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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1104

Filed: 1 September 2020

Durham County, No. 18 CR 058468

STATE OF NORTH CAROLINA

v.

JONATHAN ALBERTO BARBOSA, Defendant, and CRUM & FORSTER INDEMNITY COMPANY, Surety.

Appeal by Durham Public Schools Board of Education from order entered 4 October 2019 by Judge Brian C. Wilks in Durham County District Court. Heard in the Court of Appeals 11 August 2020.

Tharrington Smith, LLP, by Stephen G. Rawson, for appellant Durham Public Schools Board of Education.

Hill Law, PLLC, by M. Brad Hill, for appellee Crum & Forster Indemnity Company.

COLLINS, Judge.

The Durham Public Schools Board of Education (“Board”) appeals from an order allowing Crum & Forster Indemnity Company’s (“Surety”) motion to amend its motion to set aside forfeiture and granting the amended motion. The Board contends

the trial court had no discretion to grant Surety's motion because Rule 15 does not apply to the bond forfeiture statutes. We affirm the trial court's order.

I. Background

On 1 December 2018, Defendant Jonathan Alberto Barbosa was arrested in the underlying criminal case on drug charges and resisting a public officer. On 2 December 2018, Surety, through its agent, signed an appearance bond on Defendant's behalf. Because Defendant failed to appear on his scheduled court date, on 7 December 2018, the Durham County Clerk of Court issued a bond forfeiture and mailed notice to Surety. Per statute, the bond forfeiture notice gave Surety 150 days to respond.

On 6 May 2019, the last day of the 150-day period, Surety's agent filed a motion to set aside forfeiture, which is a form containing blank spaces and boxes for the movant to fill in. One of the sections of the form contains seven check boxes which correspond to the seven statutorily permitted reasons enumerated in N.C. Gen. Stat. § 15A-544.5(b) to set aside forfeiture. Relevant to our case is check box four: "The defendant has been served with an order of arrest for failure to appear . . . as evidenced by a copy of an official court record." Surety's agent attached several documents showing Defendant was served with an order of arrest, but the agent did not check any of the seven boxes when he filed the motion.

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On 21 May 2019, the Board objected to Surety's motion to set aside. "No box marked" is hand-written in the margin of the form next to the check boxes as the reason for the Board's objection. On 12 June 2019, the parties consented to a continuance to grant Surety additional time to retain counsel. On 21 June 2019, 46 days after the 150-day period had expired, Surety filed a motion pursuant to North Carolina Rule of Civil Procedure 15 to amend its motion to set aside by checking box four. Thereafter, the parties consented to continuing the matter two additional times. On 11 September 2019, the trial court held a hearing on the motion to amend and the Board's objection to Surety's motion to set aside. On 3 October 2019, the trial court allowed Surety's motion to amend and granted Surety's amended motion to set aside forfeiture. The trial court awarded the Board a sanction in the amount of \$300.00, which was 10% of the amount of the bond.

On 15 October 2019, the Board filed notice of appeal.

II. Discussion

A question of statutory construction is a question of law that we review de novo. *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008). "A motion to amend is addressed to the discretion of the trial court. Its decision will

not be disturbed on appeal absent a showing of abuse of discretion.” *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984).

a. Rule 15

The Board first argues that Rule 15 of the North Carolina Rules of Civil Procedure, which governs the amendment of pleadings in civil cases, does not apply to the bond forfeiture statutes. We disagree as this Court’s opinion and holding in *State v. Isaacs*, 261 N.C. App. 696, 700, 821 S.E.2d 300, 304 (2018), rejects this argument.

Under the bond forfeiture statute, once notice of bond forfeiture has been given, a surety or its agent may make a written motion to set aside forfeiture “before the expiration of 150 days after the date on which notice was given.” N.C. Gen. Stat. § 15A-544.5(d)(1) (2019). The statute requires that the motion indicate “the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section,” which in this case is evidence that “defendant has been served with an Order of Arrest for Failure to Appear.” N.C. Gen. Stat. § 15A-544.5(b)(4), (d)(1) (2019).

“[A] bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter[,]” and the rules of civil procedure apply. *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). “Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend.” *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). This liberal policy for

amendment supports “the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities.” *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972).

Isaacs, 261 N.C. App. at 700, 821 S.E.2d at 304.

In *Isaacs*, this Court affirmed a trial court’s order allowing a surety’s motion to amend a motion to set aside forfeiture made outside the 150-day timeframe prescribed in N.C. Gen. Stat. § 15A-544.5(d)(1) and granting the motion to set aside. The surety, through its bail agent, timely filed a motion to set aside the bond forfeiture, indicating reason number four, that “defendant had been served with an order for arrest for the failure to appear on the bonded criminal charge, as evidenced by a copy of an official court record including an electronic record.” *Id.* at 697, 821 S.E.2d at 302. “However, attached to surety’s motion was the warrant for Defendant’s initial arrest . . . rather than the order for arrest for Defendant’s failure to appear.” *Id.* The Board objected to the motion to set aside. At a hearing on the Board’s objection, held 167 days after notice of forfeiture, the surety moved to amend its motion to allow it to attach defendant’s order for arrest for the failure to appear. *Id.*

The trial court allowed the surety to amend its motion and attach the necessary evidence. We explained that this Court’s liberal policy of allowing motions to amend applies even in the context of bond forfeiture proceedings, and that these motions will be freely granted unless the objecting party can show granting the motion will materially prejudice them. *Id.* at 700, 821 S.E.2d at 304 (citations omitted).

Accordingly, even after the expiration of the 150-day period, it was within the trial court's discretion to allow the motion to amend unless the Board showed that doing so was materially prejudicial. *Id.* at 702, 821 at 305.

In this case, Surety timely filed a motion to set aside the bond forfeiture, to which it attached several documents showing that Defendant was served with an order of arrest for his failure to appear, but Surety failed to check off a reason for setting aside the forfeiture in its original motion. Thus, 46 days after the expiration of the 150-day period, Surety filed a motion to amend its motion to set aside to correct its mistake by checking box four: "that Defendant had been served with an order for arrest for the failure to appear on the bonded criminal charge, as evidenced by a copy of an official court record including an electronic record." *See id.* at 697, 821 S.E.2d at 302. After hearing arguments, the trial court allowed Surety's motion to amend, and in turn granted Surety's motion to set aside forfeiture.

As in *Isaacs*, the trial court acted within its discretion to allow a motion to amend, even after the 150 days had expired. *Id.* at 702, 821 at 305.

B. Prejudice

The Board argues that even if Rule 15 applies to bond forfeiture proceedings, the trial court abused its discretion in allowing Surety's motion to amend. We disagree.

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The Board broadly argues that allowing sureties' motions to amend will prejudice the State because it will give sureties "*carte blanche* to amend at will irrespective of the underlying facts," which in turn would cause an avalanche of court expenses to befall the Board as it will be forced to respond to these amended motions. The Board's broad prejudice argument is a reiteration of the prejudice argument asserted in *Isaacs* and is essentially a policy argument why Rule 15 should not apply to bond forfeiture proceedings. We reject this argument for the same reason. *Id.* at 304, 821 S.E.2d at 304.

The Board also contends that in this specific case, Surety should not be allowed to make "a mockery of the statutory scheme carefully created by the General Assembly, [by] filing what amounted to a placeholder motion to set aside and then [sought] to amend it after an objection, a hearing, and a continuance that was consented to for the purposes of allowing for retention of legal counsel, not for the purposes of expanding the time in which the Surety could seek to avoid the consequences of its faulty filing."

However, nothing in the record supports the Board's argument that Surety essentially filed a "placeholder motion to set aside." Surety's agent filled out the motion to set aside form, neglecting to check box four, and attached a copy of Defendant's record of arrest. From the attached documentation, the Board could determine that Surety was alleging statutory reason number 4 for setting aside the

forfeiture: “[D]efendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.” N.C. Gen. Stat. § 15A-544.5(4). We thus see no merit in the Board’s categorization of the initial motion as a “placeholder” argument or that it was filed for purposes of delay or asserted in bad faith.

Moreover, the opinion in *Isaacs* was published by this Court on 2 October 2018, putting the Board on notice in this case that a trial court has broad discretion to allow a motion to amend. The Board, nonetheless, chose to object to Surety’s motion to set aside and oppose Surety’s motion to amend. We conclude the trial court did not abuse its discretion in granting Surety’s motion to amend.

We recognize that the Board made several policy arguments as to why *Isaacs* and other similar cases must be overturned. We are bound to follow our own precedent until it becomes overturned by a higher court. *See State v. Gonzalez*, 263 N.C. App. 527, 530, 823 S.E.2d 886, 888 (2019) (discussing the effect of *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)).

III. Conclusion

The order of the trial court is AFFIRMED.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

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Report per Rule 30(e).