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NO. COA07-1033

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

KEITH A. EAKER,
Plaintiff,

v.

Randolph County
No. 06 CVS 770

NABER CHRYSLER DODGE
JEEP, INC.,
Defendant.

Court of Appeals

Appeal by plaintiff from order entered 12 June 2007 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 21 February 2008.

Slip Opinion

Morgan, Herring, Morgan, Gleen, & Rosenblutt, LLP, by Todd J. Combs, for plaintiff-appellant.

Freeman Law, PLLC, by Maranda J. Freeman, for defendant-appellee.

GEER, Judge.

Plaintiff Keith A. Eaker appeals from an order denying his motion to set aside an order granting defendant Naber Chrysler Dodge Jeep, Inc. summary judgment. The trial court concluded that plaintiff had failed to demonstrate any justification under Rules 59 and 60 of the Rules of Civil Procedure for setting aside the summary judgment order. Based upon our review of the record, we affirm.

Facts

On 10 April 2006, plaintiff filed a complaint alleging that defendant had terminated his employment in violation of the Retaliatory Employment Discrimination Act. Defendant answered plaintiff's complaint on 24 May 2006. On 16 February 2007, after discovery, defendant served a motion for summary judgment supported by affidavits and plaintiff's deposition. On the same date, defendant also served a notice of hearing, specifying that its summary judgment motion would be heard on 26 February 2007.

Neither plaintiff nor his counsel was present for the hearing. In an order signed 5 March 2007, the trial court found that the motion and notice of hearing had been sent to the proper address with the proper postage, that the envelope had not been returned, and that plaintiff had not requested a continuance. The trial court reviewed the evidence and law relied upon by defendant and concluded that plaintiff had "failed to establish a genuine issue of material fact as to whether the Defendant took retaliatory action against the Plaintiff because he filed workers' compensation claims."

On 2 March 2007, three days prior to the signing of the summary judgment order, plaintiff filed a motion pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure to set aside the entry of summary judgment "on the 26th day of February, 2007," the day of the hearing. In support of this motion, plaintiff's counsel admitted that he had received the motion for summary judgment and notice of hearing on 19 February 2007. Plaintiff contended, however, that defendant had not provided the

13-days notice of the hearing required by Rule 6(e) and Rule 56(c) of the Rules of Civil Procedure. Plaintiff stated that the entry of summary judgment "must be set aside" because:

The earliest possible date when the Motion for Summary Judgment could have been heard in order to provide proper notice to Plaintiff was March 2, 2007. Thus, Plaintiff was not provided adequate notice of hearing for the Motion for Summary Judgment as provided by North Carolina [l]aw, and the entry of Summary Judgment must therefore be set aside, declared void, rescinded, or otherwise vacated.

On 12 June 2007, the trial court entered an order denying plaintiff's motion. The court found: "Counsel for Plaintiff acknowledges receipt of the Summary Judgment Motion and Notice of Hearing. Counsel for Plaintiff told the Court that as he does many federal employment cases in the Middle District of North Carolina, he assumed when he received the motion and Notice of Hearing that this was a federal case in the Middle District and that he had 30 days to respond to it." The trial court further determined:

The Court finds that while a meritorious defense to the summary judgment motion may in fact exist, counsel for the Plaintiff has failed to establish under Rule 59 any grounds for relief under Rule 59(a)(1) through (9) or any grounds for relief under Rule 59(e) for amendment of the Order. The Court further finds that the Plaintiff fails to establish under Rule 60(b)(1) any mistake, inadvertence, surprise or excusable neglect as just cause for relieving Plaintiff from summary judgment which was entered on June 4, 2007 and executed on March 5, 2007. Further, Rule 60(b)(2), (3), (4) and (5) do not apply to the request for relief made by the Plaintiff.

Plaintiff timely appealed from this order.

Discussion

We first note that defendant, in its appellee brief, points out the following violations of the appellate rules committed by plaintiff: (1) failure to adequately set out a statement of the grounds for appellate review; (2) failure to recite the applicable standard of review; and (3) failure to set out assignments of error that comply with N.C.R. App. P. 10(c) by omitting the legal basis upon which error was assigned. Defendant asks that we dismiss this appeal based on these appellate rules violations.

This Court has, however, repeatedly held that a motion to dismiss an appeal must be filed in accordance with N.C.R. App. P. 37 and may not be raised for the first time in the appellee's brief. See *Vaden v. Dombrowski*, ___ N.C. App. ___, ___, 653 S.E.2d 543, 545 (2007) (holding that because appellee failed to file separate motion to dismiss for rules violations Court would address merits of appeal); *Smithers v. Tru-Pak Moving Sys., Inc.*, 121 N.C. App. 542, 545, 468 S.E.2d 410, 412 ("Defendant's motion to dismiss plaintiff's appeal is not properly before us. A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief as defendant has done here."), *disc. rev. denied*, 343 N.C. 514, 472 S.E.2d 20 (1996); *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988) ("The record on appeal contains no motion to dismiss filed in accordance with Rule 37 of the North Carolina Rules of Appellate Procedure. Therefore, we decline to address the motion as presented in defendant's brief."). Because defendant failed to

file a motion to dismiss pursuant to Rule 37, its arguments pertaining to plaintiff's appellate rules violations are not properly before us, and we do not address them.

We also observe that the summary judgment order is not before this Court for review. Plaintiff's notice of appeal states in its entirety:

Plaintiff, Keith A. Eaker, hereby gives notice of appeal to the Court of Appeals of North Carolina from the Order entered on June 4, 2007 in the Superior Court of Randolph County denying the Plaintiff's Motion To Set Aside Summary Judgment at the Plaintiff's hearing for Motion To Set Aside Summary Judgment pursuant to Rule 6(e), 56(c), 59 and 60 of the North Carolina Rules of Civil Procedure.

This Court has specifically held that "[n]otice 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).

With respect to the motion to set aside the entry of summary judgment, plaintiff failed in both the trial court and in this Court to specifically identify which provision of Rule 59 or Rule 60 might apply to this case. Plaintiff argues, however, that because he did not receive timely notice of the summary judgment hearing, the order granting summary judgment is void. We assume that plaintiff is proceeding under Rule 60(b)(4) (authorizing relief when "[t]he judgment is void").

Plaintiff points out that Rule 56(c) requires that a motion for summary judgment be "served at least 10 days before the time

fixed for the hearing." When notice is served by mail, Rule 6(e) adds an additional three days to the prescribed period of time in which a party may respond to the notice. Thus, when a motion for summary judgment is served by mail, it must be served 13 days prior to the hearing. See *Planters Nat'l Bank & Trust Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97 (1973) ("Rule 6(e), in effect, extends the minimum 10 day notice period to 13 days when the notice is by mail.").

There is no dispute that defendant did not provide the required 13-days notice. Nevertheless, plaintiff has cited no authority – and we have found none – suggesting that an order granting summary judgment is void when the notice provided failed to comply with Rule 6.

All but one of the cases relied upon by plaintiff involve the entry of summary judgment when the opposing party had received no reasonable opportunity to respond to the motion either (1) because of receiving no prior notice at all, or (2) because the trial court had indicated it would not rule on summary judgment. See *Calhoun v. Wayne Dennis Heating & Air Conditioning*, 129 N.C. App. 794, 800, 501 S.E.2d 346, 350 (1998) (reversing entry of "judgment" when trial court stated orally that it would not hear plaintiff's motion for summary judgment because defendants had not received adequate notice of motion and had not waived notice, but nonetheless entered "judgment" that was in fact summary judgment), *disc. review dismissed*, 350 N.C. 92, 532 S.E.2d 524 (1999); *Tri City Bldg. Components, Inc. v. Plyler Const. Co.*, 70 N.C. App. 605, 607-08,

320 S.E.2d 418, 420-21 (1984) (reversing entry of summary judgment in favor of plaintiff and rejecting trial court's finding that defendant was not prejudiced by lack of notice when defendant received no notice at all that motion would be heard and had no opportunity to prepare to oppose summary judgment motion that had never been calendared); *Zimmerman's Dep't Store, Inc. v. Shipper's Freight Lines, Inc.*, 67 N.C. App. 556, 557-58, 313 S.E.2d 252, 253 (1984) (holding that summary judgment was improperly entered when motion made orally without any notice to plaintiff or opportunity to obtain opposing affidavits from intended witnesses); *Ketner v. Rouzer*, 11 N.C. App. 483, 488, 182 S.E.2d 21, 25 (1971) (reversing summary judgment when motion made "without any prior notice" during pretrial hearing). *But see Planters Nat'l Bank*, 17 N.C. App. at 566, 195 S.E.2d at 97-98 ("Because of plaintiff's failure to give defendant the extra three days notice as required by Rule 6(e) when service of notice is by mail, the allowance of the motion for summary judgment was error.").

Although plaintiff attempts to bring himself within the scope of these cases by asserting in his brief on appeal that "[a]t the time of the hearing on February 26, 2007, the Plaintiff did not have actual notice of the hearing and did not in anyway waive any right to proper notice[,]" that assertion is not accurate. Plaintiff admitted in his Rule 59/Rule 60 motion that he in fact received the motion for summary judgment and notice of hearing on 19 February 2007, a week before the hearing. Further, the trial court found in findings of fact not challenged on appeal:

10. Counsel for Plaintiff acknowledges receipt of the Summary Judgment Motion and Notice of Hearing. Counsel for Plaintiff told the Court that as he does many federal employment cases in the Middle District of North Carolina, he assumed when he received the motion and Notice of Hearing that this was a federal case in the Middle District and that he had 30 days to respond to it.

11. Counsel for Plaintiff failed to read the Notice of Hearing, pursuant to his own statement, as he believed that it was for a federal case.

In short, plaintiff's counsel received actual notice. He simply ignored it.

Although *Planters Nat'l Bank* involved a similar failure to comply with Rule 6(e), we do not believe it controls in this case. *Planters Nat'l Bank* involved an appeal from the actual summary judgment order rather than an appeal from an order denying relief from the order under Rule 59 or Rule 60. As the trial court in this case recognized, while plaintiff may have had a meritorious response to the motion for summary judgment – such as, arguably, the holding in *Planters Nat'l Bank* – plaintiff must still establish a basis for relief under Rule 59 or Rule 60.

Moreover, *Planters Nat'l Bank* did not address the issue of prejudice one way or the other. This Court has since established, however, that when, as here, the issue is not a complete absence of notice, but rather shortened notice, there must be a showing of prejudice. In *Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 20, 422 S.E.2d 365, 367 (1992), the defendant argued that summary judgment in favor of the plaintiff should be reversed because the notice of hearing provided only nine days rather than

the required 13-days notice. This Court noted that defense counsel had acknowledged to the trial court that he was prepared to proceed and concluded, from that statement, "that defendants were not unduly prejudiced by the untimely notice." *Id.* at 21, 422 S.E.2d at 367. The Court characterized the defendant's contention that the summary judgment order should be reversed for inadequate notice as "frivolous." *Id.* See also *Adair v. Adair*, 62 N.C. App. 493, 496-97, 303 S.E.2d 190, 192 (holding that defendant not entitled to reversal of order based on having received three days notice of a hearing rather than the required five days notice when defendant "brought forward no argument nor does the record reveal that she was prejudiced by virtue of the length of notice given"), *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983).

Jenkins v. Jenkins, 27 N.C. App. 205, 206, 218 S.E.2d 518, 519 (1975), presents circumstances analogous to those here. Defendant did not appear at a hearing, although a member of the defendant's attorney's law firm was present. The attorney moved for a continuance that was denied even though the defendant's regular attorney was in trial in superior court. The trial court heard the evidence in the absence of the defendant when the defendant still failed to appear after he was telephoned. *Id.* On appeal, the defendant argued that because the plaintiff's counsel misapplied Rule 6(a) of the Rules of Civil Procedure, he was not given the full five-days notice to which he was entitled. This Court held that "defendant does not have an absolute right to the notice requirement of Rule 6" and "a new trial will not be granted for a

mere technical error." *Jenkins*, 27 N.C. App. at 206, 218 S.E.2d at 519. Instead, "[i]t is incumbent on defendant to show he was prejudiced." *Id.* The Court concluded: "Defendant has not argued any prejudicial harm and we can find none." *Id.*

In this case, plaintiff likewise has failed to demonstrate any prejudice from defendant's failure to take into account the three-day mailing period in serving its notice of hearing. Instead, it is apparent from the record, as the trial court essentially found, that the prejudice suffered by plaintiff was due to his counsel's failure to read the notice of hearing and not due to a need for the three extra days provided for mailing. Because plaintiff has merely identified a "technical error" and made no effort to show prejudice resulting from that error, the trial court did not err in denying plaintiff relief from the summary judgment order. *Id.*

While plaintiff's counsel did not, in his motion – or indeed even on appeal – specifically identify which provisions of Rules 59 and 60 warranted relief under the circumstances of this case, the trial court reviewed all of the grounds under each rule and concluded that none of them was arguably relevant except for Rule 60(b)(1), which authorizes a court to relieve a party from a final judgment based on "[m]istake, inadvertence, surprise, or excusable neglect." The trial court then found that plaintiff had failed to establish any of these bases under Rule 60(b)(1). Plaintiff makes no argument on appeal why this finding was in error, and makes no argument that any other provision of Rule 59 or Rule 60 applies. Accordingly, we affirm the trial court.

Affirmed.

Judges TYSON and STROUD concur.

Report per Rule 30(e).