NO. COA10-192

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

LARRY D. MCCANN,
Plaintiff,

v. Alleghany County
No. 09 CVS 100

THE TOWN OF SPARTA,
Defendant.

Appeal by plaintiff from order entered 30 September 2009 by Judge Andy Cromer in Alleghany County Superior Court. Heard in the Court of Appeals 7 June 2010.

Larry D. McCann, pro se, for plaintiff-appellant.

Frazier Hill & Fury, R.L.L.P., by Torin L. Fury and William L. Hill, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff Larry D. McCann appeals from the trial court's order granting summary judgment in favor of defendant Town of Sparta ("defendant-town"). We affirm.

Plaintiff is the owner of a residential property located at 342 West Whitehead Street in Sparta, North Carolina. Between 8:00 p.m. and 8:30 p.m. on 10 May 2006, Mark Richardson, the tenant at 342 West Whitehead Street, contacted Ronnie Norris, the on-call employee with defendant-town's maintenance division, to report that "sewage had backed up into the house" Mr. Richardson was renting

from plaintiff. When Mr. Norris arrived at the West Whitehead Street residence, he "observed [a] large amount of standing water on the floor of the residence." Because Mr. Norris "determined that the situation had existed for at least several days[] and that there was no emergency situation," Mr. Norris decided to return to the West Whitehead Street residence the next morning to address the matter. The next morning, Mr. Norris called Raymond Moxley, defendant-town's maintenance division supervisor, who arrived at the West Whitehead Street residence and saw the standing water inside the house. Mr. Moxley "did not see any sewage or standing water anywhere outside of the house." Based on his experience, Mr. Moxley suspected the problem was caused by "a blockage of some type in the branch line" that carries sewage southward from plaintiff's residential property to the main sewage line at West Whitehead Street.

Mr. Moxley and Mr. Norris next retrieved defendant-town's Jet Vac sewer machine rodder, which uses pressurized water to dislodge blockages in the sewer line, and sprayed high pressurized water from the rodder northward into the branch line towards plaintiff's property. Shortly thereafter, the water and sewage began "flowing freely through the branch line," causing Mr. Moxley to conclude that the blockage was "most likely a small amount of grease built up in the line," since larger blockages such as roots in the line or large amounts of grease "take much longer to clear." After the blockage was cleared, defendant-town's Town Manager Bryan Edwards

arranged for the sewage and water to be removed from plaintiff's property at defendant-town's expense.

On 1 April 2009, plaintiff filed a complaint *pro se* against several parties, including defendant-town, seeking compensatory damages allegedly caused by defendants' negligence and trespass. On 4 May 2009, defendants moved to dismiss plaintiff's complaint. On 26 June 2009, the trial court dismissed plaintiff's complaint with prejudice as to all defendants except defendant-town. On 10 September 2009, defendant-town moved for summary judgment as to all of plaintiff's claims against it, and provided affidavits from Mr. Norris, Mr. Moxley, and Mr. Edwards in support of its motion.

On 11 September 2009, notwithstanding his having participated in the previous motion hearing as well as a court-ordered mediated settlement conference, plaintiff sought to continue both the summary judgment hearing and the trial that was set to begin on 12 October 2009 so that he could obtain counsel. The court denied plaintiff's motion. On 24 September 2009, plaintiff requested that the trial court reconsider his motion to continue. Because the matter had been calendared for trial since 5 May 2009, the court denied plaintiff's request to reconsider his motion to continue. After hearing defendant-town's motion for summary judgment on 28 September 2009, the trial court granted defendant-town's motion and dismissed plaintiff's complaint with prejudice. Plaintiff appealed.

Plaintiff first asks this Court to review the trial court's orders denying his 11 September and 24 September 2009 motions to continue. The requirements of Appellate Rule 3, which mandate that a notice of appeal "shall designate the judgment or order from which appeal is taken," *see* N.C.R. App. P. 3(d), "are jurisdictional in nature." *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 158, 392 S.E.2d 422, 425 (1990). "As such, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006) (internal quotation marks omitted). "Without proper notice of appeal, this Court acquires no jurisdiction." *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424 (internal quotation marks omitted). Since, in his 9 October 2009 notice of appeal to this Court, entitled "Notice of Appeal Order Granting Defendant's Motion for Summary Judgement," plaintiff only indicated that he sought to appeal from the trial court's 30 September 2009 order granting defendant-town's motion for summary judgment, we dismiss the portions of plaintiff's appeal arguing error with respect to the trial court's denial of plaintiff's motions to continue. In addition, in his brief, plaintiff mentions but provides no legal argument in support of his contention that his trespass claim against defendant-town was erroneously dismissed. Since it is not "the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein," *see*

State v. Hill, 179 N.C. App. 1, 21, 632 S.E.2d 777, 789 (2006), this issue is deemed abandoned. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

"Summary judgment is . . . a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a *prima facie* case or that he will be able to surmount an affirmative defense." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). A moving party may meet its burden to establish the lack of a genuine issue as to any material fact and its entitlement to judgment as a matter of law by "proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party . . . cannot produce evidence to support an essential element of his or her claim, or . . . cannot surmount an affirmative defense which would bar the claim." *Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982) (citing *Dickens*, 302 N.C. at 453, 276 S.E.2d at 335). "'[T]he evidence is considered in the light most favorable to the nonmoving party,'" *Schwartz v. Banbury Woods Homeowners Ass'n*, __ N.C. App. __, __,

675 S.E.2d 382, 387 (2009) (quoting *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999)), *disc. review denied*, 363 N.C. 856, __ S.E.2d __ (2010), and "the order is reviewed *de novo*." *Id.* at __, 675 S.E.2d at 387 (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). While "[s]ummary judgment is a drastic measure, and . . . should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case," summary judgment is nevertheless proper in a negligence claim "where the plaintiff's forecast of evidence is insufficient to support an essential element of negligence." *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002).

A municipal corporation which either constructs sewer lines or adopts sewer lines constructed by third persons becomes responsible for maintenance and liable for injuries resulting from lack of due care in upkeep. *See Ward v. City of Charlotte*, 48 N.C. App. 463, 467, 269 S.E.2d 663, 666, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 463 (1980); 11 Eugene McQuillin, *The Law of Municipal Corporations* § 31.33 (3d ed. rev. vol. 2000). "The duty of maintenance includes the duty of exercising a reasonable degree of watchfulness so as to keep the sewerage system free from obstruction." *Ward*, 48 N.C. App. at 467, 269 S.E.2d at 666. "However, a municipal corporation is not an insurer of the condition of its sewerage system, and liability may only arise

where the municipality has [actual] or constructive notice of the existence of an obstruction or defect and fails to act." *Id.*

In the present case, according to the sworn affidavits from defendant-town's maintenance division employee Mr. Norris, maintenance supervisor Mr. Moxley, and town manager Mr. Edwards, plaintiff's tenant first notified defendant-town of the sewage backup into plaintiff's residential property on the evening of 10 May 2006. Prior to 10 May 2006, defendant-town had not received any complaints about sewage problems or blockages in the branch line or main line near 342 West Whitehead Street. Additionally, Mr. Moxley, who has served as defendant-town's maintenance supervisor since 1979, offered uncontradicted testimony that, while defendant-town's maintenance division employees "can inspect the sewer lines for breaks or roots growing into the lines, [they] cannot inspect the lines for blockages." Instead, the maintenance division is "forced to rely on the notice of others to alert [it] to possible blockages."

Although plaintiff concedes, "I have no idea that the [defendant-]town knew af [sic] a Blockage before May 11, 2006," and alleges in his complaint that his tenant Mr. Richardson only first discovered sewage in the West Whitehead Street residence "[o]n or about the 11 day of May[] 2006," plaintiff insists that the sewage backup occurred sometime in April 2006 while Mr. Richardson "was not a fulltime resident you might say." Plaintiff further suggests that, "since a sector of the [defendant-town's] Sewage was entering Plaintiff['s] House for two or three weeks[,] it looks like

[defendant-town] would have noticed a shortage of Sewage at the Sewage Treatment Plant." However, although defendant-town's maintenance employee Mr. Norris testified that he had "determined that [the presence of water and sewage in plaintiff's residence] had existed for at least several days," plaintiff offered no evidence to show that the blockage "had been present for a sufficient period of time" so as to place defendant-town on constructive notice of the blockage, or to show that an inspection would have disclosed its presence. *See Ward*, 48 N.C. App. at 469, 269 S.E.2d at 667. Thus, since plaintiff has not set forth specific facts establishing that defendant-town had actual or constructive notice of the small grease blockage in the branch line south of plaintiff's residence sometime prior to the evening of 10 May 2006 and failed to act to remove the obstruction, plaintiff failed to forecast sufficient evidence to establish his negligence claim against defendant-town. Accordingly, we conclude that the trial court did not err in granting summary judgment in favor of defendant-town. Our disposition renders it unnecessary to address plaintiff's remaining arguments.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).