affidavit opposing defendants' motion which stated in sworn testimony that the trial judge denied the motion for change of venue orally at the hearing on 22 August. Further, it appears from the record that before hearing the motion for summary judgment, the trial judge orally denied the motion for change of venue where an order had not yet been entered.

From a review of the evidence in the record, it cannot be said that the trial court abused its discretion in denying the motion to set aside summary judgment. Therefore, this assignment of error is overruled.

Accordingly, the order of the trial court denying defendants' motions under Rules 59 and 60 are affirmed.

Affirmed.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).