NO. COA06-836

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

DONALD W. BAKER, NANCY O. BAKER, MICHAEL W. BEASLEY, TONYA H. BEASLEY, DAVID LEONARD CHURCHILL, TIMOTHY WAYNE CHURCHILL, WILLIAM J. DAUBENMIER, CLAUDE GERALD DIXON, JEAN B. DIXON, EUGENE F. FLOYD, ROSE P. FLOYD, ALETHEA M. GIVENS, DOROTHY UTLEY HACKNEY, LESTER R. HAMILTON, MARIE C. HAMILTON, JAMES R. HUDSON, DEBORAH H. HUDSON, WILLIAM R. JOHNSON, MICHELLE R. JOHNSON, STEWARD A. JONES, JR., GLOIS M. JONES, DINA L. KENNEDY, JAMES M. LOWE, HELEN B. LOWE, CHRISTOPHER M. MCGARRAH, KENNETH LEE OLIVE, BONNIE B. SMITH, ROBERT LOUIS TROTTER AND MARILYN J. TROTTER,
Plaintiffs,

v.

Durham County
No. 03 CVS 04951

CENTEX REAL ESTATE CORPORATION d/b/a CENTEX-CROSLAND HOMES, CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP AND EAST COAST DRILLING AND BLASTING, INC.,
Defendants.

Appeal by plaintiffs from judgments entered 25 July 2005 and 24 January 2006 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 February 2007.

Robert B. Jervis, P.C., by Robert B. Jervis and Arthur D. Begun, for plaintiffs-appellants.

Young, Moore & Henderson, P.A., by Jay P. Tobin, for defendants-appellees.

MARTIN, Chief Judge.

The twenty-nine plaintiffs named above brought this action on 10 October 2003 alleging claims against Centex Real Estate Corporation d/b/a Centex-Crossland Homes; Centex Homes, a Nevada General Partnership; and East Coast Drilling and Blasting, Inc. ("defendants") for damages to their residences. Defendants filed answers denying liability and asserting defenses including, *inter alia*, that some or all of plaintiffs' claims were barred by the three-year statute of limitations.

After conducting discovery, defendants moved for summary judgment. Briefly summarized as applicable to this appeal, the materials before the trial court showed that plaintiffs Robert Louis Trotter, Marilyn J. Trotter, James R. Hudson, Deborah H. Hudson, James M. Lowe, Helen B. Lowe, David Leonard Churchill and Timothy Wayne Churchill live in Durham County near a residential subdivision known as Magnolia Place, which, in August 2000, was being developed by defendant Centex-Crossland. Defendant Centex-Crossland hired defendant East Coast Drilling and Blasting, Inc. to clear the site, including blasting to remove rock and other materials on the site. Blasting occurred at Magnolia Place between 24 August 2000 and 15 May 2001. Plaintiffs alleged that the blasting damaged plaintiffs' homes and related structures. The most noticeable of the blasts occurred on 11 September 2000. In response to this particular blast, the Lowes and Mr. Trotter contacted the City of Durham Fire Department, which investigated. Mr. Trotter also spoke with the Hudsons and the Churchills about

the blast and the resulting damages. Mr. Trotter received correspondence from the Fire Marshal on 23 October 2000 informing him that the blasting was occurring with a permit and was in compliance with the city's regulations. The blasting continued into 2001 with all plaintiffs discovering damages in and around their homes as time progressed.

By order filed 25 July 2006, the trial court granted partial summary judgment in favor of all defendants dismissing all of the claims of plaintiffs Robert Louis Trotter and Marilyn J. Trotter; James R. Hudson and Deborah H. Hudson; James M. Lowe and Helen B. Lowe; David Leonard Churchill; and Timothy Wayne Churchill; and dismissing the claims of plaintiffs Donald W. Baker and Nancy O. Baker; Michael W. Beasley and Tonya H. Beasley; Claude Gerald Dixon and Jean B. Dixon; Eugene F. Floyd and Rose P. Floyd; and Steward A. Jones, Jr. (now deceased) and Glois M. Jones, against defendant Centex Homes. The award of summary judgment against plaintiffs Trotter, Hudson, Churchill, and Lowe was entered as a final judgment pursuant to N.C.G.S. § 1A-1, Rule 54(b).

Within ten days after entry of judgment, plaintiffs Trotter, Hudson, Churchill, and Lowe filed a "Motion To Amend Judgment" alleging that "the order entered by the court was entered as a result of error in law and should be set aside pursuant to N.C.G.S. [§] 1A-1, Rule 59(a)(8)." By order filed 24 January 2006, the motion was denied. Plaintiffs Trotter, Hudson, Churchill and Lowe appeal from the order granting defendants partial summary judgment and denying their motion to amend the judgment.

Defendants argue that plaintiffs' appeal should be dismissed for their violation of the North Carolina Rules of Appellate Procedure in two respects. First, defendants contend that plaintiffs failed to file a timely notice of appeal. *See* N.C.R. App. P. 3(c) (2005) (requiring an appeal from a judgment or order in a civil action to be taken within thirty days of its entry with limited exceptions). Specifically, defendants contend that plaintiffs' motion pursuant to N.C.G.S. § 1A-1, Rule 59(a)(8) was not a proper motion and did not toll the statute of limitations.

The trial court granted defendants' motion for summary judgment on 25 July 2005. On 3 August 2005, plaintiffs filed a motion pursuant to N.C.G.S. § 1A-1, Rule 59(a)(8), to amend judgment. If a party makes a timely motion for relief under Rule 59, "the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion[.]" N.C.R. App. P. 3(c)(3). The trial court denied plaintiffs' motion on 24 January 2006. Plaintiffs filed a notice of appeal on 23 February 2006.

Defendants argue that Rule 59(a)(8) motions apply to errors in law occurring *at trial* and that this motion was not an appropriate basis for relief from the entry of summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (granting a new trial when the movant shows an "[e]rror in law occurring at the trial and objected to by the party making the motion.") The period for appeal is not tolled when a party makes a motion which it is not entitled to file.

Middleton v. Middleton, 98 N.C. App. 217, 221, 390 S.E.2d 453, 455 (1990). Since plaintiffs' Rule 59(a)(8) motion alleged only that the order granting summary judgment was erroneous, it stated no proper ground for relief and was insufficient to toll the thirty day period for taking an appeal. Plaintiffs' appeal was, therefore, untimely.

Anticipating our holding that their appeal was untimely, plaintiffs have also filed a petition for writ of certiorari. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2005). In our discretion, we conclude this case is an appropriate one in which to issue the writ. We choose to allow plaintiffs' petition for writ of certiorari pursuant to N.C.R. App. P. 21 and address the merits of their arguments. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320-21 (2005).

Defendants also argue that the assignments of error raised by plaintiffs violate N.C.R. App. P. 10(c)(1) by either failing to address a single issue of law or failing to state an appropriate legal basis upon which error is assigned. This Court has held that assignments of error related to summary judgment will be heard on the merits despite technical deficiencies where those deficiencies do not prevent a review of the issues. *Nelson v. Hartford Underwriters Ins. Co.*, __ N.C. App. __, __, 630 S.E.2d 221, 226-28 (2006) (reviewing a summary judgment order despite an absence of

exceptions or specific assignments of error where the sole question argued in brief related to the trial court's order granting summary judgment). "An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law." *Id.* at __, 630 S.E.2d at 226 (quoting *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 778, 782 (2004)). As a result, a notice of appeal related to a summary judgment order adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. *Id.* at __, 630 S.E.2d at 227 (quoting *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987)). In the present case, any of the alleged deficiencies in plaintiffs' assignments of error do not prevent our review of whether genuine issues of material fact exist.

Turning to the merits of this appeal, plaintiffs contend that the trial court committed reversible error in granting summary judgment in favor of defendants as to all of their claims. We review the grant of summary judgment *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Summary judgment is appropriate only when "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).

Defendants premised their motion for summary judgment on the ground that the appealing plaintiffs filed their action outside the applicable statute of limitations. When dealing with actions for trespass upon real property, if "the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter." N.C. Gen. Stat. § 1-52(3) (2005). The cause of action does not accrue until "physical damage to [the claimant's] property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16). Plaintiffs argue the blasts should be considered intermittent rather than continuing for purposes of assessing the statute of limitations. We agree.

A continuing trespass is a trespass to real property "caused by structures permanent in their nature" or "where a wrongful act, being entire and complete, causes continuing damage." *Oakley v. Texas Co.*, 236 N.C. 751, 753, 73 S.E.2d 898, 899 (1953). The term "continuing trespass" was "never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong." *Id.* Such successive acts are more accurately termed "intermittent trespasses." If damages are caused by an intermittent trespass, "a plaintiff may recover for any damages within three years before the action is filed." *Galloway v. Pace Oil Co.*, 62 N.C. App. 213, 214, 302 S.E.2d 472, 473 (1983). We believe that blasting is an intermittent trespass and should be treated as such when assessing whether a party complied with the statute of limitations. *See Hanna v. Brady*, 73 N.C. App. 521, 526,

327 S.E.2d 22, 24 (1985) (treating blasts as distinct and separate acts in a challenge to evidence of blasts occurring earlier than three years before the complaint's filing).

The evidence before the trial court gives rise to genuine issues as to the severity of blasting occurring within three years of the complaint's filing and the resulting damages. Robert and Marilyn Trotter noticed vertical cracks on both sides of their home caused by the 11 September 2000 blast. Mr. Trotter claimed that the damage got worse as defendants continued to do the blasting into 2001 and that "each blast created problems." Ms. Trotter was unsure whether damage in her basement "happened on September 11th or at a later date."

James and Deborah Hudson were at home for the 11 September 2000 blast. Mr. Hudson indicated that the blasts continued for "another 30 or 60 days maybe." In what he believed to be 2001, Mr. Hudson noticed sheetrock damage in a corner of his garage and two or three months later he discovered damage in a different area in the garage. In addition, Mr. Hudson did not notice cracks in his pool until it was uncovered in the summer of 2001.

Helen and James Lowe also experienced damages from blasts occurring within three years of the complaint's filing. Helen Lowe indicated that the blasts were felt beyond September 2000 and into the following year. As for damages, she made the following responses during her deposition:

> Q: Let's start say October the 15th [2000] forward. Did you observe and discover additional damage that occurred after that date?

> A: Oh, yes, sir. Through that winter and into the spring we were continually finding one thing or the other.
>
> Q: The spring of 2001?
>
> A: And even later. It seemed like through that summer every time somebody came to take pictures or check something, something else would be found[.]

David and Timothy Churchill are brothers prosecuting the lawsuit on behalf of their deceased parents, Troy and Mae Churchill. To the best of Timothy Churchill's recollection, the blasting continued over a six month period after the 11 September 2000 blast. Timothy Churchill stated in his deposition that significant blasting damage to the home was not discovered until after his father died, in June 2001.

In this case, we hold genuine issues of material fact exist as to whether the appealing plaintiffs sustained damage resulting from the defendants' blasting activities occurring after 10 October 2000. As a result, summary judgment dismissing plaintiffs' claims for any such damages was error and must be reversed. This cause is remanded to the trial court for such further proceedings as may be required.

Reversed and remanded.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).