IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-412

Filed: 17 December 2019

Cumberland County, No. 18 CVD 4018

QL TITLING TRUST LTD, Plaintiff,

v.

PATRICK PAUL THOMAS, Individually and d/b/a THOMAS TRUCKING and SOLES AUTOMOTIVE TOWING, INC., Defendants.

Appeal by plaintiff from order entered 5 December 2018 by Judge Talmage S. Baggett, Jr. in Cumberland County District Court. Heard in the Court of Appeals 30 October 2019.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by John M. Sperati, for plaintiff-appellant.

Macrae, Perry, Macrae & Whitley, LLP, by Gregory T. Whitley, for defendant-appellee Soles Automotive Towing, Inc.

TYSON, Judge.

QL Titling Trust, LTD ("Plaintiff") appeals an order granting Soles Automotive Towing, Inc.'s ("Defendant Soles Automotive") motions to dismiss Plaintiff's complaint with prejudice. We affirm in part, reverse in part, and remand.

I. Background

This action arose out of the Master Lease Agreement (hereinafter "the Agreement") executed between Defendant, Patrick Paul Thomas, d/b/a Thomas Trucking ("Defendant Thomas"), and Plaintiff. Defendant Thomas leased a 2005 Peterbuilt dump truck (hereinafter "the Truck") and granted Plaintiff a first-priority security interest in the Truck in order to secure performance of the Agreement. Defendant Thomas agreed to make the required monthly payments and to take the necessary steps to protect Plaintiff's security interest in the Truck. The Agreement also stated that seizure or impoundment of the Truck would be considered a breach of the Agreement and entitle Plaintiff to possession from Defendant Thomas.

Plaintiff alleged that as a result of a joint criminal investigation between local law enforcement and the Department of Homeland Security, the Truck and other vehicles were seized from Defendant Thomas. Local law enforcement contracted with Defendant Soles Automotive to tow and store the seized vehicles, including the Truck. Defendant Soles Automotive alleged Defendant Thomas brought the Truck to it for repairs and he had failed to pay for services it had performed.

Defendant Soles Automotive filed a Notice of Unclaimed Vehicle report with the North Carolina Department of Motor Vehicles ("DMV") to begin the process of enforcing a lien for unpaid services performed on the Truck. *See* N.C. Gen. Stat. § 44A-2 (2017). The DMV provided notice to Plaintiff after Defendant Soles Automotive filed the Notice of Unclaimed Vehicle. Plaintiff then contacted Defendant Soles

Automotive to inquire into the services provided by them and the costs associated with those services.

Plaintiff and Defendant Soles Automotive dispute the amount owed by Defendant Thomas for towing, storage and repairs performed by Defendant Soles Automotive on the Truck. Plaintiff alleged Defendant Soles Automotive had indicated that $418.20 was owed for repairs on the Truck. Additionally, Plaintiff alleged Defendant Soles Automotive would not release the Truck unless Plaintiff paid for all repairs related to vehicles towed for law enforcement, which exceeded $14,000.00.

Plaintiff disputed the claims made by Defendant Soles Automotive and argued it could only claim a lien on the Truck for money owed arising from towing and repairs to the Truck. Defendant Soles Automotive rejected Plaintiff's demand to release the Truck. Defendant Soles Automotive then filed a Notice of Intent to Sell the Truck with the DMV to enforce its lien rights under N.C. Gen. Stat. § 44A-2.

On 1 June 2018, Plaintiff filed its complaint. Plaintiff alleged Defendant Thomas had breached the Agreement and the guaranty within it. Plaintiff also sought a declaratory judgment as to the rights of the parties in the Truck. Plaintiff alleged fraud/negligent misrepresentation against Defendant Soles Automotive and sought a temporary restraining order, preliminary and permanent injunctions.

On 1 June 2018, the clerk of court issued a summons for Defendant Thomas, individually "and d/b/a Thomas Trucking and Soles Automotive Towing, Inc." Plaintiff's counsel later realized his office had erred in naming the Defendants and had not included a second summons for the clerk to issue.

Two-and-one-half months later, the clerk of court issued a second summons specifically for Defendant Soles Automotive on 15 August 2018. Defendant Soles Automotive was served with the second summons by certified mail on 23 August 2018, and again by the Cumberland County Sheriff on 5 September 2018.

On 3 October 2018, Defendant Soles Automotive filed its answer and motions to dismiss pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. §1A-1 (2017).

On 19 November 2018, Defendant Soles Automotive's motions to dismiss were heard by the trial court. Following arguments from counsel, the trial court granted Defendant Soles Automotive's motions to dismiss pursuant to Rules 12(b)(2), 12(b)(4), and 12(b)(5) and ordered Plaintiff's claims to be dismissed with prejudice as to it. The trial court found Plaintiff had failed to comply with Rule 4 of the North Carolina Rules of Civil Procedure by not timely issuing the summons directed to Defendant Soles Automotive. The trial court also found Plaintiff had failed to properly perfect service of process due to an invalid summons. The trial court dismissed Plaintiff's action with prejudice. Plaintiff timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Plaintiff argues the trial court: (1) erred by granting Defendant Soles Automotive's motions to dismiss for lack of jurisdiction, insufficiency of process, and insufficiency of service of process under Rules 12(b)(2), 12(b)(4), and 12(b)(5) of the North Carolina Rules of Civil Procedure; and, (2) erred in dismissing Plaintiff's complaint with prejudice.

IV. Service of Process

A. Standard of Review

"We review *de novo* questions of law implicated by a motion to dismiss for insufficiency of service of process." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of

the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks and citation omitted).

B. Analysis

Plaintiff argues the issuance and service of a valid summons on 15 August 2018 "revived" its original action, which was abated and subject to dismissal by Defendant Soles Automotive because of the failure to issue to it a timely summons. Plaintiff argues this revival constituted a new commencement date of this action, and the trial court erred by granting Defendant Soles Automotive's motion to dismiss. We disagree.

Under our Rules of Civil Procedure, a summons must be issued within five days of the filing the complaint. N.C. Gen. Stat. §1A-1, Rule 4(a). "The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984).

Our Supreme Court also stated the fundamental purposes of Rule 4's requirements are to provide "notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Wiles v. Welparnel Const. Co.*, 295 N.C. 81, 84, 243 S.E.2d 756, 758 (1978) (citation omitted).

The summons "must be issued in the manner prescribed by statute" in order to be effective. *Stinchcomb v. Presbyterian Med. Care Corp.*, 211 N.C. App. 556, 562, 710 S.E.2d 320, 325 (2011) (citation omitted). "[W]here a summons does not issue within five days of the filing of a complaint, the action abates and is deemed never to have commenced." *Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006) (citation omitted). Eighty-five years ago, our Supreme Court held the trial court does not acquire or possess jurisdiction to proceed to trial unless proper service and notice is given to a defendant. *Beaufort Cty. v. Mayo*, 207 N.C. 211, 214, 176 S.E. 753, 755 (1934).

Plaintiff's argument ignores the clear language of Rule 4 of the North Carolina Rules of Civil Procedure. "Where the language of a statute is clear and unambiguous . . . the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Rule 4 clearly states that "[u]pon the filing of the complaint, summons *shall be issued* forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a) (emphasis supplied). The "outer limits of tolerance in respect to delay in issuing the summons" is five days. N.C. Gen. Stat. § 1A-1, Rule 4(a), cmt.

When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence concerning defendant by the suing out of an alias and pluries summons "at any time within 90 days after the date of

issue of the last preceding summons." N.C. Gen. Stat. §1A-1, Rule 4(d)(2). The validity of an alias and pluries summons is dependent upon the validity of the original summons. *Stack v. Union Reg'l Mem'l Med. Ctr. Inc.*, 171 N.C. App. 322, 325, 614 S.E.2d 378, 381 (2005); s*ee also Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 5, 351 S.E.2d 834, 837 (1987) ("The function of an alias and pluries summons is to keep a lawsuit alive and maintain the original date of the commencement of the action when the original summons has not been properly served upon the original defendant named therein.").

In an action against multiple defendants, notice required under Rule 4 is not satisfied when a summons is issued to a single defendant "with process and service to the other defendants to come at plaintiff's leisure." *Stack*, 171 N.C. App at 327, 614 S.E.2d at 381. In *Stack*, the plaintiff never attempted to serve the defendant until five months after the lawsuit was commenced. *Id.* at 327, 614 S.E.2d at 382. The alias and pluries summons was invalid, because the original summons did not name the second defendant. *Id.*, 614 S.E.2d at 381.

Similar to S*tack*, Plaintiff failed to satisfy the notice requirement for serving Defendant Soles Automotive with process within the requirements of Rule 4. *See id.* at 327, 614 S.E.2d at 382 ("notice cannot be accomplished when service of summons is not made to each individual defendant"). Our Supreme Court has held the trial

court does not acquire jurisdiction over a defendant unless notice is properly given to the defendant. *Beaufort Cty.*, 207 N.C. at 214, 176 S.E. at 755.

Plaintiff cites *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E.2d 355 (1982), to argue the issuance of a second summons prior to dismissal "revive[d] and commence[d] a new action." *Id.* at 308, 291 S.E.2d at 357. However, *Roshelli* only involved one defendant, such that the lawsuit was dormant and subject to being revived with the subsequent summons. *Id.* Here, as in *Stack*, there were multiple defendants involved. *Stack* controls our outcome on these facts, not *Roshelli*. *See id.*

Plaintiff failed to comply with Rule 4's notice requirements because another summons was not issued for Defendant Soles Automotive until two-and-a-half months after Plaintiff had filed the complaint. Also, Plaintiff failed to serve Defendant Soles Automotive until over three months after Plaintiff filed the complaint. Since Plaintiff failed to properly provide notice to Defendant, the trial court did not acquire jurisdiction over Defendant. *See Beaufort Cty.*, 207 N.C. at 214, 176 S.E. at 755.

The fundamental purposes of Rule 4 are to provide "notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Wiles*, 295 N.C. at 84, 243 S.E.2d at 758 (citation omitted). The trial court correctly granted Defendant

Soles Automotive's motions to dismiss for lack of jurisdiction, insufficiency of process, and insufficiency of service of process. *See id.*

V. Dismissal with Prejudice

Plaintiff argues the trial court erred in dismissing Plaintiff's action with prejudice. We agree.

"A dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Assocs. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). Whether a dismissal under Rule 12(b) is an adjudication on the merits depends upon under which subsection in the rule the case was dismissed. A dismissal under Rule 12(b)(6), for failure to state a claim upon which relief can be granted, serves as an adjudication on the merits, unless the trial court specifies that the dismissal is without prejudice. *Clancy v. Onslow Cty.,* 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002) (citation omitted).

"Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997). When the first summons was not issued within five days as is required by Rule 4(a) and the second summons did not relate back to the date of issue of the first summons, the action never commenced and the trial court did not acquire jurisdiction over the defendant. *Id.* at 434, 485 S.E.2d at 624.

This Court has recognized that a dismissal for lack of jurisdiction is not an adjudication on the merits. *Allen Industries v. Kluttz*, 248 N.C. App. 124, 126, 788 S.E.2d 208, 210 (2016) (citation omitted); *see also Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (holding a dismissal under Rule 12(b)(1) is not treated as an adjudication on the merits). Additionally, the Rules of Civil Procedure expressly state, "[u]nless the court in its order for dismissal otherwise specifies, [an involuntary dismissal] *other than a dismissal for lack of jurisdiction* . . . operates as an adjudication on the merits." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017) (emphasis supplied).

Here, Plaintiff failed to timely issue a summons to Defendant Soles Automotive as is required by Rule 4(a). The summons served on Defendant Soles Automotive on 15 August 2018 was untimely and defective. The trial court did not acquire jurisdiction over Defendant Soles Automotive.

Without jurisdiction, the trial court could not adjudicate the matter on its merits. Additionally, our Rules and precedents recognize that dismissal for lack of jurisdiction is not an adjudication on the merits. *Id.* The trial court erred in dismissing Plaintiff's complaint with prejudice, because the trial court never acquired jurisdiction over Defendant Soles Automotive.

VI. Conclusion

The trial court correctly granted Defendant Soles Automotive's motion to dismiss. Plaintiff' failed to provide timely notice to Defendant Soles Automotive, as is required by Rule 4, and the trial court did not acquire jurisdiction over Soles Automotive. That portion of the trial court's order is affirmed.

The trial court did not acquire jurisdiction over Soles Automotive to adjudicate Plaintiff's claim on the merits. Dismissal with prejudice was improper and is reversed.

We affirm the trial court's order in part, reverse in part, and remand. We express no opinion on the validity or merit, if any, of Plaintiff's claims. *It is so ordered*.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges COLLINS and BROOK concur.

Report per Rule 30(e).