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NO. COA09-163

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

JAMES D. BLYTH and  
ELK COUNTRY REALTY, INC.,  
Plaintiffs,

v.

Haywood County  
No. 04 CVS 370

SAMUEL E. McCRARY, COUNTRY  
SQUIRE REAL ESTATE, COUNTRY  
SQUIRE ENTERPRISES, INC.,  
COUNTRY SQUIRE ENTERPRISES,  
INC., d/b/a COUNTRY SQUIRE  
REAL ESTATE, PETER HESSION  
and wife, KAREN HESSION,  
SCOTT GREENHALGE, BLUE SKY  
GROUP, INC., and WILLIAM GUNN,  
Defendants.

Appeal by plaintiffs from order filed 15 October 2008 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 2 September 2009.

*Adams, Hendon, Carson, Crow & Saenger, P.A., by George W. Saenger, for plaintiff-appellants.*

*Patrick U. Smathers and Jonathan J. Song, for defendant-appellees.*

STEELMAN, Judge.

A motion made pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure can only be made as to final judgments, orders or proceedings, and does not apply to interlocutory orders.

I. Factual and Procedural Background

This is the second occasion that this matter has been before this Court. The underlying facts of this case are set forth in *Blyth v. McCrary*, 184 N.C. App. 654, 646 S.E.2d 813 (2007) (*Blyth I*), *disc. review denied*, \_\_\_ N.C. \_\_\_, 658 S.E.2d 482 (2008) and are not repeated.

In *Blyth I*, this Court reversed and remanded the defamation claim against Peter Hession, the McCrary defendants and the Greenhalge defendants; the unfair and deceptive trade practices claim against Scott Greenhalge; and the trial court's order granting attorney's fees and costs to the Greenhalge defendants. This Court also dismissed ten of plaintiffs' assignments of error based on procedural grounds, including that assigning error to the granting of a directed verdict as to plaintiffs' claims against Karen Hession. Plaintiffs did not appeal the trial court's summary judgment order as to Peter Hession and Karen Hession (collectively the Hession defendants) and the McCrary defendants, dismissing the unfair and deceptive trade practices claim. Their assignment of error pertaining to the trial court's order awarding attorney's fees and costs to the Hession defendants and the McCrary defendants was deemed abandoned.

On 8 August 2008, the Hession defendants and the McCrary defendants filed a motion to execute on plaintiff's appeal bond. On 29 August 2008, plaintiffs filed a Motion for Relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 based upon this Court's remand of the case for a new trial. Plaintiffs contended that the trial court's order awarding attorney's fees to the Hession defendants

and the McCrary defendants should be recalculated to only "include attorneys' fees through the date of summary judgment for the Plaintiffs' claim of unfair and deceptive trade practices . . . ."

On 26 September 2008, plaintiffs filed a voluntary dismissal with prejudice of their claims against Scott Greenhalge and Blue Sky Group, Inc. On 15 October 2008, the trial court denied plaintiffs' motion for relief and granted the Hession defendants' motion to execute on plaintiffs' appeal bond, but then stayed execution on plaintiffs' appeal bond. On 17 November 2008, plaintiffs filed a voluntary dismissal with prejudice of their claims against the McCrary defendants.

Plaintiffs appeal.

## II. Interlocutory Appeal

Plaintiffs' main argument on appeal is that the trial court abused its discretion by denying plaintiffs' Rule 60(b) motion. We disagree.

Not every order or judgment of the trial court is appealable to the Court of Appeals. Appeals are not granted as a matter of right and can only be taken from orders and judgments that are designated by the statutes regulating the right to appeal. See N.C. Gen. Stat. § 1-271 (2007); see also *McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 501, 645 S.E.2d 219, 221 (2007); N.C.R. App. P. 28(b)(4).

Rule 60(b) of the North Carolina Rules of Civil Procedure provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment,

order, or proceeding . . . ." N.C.R. Civ. P. 60(b) (2007). By its express language, Rule 60(b) only applies to final judgments, orders or proceedings, and does not apply to interlocutory orders. *See Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540-41 (1975) (citations omitted); *see also Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 408, 436 S.E.2d 145, 150-51 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). This Court's prior decision in *Blyth I* did not dispose of the entire case but remanded it for a new trial on the claims for defamation against defendant Peter Hession, the McCrary defendants and the Greenhalge defendants; and the claim for unfair and deceptive trade practices against Scott Greenhalge.

Plaintiffs' Rule 60(b) motion attempted to set aside and relieve them from the effect of the trial court's 20 January 2006 order awarding attorney's fees and costs to the Hession defendants. This motion was filed prior to the trial court entering a final judgment on the remanded claims. Because there has not been an adjudication and disposition of all claims, the trial court properly denied plaintiffs' Rule 60(b) motion. Until the trial court enters a final judgment, there is no order from which plaintiffs can seek relief pursuant to Rule 60(b). *Brock and Scott*

*Holdings, Inc. v. West*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 679 S.E.2d 507, 512 (2009) (citations omitted).

We note that the trial court's order granting the Hession defendants' motion for attorney's fees and costs does not allocate the award between Peter Hession and Karen Hession. Nor does the order indicate which portion of the award granted was based on Rule 11 of the North Carolina Rules of Civil Procedure and which portion was based on N.C. Gen. Stat. § 75-16.1. These determinations are based on facts. It is not the role of appellate courts to engage in fact-finding. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). We dismiss this appeal with instructions to the trial court to allocate any fees awarded between Peter Hession and Karen Hession. The trial court should also determine which portion of the fees are based on Rule 11 of the North Carolina Rules of Civil Procedure, and which portion are based on N.C. Gen. Stat. § 75-16.1.

DISMISSED.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).