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NO. COA11-1572
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

BLUERIDGE GENERAL, INC.,
Plaintiff

v.

Currituck County
No. 08-CVS-403

CURRITUCK COUNTY AND
CURRITUCK COUNTY BOARD
OF EDUCATION,
Defendants.

Appeal by Plaintiff from order entered 20 September 2011 by
Judge Jerry R. Tillett in Currituck County Superior Court.
Heard in the Court of Appeals 8 May 2012.

*C. Everett Thompson, II, PA, by C. Everett Thompson, II,
for Plaintiff-appellant.*

*Currituck County Attorney Donald I. McRee, Jr., for
Defendant-appellee Currituck County.*

*Tharrington Smith, L.L.P., by V. Rod Malone and Eva B.
DuBuisson, for Defendant-appellee Currituck County Board of
Education.*

HUNTER, JR., Robert N., Judge.

Blueridge General, Inc. ("Blueridge") appeals from the
trial court's order denying its motion for relief from judgment
and motion to amend. We affirm.

I. Factual & Procedural Background

On 4 September 2008, Blueridge filed a complaint against Defendants Currituck County and Currituck County Board of Education (collectively, "Defendants") in Currituck County Superior Court. The complaint alleged that on or about 17 January 2006, Blueridge entered into a contract with Defendants to construct the Jarvisburg School in Currituck County and that Defendants subsequently refused to reimburse Blueridge for insurance purchased as required under their agreement. Blueridge sought declaratory relief in the form of "a declaration . . . interpreting the relevant contractual documents so as to require the Defendants to pay [Blueridge] . . . for the insurance purchased." Defendants moved to dismiss Blueridge's complaint for failure to state a claim pursuant to Rule 12(b)(6), asserting that the requested relief was inappropriate because "such a declaration would not terminate the controversy between the parties nor resolve such equitable claims or defenses as the parties may have with regard to the construction."

The matter came on for hearing in Currituck County Superior Court on 17 August 2009, Judge Jerry R. Tillett presiding. At the hearing, Judge Tillett "stated, in accordance with [his]

belief at the time, that no statute of limitations problem precluded [Blueridge] from filing a new breach of contract action if the present action were dismissed with prejudice." Defendants expressed no opinion on the matter. By order entered 1 September 2009, Judge Tillett dismissed Blueridge's complaint for failure to state a claim for relief, noting that the requested declaratory relief "would not terminate the controversy between the parties nor resolve such equitable claims or defenses as the parties may have with regard to the construction of the school in question."

On 8 December 2009, Blueridge filed a second complaint against Defendants alleging breach of contract in case 09-CVS-725. On 19 January 2010, Defendants moved to dismiss the complaint on the grounds that the breach of contract claim asserted therein was barred by the applicable two-year statute of limitations for a contract claim against local government as set forth under N.C. Gen. Stat. § 1-53(1). Defendants contended that the breach complained of could have occurred no later than 10 May 2007 and, accordingly, the statute of limitations ran on 10 May 2009.¹

¹ Blueridge alleges that no ruling has been issued on Defendants' motion to dismiss its complaint in 09-CVS-725.

On 4 March 2010, evidently recognizing that its second complaint might be barred by the applicable statute of limitations, Blueridge filed a motion for relief from the trial court's 1 September 2009 order. Specifically, Blueridge asserted that both the parties and the court believed there was no statute of limitations issue at the time of the 17 August 2009 hearing and that this mistaken belief "constitute[d] grounds of mistake and excusable neglect pursuant to" Rule 60(b)(1) of the North Carolina Rules of Civil Procedure. Blueridge also moved to amend its 4 September 2008 complaint to state a claim for breach of contract.

By letter dated 14 May 2010, Judge Tillett notified the parties of his intention to grant Blueridge's motion for relief and instructed Blueridge to prepare a draft order. Nearly one year later, on 4 May 2011, Blueridge served Defendants and the trial court with its proposed order.² Defendants responded by submitting their own, alternative draft order. By letter dated 16 June 2011, Judge Tillett informed the parties that the proposed orders did not "accurately reflect[] the Courts [sic] decision" and that the court had "decide[d] to reverse its

² The record indicates that Blueridge acquired new counsel following Judge Tillett's 14 May 2010 letter, and that it was Blueridge's new counsel who provided Judge Tillett with the proposed order upon assuming his role.

notification of decision to the parties on May 14, 2010" and to deny Blueridge's motion for relief. The trial court entered an order denying Blueridge's motion for relief on 20 September 2011. Blueridge filed notice of appeal with this Court on 19 October 2011.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Blueridge appeals from a final order of the superior court as a matter of right.

III. Analysis

A. The Trial Court's 1 September 2009 Order Granting Defendants' Motion to Dismiss

Blueridge first contends the trial court erred in dismissing its 4 September 2008 complaint "for the reason that [the] complaint stated a cause of action for breach of contract." We conclude Blueridge failed to perfect a timely appeal from the trial court's order dismissing this complaint, and we therefore do not reach the merits of Blueridge's contention on this issue.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313,

322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997). Rule 3(c) requires that an appeal be taken "within thirty days after entry of judgment," N.C. R. App. P. 3(c)(1), or "within thirty days after service upon the party of a copy of the judgment if service is not made within" three days after entry. N.C. R. App. P. 3(c)(2). This holds true even where the appealing party moves for relief from the order under Rule 60(b) of the North Carolina Rules of Civil Procedure. See *Wallis v. Cambron*, 194 N.C. App. 190, 192-93, 670 S.E.2d 239, 241 (2008) (holding appellant's Rule 60(b) motion for relief did not toll time for appealing the underlying order). Moreover, Rule 3(d) provides that "[t]he notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). We have adopted a liberal construction of this rule in holding that "'a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not mislead by the mistake.'" *Smith v.*

Indep. Life Ins. Co., 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (citation omitted).

Here, the trial court entered its order dismissing Blueridge's complaint seeking declaratory relief on 1 September 2009. Blueridge did not file its notice of appeal until 19 October 2011, well outside the thirty-day timeframe imposed by Rule 3(c). Moreover, Blueridge's notice of appeal states its intent to appeal "from the Order Denying Motion for Relief from Judgment and Denying Amendment in favor of defendants signed on September 12, 2011." The notice of appeal fails to designate the trial court's 1 September 2009 order, nor can we fairly infer Blueridge's intent to appeal therefrom. We conclude Blueridge has failed to comply with the requirements of Rule 3 and, therefore, this Court is without jurisdiction to review Blueridge's challenge to the trial court's 1 September 2009 order.

B. The Trial Court's 20 September 2011 Order Denying Blueridge's Motion for Relief

Blueridge next contends the trial court erred in denying its motion for relief pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. We disagree.

Rule 60(b) affords the trial court discretion to "relieve a party or his legal representative from a final judgment, order,

or proceeding." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011). A trial court's decision on a Rule 60(b) motion will not be overturned absent an abuse of discretion. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 547, 501 S.E.2d at 656.

Blueridge first argues that the trial court abused its discretion in denying its motion for relief because "all parties were operating under the misconception of law and fact that [Blueridge's] complaint did not allege a claim for breach of contract." We do not reach the merits of this argument, however, as we conclude it was not properly preserved for appellate review.

It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount,' meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); see also *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)

("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.").

Here, Blueridge's sole argument before the trial court was that it was entitled to relief under Rule 60(b) due to its mistaken belief that the statute of limitations applicable to its breach of contract claim was three years, not two, at the time of the hearing on its claim for declaratory relief. Nevertheless, Blueridge cites its letter to Judge Tillett dated 4 May 2011 as sufficient to raise the argument "at the trial level." In the letter, counsel for Blueridge states the following: "It would appear to me that the Complaint filed in this case clearly stated the requisite elements for a claim for breech [sic] of contract and damages regardless of the title in the caption." We decline to treat this letter, submitted nearly one year after Judge Tillett's request for a proposed draft order, as sufficient to preserve for appellate review an argument asserted for the first time therein. We accordingly do not reach the merits of Blueridge's contention on this issue.

Blueridge also contends that the trial court's decision to deny its motion for relief, after it had initially asked Blueridge to draft an order affording the requested relief, "in

and of itself should be considered arbitrary and therefore entitle [Blueridge] to relief." Blueridge provides no authority or reason in support of its argument on this issue and we therefore deem the issue abandoned. See N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Moreover, we note this argument would fail even if Blueridge had preserved the issue for appellate review. Rule 58 of the North Carolina Rules of Civil Procedure provides that "a judgment is entered when it is reduced to writing, signed by the judge, *and filed with the clerk of court.*" N.C. Gen. Stat. § 1A-1, Rule 58 (emphasis added). Similarly, "an order is entered 'when it is reduced to writing, signed by the judge, *and filed with the clerk of court.*'" *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 738 (emphasis added) (citation omitted). This Court has held that a rendition of a judgment, *i.e.*, "[a]n announcement of judgment in open court," *Searles v. Searles*, 100 N.C. App. 723, 726, 398 S.E.2d 55, 56 (1990), is "of no effect absent an *entry* of judgment." *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 321, 438 S.E.2d 471, 475 (1994).

Here, Judge Tillett's 14 May 2010 letter stating his intention to grant Blueridge's motion for relief did not constitute a rendition, much less an entry of judgment. Like the parties' proposed orders, the letter was never filed with the clerk of court. Thus, Judge Tillett's "ruling" in the letter was "of no effect" and was ultimately displaced by entry of the 20 September 2011 order denying Blueridge's motion for relief. We note Blueridge's statement in its brief that the letter, as well as Blueridge's proposed order submitted nearly one year later, was sent "before the court had apparently made a final decision." We fail to see how Judge Tillett's 20 September 2011 order was "arbitrary" if, as Blueridge concedes, any decision prior to that was not final. This argument is overruled.

Blueridge further contends that the trial court abused its discretion in denying its motion for relief because "[i]t is clear from the record that at the time of the hearing of defendants' motion to dismiss this case, the court was of the opinion that the statute of limitations had not expired." We disagree.

Although Blueridge does not specify the subsection of Rule 60(b) upon which it bases its request for relief, we infer from

its arguments before the trial court and those presented on appeal that Rule 60(b)(1) is the relevant provision. Rule 60(b)(1) affords the trial court discretion to grant relief in instances of "[m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2011). Our Supreme Court has held, however, that "an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1)." *Briley*, 348 N.C. at 546, 501 S.E.2d at 655. Moreover, "[a] showing of carelessness or negligence or ignorance of the rules of procedure . . . does not constitute 'excusable neglect' within [Rule 60(b)(1)]." *Id.*

Here, counsel for Blueridge filed a complaint seeking declaratory relief, instead of a complaint alleging breach of contract. When the trial court inquired whether Blueridge could mitigate this error by filing a new complaint, Blueridge stated that the statute of limitations would not bar the new complaint. We discern nothing arbitrary or unreasonable in the trial court's conclusion that these procedural actions were insufficient to set aside its prior ruling. This is especially true in light of the trial court's articulated basis for dismissing Blueridge's complaint in its 1 September 2009 order,

which makes no mention of the statute of limitations issue and relies exclusively upon Blueridge's failure to state a claim for relief as required under the Declaratory Judgment Act:

4. Declaratory judgment regarding the contract documents referenced in the Complaint is not appropriate in this matter, where such a declaration would not terminate the controversy between the parties nor resolve such equitable claims or defenses as the parties may have with regard to the construction of the school in question.

5. This Court therefore finds that [Blueridge] has failed to state a claim for relief and declines to exercise jurisdiction over [Blueridge's] claims pursuant to the Declaratory Judgment Act.

Thus, we conclude that even if a mistake regarding the statute of limitations was excusable, it was not material to the trial court's ruling and therefore cannot serve as a basis for relief in the instant case.

We note that Blueridge's contention "[i]t would be inequitable for defendants to be rewarded for their silence" at the hearing implies Defendants knew or should have known the applicable statute of limitations and had an affirmative duty to correct Blueridge's mistake at that time. This argument is without merit, as Blueridge offers no evidence to support its assertion that Defendants were aware of the applicable statute of limitations, nor any authority to support its claim for

equitable relief in this context. Accordingly, we hold the trial court did not abuse its discretion in denying Blueridge's Rule 60(b) motion for relief.

IV. Conclusion

For the foregoing reasons, the trial court's order is Affirmed.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).