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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1372

Filed: 20 September 2016

Davidson County, No. 07 CVD 26

NEWBRIDGE BANK, FORMERLY LEXINGTON STATE BANK, Plaintiff

v.

RONNIE C. HEDGEPEETH AND SHIRA C. HEDGEPEETH D/B/A KICKS MARTIAL ARTS & MOVEMENT CENTER, Defendants

Appeal by defendants from order entered 2 October 2015 by Judge John R. Penry, Jr., in Davidson County District Court. Heard in the Court of Appeals 27 April 2016.

Carruthers & Roth, P.A., by Rachel Scott Decker and June L. Basden, for plaintiff-appellee.

Ronnie C. Hedgepeth and Shira Hedgepeth, pro se defendant-appellants.

CALABRIA, Judge.

Ronnie C. Hedgepeth and Shira Hedgepeth (“defendants”) appeal from an order denying their Rule 60 motion for relief and their Rule 59 motion to amend. We dismiss the appeal *ex mero motu* for lack of jurisdiction.

I. Factual and Procedural Background

From 1997 to 2006, defendants maintained a line of credit for their business, Kicks Martial Arts and Movement Center, with NewBridge Bank (“plaintiff”).

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Defendants steadily accumulated debt on this account, and defaulted in 2006. On 3 January 2007 plaintiff filed a complaint in Davidson County District Court seeking payment for the principle and interest owed by defendants, and attorney's fees associated with the action.

On 6 February 2007, defendants filed a motion for an extension of time to answer the complaint. The trial court granted defendants' motion. Defendants filed an answer to the complaint on 7 March 2007, but only Ms. Hedgepeth signed the answer. Because Mr. Hedgepeth failed to sign the answer, plaintiff filed for an entry of default against him, and the trial court entered default against Mr. Hedgepeth on 14 March 2007. Because a separate action involving the parties was pending in Superior Court that would affect the amounts defendants owed in the instant case, plaintiff waited to pursue the action against Ms. Hedgepeth until the Superior Court action was resolved.

Three years later, on 31 August 2010, the trial court filed an Order to Close the File and removed the case from the trial docket. However, the trial court's order stated that the case was removed from the docket without prejudice and any party could reopen the case. The Superior Court action was resolved in 2013, but no further action was taken in the instant case until 2015.

On 20 May 2015, plaintiff filed a motion for summary judgment against Ms. Hedgepeth and a motion for default judgment against Mr. Hedgepeth. On 26 May

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2015, defendants filed a Rule 12(b)(6) motion to dismiss and raised counterclaims, alleging that plaintiff violated the federal Fair Debt Collection Practices Act and the North Carolina Fair Debt Collection Act, and that plaintiff abused process. Defendants' motion also sought declaratory judgment that plaintiff's claims were barred by the statute of limitations.

On 12 June 2015, defendants filed an amended motion to dismiss for failure to prosecute and a motion to set aside the default against Mr. Hedgepeth. On 24 June 2015, plaintiff moved for extension of time to reply to defendants' counterclaims and the trial court granted the motion. On June 30 2015, plaintiff filed a Rule 12 motion to strike or alternatively dismiss defendants' counterclaims.

The trial court held a hearing on these motions on 10 August 2015. The trial court allowed plaintiff's motions for, *inter alia*, default judgment against Mr. Hedgepeth and summary judgment against Ms. Hedgepeth. The trial court denied defendants' motions, and memorialized its decision in an order filed 12 August 2015. Defendants did not appeal this order.

On 24 August 2015, defendants filed a Rule 60(b) motion for relief from summary judgment for Ms. Hedgepeth and relief from default judgment for Mr. Hedgepeth. Defendants alleged that they should be granted relief "on the grounds of mistake, inadvertence, excusable neglect or any other reason justifying relief[.]"

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Defendants also filed a Rule 59 motion to alter or amend the default judgment and summary judgment entered 12 August 2015.

After hearing the parties' arguments, the trial court entered an order denying defendants' Rule 60 and 59 motions on 2 October 2015.

Defendants appeal from the 2 October 2015 order.

II. Jurisdiction

“When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.” *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citations omitted).

This Court notes a defect in defendants' notice of appeal. Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that “[t]he notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken” N.C.R. App. P. 3(d) (2016). “Without proper notice of appeal, this Court acquires no jurisdiction.” *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (citations omitted). “A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal.”

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Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citations omitted).

Here, defendants gave notice of appeal as follows:

Defendants . . . hereby give notice of appeal from the final judgment in the District Court of Davidson County of the Honorable John R. Penry, Jr., Judge, dated October 2, 2015, filed October 2, 2015, served via mail on Defendants on October 7, 2015 . . . entering judgment of dismissal from Motions pursuant to Rules 59 and 60 arising from the order entered on August 12, 2015 against the Defendants.

After review of defendants' appellate brief, it is clear that defendants are arguing the merits of their motions to dismiss and counterclaims, which were disposed of in the trial court's 12 August 2015 order. Defendants failed to give notice of appeal from the 12 August 2015 order, thereby violating Appellate Rule 3(d). Because defendants' "arguments pertain to the underlying order" that was not appealed, their arguments "are not properly before this Court." *Atchley Grading Co. v. W. Cabarrus Church*, 148 N.C. App. 211, 212-13, 557 S.E.2d 188, 188-89 (2001) (dismissing for lack of jurisdiction where plaintiff appealed from order denying its Rule 59 and Rule 60 motions but its arguments pertained to the underlying order). Further, even if we were to liberally construe defendants' notice of appeal so as to

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infer an intent to appeal from the underlying order, we note that the time period to appeal from the 12 August 2015 order has already expired.¹

III. Conclusion

For the foregoing reasons, we dismiss the appeal *ex mero motu*.

DISMISSED.

Judges HUNTER, JR., and TYSON concur.

Report per Rule 30(e).

¹ Plaintiff served defendants with the 12 August 2015 order on 17 August 2015. This period does not fall within the three day period provided for in Rule 58 of the North Carolina Rules of Civil Procedure. Therefore, defendants had thirty days from the date of service, 17 August 2015, to file a notice of appeal from the 12 August 2015 order. *See* N.C.R. App. P. 3(c)(2). Defendants' Rule 59 motion tolled the thirty day period until the trial court disposed of the Rule 59 motion on 2 October 2015, when the trial court issued its order. Defendants were untimely served with the 2 October 2015 order on 7 October 2015. Normally, the thirty day period runs again, from the date the trial court entered the order, if the order is timely served. N.C.R. App. P. 3(c)(3). When the order is not timely served, the thirty day period begins to run from the date of untimely service. *Id.* Nonetheless, the tolling effect of defendants' Rule 59 motion has passed, as has the thirty day period for defendants to file notice of appeal from the 12 August 2015 order.