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NO. COA10-180

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

SOUTHERN SEEDING SERVICE, INC.  
Plaintiff,

v.

Durham County  
No. 07 CVD 1291

MARTIN'S GRADING & CONSTRUCTION,  
Defendant.

Appeal by plaintiff Southern Seeding Service, Inc., from order entered 21 June 2009 by Judge Nancy Gordon and order entered 10 December 2009 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 9 June 2010.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse, for plaintiff-appellant.*

*Shanahan Law Group, PLLC, by Kieran J. Shanahan, and Michael J. Denning, for defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Southern Seeding Service, Inc. ("SSSI"), appeals from orders entered by the trial court denying execution against Greg S. Martin. Mr. Martin is a sole proprietor doing business under the name Martin's Grading and Construction ("MGC"), and SSSI sued MGC in order to recover \$4,294.00 due on an account. Mr. Martin was not named individually in the complaint. On appeal, SSSI contends the trial court committed reversible error in denying: (1) SSSI's

motion for relief under Rule 60 (the "Rule 60 Motion") to revise or amend the judgment; and (2) SSSI's Motion for Order Requiring Debtor's Property to be Sold (the "Second Motion").

We conclude that SSSI did not file a timely notice of appeal from the Rule 60 Motion, and that the Second Motion was merely a reiteration of the Rule 60 Motion. Accordingly, we affirm the order denying the Second Motion as duplicitous, and dismiss SSSI's appeal concerning the Rule 60 Motion.

#### I. BACKGROUND

On 29 October 2007, SSSI commenced a small claim action against MGC, by filing a complaint in the Magistrate Court of Durham County seeking damages for breach of contract. Judgment was entered in favor of SSSI, and MGC gave timely notice of appeal to the district court. The notice of appeal named "Greg S. Martin, d/b/a Martin's Grading" as the appellant.

The case was set for mandatory arbitration, and on 20 February 2008, the arbitrator found in favor of SSSI. The arbitration award listed the damages as recoverable only from "Martin's Grading & Construction." On 21 February 2008, contesting the amount awarded, SSSI appealed the arbitration award for a trial *de novo* in Durham County District Court. SSSI again named MGC as the sole defendant.

On 23 June 2008, a bench trial was held before Judge Marcia Morey. On 2 July 2008, judgment was entered against MGC, ordering it to pay SSSI the amount of \$3,749.49. SSSI attempted to recover on the judgment, but was informed by the clerk of court that a Writ of Execution against Greg Martin's property could not be obtained

until the caption in the order and judgment was changed to reflect Greg Martin's involvement in the case as a party-defendant.

On 20 February 2009, SSSI filed the Rule 60 Motion requesting the trial court to: (1) substitute the name "Greg S. Martin, d/b/a Martin's Grading and Construction" as the named defendant in place of "Martin's Grading and Construction"; and (2) amend the judgment to reflect judgment against "Greg Martin, d/b/a Martin's Grading and Construction." On 21 June 2009, Judge Nancy Gordon entered an order denying SSSI's motion. In the order, Judge Gordon recited the procedural history of the case, and then concluded as a matter of law that SSSI was not entitled to the relief it sought under Rule 60.

On 28 October 2009, SSSI filed the Second Motion. In the Second Motion, SSSI stated that there was no confusion as to Greg Martin's relationship with MGC at any point in the case, and that since there was no legal separation between Greg Martin and MGC, SSSI was entitled to execute the judgment against Greg Martin's property. On 10 December 2009, Judge James T. Hill entered an order denying the second motion. In the order, Judge Hill noted that SSSI had made the Rule 60 Motion attempting to add Greg Martin as a defendant, and that the Rule 60 Motion had already been denied. Accordingly, Judge Hill found that "[t]here is no basis in law for entry of the Order requested by [SSSI] which would require Greg Martin be added as an individual." On 16 December 2009, SSSI filed notice of appeal to this Court from the Rule 60 Motion and the Second Motion.

## II. ANALYSIS

SSSI argues that: (1) the judgment is valid against Greg Martin, because Greg Martin and MGC are the same legal entity and Greg Martin is named in the judgment through his trade name; and (2) the trial court erred in denying SSSI's Rule 60 motion to amend the judgment. We disagree.

Our Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) (review of final judgment). "[R]eview of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *In re J.L.*, 183 N.C. App. 126, 130, 643 S.E.2d 604, 606 (2007). Since SSSI does not challenge any of the trial court's findings of fact, we review this matter only to determine if those findings of fact support the trial court's legal conclusions. *Lumsden v. Lawing*, 107 N.C. App. 493, 499, 421 S.E.2d 594, 598 (1992).

### A. Order Denying the Rule 60 Motion

In this case, after the denial of SSSI's Rule 60 Motion entered by the trial court on 21 June 2009, there was nothing left to be judicially determined. As a result, it was "[a] final judgment dispos[ing] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[.]" *Blythe v. Blythe*, 163 N.C. App. 198, 200, 593 S.E.2d 403, 404 (2004) (citation omitted). Following this order, no further action was taken by SSSI until 28 October 2009, when SSSI filed the Second Motion.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citations omitted). Rule 3 provides in part:

(c) . . . In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C.R. App. P. 3(c)(1)-(3) (2010). The requirements of Rule 3 are jurisdictional, and if not complied with, the appeal must be dismissed. *Bailey*, 353 N.C. at 156, 540 S.E.2d at 322 (Failure to comply "mandates" dismissal of the appeal.). "Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal." *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008).

The notice of appeal in this case for the order denying the Rule 60 Motion, filed on 21 June 2009, was not filed until 16 December 2009, well outside the bounds prescribed in Rule 3 of the North Carolina Rules of Appellate Procedure. Accordingly, SSSI's arguments regarding the denial of its Rule 60 Motion are dismissed.

*B. Order Denying the Second Motion*

"A motion is properly treated according to its substance rather than its label." *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981). "This Court has previously stated that '[t]he conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge.'" *Huffaker v. Holley*, 111 N.C. App. 914, 915-16, 433 S.E.2d 474, 475 (1993) (addressing repeated motions for summary judgment under Rule 56) (quoting *Carr v. Carbon Corp.*, 49 N.C. App. 631, 636, 272 S.E.2d 374, 378 (1980)).

In its 10 December 2009 order, the trial court denied SSSI's Second Motion after making the following findings of fact:

1. On February 19, 2009 [SSSI] filed a Motion for Relief pursuant to Rule 60 of the North Carolina Rules of Civil Procedure requesting relief from the Judgment through amendment of the caption of same.
2. Specifically, SSSI requested that Greg Martin be added as an individual to facilitate execution of the Judgment.

3. [SSSI]'s motion was denied on June 8, 2009.
4. There is no basis in law for entry of the Order requested by [SSSI] which would require Greg Martin be added as an individual.

We agree with the trial court that the Second Motion was merely a reiteration of SSSI's Rule 60 Motion. SSSI presented no additional issues for the trial court's determination, and merely used the Second Motion to again bring the substance of the Rule 60 Motion before the trial court. Since the trial court correctly concluded that SSSI had no basis in law for its motion, we affirm the 10 December 2009 order of the trial court.

Affirmed in part and dismissed in part.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).