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NO. COA12-1349
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

DAVID ENNIS,
Plaintiff,

v.

New Hanover County
Nos. 11 CVM 1575
11 CVM 1576

JOHN MUNN,
Defendant.

Appeal by plaintiff from orders entered 13 June 2012 and 24 August 2012 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 26 March 2013.

David Paul Ennis, pro se, plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

Plaintiff David Ennis appeals from (1) the trial court's order granting defendant John Munn's motion under Rule 60(b) of the Rules of Civil Procedure to set aside default judgments and (2) the trial court's order denying plaintiff's motion to reconsider the Rule 60(b) order. In the same order granting the Rule 60(b) motion, the trial court also dismissed plaintiff's

claims. Plaintiff did not appeal until more than 30 days later, after the trial court denied his motion to reconsider.

Because plaintiff's motion for reconsideration was not a proper motion under Rule 59 of the Rules of Civil Procedure, it did not toll plaintiff's time to appeal. As a result, plaintiff did not timely appeal from the trial court's order granting the Rule 60(b) motion. We further hold that because plaintiff's motion to reconsider was not a proper motion under Rule 59 of the Rules of Civil Procedure, the trial court also did not err in denying the motion to reconsider. We, therefore, dismiss in part and affirm in part.

Facts

This case arises out of a dispute in which plaintiff, an attorney, claimed that defendant, plaintiff's former landlord, failed to return a rent deposit, failed to pay plaintiff for house repairs, and failed to pay plaintiff for legal services rendered by plaintiff to defendant. Defendant, in turn, claimed plaintiff failed to pay defendant rent and failed to pay for damages to defendant's property.

On or about 13 April 2011, plaintiff filed a small claims court action against defendant for \$3,180.00. Defendant appeared at the scheduled hearing on the claim, but plaintiff failed to appear and the matter was dismissed. On 4 May 2011,

plaintiff filed two more small claims court actions against defendant for \$3,180.00 and \$4,991.87, respectively. The complaint for the \$3,180.00 claim stated it was for "[f]ailure to return rent deposit," "house repairs," and "[a]ttorney's fees." The complaint for the \$4,991.87 claim stated it was for "[f]ailure to pay for legal services" and "[a]ttorney's fees."

On 23 May 2011, defendant, acting pro se, filed three small claims court actions against plaintiff seeking \$5,000.00, \$4,000.00, and \$3,600.00, respectively. All three claims alleged they were for past due rent and the \$4,000.00 and \$3,600.00 claims additionally alleged they were for damage to property.

On 24 May 2011, the magistrate entered default judgments against defendant on both of plaintiff's claims after defendant failed to appear at a hearing on the claims. On 13 June 2011, both parties appeared at a hearing on defendant's claims and the magistrate dismissed defendant's claims with prejudice.

On 7 June 2011, plaintiff filed notices of right to have exemptions designated and, on 6 July 2011, plaintiff filed writs of execution on the default judgments. On 23 January 2012, the New Hanover County District Court entered two orders, one for each of the two default judgments, compelling defendant to comply with interrogatories served on defendant by plaintiff and

each imposing an attorney's fees sanction on defendant in the amount of \$500.00.

On or about 24 February 2012, plaintiff filed a motion for show cause order seeking an order requiring defendant to appear and show cause as to why defendant should not be held in contempt for failing to respond to plaintiff's interrogatories and for failing to comply with the district court order compelling defendant to respond to the interrogatories. On or about 9 April 2012, defendant, now represented by counsel, filed a motion under Rules 60(b)(3) and (6) to have the default judgments set aside on grounds of fraud.

Defendant's Rule 60(b) motion was heard by the district court on 24 April 2012 and, at the hearing, defendant testified to the following. Plaintiff rented a house from defendant. The two became acquaintances, and at one point plaintiff offered to help defendant recover on a putative breach of contract claim against defendant's former employer. Plaintiff and defendant never, however, entered into any agreement for defendant to pay plaintiff for plaintiff's legal services. Rather, they agreed that, should plaintiff induce defendant's former employer to settle defendant's breach of contract claim, plaintiff and defendant would split the proceeds of the settlement evenly. The parties never reduced this agreement to writing. Plaintiff

was unable to obtain a settlement with defendant's former employer on the putative breach of contract claim, and defendant told plaintiff he did not want to pursue the matter further.

Plaintiff then fell behind paying defendant rent, and when defendant asked for rent payments, plaintiff contended that he had incurred legal expenses in his representation of defendant on the contract claim. Defendant, however, told plaintiff he had not intended to comingle the rent payments and any legal representation by plaintiff. According to defendant, when he threatened to evict plaintiff, plaintiff informed defendant he would make defendant's life miserable. Defendant testified that prior to receiving the default judgments, plaintiff had never suggested that defendant owed plaintiff roughly \$8,000.00.

At the hearing, the trial court rendered an order granting defendant's Rule 60(b) motion and vacating the default judgments. The court also announced that it was dismissing plaintiff's claims without prejudice. The court stated that it granted the Rule 60(b) motion because the two default judgments entered in small claims court should have been consolidated into a single claim and, had they been consolidated, the amount in controversy would have exceeded the \$5,000.00 limit for small claims court jurisdiction.

The next day, on 25 April 2012, plaintiff filed a "MOTION TO RECONSIDER" the trial court's order granting defendant's Rule 60(b) motion. The motion did not identify the Rule of Civil Procedure under which plaintiff was proceeding. It also did not address the portion of the trial court's oral order dismissing plaintiff's claims without prejudice. Instead, plaintiff's motion for reconsideration requested that the trial court, in light of N.C. Gen. Stat. § 7A-212 and N.C. Gen. Stat. § 7A-228(a), "reconsider" its order granting defendant's Rule 60(b) motion and "modify" the order to provide that defendant's Rule 60(b) motion was denied "as a matter of law."

On 13 June 2012, the trial court entered a written order granting defendant's Rule 60(b) motion, vacating the default judgments, and dismissing plaintiff's claims without prejudice. The 13 June 2012 order provides:

THIS CAUSE came on to be heard and being heard by the undersigned on Motion of Defendant, John Munn, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, to vacate the two monetary judgments entered on May 24, 2011 by the Magistrate of New Hanover County in the above-captioned matters, for \$3,180.00 and \$4,991.87, respectively; and it appearing such relief should be granted as Plaintiff's claims should have been consolidated and therefore were outside the jurisdiction of the Magistrate's Court;

THEREFORE, IT IS ORDERED that the Defendant's Motion to vacate the two

monetary judgments on the above grounds is hereby GRANTED. Judgments entered for Plaintiff's Motion to Compel and Attorney Fees shall be vacated, and these actions are dismissed without prejudice.

On 24 August 2012, the court entered an order denying plaintiff's motion to reconsider, stating: "This matter is heard by the court in chambers upon the filing of a Motion to Reconsider filed by the Plaintiff. The court has considered the Motion, all attachments, and is not inclined to modify the prior ruling." On 4 September 2012, plaintiff filed notice of appeal "from the Order entered on July 13, 2012 in the District Court of New Hanover County, in which Judge J.H. Corpening allowed Defendant's Order Granting his 60(b) Motion, thereby vacating two monetary judgments in the above-captioned matters against the same Defendant and subsequently denying Plaintiff's Motion for Reconsideration."

Discussion

We must first address whether plaintiff timely filed his notice of appeal. Rule 3(c)(1) of the Rules of Appellate Procedure provides that notice of appeal is timely if filed "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" Rule 58 of the Rules of Civil Procedure provides: "The

party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered."

Here, plaintiff was served by mail on the same day the order granting defendant's Rule 60(b) motion was entered, 13 June 2012.¹ Thus, plaintiff had until 13 July 2012 to file notice of appeal from the order granting the Rule 60(b) motion and dismissing plaintiff's claims. However, plaintiff did not file notice of appeal from that order until 4 September 2012, outside of the 30-day window. Unless the time for filing notice of appeal was tolled, plaintiff's appeal from the Rule 60(b) order was not timely.

Rule 3(c)(3) of the North Carolina Rules of Appellate Procedure provides regarding tolling: "[I]f 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" We note that plaintiff did

¹We note that plaintiff's notice of appeal states that it is appealing the order granting the Rule 60(b) motion, but does not mention the portion of the order dismissing his claims without prejudice. Because of our disposition of this appeal, we have not addressed the effect, if any, of plaintiff's failure to challenge on appeal the dismissal.

not specify the rule upon which he was relying in filing his motion for reconsideration.

There is no question that neither Rule 50(b), which pertains to judgments notwithstanding the verdict, nor Rule 52(b), regarding amendments to findings of fact, applies in this case. Plaintiff's motion does not address factual findings and, accordingly, was not a Rule 52(b) motion. The question remains whether plaintiff's motion for reconsideration was a proper Rule 59 motion.

Rule 59 provides for motions for a new trial under Rule 59(a) and for motions to alter or amend a judgment under Rule 59(e). Because there was no trial, plaintiff's motion to reconsider tolled the time for filing notice of appeal only if the motion constituted a motion to alter or amend the judgment under Rule 59(e). Rule 59(e) provides: "A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment."

We first address whether the trial court's order granting defendant's Rule 60(b) motion constituted a "judgment" for the purposes of Rule 59(e). In *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 207, 450 S.E.2d 554, 555 (1994), the trial court entered a default judgment against the defendant establishing the defendant's paternity to a child and ordering

the defendant to pay child support. The defendant filed a Rule 60(b) motion requesting that the court suspend the judgment pending a blood test to determine paternity and the court denied the motion. *Garrison*, 117 N.C. App. at 208-09, 450 S.E.2d at 555-56. The defendant then filed, among other motions, a Rule 59(e) motion requesting that the court "amend or alter the judgment [denying the Rule 60(b) motion] so as to vacate the [judgment establishing the defendant's paternity and ordering the defendant to pay child support] and allow him relief therefrom and a blood test" *Garrison*, 117 N.C. App. at 209, 450 S.E.2d at 556.

The trial court in *Garrison* denied the defendant's Rule 59(e) motion, and the defendant appealed that ruling. *Garrison*, 117 N.C. App. at 209, 210, 450 S.E.2d at 556, 557. This Court held:

[B]ecause Rule 59 is an inappropriate vehicle to challenge the denial of a Rule 60 motion, [the trial court] did not abuse [it]s discretion in denying defendant's motion to amend the . . . denial of his Rule 60(b)(6) motion. N.C.G.S. § 1A-1, Rule 59 (1990); W. Brian Howell, *Shuford North Carolina Civil Practice & Procedure* § 59, at 625 (4th ed. 1992) (Rule 59 provides relief from judgments in jury or nonjury trials resulting from errors occurring during trial).

Id. at 211, 450 S.E.2d at 557.

While *Garrison* addressed the denial of a Rule 60 motion, the Court appeared to be reasoning that Rule 59 applies only to judgments resulting from trials. That reasoning would apply equally to an order granting a Rule 60 motion, as occurred here. See also *Bodie Island Beach Club Ass'n v. Wray*, ___ N.C. App. ___, ___, 716 S.E.2d 67, 77 (2011) ("Because both Rule 59(a)(8) and (9) are post-trial motions and because the instant case concluded at the summary judgment stage, the court did not err by concluding that 'it [was] not proper to set aside default against Defendant SRS and vacate the summary judgment pursuant to Rule 59(a)(8) and (9).'). Under *Garrison*, therefore, plaintiff's motion to reconsider was not a proper Rule 59(e) motion.

Even if Rule 59(e) did apply in this context, it is established that "[t]o qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must 'state the grounds therefor' and the grounds stated must be among those listed in Rule 59(a)." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (quoting N.C.R. Civ. P. 7(b)(1) (1990)). Plaintiff's motion to reconsider did not, however, comply with the requirement that the grounds for his motion fall within the scope of Rule 59(a).

In this case, plaintiff's motion makes a purely legal argument and requests that the trial court "modify" its ruling to state that defendant's Rule 60 motion "is hereby DENIED as a matter of law." Our Supreme Court has explained that "'[t]he appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8).'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988)). Thus, of the nine grounds for a new trial recognized in Rule 59(a), the only ground potentially applicable to defendant's motion for reconsideration is Rule 59(a)(8).

Rule 59(a)(8) provides that a trial court may grant a new trial based upon an "[e]rror in law occurring at the trial *and objected to by the party making the motion . . .*" (Emphasis added.) Accordingly, "[i]n order to obtain relief under Rule 59(a)(8), a [party] must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion." *Davis*, 360 N.C. at 522, 631 S.E.2d at 118.

There was, of course, no trial in this case. Assuming, without deciding, that Rule 59(a)(8) applies to the Rule 60(b) hearing, plaintiff did not, in that hearing, make the argument that he included in his motion for reconsideration. He did not

object, therefore, at the hearing, to the error of law that was the basis for his motion for reconsideration. Consequently, plaintiff's motion for reconsideration does not meet the requirements under Rule 59(a)(8). See *Davis*, 360 N.C. at 522-23, 631 S.E.2d at 118 ("Neither defendant's post-trial motion nor the remaining record before us shows a proper objection at trial to any of the rulings at issue. Nothing else appearing, from the record before us, defendant failed to preserve his right to pursue a Rule 59(a)(8) motion."). Since plaintiff's motion was not based on a ground enumerated in Rule 59(a), it was not a proper Rule 59(e) motion for that reason as well.

Because the motion for reconsideration was not a proper Rule 59(e) motion, it did not toll the time for filing notice of appeal, and plaintiff's notice of appeal from the order granting defendant's Rule 60(b) motion was untimely. We must, therefore, dismiss plaintiff's appeal from that order. See *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108-09 (2007) ("[S]ince the time for filing an appeal was not tolled by the improper Rule 59 motion, petitioners' notice of appeal on 6 January 2006 was not a timely appeal of the 27 September 2005 order and petitioners' remaining appeal from that order is dismissed.").

Plaintiff's appeal from the trial court's order denying his motion to reconsider is, however, properly before this Court. Nevertheless, since plaintiff's motion to reconsider was not a proper Rule 59 motion, the trial court did not abuse its discretion in denying it. See *N.C. Alliance for Transp. Reform*, 183 N.C. App. at 470, 645 S.E.2d at 108 (holding trial court properly denied Rule 59(e) motion when motion did not specify grounds for motion as required under Rule 7(b)(1) of Rules of Civil Procedure and motion was not proper Rule 59(e) motion).

In sum, we dismiss plaintiff's appeal from the trial court's order granting defendant's Rule 60(b) motion as untimely. Further, since plaintiff's motion to reconsider the order granting defendant's Rule 60(b) motion was not a proper Rule 59 motion, we affirm the trial court's order denying plaintiff's motion to reconsider.

Dismissed in part and affirmed in part.

Judges MCGEE and DAVIS concur.

Report per Rule 30(e).