

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-376

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

ESTATE OF CHARLES H. ELKINS, SR.,
et al.,

Plaintiffs,

v.

Forsyth County
No. 04 CVS 6138

ELECTRONIC MORTGAGE SYSTEMS,
et al.,

Defendants.

Court of Appeals

Appeal by plaintiffs from order entered 12 December 2007 by Judge Larry G. Ford in Superior Court, Forsyth County. Heard in the Court of Appeals 23 September 2008.

Slip Opinion

Nelson Mullins Riley & Scarborough, L.L.P., by Mark A. Stafford and Donald R. Pocock; Morris, Schneider, Prior, Johnson & Freedman, L.L.C., by Wendy A. Owens, for defendant-appellees; Craig Brawley Lijpfert & Walker, L.L.P., by William W. Walker, for plaintiff-appellee.

John W. Elkins, pro se, for plaintiff-appellant.

WYNN, Judge.

Appellate review of a motion under Rule 60(b) of the North Carolina Rules of Civil Procedure "is limited to determining whether the court abused its discretion."¹ Here, *pro-se* Plaintiff appeals from an order denying his motion to set aside two prior orders as void for lack of jurisdiction. After careful review, we

¹ *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

affirm the trial court's decision.

On 20 September 2004, Plaintiff John Elkins, individually and as co-executor of his father's Estate, brought an action against Defendants Mortgage Electronic Registration Systems, Inc., et al. ("Mortgage Electronic"). In March 2005, the Clerk of Forsyth County removed Mr. Elkins and his brother as co-executors of the Estate and appointed a public administrator ("Public Administrator"). Following the filing of a motion to dismiss by Mortgage Electronic, Judge Ronald E. Spivey issued an order on 23 November 2005 upholding Mr. Elkins' standing on his claim for intentional infliction of emotional distress but abating the other eight claims, pending action by the Public Administrator. Thereafter, on 25 September 2006, Judge Michael E. Helms denied the Public Administrator's motion to withdraw and instructed him to prosecute, settle, or dismiss the remaining claims.

On 27 November 2006, Mr. Elkins filed a notice of appeal to this Court contesting both orders. In the meantime, the Public Administrator reached a settlement with Mortgage Electronic and filed a motion in the cause seeking court approval. However, the trial court concluded that, in light of Mr. Elkins' pending appeal, the superior court lacked jurisdiction to hear the motion.

On 2 January 2007, Mr. Elkins served a proposed record on Mortgage Electronic and Public Administrator in connection with his initial appeal. On 6 February 2007, the Public Administrator filed a motion to dismiss, citing Mr. Elkins' failure to serve a proper record on appeal as required by N.C. R. App. P. 9 and 11 (2007).

Judge Catherine C. Eagles granted the motion to dismiss the appeal on 19 February 2007.

Notwithstanding Judge Eagles' order dismissing his appeal, Mr. Elkins filed the same non-compliant record on appeal with this Court on 26 February 2007. However, before reaching the issue regarding Judge Eagles' dismissal of the appeal, this Court dismissed Mr. Elkins first appeal for failure to pay the required fees and printing deposits. Thereafter, the Public Administrator re-calendared his motion in the cause, requesting approval of the settlement agreement between the Estate and Mortgage Electronic. On 19 March 2007, Judge Moses Massey granted the motion.

On 14 September 2007, Mr. Elkins filed a motion in the cause

to set aside two previous Orders of the Court, one entered February 19, 2007 dismissing an appeal taken by plaintiff to the Court of Appeals, . . . and the other entered March 19, 2007 granting a motion in the cause brought by the administrator for approval of a settlement and voluntary dismissal of the case pursuant thereto.

From the denial of this motion on 12 December 2007, Mr. Elkins appeals.

From the outset, we note that, while Mr. Elkins assigns error to the 19 February 2007 order dismissing his first appeal, his notice of appeal designates his appeal to be from the 12 December 2007 order. Accordingly, per Rule 3 of the North Carolina Rules of Appellate Procedure, we must dismiss his attempt to appeal from the 19 February 2007 order. N.C. R. App. P. 3(d) (2007) (the notice of appeal "shall designate the judgment or order from which appeal is taken . . ."). Additionally, Mr. Elkins seeks to appeal from the

trial court's 12 December 2007 order, denying his motion to set aside the dismissal of his first appeal from the 19 February 2007 order. However, his first appeal was ultimately dismissed by this Court for failure to pay the required fees and printing deposits. Accordingly, his appeal from the trial court's failure to set aside the dismissal by this Court is feckless. The trial court had no jurisdiction to overturn this Court's dismissal of his first appeal.

Accordingly, we address only Mr. Elkins' contention that the trial court abused its discretion by declining to set aside the 19 March 2007 order under Rule 60(b) of the North Carolina Rules of Civil Procedure.

Rule 60(b) allows a court, on motion, to relieve a party from an order when that judgment is void. N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2007). Mr. Elkins contends the issuing court lacked jurisdiction to act because the 19 February 2007 order was invalid and thus his first appeal was still pending. Having found no error in the 19 February 2007 order, and therefore no active appeal at the time the court entered the 19 March 2007 order, we disagree.

Accordingly, we affirm the trial court's 12 December 2007 order denying Mr. Elkins' motion in the cause.

Affirm.

Judge BRYANT concurs.

Judge ARROWOOD concurs prior to 31 December 2008.

Report per 30(e).