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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-194

Filed: 4 October 2016

Durham County, No. 13 CVS 2727

LINWOOD WILSON, Plaintiff-Appellant,

v.

JOE CURTIS, Defendant-Appellee.

Appeal by Plaintiff from order entered 15 December 2015 by Judge G. Bryan Collins in Durham County Superior Court. Heard in the Court of Appeals 8 September 2016.

Linwood E. Wilson, pro se, for Plaintiff-Appellant.

Bachman & Swanson, PLLC, by Glen D. Bachman, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Linwood E. Wilson (“Wilson”) appeals from an order entered 15 December 2015 denying his Rule 59 motion for relief from judgment and motion for new trial on a 29 October 2014 grant of a motion for summary judgment in favor of Joe Curtis (“Curtis”). For the following reasons, we affirm.

I. Factual and Procedural Background

On 18 April 2013, Wilson filed a civil summons to be served with order extending time to file complaint. Wilson subsequently filed and served Curtis a

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complaint on 8 May 2013, seeking damages for relief on theories of alienation of affection, criminal conversation, and intentional infliction of emotional distress.¹

Curtis filed a verified answer on 15 July 2013, moved to dismiss the complaint under Rule 12(b)(6), denied all of Wilson’s allegations, and asserted affirmative defenses that Wilson’s claims were barred by the statute of limitations, estoppel, and laches. Curtis also argued that Wilson’s claim for punitive damages was frivolous and asked his attorney’s fees be paid to defend that claim.

On 31 March 2014, the case appeared on the trial calendar in front of Judge Howard Manning in Durham County Superior Court. Because neither party had conducted any discovery, Judge Manning continued the case until 10 November 2014 and entered a Case Management Order (“CMO”). The CMO directed that discovery would close on 1 October 2014, with all written responses to interrogatories, requests for production of documents, and requests for written statements of monetary relief to be served by 15 June 2014, and all depositions completed by 15 September 2014. The order went on to direct that “[t]he parties shall have until October 1, 2014 to file dispositive motions. The Parties may move for summary judgment at any time before October 1, 2014.”

Curtis filed a motion for summary judgment on 1 October 2014. As allowed under Rule 56(c), Curtis filed two affidavits, dated and served on Wilson 21 October

¹ The parties disagree as to whether the complaint was verified.

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2014. The first, from Curtis, explicitly denied a romantic relationship with Wilson's wife. The second, from Mrs. Wilson, similarly denied a romantic relationship, and alleged that the Wilsons' marriage was "devoid of any genuine love or affection long before" they legally separated. This proof was a forecast of evidence for a defense verdict.

Believing that Curtis's motion was untimely under the CMO, and in an effort to "incur no fees" from his lawyer, Wilson purposely "took no steps" to file counter affidavits, as he was allowed to do under Rule 56(c). Wilson had conducted no discovery to counter the affidavits. His only response to the motion for summary judgment was to move for its dismissal as untimely at a hearing before the trial court on 27 October 2014.

At the hearing, Wilson asserted that the facts as alleged in his complaint were sufficient to defeat summary judgment. However, the trial court refused to accept Wilson's unverified complaint as an affidavit, and in its discretion pursuant to Rule 56(c), refused to allow Wilson to swear to the veracity of his complaint at the hearing. Following Rule 56(b) and (c), the trial court granted Curtis's motion for summary judgment and issued a written order filed 29 October 2014.²

² Under Rule 56(b), "[a] party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." N.C. R. Civ. P. 56(b) (2015). Additionally, Rule 56(c) states that "[t]he motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing.

On 7 November 2014, Wilson filed a motion for new trial or relief of judgment under Rule 59. Curtis answered on 5 May 2015, and the trial court denied the motion on 15 December 2015.

Wilson filed a motion to proceed in forma pauperis in Durham County Superior Court on 26 December 2015, which was granted by Judge Orlando Hudson on 14 January 2016. Wilson filed his notice of appeal of the trial court's 15 December 2015 order in Durham County Superior Court on 28 December 2015 and served it upon Curtis the same day. The two sides stipulated to the record on appeal on 22 February 2016.

II. Analysis

Here, Wilson's notice of appeal states that he seeks review of "the order entered on 15 December 2015 in the Superior Court of Durham County, by the Honorable Judge Brian [sic] Collins," but fails to designate the underlying order granting summary judgment as grounds for appeal.

If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require The judgment sought shall be rendered forthwith if 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party. N.C. R. Civ. P. 56(c) (2015).

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Thus, the only question before us is whether Curtis’s motion for summary judgment was timely filed. It was. Rule 56(b) states that “[a] party against whom a claim, counterclaim, or crossclaim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor” N.C. R. Civ. P. 56(b) (2015). Moreover, the last day of any period of time “prescribed or allowed . . . by order of court” is included within the period. N.C. R. Civ. P. 6(a) (2015). Thus, Curtis’s motion, filed on 1 October 2014, the last day for such motions under the CMO and well ahead of the 27 October 2014 hearing, was timely. A judge has the discretion to continue a summary judgment hearing or allow a party to file counter affidavits, however, where a party conducts no discovery nor timely files counter affidavits, the trial court is well within its authority to deny a plaintiff additional opportunities to continue a matter which appears meritless. As a result, the trial court is

AFFIRMED.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).