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NO. COA08-1317

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

THE AMANDA LEIGH PEARMAN TRUST #2
and RICHARD M. PEARMAN, JR., Trustee of
THE AMANDA LEIGH PEARMAN TRUST #2,
Plaintiff,

v.

Guilford County
No. 08 CVS 2938

DOYLE FRANKLIN DENNIS,
GREGORY A. POTTER,
GREGG POTTER, INC., and
RED NECK FARMS, LLC,
Defendants.

Appeal by plaintiffs from order entered 25 June 2008 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 12 March 2009.

Higgins, Benjamin, Eagles & Adams, PLLC, by William A. Eagles, for plaintiffs-appellants.

Alexander Ralston, Speckhard & Speckhard, L.L.P., by Stanley E. Speckhard, for defendants-appellees.

STROUD, Judge.

The trial court allowed defendants' motion for change of venue and plaintiffs appeal, arguing "the trial court committed reversible error in granting defendants' motion for change of venue because this is a transitory action to which N.C. Gen. Stat. § 1-76(1) does not apply" and "defendants waived any right to a change of venue by failing to raise venue in response to the amended

complaint and by failing to pursue their motion for removal." (Original in all caps.) For the following reasons, we reverse and remand.

I. Background

On 16 January 2008, plaintiffs filed a complaint against defendants alleging in pertinent part:

1. The Pearman Trust is a trust created July 24, 1992, having its principal location in Guilford County, North Carolina.

2. Upon information and belief, Gregory A. Potter ("Potter") and Doyle Franklin Dennis ("Dennis") reside in Brunswick County, North Carolina.

3. Upon information and belief, Gregg Potter, Inc. ("Potter, Inc.") is a North Carolina Corporation, owned exclusively by Potter, and is a licensed contractor in the business of constructing residential housing, with a principal place of business in Brunswick County, North Carolina.

4. Upon information and belief, Red Neck Farms, LLC ("Red Neck") is a North Carolina Limited Liability Company in the business of buying, developing, and selling residential housing, is owned equally by Dennis and Potter, and has a principal place of business in Brunswick County, North Carolina.

5. The Pearman Trust owns real property in Brunswick County identified as Lot 3, Block 49, Long Beach Subdivision, Plat Book 2 1/2, Page 244, Brunswick County Registry, (the "Pearman Lot" or the "Lot"). The Trust and its predecessors in title have owned the Lot for more than twenty-five years. It is used primarily as a resort or vacation home and is not continually occupied in the manner of a full-time residence.

6. On or about July 12, 2004, Red Neck purchased Brunswick County identified as Lot 2, Block 149, Long Beach Subdivision, Plat

Book 2 1/2, Page 244, Brunswick County Registry, ("Lot 2") which adjoins the Pearman Lot.

7. A brick wall (the "Wall") built and maintained by the Trust and its predecessors in title divided the Pearman Lot from Lot 2 for approximately twenty five (25) years before Red Neck's purchase.

8. In 2005, Potter, Inc., at the request and direction of Dennis, Potter, and Red Neck, began construction of a house on Lot 2, to offer it for public sale. Potter, Inc. built the house and Lot 2, with a house on it, was sold in June 2005 to Edward and Sherry Braidic, (the "Braidics").

9. Shortly before the closing of the sale of Lot 2 to the Braidics, Defendants decided that the Wall encroached upon Lot 2. Defendants also decided that septic system appurtenant to the Pearman Lot encroached upon Lot 2. Thereafter, the Defendants conspired together to destroy the Wall.

10. In May 2005, Dennis and Potter, and the corporate defendants through Dennis and Potter, decided that the Wall would be destroyed. Later, they each testified about their actions in another civil action.

. . . .

13. The Defendants put the debris from their destruction on the Trust property, on the Pearman Lot. The destruction of the Wall and the dumping of the debris caused destruction of shrubs and landscaping material of the Trust's. In addition, in the construction of the house on Lot 2, Defendants and their subcontractors dumped other construction debris on the Pearman Lot, including siding, bundles of discarded straw, and nails.

. . . .

15. Having destroyed property of the Trust, Defendants have threatened to destroy other property of the Trust, specifically to

damage the septic system and make it inoperable.

Plaintiffs brought causes of action for trespass, damage to plaintiffs' wall, damage to plaintiffs' shrubs, punitive and exemplary damages, conspiracy, and a permanent injunction. Plaintiffs also requested a temporary restraining order and preliminary injunction.

On 17 January 2008, a temporary restraining order was issued for ten days which enjoined defendants "from going on or about" plaintiffs' property, "including the wall and the septic system appurtenant thereto[.]" On 25 January 2008, a consent preliminary injunction was entered, which prevented defendants from entering plaintiffs' property or anything "appurtenant thereto[.]"

On 14 March 2008, defendants filed motions for a change of venue and to dismiss the case. Defendants claimed in pertinent part:

- 1) This is an action brought in the Superior Court division of Guilford County, North Carolina, grounded upon alleged injury to real property located in Brunswick County, North Carolina.
- 2) The individual defendants are citizens and residents of Brunswick County, North Carolina.
- 3) The offices and principal place of business of the corporate defendants is Brunswick County, North Carolina.
- 4) The trustee of the Amanda Leigh Pearman Trust #2, Richard Pearman, is not a resident of Guilford County, North Carolina.

- 5) All events giving rise to this cause of action occurred in Brunswick County, North Carolina.
- 6) Multiple witnesses to the events giving rise to this cause of action reside in Brunswick County. None resides in Guilford County. The distance from Greensboro, the county seat of Guilford County, to Bolivia, the county seat of Brunswick County, is over 200 miles, with an estimated drive time in excess of three and one-half (3 1/2) hours.
- 7) Brunswick County is the county of proper venue, pursuant to the provisions of Chapter 1, Subchapter 4, Article 7, Section 1-76 of the General Statutes of North Carolina.
- 8) The convenience of the witnesses and the ends of justice would be promoted by a change of venue from Guilford County to Brunswick County.

On 19 March 2008, plaintiffs amended their complaint by striking paragraph one of its original complaint and replacing it with:

1. The Pearman Trust is a trust created July 24, 1992, having its principal location and place of administration in Guilford County, North Carolina, and Richard M. Pearman, trustee and resident of Randolph County, has his principle [sic] place of business, including as to the administration of the Trust, in Guilford County, North Carolina (collectively, the "Trust" or the "Pearman Trust").

On 30 May 2008, defendants filed an answer which addressed the allegations of the amended complaint and included motions to dismiss and for change of venue. On 25 June 2008, the trial court entered an order granting defendants' motion and directing that the case be transferred to Brunswick County because "this is an action

for determination of a right or interest in real property and for injury to real property[.]”¹ Plaintiffs appeal.² Plaintiffs argue “the trial court committed reversible error in granting defendants’ motion for change of venue because this is a transitory action to which N.C. Gen. Stat. § 1-76(1) does not apply” and “defendants waived any right to a change of venue by failing to raise venue in response to the amended complaint and by failing to pursue their motion for removal.” (Original in all caps.) For the following reasons, we reverse and remand.

II. Waiver

Plaintiffs contend that defendants have waived any objections they may have regarding venue as “[t]he Defendants did not respond to the amended pleading and did not raise any objection to venue in Guilford County within the time required.” We disagree.

Plaintiffs filed their complaint on 16 January 2008.³ On 12 February 2008, defendants filed a motion for an extension of time to respond to plaintiffs’ complaint. The trial court issued an

¹ The record does not indicate whether the court considered the 14 March 2008 motion for change of venue, the 30 May 2008 motion for change of venue contained in the answer or both.

² The record includes assignments of error from defendants and defendants argue a cross-appeal in their brief, but the record does not indicate that defendants actually filed a notice of appeal. However, even assuming *arguendo* that defendants did properly cross-appeal, their argument need not be recited in this opinion as it has been fully addressed within this opinion’s substance and disposition.

³ By stipulation of the parties, the summons was not included within the record on appeal, and thus the record does not reflect when the summons was served upon any defendant nor when defendants’ answer was originally due to be filed. See N.C. Gen. Stat. § 1A-1, Rule 12(a)(1)(a).

order allowing defendants until 18 March 2008 to respond to plaintiffs' original complaint. Defendants filed a motion for change of venue and motion to dismiss on 14 March 2008. On 19 March 2008, plaintiffs filed and served the amendment to their complaint. The only substantive change to the complaint was the addition of the allegation of Guilford County as the principal place of business of the trustee. Defendants' answer filed on 30 May 2008 addressed the allegations of the amended complaint and contained a motion to dismiss and for change of venue. Therefore, both parts of plaintiffs' contentions as quoted above are incorrect as defendants did respond to the amended pleading, and defendants did raise an objection to venue in Guilford County both prior to filing their answer, by the 14 March 2008 motion, and in their answer.

Plaintiffs' primary argument is that defendants' objection to venue in Guilford County was not timely. Plaintiffs are correct that an objection to improper venue must be raised in a timely manner, which is prior to filing an answer. See N.C. Gen. Stat. § 1A-1, Rule 12(b) ("A motion making any of these defenses[, including improper venue,] shall be made before pleading if a further pleading is permitted."); see *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (citations omitted) ("If . . . the motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. . . . The language of the statute is clear that the time for making the written demand is before the time for filing answer expires.

Moreover, our Supreme Court, interpreting this statute, has explicitly stated that the defendant who files answer to the merits before raising his objection to venue, waives the right.”). However, defendants herein did file a timely motion on 14 March 2008 objecting to venue and requesting a change of venue to Brunswick County. Plaintiff’s argument thus assumes that (1) the 14 March 2008 motion somehow became ineffective to serve as an objection to venue because of plaintiff’s later amendment to the complaint and (2) because defendants’ answer to the amended complaint was arguably filed late, the trial court should also disregard the second motion for change of venue raised in the answer. However, the record does not support either assumption.

As to plaintiff’s first assumption, the record contains no indication that plaintiffs raised before the trial court the argument that defendants’ 14 March 2008 motion for change of venue was no longer viable or that the defendants’ motion for change of venue within the answer or the answer itself should be stricken. Although we do not have a transcript of the parties’ oral arguments before the trial court on the motion for change of venue, it is the responsibility of plaintiffs to ensure that the record contains everything necessary for our consideration of their argument. *McKyer v. McKyer*, 182 N.C. App. 456, 463, 642 S.E.2d 527, 532 (citations and quotation marks omitted) (“It is the appellant’s duty and responsibility to see that the record is in proper form and complete. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the

record before the appellate court."), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007). The trial court heard defendants' motion to change venue, whether based upon the 14 March 2008 motion or upon the 30 May 2008 answer or both, on the merits without objection from plaintiffs. As plaintiffs failed to make this argument at trial, they cannot "swap horses between courts in order to get a better mount [on appeal]." *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citations and quotation marks omitted), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999).

As to plaintiff's second assumption, plaintiffs overlook the fact that defendants had 20 days after the trial court's ruling upon the motion for change of venue to file an answer pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(a)(1)(a), which would mean that defendants' answer was timely filed. *See Moseley v. Trust Co.*, 19 N.C. App. 137, 142, 198 S.E.2d 36, 39 ("Under Rule 12(a)(1)(a) defendant had 20 days to answer from the time of notice of the court's . . . denial of his motion to remove because of improper venue."), *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). Thus, even though defendants did file an answer to plaintiffs' amended complaint on 30 May 2008, none was needed until 20 days after the trial court had ruled upon its motion to change venue, which occurred on 25 June 2008. *See* N.C. Gen. Stat. § 1A-1, Rule 12(a)(1)(a); *Moseley* at 142, 198 S.E.2d at 39. Defendants' answer was actually filed early, not late.

Plaintiffs further argue that defendants waited too long to schedule a hearing regarding the change of venue and have thus

waived this issue. Plaintiffs direct our attention to *Miller v. Miller*, in which this Court determined a defendant had waived her motion for removal when she filed for removal and then "almost a year passed between the time [the] defendant filed her motion and the first hearing date, [and the] defendant sought a continuance at that time, and on the second hearing date five months later failed to appear." 38 N.C. App. 95, 98, 247 S.E.2d 278, 280 (1978). Here, defendants' motion for change of venue was heard approximately three and one half months after it was originally filed and approximately one month after it was filed within defendants' answer. Furthermore, defendants did not continue the case nor did defendants fail to appear. We conclude that *Miller* is factually distinguishable from this case and that defendants before us did not waive their right to challenge venue. *See id.*

Lastly, plaintiffs also argue that defendants failed to comply with Rule 5.12 of the Guilford County Superior Court Local Rules by failing to schedule hearing of the motion for change of venue "immediately."⁴ Plaintiffs contend that Guilford County Superior Court Rule 5.12 provides:

If a party responding to a complaint . . . does not file Answer, but instead files a dispositive motion, said party must immediately schedule the motion for hearing. Dispositive motion [sic] not promptly scheduled for hearing may be deemed abandoned and denied without notice or scheduled for hearing *sua*

⁴ The version of the Guilford County Superior Court Local Rules in effect at the time of the filing of the motion for change of venue has since been superceded. The relevant Local Rules were not included in the record, and this Court was unable to obtain that version of the Local Rules.

sponte by the court, or other sanctions or consequences may be imposed.

Again, we disagree.

First, although the motion to dismiss which accompanied the motion to change venue would be a dispositive motion, a motion to change venue, the matter which is the subject of this appeal, is not a dispositive motion, and thus Rule 5.12 would not apply. See *Black's Law Dictionary* 505 (8th ed. 2004) (defining "dispositive" as "[b]eing a deciding factor; . . . bring about a final determination"). Second, even assuming *arguendo* that defendants were required to schedule their motion for change of venue for hearing "immediately," the record contains no indication of when defendants actually did request that the motion be scheduled for hearing. The record also contains no indication that plaintiffs requested the trial court to dismiss or deny defendants' motion for change of venue on the basis that it was not properly scheduled for hearing. Again, "[a]n appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *McKyer* at 463, 642 S.E.2d at 532 (citation and quotation marks omitted). This argument is overruled.

III. Change of Venue

As to the substantive issue of venue, plaintiffs first claim that "the action is transitory, N.C. Gen. Stat. § 1-76(1) does not apply, and venue should remain in Guilford County." In its order for change of venue, the trial court concluded that "it appears . . . that this is an action for determination of a right or

interest in real property and for injury to real property and that the motion should be allowed." This language indicates the trial court changed venue pursuant to N.C. Gen. Stat. § 1-76(1) which establishes a change of venue as a matter of right to "the county in which the subject of the action, or some part thereof, is situated" for cases involving the "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." N.C. Gen. Stat. § 1-76(1) (2007). We review a change in venue as a matter of right *de novo*. See *Causey v. Morris*, 195 N.C. 532, 533, 142 S.E. 783, 784 (1928) (applying *de novo* review to trial court's determination that motion for removal be allowed "as a matter of right, upon the ground, that the action [was] for the determination of a right to or an interest in land").

N.C. Gen. Stat. § 1-76(1) applies only to local actions and not to transitory actions. See *Thompson v. Horrell*, 272 N.C. 503, 504, 158 S.E.2d 633, 634 (1968) (citations omitted).

The test is this: If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Thompson at 505, 158 S.E.2d at 634-35 (citations omitted).

North Carolina law holds that an action for a tort against real property is transitory. See *Cox v. Cotton Mills*, 211 N.C. 473, 474, 190 S.E. 750, 750 (1937) (an action to recover damages to

land caused by wrongful obstruction of a river was transitory and not local because "[t]he action does not involve title to or any interest in land"⁵; see *Harris Clay Co. v. Carolina China Clay Co.*, 164 S.E. 341, 341 (N.C. 1932) ("Action by lessee of mining rights for breach of contract and for tort against lessor, alleging lessor polluted stream forcing lessee to close operations, held 'transitory' and maintainable in county where plaintiff's principal place of business was located[.]").

Here, plaintiffs' complaint asserts causes of action for trespass, damage to plaintiffs' wall, damage to plaintiffs' shrubs, punitive and exemplary damages, conspiracy, and a permanent injunction. Based on these allegations, the judgment to which plaintiffs would be entitled would not affect the title to the land. Thus, the action is transitory, and change of venue as a matter of right does not exist under N.C. Gen. Stat. § 1-76(1). See *Harris*, 164 S.E. at 341; *Cox* at 474, 190 S.E. at 750; see also *Thompson* at 504, 158 S.E.2d at 634-35.

However, although the language of the trial court's order indicates that it changed venue based on N.C. Gen. Stat. § 1-76(1), defendants also requested a change of venue based upon N.C. Gen. Stat. § 1-83. Pursuant to N.C. Gen. Stat. § 1-83(2), defendants requested a change of venue for "[t]he convenience of the witnesses

⁵ We note that in *Cox*, the action was pending in the county in which the alleged injury to the real property occurred. See *Cox v. Cotton Mills*, 211 N.C. 473, 190 S.E. 750. Thus, this case does not provide a clear holding that the matter could have been instituted in a county other than the one in which the property was located.

and the ends of justice would be promoted by a change of venue from Guilford County to Brunswick County." N.C. Gen. Stat. § 1-83 provides in pertinent part, "The court may change the place of trial in the following cases . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C. Gen. Stat. § 1-83(2) (2007). Thus, even if venue was proper in Guilford County, the trial court has the discretion to transfer venue if it determines that "[t]he convenience of the witnesses and the ends of justice would be promoted by the change" of venue from Guilford County to Brunswick County. *Id.*; see generally *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 122, 535 S.E.2d 397, 402 (2000) (citations omitted) ("We recognize that Salisbury's right to remove the case to Rowan County (the county of proper venue) does not preclude plaintiff from later filing a motion to return venue to Mecklenburg County for the convenience of witnesses and to promote the ends of justice.").

Here, plaintiffs' own complaint shows: (1) both individual defendants reside in Brunswick County; (2) the corporate defendant's principal place of business is Brunswick County; (3) the Limited Liability Company defendant's principal place of business is Brunswick County; (4) defendants allegedly trespassed in Brunswick County; (5) the property at issue including the allegedly damaged wall and shrubs are located in Brunswick County; (6) defendants' actions which were allegedly "done intentionally, with malice, willfully, wantonly, and in total and complete disregard for the rights of Plaintiff" were all performed in

Brunswick County; (7) defendants' alleged "conspiring together against the Plaintiff and acting in concert pursuant to that conspiracy" occurred in Brunswick County; and (8) a permanent injunction is being requested regarding property in Brunswick County. Furthermore, a temporary restraining order and preliminary injunction have been entered regarding property in Brunswick County, and the individual bringing this action, Richard M. Pearman, Jr., the trustee of the Amanda Leigh Pearman Trust #2, is a resident of Randolph County. The only connection this action allegedly has with Guilford County is that the trust has "its principal location and place of administration in Guilford County" and the trustee "has his principle [sic] place of business, including as to the administration of the Trust, in Guilford County[.]" Based upon these facts, the trial court would have the discretion to find that "the convenience of witnesses and the ends of justice [c]ould be promoted by the change," N.C. Gen. Stat. § 1-83(2), as all defendants and the realty at issue are located in Brunswick County and all alleged wrongful acts occurred in Brunswick County. Because the trial court failed to address this possible alternative basis for its ruling, which was requested by defendants' motion and which is supported by the allegations of the plaintiff's complaint, we remand this order to the trial court so that the trial court may make a determination in its discretion of whether venue should be transferred pursuant to N.C. Gen. Stat. § 1-83(2).

IV. Conclusion

We conclude that defendants did not waive their right to challenge venue. We reverse the trial court's order based upon N.C. Gen. Stat. § 1-76(1) and remand to the trial court so that the trial court may consider and rule upon defendants' motion for change of venue based upon N.C. Gen. Stat. § 1-83(2).

REVERSED and REMANDED.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).