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NO. COA12-287
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

CELESTE G. BROUGHTON,
Plaintiff

v. Wake County
No. 10 CVD 20602

COUNTY COMMISSION OF WAKE COUNTY,
Defendant

Appeal by plaintiff from orders entered 12 July 2011 and 12 October 2011 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 13 September 2012.

Celeste G. Broughton, Plaintiff-Appellant, pro se.

Office of the Wake County Attorney, by Scott W. Warren & Mary Elizabeth Smerko, for Defendant-Appellee.

ERVIN, Judge.

Plaintiff Celeste G. Broughton appeals from orders entered by the trial court granting a dismissal motion filed by Defendant County Commission of Wake County and denying Plaintiff's request for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. In her brief, Plaintiff advances numerous

challenges to the trial court's orders, including contentions that the 12 July 2011 order lacks adequate findings of fact and conclusions of law, that the trial court's findings of fact lack adequate evidentiary support, that the trial court misapplied or misunderstood the legal principles upon which it relied in dismissing Plaintiff's complaint, and that the trial court unlawfully failed to allow Plaintiff's motion for change of venue. After careful consideration of Plaintiff's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

Plaintiff is a resident of Wake County. In her complaint, Plaintiff alleges that Defendant valued a tract of real property that she owned at an impermissibly high amount in 2000. After unsuccessfully pursuing available administrative remedies, Plaintiff filed a civil action against Defendant in the Wake County District Court in 2006. However, Plaintiff voluntarily dismissed her complaint against Defendant without prejudice on 14 December 2009. On 13 December 2010, Plaintiff filed the complaint which led to the present proceeding, in which she alleged that her property had been impermissibly assessed in violation of N.C. Gen. Stat. § 105-317; that Defendant had been

unjustly enriched at Plaintiff's expense through the receipt of excessive tax payments premised on the impermissibly high valuation assigned to her property; that Plaintiff had been denied due process of law during her attempts to challenge the valuation assigned to her property; that Defendant's actions subjected it to liability pursuant to N.C. Gen. Stat. §§ 75-1, 50, 51, and 54; that Defendant's actions violated N.C. Gen. Stat. §§ 14-112.2 and 221.1; and that Defendant was liable to Plaintiff pursuant to 42 U.S.C. § 1983 based upon alleged due process and equal protection violations. Defendant sought compensatory and punitive damages, injunctive relief, and a declaratory judgment in her favor.

On 14 January 2011, Defendant filed a responsive pleading in which it sought dismissal of Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(b)(7) for lack of standing, lack of jurisdiction over Defendant's person, failure to state a claim for which relief could be granted, and failure to join the real party in interest. In addition, Defendant asserted various additional affirmative defenses and denied the material allegations of Plaintiff's complaint.¹ On 8 June 2011, Plaintiff filed a

¹Although Plaintiff argues that Defendant waived the right to seek dismissal of her complaint on the grounds that a similar motion had not been filed in response to the earlier complaint

response to Defendant's responsive pleading in which she disputed the validity of Defendant's legal positions, including its assertion that she had lacked the authority to file suit against Defendant.

On 10 June 2011, Defendant's dismissal motions came on for hearing before the trial court. On 12 July 2011, the trial court entered an order granting Defendant's dismissal motions in which it stated, among other things, that:

The Court finds that the "County Commission of Wake County" is not a proper defendant as to any of the eight causes of action alleged in the Plaintiff's Complaint and any amendment to add a new party defendant at this time would not relate back to the original complaint. Except for the Plaintiff's claims under [42 U.S.C.] § 1983, which may be based on a pattern or practice of behavior, the allegations of the Complaint establish that the causes of action would be barred by applicable statutes of limitation. The last tax assessment referred to in the Complaint was in 2006, and there is some mention of behavior in 2008. The Plaintiff's oral request for leave to amend the Complaint should be denied. Plaintiff's Complaint should be dismissed in [its] entirety pursuant to the authority of *Piland v. Hertford County Board of Commissioners*, 141 N.C. App. 293, 539 S.E.2d 669 (2000).

that she voluntarily dismissed with prejudice, that argument is without merit in light of well-established principles of North Carolina law. *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 336, 385 S.E.2d 545, 547 (1989) (stating that, in the event that a plaintiff refiles a voluntarily dismissed action, "it was as if the suit had never been filed"), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990).

In the alternative, and as separate and additional grounds for dismissal:

1. To the extent that Plaintiff has attempted to set out an unjust enrichment claim in Count Two of the Complaint, this claim is dismissed pursuant to [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) in that unjust enrichment is not a cognizable claim against the party defendant or a county;
2. To the extent that Plaintiff has attempted to set out a claim for unfair and deceptive trade practices in Count Four of the Complaint, this claim is dismissed pursuant to [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) for failure to state a cognizable claim;
3. To the extent that Plaintiff has attempted to set out a claim for unfair debt collection practices in Count Four of the Complaint, this claim is dismissed pursuant to [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) in that the defendant is not a "debt collector" within the meaning of N.C. [Gen. Stat. §] 75-50;
4. To the extent that Plaintiff attempted to bring claims for violation of criminal statutes N.C. [Gen. Stat. §§] 14-112.2 and [] 221.1, these claims are dismissed pursuant to [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) in that Plaintiff has no civil cause of action under Chapter 14.

Based on this reasoning, the trial court dismissed Plaintiff's complaint with prejudice.

On 25 July 2011, Plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 seeking relief from the 12 July 2011 order on the grounds that Defendant had made certain misrepresentations of fact, that the decision to dismiss Plaintiff's complaint was contrary to the evidence, and that the trial court erred by failing to allow Plaintiff to amend her complaint. On 12 October 2011, the trial court entered an order denying Plaintiff's request for relief from the 12 July 2011 order, rejecting Plaintiff's request that this case be transferred to Nash County, and noting that Plaintiff had withdrawn her request to amend her complaint.² Plaintiff noted an appeal to this Court from the trial court's orders.³

²The trial court's 12 October 2011 order suggests that Plaintiff filed a separate motion to amend her complaint. The record on appeal does not contain a separate amendment motion of the type to which the trial court appears to allude. However, the motion that Plaintiff filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 includes language suggesting that Plaintiff should be allowed to amend her complaint to assert her claims against Wake County rather than the County Commission. We need not address the extent to which Plaintiff did, in fact, properly seek to amend her complaint or whether Plaintiff withdrew her request for leave to amend given that, for the reasons set forth below, Plaintiff has failed to properly preserve any challenge which she might have otherwise been able to assert with respect to her amendment motion for appellate review.

³As the trial court noted, the extent to which Plaintiff was entitled to seek relief from the 12 July 2011 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 is, at best, uncertain. In the event that Plaintiff lacked the right to seek relief from the 12 July 2011 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, her notice of appeal from the 12 July 2011 order would not have been

II. Legal Analysis

As the trial court noted, this case is controlled by our previous decision in *Piland v. Hertford County Board of Commissioners*, 141 N.C. App. 293, 539 S.E.2d 669 (2000), in which the plaintiffs challenged the rezoning of their property by initiating a civil action against the Hertford County Board of Commissioners. *Piland*, 141 N.C. App. at 294, 539 S.E.2d at 670. The defendant filed a motion to dismiss the plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(6), and 12(b)(7) on the grounds that "it was not a proper defendant, that Hertford County was the proper defendant, and that the complaint could not be amended to add or substitute Hertford County as a defendant" given that the applicable statute of limitations had expired. *Id.* at 295, 539 S.E.2d at 670. Although the trial court denied the defendant's dismissal motion, this Court on appeal noted that, "[w]here a county is the real party in interest, it must sue and be sued in its name" and held that "the real party in interest in this case is Hertford County, not the Board of Commissioners." *Id.*

timely filed. N.C.R. App. P. 3(c)(3) (stating that, "if a timely motion is made by any party for relief under [N.C. Gen. Stat. §§ 1A-1,] 50(b), 52, or 59 of the Rules of Civil Procedure, the thirty day period for taking an appeal is tolled as to all parties until entry of an order disposing of the motion"). However, we need not address this issue since Plaintiff is not entitled to appellate relief from the trial court's orders for other reasons.

at 296, 539 S.E.2d at 671 (alteration in original) (quoting *Johnson v. Marrow*, 228 N.C. 58, 60, 44 S.E.2d 468, 470 (1947)). In addition, we held that any attempt to amend the plaintiffs' complaint to name Hertford County as the party defendant would "effectively seek[] to add a new party-defendant rather than merely correct a misnomer," so that such an amendment would not relate back to the date upon which the original complaint was filed. *Id.* at 301-02, 539 S.E.2d at 674. As a result, since "the plaintiffs' suit against the county was time-barred," we concluded that "the trial court should have granted the defendant's motion to dismiss." *Id.* at 302, 539 S.E.2d at 674.

In this case, as in *Piland*, Plaintiff filed suit against the "County Commission of Wake County." As was the case in *Piland*, the real party in interest in this case was Wake County rather than the Wake County Commission. We need not decide whether a timely motion to amend her complaint might have sufficed to remedy this deficiency given that Plaintiff has failed to advance any argument in her brief to the effect that she was erroneously denied the right to amend her complaint for the purpose of asserting her claim against the proper party defendant, thereby abandoning any contention to that effect that she might have otherwise been able to advance. N.C.R. App. P. 28(a) (stating that "[i]ssues not presented and discussed in a

party's brief are deemed abandoned"). As a result, since the trial court did not err by dismissing Plaintiff's complaint⁴ and since Plaintiff has not preserved any challenge that she might otherwise have had to the denial of her amendment motion for appellate review, we conclude that the trial court's order should be, and hereby is, affirmed.⁵

AFFIRMED.

Judges ROBERT N. HUNTER, JR. and McCULLOUGH concur.

Report per Rule 30(e).

⁴The fact that the trial court had already dismissed Plaintiff's complaint prior to the time at which Plaintiff appears to have requested that this case be transferred from Wake County to Nash County precludes us from finding that the denial of her transfer motion was unlawful, given that there was no case to transfer by the time that Plaintiff sought such relief.

⁵Although Plaintiff argues at length in her brief that the 12 July 2011 order lacked proper findings and conclusions, such findings and conclusions are generally not required in the absence of a timely request. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (stating that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided in [N.C. Gen. Stat. § 1A-1,] Rule 41(b))." As a result of the fact that the record contains no indication that Plaintiff requested the making of findings and conclusions prior to the entry of the 12 July 2011 order, Plaintiff has waived her right to object to the absence of such findings and conclusions from that order. Moreover, given the basis for the trial court's dismissal decision, we are unable to ascertain how the making of findings and conclusions would have assisted us in reviewing the trial court's order.