

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1594

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

TRACY SPEARS,  
Plaintiff,

v.

Wake County  
No. 03-CVD-8081

RUSSELL LONG,  
Defendant.

Appeal by plaintiff from orders entered 1 October 2004 and 13 January 2005 by Judge Shelley Desvousges in District Court, Wake County. Heard in the Court of Appeals 14 November 2006.

*Rosen Law Firm, by Ketan P. Soni, for plaintiff-appellant.*

*Haas McNeil & Associates, by John Patrick McNeil and Angela L. Haas, for defendant-appellee.*

WYNN, Judge.

Unless tolled by a motion made under Rules 50(b), 52(b), or 59 of the North Carolina Rules of Civil Procedure, a party has thirty days to appeal from a civil judgment. N.C. R. App. P. 3(c)(3). Here, plaintiff gave notice of appeal on 14 February 2005, from a 13 January 2005 order denying her motion to reconsider under Rule 60, and from the 1 October 2004 underlying order of final judgment. Because Rule 60 did not toll the time for filing a notice of appeal from the underlying judgment, we must dismiss plaintiff's appeal from the 1 October 2004 judgment.

On 11 June 2003, Plaintiff Tracy Spears brought a breach of separation agreement action against Defendant Russell Long. She sought specific performance of the provisions of the agreement, namely, that Mr. Long evenly split any proceeds realized from the sale of a Waldorf, Maryland rental property jointly owned during their marriage, as well as attorney's fees incurred as a result of prosecuting the alleged breach. Following a hearing in March 2004, the trial court issued a verbal order in favor of Mr. Long, concluding that the separation agreement was valid and enforceable and that Ms. Spears had relinquished her rights to the Waldorf property. The trial court filed a written order on 1 October 2004, which was served on Ms. Spears on 4 October 2004.

On 20 August 2004, in the months between the verbal and written orders, Ms. Spears filed a motion to reconsider "pursuant to Rule 60 of the North Carolina Rules of Civil Procedure," seeking relief from the verbal order and specific findings that the separation agreement could not be orally modified, that Mr. Long had breached the agreement, and that Ms. Spears should be entitled to attorney's fees. The trial court denied the motion to reconsider in a written order titled "Order-Rule 60," filed 13 January 2005.

On 14 February 2005, Ms. Spears filed a notice of appeal from the 13 January 2005 order denying her motion to reconsider and from the 1 October 2004 order finding in favor of Mr. Long on the claims for specific performance and attorney's fees. Her sole argument on appeal, encompassing seventeen assignments of error,

is that the trial court erred in not ordering Mr. Long to specifically perform pursuant to the terms of the separation agreement and in ruling that Mr. Long was not in breach of the agreement due to oral modifications after the execution of the agreement. All seventeen assignments of error cited and argued by Ms. Spears in her brief refer to the 1 October 2004 order. We, however, do not reach the merits of this appeal because our rules of appellate procedure require that this appeal be dismissed as untimely.<sup>1</sup>

Indeed, Rule 3 of the North Carolina Rules of Appellate Procedure allows only thirty days following entry of judgment for the filing and serving of the notice of appeal, which time period is tolled only 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." N.C. R. App. P. 3(c)(3). Here, the notice of appeal was filed 14 February 2005, some four months after the order was filed on 1 October 2004. However, Ms. Spears argues that the order is still subject to review by this Court because "[t]he order . . . on

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<sup>1</sup> Per the North Carolina Rules of Appellate Procedure, Ms. Spears has made specific references to the record for each of the assignments of error preserved for appeal. See N.C. R. App. P. 10(c)(1). For the seventeen assignments of error argued in her brief, the references point to the 1 October 2004 order; the remaining assignment of error, not argued by Ms. Spears, refers to the 13 January 2005 order. Our appellate rules preclude the substitution of one order for another, even if the issues are substantively the same. See *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *but see Broderick v. Broderick*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 623 S.E.2d 806, 808 (2006) (Wynn, J., concurring) ("Indeed, the strict enforcement of the requirements of Rule 10 often does no more than bar litigants . . . from their pursuit of justice.").

breach of contract was not a final order," such that the time to file the notice of appeal was tolled by the motion to reconsider made immediately after the hearing.

Despite this assertion, a motion to reconsider does not transform a final order into an interlocutory one; rather, Rule 60 offers parties the opportunity to have a final judgment set aside due to clerical and other mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud on the court, or other reasons. N.C. Gen. Stat. § 1A-1, Rule 60 (2005). The 1 October 2004 order was "one which dispose[d] of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court," and not one which "le[ft] it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

Ms. Spears makes no other arguments in her brief as to why the four-month delay in filing her notice of appeal from the 1 October 2004 order should be allowed. Moreover, we note that this is not a situation in which her Rule 60 motion should be treated as a Rule 59 motion for purposes of tolling the thirty-day period dictated by the appellate rules. See *Scott v. Scott*, 106 N.C. App. 379, 382, 416 S.E.2d 583, 585 (1992) ("motions are properly treated according to their substance rather than their labels") (citing *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 380

(1982)). In *Scott*, the defendant had made a motion under Rule 60(b) to strike a finding of fact from his divorce judgment. *Id.* at 380, 416 S.E.2d at 584. This Court determined that his Rule 60(b) motion should in fact be treated as a Rule 59 motion because it was filed "only . . . to amend the judgment," and Rule 59 "governs amendments to judgments while Rule 60(b) governs relief from the legal effects of judgments." *Id.* at 381-82, 416 S.E.2d at 584-85.

Here, Ms. Spears cited to Rule 60 in her motion to reconsider and sought relief including findings that the separation agreement in question was modifiable only in writing, that Mr. Long had breached the agreement, and that Mr. Long was responsible for costs and attorney's fees. In the caption and body of the order denying the motion, the trial court also referred to Rule 60. The record shows the motion was intended not simply to amend the 1 October 2004 order, but to have it vacated and reversed altogether. Although "it is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments," and that "[t]he appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under . . . Rule 59," *Baxley v. Jackson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 634 S.E.2d 905, 907 (citing *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994)), *disc. review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2006), we decline to treat Ms. Spears' Rule 60 motion as a Rule 59 motion when it was improperly filed as a premature alternative to appellate review. *Id.*; see also N.C.

Gen. Stat. § 1A-1, Rule 59(b) ("A [Rule 59] motion for a new trial shall be served not later than 10 days after entry of the judgment.").

Because Ms. Spears filed a Rule 60 motion, which did not toll the thirty-day period for the notice of appeal from the 1 October 2004 order, we find that the notice of appeal was not timely filed. Moreover, because the assignment of error in the record referring to the 13 January 2005 order denying the motion to reconsider was not argued by Ms. Spears in her brief to this Court, we must deem it abandoned. See N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Dismissed.

Judges HUDSON and STEPHENS concur.

Report per rule 30(e).