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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-271

Filed: 6 November 2018

Randolph County, No. 13 CVS 2790

JOHN O. CABLE, and Wife CAROL G. CABLE, Plaintiffs

v.

WALTER G. SINK, and WGS, LLC, Defendants

Appeal by plaintiffs from order entered 6 September 2017 by Judge John O. Craig in Randolph County Superior Court. Heard in the Court of Appeals 17 September 2018.

Stephen E. Lawing, for plaintiff-appellants.

Metcalf & Beal, LLP, by W. Eugene Metcalf, for defendant-appellees.

CALABRIA, Judge.

John O. Cable and Carol G. Cable (“plaintiffs”) appeal from the trial court’s order denying their Rule 59 motion to set aside an order granting summary judgment to defendants. After careful review, we conclude that plaintiffs’ motion failed to toll the thirty-day period for filing a notice of appeal. Accordingly, we dismiss plaintiffs’ appeal for lack of jurisdiction.

I. Factual and Procedural Background

On 6 June 2003, John G. Cable and Carol G. Cable (“plaintiffs”) purchased Lot 12 in Phase II of Finch Farm Acres Subdivision, which was adjacent to the area dedicated for a public road “Lacy Court,” from Walter G. Sink and WGS, LLC (“defendants”). On 2 December 2013, plaintiffs filed a complaint against defendants in Randolph County Superior Court, alleging breach of contract. Defendants filed an answer and motion to dismiss on 25 March 2014.

On 16 September 2014, plaintiffs moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. On 13 February 2015, defendants filed a cross motion for summary judgment. Following a hearing, on 17 March 2015, the trial court entered an order granting defendants’ motion for summary judgment, denying plaintiffs’ motion, and dismissing the action.

Plaintiffs failed to appeal from the summary judgment order. However, on 26 March 2015, plaintiffs filed a timely motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. On 6 September 2017, the trial court entered an order denying plaintiffs’ Rule 59 motion. Plaintiffs appeal.

II. Discussion

On appeal, plaintiffs contend that the trial court erred by (1) granting defendants’ motion for summary judgment, and (2) denying plaintiffs’ motion to set

aside the order and grant plaintiffs a new trial. We do not reach these arguments, however, because we conclude that we lack jurisdiction over plaintiffs' appeal.

Failure to give timely notice of appeal is a jurisdictional flaw, "and an untimely attempt to appeal must be dismissed." *Battle v. Sabates*, 198 N.C. App. 407, 413, 681 S.E.2d 788, 793 (2009) (internal quotation marks and citations omitted). In civil cases, a party seeking appellate review by this Court must file and serve notice of appeal within thirty days following entry of the trial court's judgment. N.C. R. App. P. 3(c)(1) (2015). However, a timely motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 tolls the thirty-day period as to all parties until the trial court enters an order ruling on the motion. N.C. R. App. P. 3(c)(3).

"To 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. Gen. Stat. § 1A-1, Rule 7(b)(1)). However, Rule 59 "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made." *Id.* at 606, 481 S.E.2d at 417 (citation omitted). Thus, where the movant merely seeks reconsideration of the trial court's previous decision, "the motion is not a Rule 59 motion," and the thirty-day period for filing notice of appeal is not tolled. *Id.* at 607, 481 S.E.2d at 417.

In the instant case, plaintiffs moved the trial court to set aside the summary judgment order and grant them a new trial on any of the following grounds set forth by Rule 59:

- (1) Any irregularity by which any party was prevented from having a fair trial;
- ...
- (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
- (8) Error in law occurring at the trial and objected to by the party making the motion, or
- (9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a)(1),(7)-(9) (2015).

However, in reviewing the supporting allegations, it is clear that plaintiffs' "motion is merely a request that the trial court reconsider its earlier decision" to grant defendants' motion for summary judgment, instead of plaintiffs'. *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Indeed, plaintiffs even cite specific paragraphs of their summary judgment affidavit as support for their post-judgment motion:

7. As a result of Defendants' defective construction of Lacey Court Plaintiffs are damaged in the amount of \$65,000 for repair to Lacey Court to make it comply with State requirements for acceptance in the State Road system, future maintenance of Lacey Court in an amount to be determined, diminution of the value of their home and real property in excess of \$161,000, correction of the excavation in their property by Defendant in excess of \$14,000 [*Plaintiffs' Affidavit Paragraphs 11-13, 15, 18*].

8. Defendant WG Sink repeatedly misrepresented to Plaintiffs [and] others that he would correct the

construction of Lacey Court to make it comply with the construction standards required by the North Carolina Department of Transportation Division of Highways; to make it a Public Road maintained by the North Carolina Department of Transportation Division of Highways. [*Plaintiffs' Affidavit Paragraph 10*].

(Emphases added).

As the trial court found in denying their motion, plaintiffs presented “no new evidence or arguments” that were not offered at trial. Accordingly, plaintiffs’ “motion is not a Rule 59 motion, and the time to file an appeal . . . was not tolled.” *Smith*, 125 N.C. App. at 607, 481 S.E.2d at 417 (dismissing the defendants’ appeal because their “attempt to reargue matters already decided by the trial court” failed to toll the thirty-day deadline for filing notice of appeal).

Plaintiffs filed notice of appeal on 5 October 2017, more than two years after the trial court entered its summary judgment order on 17 March 2015. Since plaintiffs’ appeal is untimely, we lack jurisdiction to consider its merits. *Battle*, 198 N.C. App. at 413, 681 S.E.2d at 793. Accordingly, we dismiss plaintiffs’ appeal.

APPEAL DISMISSED.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).