NO. COA08-1035

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

CARLTON L. GRAFTON and
LEATRICE S. GRAFTON,
Plaintiffs,

v. Durham County
No. 06 CVS 5277

WASHINGTON MUTUAL BANK, FA,
ELIZABETH B. ELLS, as
SUBSTITUTE TRUSTEE, and DAVID
W. NEILL, as SUBSTITUTE
TRUSTEE, and SHAPIRO &
INGLE, LLP,
Defendants.

Appeal by plaintiffs from order entered 25 June 2008 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 16 June 2009.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellants.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., for defendant-appellees Shapiro & Ingle, LLP, and substitute trustees Elizabeth B. Ells and David W. Neill.

Graebe Hanna & Welborn, PLLC, by Christopher T. Graebe, for defendant-appellee Federal Deposit Insurance Corporation (as substituted for defendant-appellee Washington Mutual Bank, FA).

BRYANT, Judge.

Carlton L. Grafton and Leatrice S. Grafton ("plaintiffs") appeal from the 25 June 2008 order which dismissed their appeal

from a 19 November 2007 order of dismissal. For the reasons stated below, we affirm the order of the trial court.

Facts

On 11 August 2006, plaintiffs filed a complaint seeking to set aside a foreclosure sale. Judge Robert H. Hobgood dismissed the complaint as to Washington Mutual, Inc., in an order dated 14 October 2006, but he granted plaintiffs leave to amend the complaint to add Washington Mutual Bank, FA, as a defendant. On 9 November 2006, plaintiffs filed an amended complaint against Washington Mutual Bank, FA, substitute trustees Elizabeth B. Ells and David W. Neill, and Shapiro & Ingle, LLP ("defendants").

Defendant Washington Mutual Bank, FA, filed a motion to dismiss the amended complaint on 11 December 2006, and the remaining defendants filed a similar motion to dismiss the amended complaint on 18 January 2007. Judge Henry W. Hight, Jr., granted the defendants' respective motions to dismiss the amended complaint in an order entered on 27 February 2007, and plaintiffs gave notice of appeal from that order.

On 16 August 2007, defendant filed a motion to dismiss plaintiffs' appeal. Judge Carl R. Fox dismissed the appeal by order entered 12 September 2007. Plaintiffs then gave notice of appeal from that order. Defendants subsequently filed a motion to dismiss plaintiffs' second appeal on 6 November 2007. Judge Fox dismissed that appeal on 19 November 2007, and plaintiffs gave notice of appeal from that order.

After defendants filed objections and amendments to the proposed record on appeal, plaintiffs sought judicial settlement of the record on appeal. Counsel for plaintiffs was not present at the settlement hearing, and the trial court entered an order which settled the record on appeal on 7 April 2008. Plaintiffs filed a motion with the trial court for reconsideration of the settlement order on 10 April 2008.

Defendants filed a motion to dismiss plaintiffs' third successive appeal in this matter on 29 May 2008. Following a hearing on 9 June 2008, the trial court denied plaintiffs' motion for reconsideration and granted defendants' motion to dismiss plaintiffs' third appeal in an order entered on 25 June 2008. In a notice of appeal filed on 7 July 2008, plaintiffs appealed "from the judgment entered by the Honorable Carl R. Fox on June 25, 2008 in the above-captioned action."

Plaintiffs filed their record on appeal with this Court on 26 August 2008. After the federal government declared Washington Mutual Bank, FA, insolvent on 25 September 2008 and appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver, the FDIC filed a motion seeking to be substituted for the bank and to stay the proceedings for ninety days. This Court granted the requested relief in an order entered 13 November 2008.

I

Plaintiffs first attempt to argue that their amended complaint stated a cause of action which was recognizable under the law. Plaintiffs' argument is not properly before this Court.

A notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C.R. App. P. 3(d). This is a jurisdictional requirement, which may not be waived by this Court. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). An "appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994); *see also* N.C.R. App. P. (3)(d) (2007). While there are two exceptions to this rule, neither is applicable here. *See Chee*, 117 N.C. App. at 452, 451 S.E.2d at 350-51 (intent to appeal can be fairly inferred from mistakenly designated judgment or technical failure to comply with procedural requirements in filing papers with the court while accomplishing the functional equivalent). Judge Hight dismissed plaintiffs' amended complaint in an order entered 27 February 2007, and plaintiffs gave notice of appeal from that order on 14 March 2007. Because plaintiffs failed to take timely "action required to present the appeal for decision," Judge Fox exercised his discretion and dismissed plaintiffs' first appeal pursuant to N.C.R. App. P. 25(a) on 12 September 2007.

Plaintiffs' current notice of appeal is from Judge Fox's order entered on 25 June 2008 which dismissed their third successive appeal in this matter. Judge Hight's dismissal of plaintiffs'

amended complaint on 27 February 2007 was not an interlocutory order, and it therefore cannot be properly reviewed in an appeal from the 25 June 2008 order. *See* N.C. Gen. Stat. § 1-278 (2007) (intermediate interlocutory orders reviewable on appeal from a final judgment). This Court has no jurisdiction over issues arising from the 27 February 2007 order which dismissed plaintiffs' amended complaint. In addition, plaintiffs' argument on appeal is not supported by any of the assignments of error contained in the record on appeal. *See* N.C.R. App. P. 10(a) (appeal confined to consideration of assignments of error in record on appeal). Plaintiffs also failed to cite to any authority in support of their argument. *See* N.C.R. App. P. 28(b)(6). Accordingly, plaintiffs' first argument is dismissed.

II

Plaintiffs next attempt to argue that Judge Hight improperly overruled Judge Hobgood's earlier order when he dismissed their amended complaint on 27 February 2007. Because this argument relates to the same order as the preceding argument, this Court again has no jurisdiction over the issue. Plaintiffs' second argument is therefore dismissed. We note that while generally one superior court judge cannot overrule another, *see In re Burton*, 257 N.C. 534, 541, 126 S.E.2d 581, 586 (1962), this general rule is inapplicable if the later judge is not passing upon the precise question which was addressed by the earlier judge. *See Fleming v. Mann*, 23 N.C. App. 418, 422-23, 209 S.E.2d 366, 369 (1974).

III

In their final argument, plaintiffs contend Judge Fox erred in dismissing their appeal for what they describe as minor violations of the North Carolina Rules of Appellate Procedure. They assert they were not notified of the date and time of the hearing for settling the record on appeal, "despite the allegation to the contrary in Judge Fox's Order." Plaintiffs also claim they "were not due to file their Record on Appeal prior to [the reconsideration] motion being heard." We disagree.

As an initial matter, plaintiffs' supporting assignment of error which challenges the trial court's findings of fact is "like a hoopskirt - - [it] covers everything and touches nothing." *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970). Because their first assignment of error merely asserts that the evidence does not support the trial court's findings of fact, those findings of fact are "binding on this Court, which must conclude that they are supported by competent evidence." *Hedingham Cmty. Ass'n v. GLH*, 178 N.C. App. 635, 642, 634 S.E.2d 224, 228, *disc. review denied*, 360 N.C. 646, 636 S.E.2d 805 (2006).

While plaintiffs assert they "were not notified of the date and time of the settlement hearing, . . . despite the allegation to the contrary in Judge Fox's order[,]" the order itself contains no finding relating to such a lack of notification. Judge Fox instead found that "Counsel for Plaintiff does not contend that he did not receive the Order Settling Record on Appeal." Given that plaintiffs filed their motion for reconsideration three days after

the settlement order was entered, any challenge as to that finding would be feckless.

Plaintiffs cite no authority for their claim that they "were not due to file their Record on Appeal prior to [their motion for reconsideration] being heard." While a timely motion for relief under N.C.R. App. P. 50(b), 52(b) or 59 will toll the time for filing a notice of appeal, *see* N.C.R. App. P. 3(c)(3), there is no such provision in the North Carolina Rules of Appellate Procedure for tolling the filing of a settled record on appeal. Plaintiffs did not seek any extensions of time from this Court for filing the settled record on appeal, and the filing of the record on appeal was sixty-one days late when Judge Fox dismissed plaintiffs' third appeal. Plaintiffs' argument is without merit. We therefore affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).