

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-43

Filed: 21 August 2018

Alleghany County, No. 16-CVS-89

DAVFAM, LLC, Plaintiff,

v.

ARTHUR E. DAVIS, III, Defendant.

Appeal by Defendant from order entered 14 August 2017 by Judge John O. Craig, III, in Alleghany County Superior Court. Heard in the Court of Appeals 6 June 2018.

*Lindley Law, PLLC, by Satie Munn and Trey Lindley, for the Plaintiff-Appellee.*

*Arthur E. Davis, III, pro se.*

DILLON, Judge.

Defendant Arthur E. Davis, III, appeals from the trial court's order denying his motion for reconsideration and relief from summary judgment. The trial court previously granted Plaintiff DavFam, LLC, (the "Plaintiff LLC") summary judgment in its lawsuit to quiet title concerning certain real estate and declare void a certain deed in which Defendant purportedly conveyed said real estate to himself. Defendant

contends that the trial court erred by denying his motion for reconsideration under Rules 59<sup>1</sup> and 60 of our Rules of Civil Procedure and by granting the Plaintiff LLC's motion for summary judgment. After careful review, we affirm.

### I. Background

The matter concerns title to certain real property in Alleghany County (the "Alleghany Property").

Defendant is one of six siblings. The Plaintiff LLC is a closely held family entity whose members consist of Defendant's five siblings. Defendant is neither a member nor a manager of the Plaintiff LLC.

In 2012, Defendant and his brother, Thomas, were the managers of another company called "Davis Group Farms, LLC," which owned real property for the benefit of Davis family members, including the Alleghany Property and also properties in Franklin and Nash counties. In November of that year, Defendant executed a deed purportedly conveying the Franklin and Nash County properties to a third party and allegedly pocketed the proceeds, all without the consent or knowledge of any other Davis family member. In 2013, when Thomas discovered what Defendant had done,

---

<sup>1</sup> Defendant purports to raise arguments under Rule 59 of the North Carolina Rules of Civil Procedure, but we find no arguments in his brief on appeal that present a cause for relief under this rule. Therefore, we do not address Rule 59 in our decision. N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.")

Defendant agreed to settle the matter by transferring his interest in Davis Group Farms, LLC, to Thomas through a written agreement (the “Assignment”).

Later in 2013, Thomas formed the Plaintiff LLC. Thomas, as a manager of Davis Group Farms, LLC, transferred all real estate held by that entity, including the Alleghany Property, to the Plaintiff LLC.<sup>2</sup> Thus, as of late 2013, the record owner of the Alleghany Property was the Plaintiff LLC, of which Thomas was the sole manager, and of which Defendant had no interest. Thomas then dissolved Davis Group Farms, LLC.

In April 2016, however, Defendant executed a “corrective” deed, as manager of the dissolved Davis Group Farms, LLC, which purported to (1) replace the deed which Thomas had executed in 2013 conveying the Alleghany Property to the new Plaintiff LLC and (2) convey the Alleghany Property from the Davis Group Farms, LLC, to Defendant in his individual capacity.

Two months later, in June 2016, the Plaintiff LLC commenced this action to quiet title in the Alleghany Property by having Defendant’s corrective deed set aside. The Plaintiff LLC attached to its complaint a copy of the Operating Agreement of the Davis Group Farms, LLC, showing Thomas as a manager; the Assignment in which Defendant relinquished his interest in Davis Group Farms, LLC, to Thomas; and the

---

<sup>2</sup> It is assumed that Thomas transferred the real estate from Davis Group Farms, LLC, to a new entity to prevent Defendant from having any apparent authority, as a former manager of Davis Group Farms, LLC, to execute deeds conveying the remaining real estate.

deed executed by Thomas on behalf of the Davis Group Farms, LLC, conveying the Alleghany Property to the Plaintiff LLC. Defendant filed an unverified answer, admitting some allegations and denying others; but he did not assert any affirmative defenses.

The Plaintiff LLC moved for summary judgment. Defendant filed a response to the summary judgment motion. A copy of this response has not been made part of the record, and it is unclear from the record if this response was verified. It is apparent, though, from the transcript of the summary judgment hearing that Defendant was contending that the Assignment was void for lack of consideration. In any event, Defendant did not otherwise participate in the summary judgment hearing. The Plaintiff LLC relied upon its complaint and the affidavits of Thomas and another Davis sibling. After the hearing, the trial court granted the Plaintiff LLC's motion for summary judgment, concluding that there were no issues of material fact and declaring that Defendant's corrective deed was null and void.

In January 2017, Defendant timely appealed the summary judgment order but subsequently voluntarily dismissed that appeal, choosing rather to move for the trial court for relief from or reconsideration of the summary judgment order. In August 2017, following a hearing on the matter, the trial court denied Defendant's motions. Defendant appeals.

## II. Analysis

At the outset, we note that Defendant dedicates most of his brief to arguing why the trial court erred in granting summary judgment to the Plaintiff LLC and why we should reverse that order based on a *de novo* review of that summary judgment order. However, Defendant's appeal from the summary judgment order is not properly before us. Defendant withdrew his notice of appeal as to that order. All that is properly before us is Defendant's appeal from the trial court's order denying his motions for *relief from* and *reconsideration of* the summary judgment order brought pursuant to Rule 60(b). As our Supreme Court has stated, "a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Essentially, Defendant contends that there is a material issue as to whether the Assignment – where he assigned his interest in Davis Group Farms, LLC, to his brother Thomas – was supported by consideration. However, based on the record before us, it appears that the trial court did not err in granting summary judgment to the Plaintiff LLC. For instance, the record shows that Defendant failed to plead "failure of consideration" as an affirmative defense and that Defendant never sought leave to amend his answer to plead this affirmative defense. *See Smith v. Hudson*, 48 N.C. App. 347, 352, 269 S.E.2d 172, 176 (1980) (holding that the failure to plead failure of consideration waives the right to assert the defense). Also, Thomas's

affidavit states that the Assignment was supported by consideration in that Defendant agreed to assign his interest to Thomas to settle the matter regarding Defendant's alleged fraud of selling the Franklin and Nash County properties and pocketing the proceeds without telling anyone. There is no sworn affidavit or sworn pleading which suggests that the Assignment was *not* supported by consideration. Finally, even if the Assignment was otherwise invalid for want of consideration, Defendant never made any argument at the summary judgment hearing that Thomas lacked authority to execute the deed conveying the Alleghany Property to the Plaintiff LLC, as Thomas was also a manager of the Davis Group Farms, LLC. Rather, Defendant's only argument advanced was that the Assignment was invalid.

In addition to arguments that the trial court erred in granting summary judgment, arguments that are not properly before us, Defendant argues that the trial court erred by denying him relief from the summary judgment pursuant to Rule 60(b). At various times at the trial level and on appeal, Defendant invokes Rule 60(b)(1), (3), and (6). It is questionable as to whether Defendant has properly preserved these arguments. Assuming that they are preserved, we conclude that they do not have merit. Specifically, the trial court did not abuse its discretion in denying relief under subsection (1) for "mistake, inadvertence, surprise, or excusable neglect." N.C. R. Civ. P. 60(b)(1). Rather, the record shows that Defendant was given ample notice of the summary judgment motion hearing and that his written response was considered by

the trial court. Further, the trial court did not abuse its discretion in denying relief under subsection (3) based on his contention that counsel for the Plaintiff LLC made certain misrepresentations to the trial court during the hearings. N.C. R. Civ. P. 60(b)(3). Though there *might* have been some factual inconsistencies in the record, none of them was material nor did any appear to be intentional. And the Plaintiff LLC, otherwise, certainly met its burden through its pleadings and the affidavits to support summary judgment, notwithstanding any argument that might have been made by its counsel. Finally, Defendant has failed to show how the trial court abused its discretion in denying relief under subsection (6), which provides that relief may be granted for “[a]ny other reason justifying relief[.]” N.C. R. Civ. P. 60(b)(6).

Defendant further argues that the trial court erred in making certain findings. We note that Defendant does not expound on this argument in his brief, but he simply states that “[f]or the same reasons set forth above, the Trial Court’s abuse of its discretion caused it to err in reaching findings of fact 3, 7, 12, 13, and 14.” In any event, we address each challenged finding.

Regarding finding of fact 3, Defendant argues that the trial court erred by finding that Plaintiff’s counsel made no mischaracterizations or misrepresentations at the summary judgment hearing regarding the validity of the Assignment. After reviewing the record, we do not see that counsel for the Plaintiff LLC made any material mischaracterizations or misrepresentations concerning the Assignment.

DAVFAM V. DAVIS

*Opinion of the Court*

The Assignment spoke for itself; it was signed by Defendant and his signature was notarized. Further, the affidavits considered by the trial court concerning the Assignment provided all the factual basis needed for the trial court to rule. Therefore, we conclude that the trial court did not abuse its discretion by not granting relief based on Defendant's argument that counsel for Plaintiff LLC made misrepresentations concerning the Assignment.

Regarding finding of fact 7, Defendant argues that the trial court erred by finding that Defendant received proper notice of the summary judgment hearing, a hearing which he failed to attend. However, the record clearly shows that Defendant received ample notice, weeks in advance of the hearing.

Regarding findings of fact 12 and 13, Defendant argues that the trial court erred in finding that he failed to seek leave to amend his answer and that, accordingly, Defendant's affirmative defense which was not included in his original answer was not properly before the court. However, the record shows that Defendant filed his answer without including any affirmative defenses. Further, there is nothing in the record which shows that Defendant ever sought leave to amend his answer.

Finally, regarding finding of fact 14, Defendant argues that the trial court erred in finding that Defendant had requested that the trial court allow him to present his argument to the jury. We have reviewed the record and note that



Defendant, on multiple occasions during the hearing, requested that the trial court allow a jury to decide the matter.

Defendant concludes his brief by making the following argument challenging certain conclusions of law: “For the same reasons set forth above, the Trial Court’s abuse of discretion caused it to err in reaching conclusions of law 2, 6, 13, and 15.” We conclude that Defendant has failed to show how the trial court erred in this regard. Essentially, Defendant challenges the trial court’s conclusion that his affirmative defense was not properly before the court and that he was estopped from arguing it. But Defendant’s affirmative defense was *not* properly before the trial court at the Rule 60(b) hearing. The record shows that Defendant failed to plead it. And there is nothing in the record which shows that Defendant presented any affidavit or other evidence allowable under Rule 56 at the summary judgment hearing to create a factual issue regarding his contention that the Assignment was invalid due to a want of consideration.

### III. Conclusion

We have reviewed the record and the trial court’s order that is properly before us, and we conclude that Defendant has failed to show that the trial court erred in denying his motion for relief from and reconsideration of its prior summary judgment order.

**AFFIRMED.**

DAVFAM V. DAVIS

*Opinion of the Court*

Judges DAVIS and INMAN concur.

Report per Rule 30(e).