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NO. COA08-1212

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

CAROL BENNETT,

Plaintiff,

v.

Wake County
No. 06 CVS 14229

NEWS AND OBSERVER
PUBLISHING COMPANY, d/b/a
The News & Observer,

Defendant.

Appeal by plaintiff from orders entered 14 December 2006, 21 February 2007, 19 July 2007, and 9 October 2007 by Judge Donald W. Stephens; 18 December 2006 by Judge Carl R. Fox; 19 October 2007 by Judge Ripley Rand; and 10 October 2007, 26 November 2007, 4 December 2007, and 4 February 2008 by Judge Kenneth C. Titus in Wake County Superior Court. Appeal by defendant from an order entered 4 February 2008 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 21 April 2009.

Carol Dalenko, Pro se.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens, for defendant-appellee.

JACKSON, Judge.

Carol Bennett, now Carol Dalenko, ("plaintiff") appeals the 10 October 2007 order in her defamation lawsuit against News and Observer Publishing Co. ("defendant") allowing summary judgment in defendant's favor, and other associated orders of the trial court. Defendant cross-appeals the 4 February 2008 order denying, in part, its motion for attorney fees. For the reasons stated below, we affirm in part, and reverse and remand in part.

On 4 May 2004, plaintiff filed a federal civil rights lawsuit against defendant and others. On 11 May 2004, defendant published a news article about the suit. Plaintiff made a written request for a retraction of the article, but no retraction was made. On 11 May 2005, plaintiff filed a complaint against defendant for defamation. Plaintiff took a voluntary dismissal without prejudice of that action on 27 September 2005 pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

On or about 29 August and 12 September 2006, plaintiff again made written requests that defendant retract the article. Defendant did not do so. Plaintiff filed the instant action against defendant on 27 September 2006. Her complaint alleged that the article made statements tending to "disgrace and degrade the plaintiff and to hold her out to public hatred, ridicule, and contempt." These statements included:

(a) That plaintiff is banned from "filing anything in the local trial courts without a lawyer" by a "gatekeeper" order issued against her in June 2001 for repeatedly abusing the legal process;

(b) That plaintiff "had been involved in at least 18 lawsuits the previous seven years" before June 2001;

(c) That the state Court of Appeals "rejected" plaintiffs appeal from the "gatekeeper" order, and others, citing her "history of filing frivolous lawsuits";

(d) That plaintiff filed an application in 2003 to extend the deadline for a lawsuit against defendant that its lawyer said "a lawyer had not certified" as "required" by the "gatekeeper" order, and then plaintiff "missed" the filing deadline;

(e) That plaintiff "seeks money" from each of the 12 defendants in her federal lawsuit, accusing them of "undertaking cooperative efforts amongst each other to harass, intimidate, and threaten the Plaintiff and anyone on her behalf."

Defendant filed its answer on 11 October 2006.

In the ensuing months, the parties filed several motions and in response the trial court issued several orders from which plaintiff now appeals:

(1) On 12 December 2006 defendant filed a motion for a protective order to prevent plaintiff from deposing its counsel. Plaintiff countered on 14 December 2006 with a motion to compel the deposition. Senior Resident Superior Court Judge Donald W. Stephens ("Judge Stephens") issued an order on 14 December 2006 assigning Judge Carl R. Fox ("Judge Fox") to hear these motions. On 18 December 2006, Judge Fox allowed defendant's motion for protective order, impliedly denying plaintiff's motion to compel. Plaintiff appeals both orders.

(2) Defendant filed a motion for summary judgment on 1 February 2007. Plaintiff filed affidavits and exhibits in

opposition to the motion on 7 September 2007. The matter was heard on 10 September 2007. On 13 September 2007, plaintiff filed an objection to entry of a summary judgment order out of session. The motion for summary judgment was allowed by order filed 10 October 2007. Plaintiff appeals the order.

(3) On 9 February 2007, while the summary judgment motion was pending, plaintiff filed a motion to extend the time for discovery. The motion was denied by order filed 21 February 2007. On 12 September 2007, plaintiff filed a motion to reopen discovery. That motion was denied by order filed 9 October 2007. Plaintiff appeals both orders.

(4) On 19 July 2007, Judge Stephens issued an order assigning Judge Kenneth C. Titus ("Judge Titus") to "preside over all aspects of [this] case through final judgment." Plaintiff appeals this order.

(5) On 19 October 2007, plaintiff filed a motion to appeal as an indigent. That motion was denied by order filed 19 October 2007. Plaintiff filed another motion to appeal as an indigent on 10 December 2007. The second such motion was denied by order filed 17 December 2007. Plaintiff appeals.¹

(6) On 22 October 2007, plaintiff filed a motion to vacate the summary judgment order. The motion was denied by order filed 4 December 2007. Plaintiff appeals.

¹ The second order was not referenced in any of plaintiff's three notices of appeal.

(7) Defendant filed a motion for attorney fees and sanctions on 29 October 2007. The matter was heard on 26 November 2007. On 3 December 2007, plaintiff filed an objection to entry of an order out of session on the matter. The trial court denied defendant's motion as to sanctions on 4 December 2007. On 4 February 2008, the trial court filed its order awarding attorney fees. Plaintiff appeals. Defendant appeals the portion of the order denying attorney fees for the period 27 September 2006 to 10 October 2007.

(8) Plaintiff filed a motion to disqualify Judge Titus on 26 November 2007. The motion was denied by order filed 26 November 2007. Plaintiff appeals.

On 27 June 2001, Judge Narley Cashwell ("Judge Cashwell") imposed sanctions in an unrelated case in excess of \$27,000.00 upon plaintiff and decreed:

5. So long as [plaintiff] does not qualify as an indigent pursuant to N.C.G.S. 1-110, [she] shall not file, or attempt to file, any documents with the Office of the Clerk of Superior Court of Wake County unless such document contains a certification by an attorney licensed under the laws of the State of North Carolina to practice law in North Carolina that in the opinion of that attorney the document complies with Rule 11 of the Rules of Civil Procedure. The certification shall also contain a recitation that the attorney has read and is aware of the requirements of this Order. A failure to comply with the certification requirement as set forth herein shall result in the dismissal or striking of the pleading or pleadings and the denial of the motion or motions.

6. The restrictions contained herein shall be as to *all* filings in Wake County, *not just initial filings*.

7. Violation of this Order by [plaintiff], or anyone on her behalf, shall be punishable by criminal and/or civil [contempt]. (Emphasis added.)

This "gatekeeper order" stated that special limitations were required to be placed on plaintiff's access to the Wake County courts because of her "repeated abuse of legal process."

This Court repeatedly has affirmed the validity of this "gatekeeper order." See *Dalenko v. Peden Gen. Contr., Inc.*, ___ N.C. App. ___, ___, 676 S.E.2d 625, 633 (2009) (noting that although an attorney originally had provided the required certification, that certification subsequently was revoked such that an amended complaint not filed with the required certification was properly dismissed); *Estate of Dalenko v. Monroe*, ___ N.C. App. ___, 676 S.E.2d 670 (2009), 2009 WL 1383333, at *6 (unpublished) ("[T]he language of the Gatekeeper Order . . . clearly bars Ms. Dalenko from filing, in a *pro se* capacity, any document with the Office of the Clerk of Wake County Superior Court without first obtaining a Rule 11 certification from an attorney in *all* matters due to her repeated and substantial abuse of the Wake County Court system." (emphasis added)); *Bennett v. News & Observer Publ'g Co.*, 167 N.C. App. 370, 605 S.E.2d 267 (2004), 2004 WL 2793247, at *2 (unpublished) ("Judge Cashwell's order . . . was appealed by plaintiff to this Court and her appeal was dismissed. . . . As plaintiff has exhausted all avenues of appeal, including to the United States Supreme Court, and since the Wake County Superior Court had jurisdiction over the subject matter in the earlier action, Judge Cashwell's order is not subject to collateral

attack." (internal citation omitted)), *appeal dismissed*, 359 N.C. 320, 611 S.E.2d 170 (2005).

Pursuant to the North Carolina Rules of Appellate Procedure, "review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, . . . and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)." N.C. R. App. P. 9(a) (2007). "It is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003) (citing *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983)).

Upon the record before this Court, of the documents plaintiff filed with the superior court in this case and relevant to this appeal, only two were accompanied by Rule 11 certifications pursuant to the "gatekeeper order" - the complaint and the motion to compel discovery. Absent this certification, the trial court was authorized by the "gatekeeper order" to dismiss or strike any non-compliant pleading or pleadings and deny any non-compliant motion or motions.

Included in the plethora of documents plaintiff filed without accompanying Rule 11 certifications were her three notices of appeal. Although the trial court was authorized by the "gatekeeper order" to strike these non-compliant notices of appeal, it did not elect to do so; therefore, we will address plaintiff's appeal. However, we caution plaintiff that the trial court's authority pursuant to the "gatekeeper order" is no longer subject to debate.

Plaintiff filed three notices of appeal in this case. Her first was filed on 26 November 2007, appealing the 26 November 2007 order denying her motion to disqualify Judge Titus. Her second shows a facsimile date of 3 January 2008 at 4:36 p.m., but it was not "filed" - as evidenced by the clerk's file-stamp - until 7 January 2008. Plaintiff's second notice of appeal included the remaining orders that are the subject of this appeal, with the exception of the order awarding attorney fees, which is the subject of plaintiff's third notice of appeal, filed 12 February 2008.

Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, a party to a civil action generally must file notice of appeal "within 30 days after entry of judgment[.]" N.C. R. App. P. 3(c)(1) (2007). However, "if a timely motion is made . . . under Rule[] 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled . . . until entry of an order disposing of the motion[.]" N.C. R. App. P. 3(c)(3) (2007). If the motion does not qualify as a proper Rule 59 motion, the time to file an appeal is not tolled. See *Smith v. Johnson*, 125 N.C. App. 603, 606-07, 481 S.E.2d 415, 417 (holding that a motion failing to adequately allege Rule 59 grounds was not a proper Rule 59 motion and did not serve to toll the appeal period), *disc. rev. denied*, 346 N.C. 283, 487 S.E.2d 554 (1997).

Here, the order for summary judgment was entered 10 October 2007; however, plaintiff timely filed a Rule 59 motion on 22 October 2007. This motion was not accompanied by a Rule 11 certification as required by the "gatekeeper order." Therefore,

under the circumstances of this case, it was not a proper Rule 59 motion and could not serve to toll the period in which plaintiff could file her notice of appeal. Plaintiff did not file her second notice of appeal challenging the order for summary judgment until January 2008, more than thirty days after the order was entered. Because plaintiff's notice of appeal was not timely filed, pursuant to Rule 3, this Court is without jurisdiction to review the orders appealed by plaintiff's second notice of appeal.

Accordingly, we address only the orders appealed in plaintiff's first and third notices of appeal - the 26 November 2007 order denying plaintiff's motion to disqualify Judge Titus and the 4 February 2008 order awarding attorney fees.

Here again, no attorney certified that plaintiff's motion to disqualify Judge Titus complied with Rule 11. Accordingly, the trial court was authorized to deny the motion by the "gatekeeper order." Therefore, the trial court properly denied the motion.

Finally, as to the order awarding attorney fees, plaintiff argues (1) the trial court lacked subject matter jurisdiction due to entry of the order out of session, and (2) that she already had filed notices of appeal, divesting the trial court of jurisdiction. Defendant argues that the trial court erred in ruling that plaintiff was insulated against its motion by the complaint's Rule 11 certification.

Plaintiff's first argument fails because her objection to entry of the order out of session did not contain an attorney's certification that it complied with Rule 11 pursuant to the

"gatekeeper order," rendering her objection ineffective. Therefore, entry of the order out of session was not improper; the trial court was not divested of its subject matter jurisdiction to enter the order.

As to plaintiff's second argument, defendant concedes that the order should be remanded whether or not the trial court had jurisdiction to enter the order. Defendant argues that pursuant to this Court's decision in *Dalenko v. Collier*, ___ N.C. App. ___, 664 S.E.2d 425, *appeal dismissed*, 362 N.C. 680, 670 S.E.2d 563 (2008), plaintiff is not insulated by a Rule 11 certification. Because our holding as to defendant's argument is dispositive, we address it at this point.

In *Collier*, this Court discussed whether plaintiff was insulated from Rule 11 sanctions by the certification of an attorney. *Id.* at ___, 664 S.E.2d at 427-28. This Court determined that she was not, because the certification specifically disclaimed any representation by counsel; plaintiff was proceeding strictly *pro se*. *Id.*

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]

N.C. Gen. Stat. § 1A-1, Rule 11 (2007) (emphasis added).

In any civil action, . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a

complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. . . . A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees.

N.C. Gen. Stat. § 6-21.5 (2007).

Here, the trial court found as fact that

10. The plaintiff's complaint raises no justiciable issue of either law or fact.

11. The plaintiff's complaint is not well grounded in fact and was not warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law.

As in *Collier*, plaintiff could not rely on the Rule 11 certification because the certifying attorney specifically stated, "This Certification by me as an 'officer of the court' does not, and is not intended to constitute an entry of appearance in this or any other case on Carol Dalenko's behalf." Therefore, as in *Collier*, plaintiff is not insulated by the certification. She signed the complaint. The trial court determined that the complaint was without merit. Accordingly, defendant was entitled to recover attorney fees pursuant to section 6-21.5, not only for the period after summary judgment was allowed, but also for the entire time the case was pending - since 27 September 2006. The order must be reversed and remanded for entry in accordance with this decision.

In sum, although plaintiff's notices of appeal were not accompanied by Rule 11 certifications pursuant to the "gatekeeper order," we address her appeal because the trial court did not

strike them. We are without jurisdiction to review the bulk of plaintiff's appeal because her second notice of appeal was not filed in a timely manner. We affirm the trial court's entry of the 26 November 2007 order denying plaintiff's motion to disqualify Judge Titus because her motion did not contain a Rule 11 certification. We reverse and remand the 4 February 2008 order of attorney fees because pursuant to *Collier*, plaintiff was not insulated by an attorney's Rule 11 certification.

Affirmed in part, reversed and remanded in part.

Judges WYNN and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).