IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-265

Filed: 15 January 2019

Greene County, No. 15 CVS 197

D.A.N. JOINT VENTURE PROPERTIES OF NORTH CAROLINA, LLC, Plaintiff,

v.

N.C. GRANGE MUTUAL INSURANCE COMPANY, Defendant.

Appeal by plaintiff from orders entered 29 September 2017 and 13 November 2017 by Judge Imelda J. Pate in Greene County Superior Court. Heard in the Court of Appeals 19 September 2018.

Driscoll Sheedy, P.A., by Susan E. Driscoll, for plaintiff-appellant.

The Fonda Law Firm, by John R. Fonda, for defendant-appellee.

ZACHARY, Judge.

Plaintiff D.A.N. Joint Venture Properties of North Carolina ("D.A.N.") appeals from the trial court's order granting summary judgment in favor of defendant N.C. Grange Mutual Insurance Company ("N.C. Grange"). However, because D.A.N. did not timely file notice of appeal from the trial court's summary judgment order, we are without jurisdiction to review D.A.N.'s challenges thereto. Accordingly, we must dismiss the appeal.

Background

The facts of the present appeal are largely undisputed. In April 1996, Doris Murphrey, L.L. Murphrey Hog Co., Lois M. Barrow, Larry Barrow, Connie M. Stocks, and Donald Stocks (herein after "L.L. Murphrey"), executed a Deed of Trust in favor of Wachovia Bank of North Carolina, N.A., secured by farm property located in Lenoir and Greene Counties ("the Property"). As required by the Deed of Trust, L.L. Murphrey obtained an insurance policy with N.C. Grange ("the Policy") that included a standard mortgage clause and a loss payee clause requiring N.C. Grange to issue any payment for loss directly to Wachovia rather than to L.L. Murphrey. The standard mortgage and loss payee clauses could only be avoided with the provision of ten days' notice by N.C. Grange to the mortgagee of its intent to cancel the Policy.

At some point, the Deed of Trust was assigned to D.A.N., the current owner and holder of the Deed of Trust. *In re L.L. Murphrey Co.*, 236 N.C. App. 544, 764 S.E.2d 221 (2014). However, because of inaction on the part of L.L. Murphrey, Wachovia continued to be the named mortgagee on the Policy at all times relevant to the instant case, and D.A.N. was never listed as a mortgagee.

The Property was damaged by storm in August 2011, and N.C. Grange issued loss payments totaling $554,092.11 to L.L. Murphrey. As assignee of the rights under the original Deed of Trust in favor of Wachovia, D.A.N. filed suit against N.C. Grange for breach of contract on 25 August 2015.

D.A.N. filed a Motion for Partial Summary Judgment as to the Issue of Liability on 28 August 2017. N.C. Grange filed a Memorandum of Law in Opposition to Motion for Partial Summary Judgment in which N.C. Grange moved for summary judgment to be granted against D.A.N. On 29 September 2017, the trial court denied D.A.N.'s Motion for Summary Judgment and granted summary judgment in favor of N.C. Grange. The trial court's order does not contain findings of fact or conclusions of law. D.A.N. filed a Rule 11(c) Supplement indicating that N.C. Grange served the trial court's 29 September 2017 summary judgment order upon D.A.N. on 18 October 2017.

On 12 October 2017, D.A.N. filed a Rule 52(b) Motion to Alter or Amend Judgment, requesting that the trial court enter a more "specific ruling" by incorporating "specific findings of fact and law" in its summary judgment order. The Motion to Alter or Amend Judgment requested a more "specific ruling" "[i]n order to aid [D.A.N.] in determining whether it will proceed with an appeal of the judgment." In response, N.C. Grange noted that "[n]otwithstanding several opportunities to review and comment on the proposed judgment, [D.A.N.] never suggested any changes to the order and never requested findings of fact or conclusions of law," and, in any event, that "making findings of fact or conclusions of law is not the role of the court on motion for summary judgment." The trial court denied D.A.N.'s Motion to Alter or Amend Judgment by order entered 13 November 2017.

On 17 November 2017, D.A.N. filed written notice of appeal from both the trial court's 29 September summary judgment order and its 13 November order denying D.A.N.'s Rule 52(b) motion, forty-nine days after entry of summary judgment and four days after the denial of its Rule 52(b) motion.

On appeal, D.A.N. argues only that the trial court erred in granting summary judgment in favor of N.C. Grange. D.A.N. does not challenge the trial court's denial of its Rule 52(b) motion.

Jurisdiction

Though neither party has addressed the issue on appeal, this Court "has the power to inquire into [subject-matter] jurisdiction in a case before it at any time, even *sua sponte*." *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010).

Rule 3 of the North Carolina Rules of Appellate Procedure governs the timing for taking appeal in a civil action. Without proper notice of appeal as required under Rule 3, "the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005).

Pursuant to Rule 3, notice of appeal must be filed and served:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
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> (2) within thirty days after service upon the party of a copy

> of the judgment if service was not made within that three-day period; provided that
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> (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order . . . .

N.C.R. App. P. Rule 3(c).

In the instant case, D.A.N. filed notice of appeal forty-nine days after the 29 September summary judgment order was entered. Nevertheless, on 12 October 2017, D.A.N. filed a Rule 52(b) motion requesting that the trial court amend the summary judgment order to include more "specific rulings," which the trial court denied on 13 November 2017. Thus, pursuant to Rule 3(c)(3), D.A.N.'s Rule 52(b) motion had the potential to toll the requisite 30-day filing period, thereby rendering its 17 November 2017 notice of appeal timely.

However, a motion that would ordinarily toll the time for taking an appeal pursuant to Rule 3(c)(3) will not do so if the motion itself was improper. *E.g.*, *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 ("[W]hen a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled."), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812 (2007). A motion pursuant to Rule 52(b) is generally improper upon a trial court's order granting or denying summary judgment because

summary judgment is improper "if findings of fact are necessary to resolve an issue." *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010). In other words, "[t]here is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact." *Id.*

Here, because the only basis of D.A.N.'s Rule 52(b) motion was to request "specific findings," that motion was not a proper avenue for relief from the trial court's summary judgment order. In addition, even assuming that specific findings would have been appropriate, the trial court was only required to include such findings in the event that D.A.N. or N.C. Grange had requested the same, which neither party did. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2017). Moreover, D.A.N.'s Rule 52(b) motion was not filed until 12 October 2017, thirteen days after the trial court's 29 September 2017 summary judgment order. Thus, D.A.N.'s Motion to Alter or Amend Judgment was not a "timely motion" for purposes of Rule 3(c)(3) tolling. *See id.* § 1A-1, Rule 52(b) ("Upon motion of a party made *not later than 10 days* after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." (emphasis added)).

Because D.A.N.'s Motion to Alter or Amend Judgment pursuant to Rule 52(b) was not a proper Rule 52(b) motion, it did not toll the time for filing notice of appeal. D.A.N.'s 17 November 2017 notice of appeal from the trial court's 29 September 2017 summary judgment order was therefore untimely.

Additionally, it is no cure that D.A.N. filed its notice of appeal within thirty days of the 18 October 2017 service of the 29 September 2017 summary judgment order.

"[W]hen a party receives actual notice of the entry and content of a judgment, . . . the service requirements of Rule 3(c) . . . are not applicable. At that point, the party has been given fair notice that judgment has been entered, and the party's actual notice essentially substitutes for the service requirements." *Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d 781, 784 (2011) (internal quotation marks and citation omitted). It is well established that "[t]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 423, 667 S.E.2d 309, 311 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 132 (2009). Thus, even if an appellant has not been properly served within three days of an order's entry, "the appellant still must notice his appeal within thirty (30) days of receiving *actual notice*" that the order was entered. *Brown v. Swarn*, ___ N.C. App. ___, ___, 810 S.E.2d 237, 239 (2018). "[W]here evidence in the record shows that the appellant received actual notice of the judgment [or order] more than thirty days before noticing the appeal, the appeal is not timely." *Id.* at ___, 810 S.E.2d at 239.

In the instant case, as N.C. Grange noted in its response to D.A.N.'s Rule 52(b) motion, the record reveals that "[o]n September 18, 2017, [N.C. Grange] submitted its proposed order to [D.A.N.'s] counsel asking if [D.A.N.] had any objections to the form of the order," and D.A.N. responded the next day, on 19 September 2017, "stating 'We have no comments on the proposed order.' " N.C. Grange transmitted the proposed order to the trial court that same day and copied D.A.N.'s counsel on the email. The trial court then entered the summary judgment order on 29 September 2017. D.A.N. thereafter filed its Rule 52(b) motion on 12 October 2017, which counsel signed on 9 October 2017. That motion explicitly referenced entry of the 29 September 2017 summary judgment order, stating that "[i]n granting summary judgment in favor of [N.C. Grange], this Court *entered* a simple, one page order. The *filed order* did not provide specific rulings on the specific issues raised by DAN during the summary judgment hearing." (Emphases added). Thus, the record reveals that D.A.N. had received actual notice of the entry of the 29 September 2017 order by, at the latest, 9 October 2017. D.A.N.'s 17 November 2017 notice of appeal was therefore untimely, notwithstanding the fact that the order was not served upon D.A.N. until 18 October 2017. *E.g., Huebner*, 193 N.C. App. at 425, 667 S.E.2d at 312 ("[B]ecause . . . the language of plaintiff's Rule 60(b) motion demonstrates that he had actual notice of the time and entry of [the] order and judgment as well as their content[,] . .

. plaintiff cannot now utilize Appellate Rule 3(c) to toll the time for filing his notice of appeal.").

Accordingly, we are without jurisdiction to address D.A.N.'s challenges to the trial court's summary judgment order, and D.A.N.'s appeal therefrom must be dismissed. *N.C. Alliance for Transp. Reform, Inc.*, 183 N.C. App. at 470, 645 S.E.2d at 108-09; *Foreman v. Sholl*, 113 N.C. App. 282, 291-92, 439 S.E.2d 169, 175-76 (1994), *appeal dismissed*, 339 N.C. 593, 453 S.E.2d 162 (1995).

APPEAL DISMISSED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).