IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-145

Filed: 15 November 2016

Rockingham County, No. 10 CVD 543

SWOFFORD, INC. d/b/a BUSINESS AND COMMERCE CENTER AT EDEN MALL and ROBERT SWOFFORD, Plaintiffs,

v.

BILL FISHER d/b/a EDEN GRAND PRIX and d/b/a THUNDER TRACKS USA, Defendant.

Appeal by Defendant from order entered 15 July 2010 by Judge Frederick B. Wilkins, Jr. and order entered 17 August 2015 by Judge Christine F. Strader in Rockingham County District Court. Heard in the Court of Appeals 23 August 2016.

Ivey, McClellan, Gatton & Siegmund, LLP, by Darren A. McDonough, for Plaintiffs-Appellees.

William L. Fisher, pro se.

DILLON, Judge.

This is a landlord-tenant action involving commercial property. Bill Fisher ("Tenant") leased certain space in a shopping center from Swofford, Inc. d/b/a Business and Commerce Center at Eden Mall and Robert Swofford (collectively referred to as the "Landlord"). On appeal, Tenant challenges the trial court's 2010 order granting summary judgment in favor of Landlord (the "2010 Order"). Tenant also challenges the trial court's 2015 order denying his Rule 59 motion for a new trial

and his Rule 60 motion for relief from the 2010 Order (the "2015 Order"). For the following reasons, we dismiss Tenant's challenge of the 2010 Order and affirm the trial court's 2015 Order.

I. Background

In 2007, Tenant entered into lease agreements to rent space in Landlord's shopping center. In 2008, Tenant failed to make certain scheduled rent, utility, and equipment payments.

In 2010, Landlord filed this action to recover the amounts owed under the leases. Tenant filed his unverified answer, generally denying the allegations in Landlord's complaint.

Landlord moved for summary judgment, submitting a supporting affidavit prepared by Landlord's business manager. Tenant did not submit any affidavits or other sworn testimony in opposition to Landlord's motion.

At the July 2010 motion hearing, Tenant appeared *pro se* and presented a number of arguments challenging the validity of Landlord's suit. In addition, Tenant orally requested that *he* be granted summary judgment, or, in the alternative, that the matter be continued so that he could obtain counsel. Following the hearing, the trial court entered the 2010 Order, which effectively denied Tenant's request to continue the matter.

In August 2010, Tenant moved for a new trial pursuant to Rule 59 of our Rules of Civil Procedure and for relief from the 2010 Order pursuant to Rule 60. However, Tenant waited five years before bringing his motion on for hearing. In August 2015, after a hearing on the matter, the trial court entered the 2015 Order, denying Tenant's Rule 59 and Rule 60 motions. Tenant filed a notice of appeal from the trial court's 2015 Order. However, his notice of appeal does not reference the trial court's 2010 Order.

II. Appellate Jurisdiction - 2010 Order

Tenant contends that this Court has appellate jurisdiction to review *not only* the 2015 Order *but also* the 2010 Order. Specifically, he contends that his notice of appeal referencing the 2015 Order also functioned as a notice of appeal from the 2010 Order. We disagree.

Rule 3 of our Rules of Appellate Procedure provides that a notice of appeal must "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) (emphasis added). Failure to designate the appealed orders in an underlying notice of appeal is fatal. *See, e.g.*, *Smith v. Smith*, ___ N.C. ___, ___, 786 S.E.2d 12, 32 (2016) (stating that "where the appellant noticed appeal from the judgment denying a Rule 59 motion, [this Court cannot] fairly infer from the notice of appeal the appellant's intent to appeal the order underlying

the appellant's Rule 59 motion"); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424-25 (1990) (restating same general principle).

Here, Tenant's notice of appeal provides, in pertinent part, the following:

> I hereby give timely written Notice of Appeal of the Order filed August 17, 2015 by the Honorable Christine F. Strader, District Court Judge, denying Rule 59 and Rule 60 Motions of Defendant.

(internal quotation marks omitted). As an appeal from the 2010 Order cannot "be fairly inferred from the notice," *Von Ramm*, 99 N.C. App. at 157, 392 S.E.2d at 424, we dismiss Tenant's challenge of the 2010 Order. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (holding that the requirements of Rule 3 are jurisdictional and that failure to comply with Rule 3 "precludes the appellate court from acting in any manner other than to dismiss the appeal").

III. Analysis - 2015 Order

Having dismissed Tenant's challenge of the 2010 Order for lack of jurisdiction, we turn now to Tenant's challenge of the 2015 Order. Here, Tenant contends that the trial court abused its discretion when it denied his Rule 59 and Rule 60 motions. We address Tenant's specific arguments in turn.

A. Denial of Rule 59 Motion

Tenant's motion for a new trial was brought under subsections (1), (2), (7) and (9) of Rule 59.[1]

1. Subsections (2) and (9) Are Abandoned

In his appellate brief, Tenant makes no specific argument concerning subsection (2) of Rule 59 – which permits a trial court to grant a new trial upon a showing of misconduct by the prevailing party – as a basis of his appeal. Therefore, his appeal on this basis is abandoned. N.C. R. App. P. 28(b)(6). Furthermore, Tenant fails to make any specific argument concerning subsection (9) – which permits a trial court to grant a new trial for "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(9) (2013). Therefore, this argument is also abandoned. *See* N.C. R. App. P. 28(b)(6).

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[1] Landlord does not contend that Rule 59 is an inappropriate vehicle to challenge a summary judgment order. There is authority from our Court which suggests that a Rule 59 motion is only appropriate following *a trial*. *See Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 287-88, 716 S.E.2d 67, 72 (2011). Specifically, we have held that "[b]ecause 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 improper] to set aside default against [the defendant] and vacate the summary judgment pursuant to Rule 59(a)(8) and (9)." *Id.* at 294-95, 716 S.E.2d at 77 (internal quotation marks omitted). *See also Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 211, 450 S.E.2d 554, 557 (1994) (holding that a Rule 59 motion is not an appropriate vehicle for challenging a Rule 60 order); *TD Bank N.A. v. Eagle Crest at Sharp Top, LLC*, No. CoA15-807, 2016 WL 4367257, at *2 (N.C. Ct. App. Aug. 16, 2016) (holding that "Rule 59 [is] not a valid route to challenge the order for summary judgment"); *Ennis v. Munn*, No. CoA12-1349, 2013 WL 5231998, at *4 (N.C. Ct. App. Sept. 17, 2013) (citing *Garrison* in support of holding that a Rule 60 order is not reviewable pursuant to a Rule 59 motion to reconsider). However, there have been a number of instances in which this Court has reviewed the merits of an appeal from a Rule 59 order, even where the underlying ruling was not a "trial" judgment. In those cases, though, the issue regarding the applicability of Rule 59 when challenging non-trial judgments was not raised. *See Rutherford Plantation, LLC v. The Challenge Golf Club of the Carolinas, LLC*, 225 N.C. App. 79, 737 S.E.2d 409 (2013); *Elliott v. Enka-Candler Fire and Rescue Department, Inc.*, 213 N.C. App. 160, 713 S.E.2d 132 (2013); *Batlle v. Sabates*, 198 N.C. App. 407, 681 S.E.2d 788 (2009).

Even assuming that these arguments are not abandoned, the record fails to disclose anything from which we could conclude that the trial court abused its discretion in denying Tenant's Rule 59 motion based on subsections (2) and (9). *See Campbell ex rel. McMillan v. Pitt Cnty. Mem'l Hosp., Inc.*, 321 N.C. 260, 264, 362 S.E.2d 273, 275 (1987) (holding that appellate review of an order denying a Rule 59 motion is typically "limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion"). The fact that Tenant waited five years to notice a hearing on his Rule 59 motion weighs in favor of the trial court's discretionary refusal to grant the motion.

2. Subsection (1)

Subsection (1) of Rule 59 permits a trial court to use its discretion to grant a new trial where it determines that there was some *irregularity* preventing the losing party from having a fair trial. N.C. Gen. Stat. § 1A-1, Rule 59(a)(1). Here, Tenant merely argues that the irregularity was the 2010 Order, which was allegedly incorrect "under the law." The proper vehicle to make this challenge would have been a direct appeal from the 2010 Order. *See Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010) ("erroneous judgments may be corrected only by appeal"). Tenant does not otherwise argue that there was some irregular procedure at the trial level or that he was deprived of some right. The summary judgment hearing was properly noticed, Tenant attended the hearing, and was not prevented from

presenting evidence. Tenant neither presents additional arguments on this point nor cites to any legal authority in support of his position. We conclude that the trial court did not abuse its discretion in denying Tenant's Rule 59 motion pursuant to subsection (1). *See Campbell*, 321 N.C. at 264, 362 S.E.2d at 275.

3. Subsection (7)

Subsection (7) of Rule 59 permits the trial court to grant a new trial where there was an "[i]nsufficiency of . . . evidence to justify the verdict or that the verdict is contrary to law."[2] N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). Our review here is *de novo* as the issues involve questions of law. *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). *See Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 611 (1977) (holding that a denial of a Rule 59 motion *based on an error of law* is not a matter of discretion).

We conclude that Tenant's contention that the evidence presented was insufficient to justify the 2010 Order is without merit. Landlord submitted a sworn affidavit in support of the summary judgment motion which evidences, in short, that Tenant breached two commercial leases by failing to make rental, utility, and equipment payments.

[2] In this case, there was no "verdict," but merely a summary judgment order. However, Landlord does not argue that subsection (7) is an inappropriate vehicle to challenge a summary judgment order. *See supra* footnote 1.

Tenant failed to submit affidavits contradicting Landlord's evidence. As there are only "latent doubts as to the affiant's credibility," *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976), we hold that the trial court did not err in rejecting Tenant's motion for a new trial on the basis of insufficient evidence. Our decision in *Lee v. Shor*, which is cited by Tenant, does not control as the "plaintiff *filed an affidavit* to the effect that he could not present by affidavit facts essential to justify his opposition to the motion . . . [as] the knowledge of such facts was . . . exclusively under the control of defendants." *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 102–03 (1970) (emphasis added).

Tenant contends that his answer contains a counterclaim, which he has not been able to litigate. We disagree. His responsive pleading is entitled "Answer to Complaint." The pleading contains nothing more than admissions and denials of the allegations in the complaint. Indeed, the prayer for relief solely requests that the trial court deny Landlord's claims. The *McCarley* decision cited by Tenant is inapposite as the defendant in that case *requested* affirmative relief, namely, an absolute divorce. *McCarley v. McCarley*, 289 N.C. 109, 113-14, 221 S.E.2d 490, 493-94 (1976). Tenant's argument is overruled.

B. Denial of Rule 60 Motion

Appellate review of a trial court's ruling pursuant to a Rule 60(b) motion is limited to determining whether the trial court abused its discretion. *Thomas M.*

McInnis & Assoc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 554 (1986); *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Here, Tenant references subsections (3) and (6) of Rule 60 in his brief. However, Tenant does not present any arguments in support of reversal on the basis of subsection (6). Therefore, our review is limited to subsection (3). *See* N.C. R. App. P. 28(b)(6).

With respect to Rule 60(b)(3), we have held as follows:

> To obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation or misconduct by the adverse party.

Milton M. Croom Charitable Remainder Unitrust v. Hedrick, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008) (internal quotation marks omitted). Tenant asserts that he had a meritorious defense based on allegedly fraudulent acts committed by Landlord during the course of his tenancy. However, Tenant makes no argument that he was unaware *at the time of the summary judgment hearing* of Landlord's allegedly fraudulent acts. Tenant also makes no argument that he was *prevented* from presenting his defense at the summary judgment hearing because of Landlord's fraudulent acts. Tenant conflates his fraud allegations against Landlord with his burden of establishing that Landlord's fraud prevented him from presenting his defense at the summary judgment hearing. Accordingly, we hold that the trial court did not abuse its discretion in denying Tenant's Rule 60(b) motion.

IV. Conclusion

As Tenant failed to designate the 2010 Order in his notice of appeal, we dismiss his appeal from that order. Moreover, we conclude that the trial court did not abuse its discretion by denying Tenant's Rule 59 and Rule 60 motions, and, therefore, affirm the trial court's order denying the same.

AFFIRMED IN PART, DISMISSED IN PART.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).