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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-129

Filed: 19 November 2019

Craven County, No. 15CVS1544

COMPLETE MARKETING SOLUTIONS, LLC, Plaintiff,

v.

LAKE CREEK CORPORATION, TOMAHAWK LAND CAROLINA, LLC,  
TOMAHAWK LAND CAROLINA II, LLC, LAKE BAY EAST, LLC, and EAST  
BLADEN LAND COMPANY, Defendants.

Appeal by defendants from judgment entered 7 May 2018 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 17 October 2019.

*The Law Offices of Oliver & Cheek, LLC, by George M. Oliver and Benjamin R. Eisner, for plaintiff-appellee.*

*Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for defendants-appellants.*

BERGER, Judge.

Appeal by Lake Creek Corporation, Tomahawk Land Carolina, LLC, Tomahawk Land Carolina II, LLC, Lake Bay East, LLC, and East Bladen Land Company (collectively, “Defendants”) from judgment entered May 7, 2018 in Craven

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County Superior Court. Defendants request this Court treat their appellate brief as a petition for certiorari and argue the trial court erred by entering seven orders between March 16, 2017 and July 12, 2018. We grant Defendants' petition for certiorari to review an order entered February 27, 2018 that struck Defendants' answer and entered judgment against Defendants. We conclude the trial court abused its discretion by striking Defendants' answer and entering judgment without first considering lesser sanctions. Accordingly, we are compelled to vacate the February 27, 2018 order and all subsequent orders and remand for consideration of lesser sanctions.

Factual and Procedural Background

The record reveals a long history of discovery related orders and sanctions stemming from a business relationship between Plaintiff and Defendants that soured in 2015. The numerous motions, orders, and sanctions are discussed briefly below.

In October 2013 and April 2014, Plaintiff and Defendants entered two contracts under which Plaintiff was to provide certain marketing services for Defendants' real properties. On November 20, 2015, Plaintiff initiated this claim against Defendants alleging breach of contract, quantum meruit, promissory estoppel, unjust enrichment, unfair and deceptive trade practices, and punitive damages stemming from Plaintiff's contractual relationship with Defendants. On February 3, 2016, Defendants responded and requested a trial by jury.

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On March 21, 2016, Plaintiff filed its first amended complaint and sought recovery in the amount of \$154,117.38, plus attorney's fees, and treble damages pursuant to Sections 75-16 and 75-16.1 of the North Carolina General Statutes. Defendants responded to the amended complaint and again requested a trial by jury on April 2, 2016.

On July 18, 2016, Plaintiff filed a motion to compel discovery seeking enforcement and compliance with the first set of interrogatories, request for production of documents, and request for admissions. On January 17, 2017, Plaintiff filed a motion to compel discovery seeking enforcement and compliance with the second set of interrogatories, request for production of documents, and request for admissions. On March 16, 2017, the trial court entered an order in which Defendants were required to comply with the discovery requests.

On May 14, 2017, Plaintiff filed a motion for sanctions following Defendants' failure to comply with the order entered on March 16, 2017. The court granted this motion and ordered Defendants to fully comply with the prior order on May 22, 2017. Additionally, the court noted that failure to comply with the sanctions order would result in the court striking Defendants' answer and entry of judgment in favor of Plaintiff.

On June 23, 2017, Plaintiff filed a motion for entry of an order striking Defendants' amended complaint, for judgment against Defendants in the amount of

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\$154,117.38, plus reasonable attorney fees, and an award for treble damages pursuant to Sections 75-16 and 75-16.1. On August 8, 2017, the trial court entered an order finding that Defendants had substantially complied with the May 22, 2017 order. The order rejected the sanctions sought by Plaintiff, but awarded attorney's fees to Plaintiff in the amount of \$15,355.00, to be paid on or before 5:00 p.m. on December 8, 2017. The court further noted that it would consider additional sanctions should Defendants fail to comply with the order.

Defendants failed to pay the attorney's fees by December 8, 2017. On January 8, 2018, the parties appeared for a determination of appropriate sanctions. At that time, Defendants' counsel informed the trial court that Defendants had collected sufficient funds to comply with the August 8, 2017 order.

On February 27, 2018, the trial court entered an order striking Defendants' answer and requiring Defendants to pay Plaintiff's expenses and costs, including attorney's fees, in the amount of \$17,494.00. The trial court also entered judgment against Defendants, with the issue of damages reserved for jury trial. On May 4, 2018, Plaintiff informed Defendants and the Court that it was proceeding only on its claims for breach of contract and unfair and deceptive trade practices.

Thereafter, the trial court determined that a jury trial on the issue of damages was unnecessary and announced that the case would be heard as a bench trial on May 7, 2018. On May 7, prior to the scheduled trial, the court found that Defendants'

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answer had been stricken and that the allegations in Plaintiff's complaint were deemed admitted and for a sum certain. The trial court then entered default judgment against Defendants. The court entered damages in the amount of \$154,117.38, trebled to \$462,353.14, pursuant to Section 75.16. Additionally, on May 15, 2018, the court awarded attorney's fees to Plaintiff in the amount of \$50,678.87.

On May 17, 2018, Defendants filed a motion requesting a new trial and relief from judgment. Then on July 12, 2018, the trial court denied Defendants' motions under Rules 59 and 60 of the North Carolina Rules of Civil Procedure. Defendants filed notice of appeal on July 25, 2018. On appeal, Defendants argue that the trial court erred when it entered each of the seven orders between March 16, 2017 and July 12, 2018.

On February 5, 2019, Plaintiff filed a motion to dismiss Defendants' appeal of all orders entered on or before May 15, 2018 for failure to comply with Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure.

Analysis

On appeal, Defendants request this Court treat their appellate brief as a petition for certiorari and argue the trial court erred by entering the following orders: (1) a March 16, 2017 order compelling Defendants to comply with discovery; (2) a May 22, 2017 order granting Plaintiff's motion for sanctions for failure to comply with discovery; (3) an August 8, 2017 order awarding Plaintiff attorney's fees; (4) a

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February 27, 2018 order striking Defendants' answer and entering judgment against Defendants; (5) a May 7, 2018 order entering default judgment against Defendants and awarding Plaintiff damages for a sum certain; (6) a May 15, 2018 order awarding Plaintiff attorney's fees; and (7) a July 12, 2018 order denying Defendants' motions under Rules 59 and 60. On February 5, 2019, Plaintiff filed a motion to dismiss Defendants' appeal of all orders entered on or before May 15, 2018 as untimely. This motion was referred to our Court.

I. Plaintiff's Motion to Dismiss and Defendants' Petition for Certiorari

As a preliminary matter, we address Plaintiff's motion to dismiss Defendants' appeal of those orders entered on or before May 15, 2018. We agree with Plaintiff that Defendants' appeal was untimely as to those six orders. However, in our discretion, we grant Defendants' petition for certiorari to review the February 27, 2018 order striking Defendants' answer and entering judgment against Defendants.

Generally, under Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure, a party must file and serve a notice of appeal "within thirty days after entry of judgment." N.C.R. App. P. 3(c)(1). Following entry of judgment, this period for filing can be further extended by a timely motion made pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. N.C.R. App. P. 3(c)(3). A properly pleaded Rule 59 motion will toll the time for taking an appeal until thirty days after entry of the order disposing of that motion. N.C.R. App. P. 3(c)(3). When an appeal fails to

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meet the requirements of Rule 3(c) of the Rules of Appellate Procedure, this Court lacks jurisdiction to hear the appeal. *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 331, 560 S.E.2d 598, 600-01 (2002).

For a Rule 59 motion to be properly pleaded, it must supply information revealing the basis of the motion. *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107 (2007). Where a motion made pursuant to Rule 59 fails to supply information revealing its basis under the rule, it does not toll the time for taking an appeal under Rule 3(c) of the Rules of Appellate Procedure. *Id.* at 470, 645 S.E.2d at 108.

In the case at hand, Defendants' motion made pursuant to Rules 59 and 60 did not provide any information revealing the basis for the motion under Rule 59. Therefore, Defendants' Rule 59 motion was improperly pleaded and the time for taking an appeal was not tolled. As such, Defendants' notice of appeal, filed on July 25, 2018, was untimely as to those six orders filed on or before May 15, 2018.

However, under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). On appeal, Defendants ask this Court to treat their appellate brief as a petition for certiorari. In our discretion, we grant Defendants' petition to review the trial court's February 27, 2018 order

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striking Defendants' answer and entering judgment against Defendants. Because we are exercising our discretion to review the February 27, 2018 order, we deny Plaintiff's motion to dismiss Defendants' appeal of the six orders entered on or before May 15, 2018.

II. Order Striking Defendants' Answer and Entry of Judgment

Next, we address Defendants' argument that the trial court erred by striking Defendants' answer and entering judgment against Defendants for failure to comply with discovery-related requests and orders. We conclude the trial court abused its discretion by striking Defendants' answer and entering judgement without first considering lesser sanctions. Therefore, we are compelled to vacate the February 27, 2018 order and all subsequent orders and remand for consideration of lesser sanctions.

The decision of whether to impose sanctions pursuant to a party's failure to comply with discovery requests and orders is a matter left to the sound discretion of the trial judge and will not be overturned on appeal absent a showing of abuse of discretion. *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992).

Rule 37(b) of the North Carolina Rules of Civil Procedure states that a trial court may strike pleadings or render a judgment by default against a disobedient party for that party's failure to comply with discovery-related requests and orders. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (2017). Generally, "[t]he choice of sanctions



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under Rule 37 lies within the [trial] court's discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984). However, when the trial court strikes a party's defenses for not complying with discovery-related orders, the severity of the sanction requires the court to first consider the adequacy of lesser sanctions. *Clawser v. Campbell*, 184 N.C. App. 526, 531, 646 S.E.2d 779, 783 (2007). The trial court's failure to consider lesser sanctions amounts to an abuse of discretion. *Id.* at 531, 646 S.E.2d at 783.

On February 27, 2018, the trial court entered an order striking Defendants' answer and entering judgment against Defendants. The hearing related to Defendants' failure to timely pay attorney's fees in the amount of \$15,355.00, as set forth in a prior order entered August 8, 2017. However, there is no evidence in the record that the trial court considered the adequacy of lesser sanctions in its February 27, 2018 order. Rather, the trial court primarily discussed its findings and conclusions in past orders in which the court reserved the right to make additional sanctions for continued noncompliance.

In the February 27, 2018 order, the trial court made the following findings relating to Defendants' noncompliance with the August 8, 2017 order:

(15) [Defendants] failed to comply with the [August 8, 2017 order]. Consequently, on December 12, 2017, counsel for Plaintiff filed its Notice of Hearing setting the matters stated herein before this Court to determine what additional sanctions should be imposed, due to

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[Defendants'] failure to comply with [the August 8, 2017 order].

(16) A hearing was conducted before [the Court] on January 8, 2018. . . . Counsel for [Defendants] made representations to this Court that he is holding in his trust account, sufficient funds to pay the attorney fees previously awarded in the [August 8, 2017 order] and any additional fees incurred by Plaintiff related to the hearing held on January 8, 2018.

(17) The Court finds that given the history of the failure of [Defendants] to comply fully with previous court Orders and given the language of the [May 22, 2017 order] and specifically paragraph 12 of the Findings of Fact, to wit: "12. If [Defendants] fail to comply with any or all aspects of this Order within the time provided, the Court shall strike Defendants' Answer and enter judgment in favor of Plaintiff. Plaintiff will also be able to request additional sanctions from [Defendants], including without limitation attorney fees and costs," it is the Order of this Court that [Defendants'] Answer is hereby struck and Judgment is entered in favor of Plaintiff.

(18) The Court finds that, upon representation in court by counsel for [Defendants] that he had in his trust account the amount to satisfy the attorney's fees of \$15,355.00 plus such additional attorney fees by reason of the required hearing of January 8, 2018, that counsel for [Defendants] shall pay to Plaintiff's counsel said amount as set forth herein forthwith.

While a trial court may consider past sanctions orders when determining the appropriateness of additional sanctions under Rule 37(b), the trial court may not forgo exercising its discretion by relying solely on those past orders. Our precedent requires the trial court to consider the adequacy of lesser sanctions prior to striking

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a party's defenses for not complying with discovery-related orders. *See Clawser*, 184 N.C. App. at 531, 646 S.E.2d at 783 (setting aside an order striking a defendant's answer for failure to comply with discovery where the record revealed that the trial court failed to first consider lesser sanctions). Here, the court abused its discretion when it failed to consider lesser sanctions. Therefore, we are compelled to vacate the February 27, 2018 order and all subsequent orders and remand for consideration of lesser sanctions.

Conclusion

For the reasons set forth herein, we vacate and remand to the trial court. Should the court ultimately determine that lesser sanctions would suffice to remedy Defendants' noncompliance with its August 8, 2017 order, then the case should continue to trial by jury as originally requested by Defendants.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).