

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-787

Filed: 7 April 2015

Guilford County, No. 13 CVS 685

HIGH POINT BANK AND TRUST COMPANY, Plaintiff,

v.

ROBERT L. FOWLER, DELORES J. FOWLER, THOMAS P. BAKER, AND
PAMELA P. BAKER, Defendants.

Appeal by defendants from order entered 4 February 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 3 December 2014.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellee.

Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellants Robert P. Fowler and Delores J. Fowler.

BRYANT, Judge.

Because defendants' appeal from a trial court order dismissing their appeal is improper, we dismiss this appeal.

On 17 April 2013, in Guilford County Superior Court, plaintiff High Point Bank and Trust Company filed suit against defendants Armadillo Holdings, LLC; Robert L. Fowler; Delores J. Fowler; Thomas P. Baker; and Pamela P. Baker. Plaintiff alleged that Armadillo Holdings, LLC, executed a promissory note for the principal amount of \$1,080,000.00 on 31 January 2006. Also on 31 January 2006,

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defendants Robert L. Fowler, Delores J. Fowler, Thomas P. Baker, and Pamela P. Baker individually executed a Commercial Guaranty for the debt. At the time of the complaint, under the terms and conditions of the promissory note, Armadillo Holdings, LLC, was in default, and was indebted to plaintiff for the sum of \$651,251.00 plus interest. Plaintiff sought recovery against defendants jointly and severally.

On 27 June 2013, Robert Fowler and Delores Fowler filed an answer to the complaint. Armadillo Holdings, LLC, filed an answer to the complaint. Thomas P. Baker filed an answer to the complaint. The record does not reflect that Pamela Baker filed an answer to the complaint. On 10 July 2013, default was entered as to defendant Pamela Baker. Also, on 10 July 2013, plaintiff filed a notice of voluntary dismissal as to defendant Armadillo Holdings, LLC.

On 16 September 2013, plaintiff moved for summary judgment. On 27 September, Robert Fowler and Delores Fowler moved to amend their answer to the complaint. They sought to amend their answer to assert the defense that the commercial guaranties were void due to illegality: specifically, that plaintiff's pre-condition of a commercial guarantee prior to making a loan was an act of discrimination in violation of 15 U.S.C. 1691 *et seq.* and 12 C.F.R. 202.7(d).

On 22 October 2013, following a 7 October hearing before the Honorable Susan E. Bray, Judge presiding, the trial court entered an Order and Judgment granting

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plaintiff's motion for summary judgment and denying the Fowlers' motion to amend their answer. In its order, the court noted that a petition for relief had been filed on behalf of defendant Thomas Baker in the Middle District of North Carolina pursuant to Chapter 7 of the United States Bankruptcy Code. Accordingly, pursuant to the stay provisions of 11 U.S.C. 362, the civil action against defendant Thomas Baker was stayed. Default, pursuant to Rule 55 of the Rules of Civil Procedure, had already been entered against defendant Pamela Baker. The court also noted that having considered the Fowlers' motion to amend and plaintiff's materials in opposition, the court in its discretion would deny the motion. The court stated that "the allowance of an amendment to the pleadings would cause undue prejudice to [] Plaintiff, undue delay in the prosecution of this action and, even if allowed, the additional matters raised in the proposed amendment are futile[.]" The trial court went on to determine that there were no genuine issues of material fact and plaintiff was entitled to judgment as a matter of law.

On 20 November 2013, Robert Fowler and Delores Fowler (hereinafter defendants) filed notice of appeal from the 22 October 2013 judgment entered by Judge Bray.

On 5 December 2013, plaintiff filed a motion to dismiss defendants' appeal. In support of its motion, plaintiff contended that defendants failed to file and serve their notice of appeal within 30 days after the entry of the judgment pursuant to Rule 3 of

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the Rules of Appellate Procedure. According to plaintiff, defendants were required to file and serve their notice of appeal no later than 21 November 2013; however, even though the certificate of service attached to the notice of appeal was dated 20 November 2013, the envelope contained a postmark of 22 November 2013. Therefore, plaintiff asserted, defendants' appeal should be dismissed because "[t]he clear failure of the Defendants in this cause to timely act in accordance with the North Carolina Rules of Appellate Procedure constitutes a jurisdictional failure."

A hearing on plaintiff's motion to dismiss defendants' appeal was held on 6 January 2014 before the Honorable Edgar B. Gregory, Judge presiding, in Guilford County Superior Court. Plaintiff's motion to dismiss was granted. In its order of 4 February 2014, the trial court found that defendants failed to timely comply with the provisions of Rule 3 of the North Carolina Rules of Appellate Procedure and plaintiff "ha[d] taken no action that would constitute a waiver of any of the requirements of North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal." The court concluded that "[t]he failure to give timely notice of appeal in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional and an untimely attempt to appeal mandates dismissal." Defendants appeal Judge Gregory's 4 February 2014 order granting plaintiff's motion to dismiss defendants' appeal.

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On appeal, defendants argue that the trial court erred in determining that defendants' late service of a timely filed notice of appeal, without more, amounts to a jurisdictional default mandating dismissal of the appeal. However, as we note herein, defendants' appeal is not properly before this Court and, therefore, subject to dismissal.

Defendants cite *Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588, *rev'g* 110 N.C. App. 621, 430 S.E.2d 457 (1993), where our Supreme Court reversed the disposition of the Court of Appeals for the reasons stated in the dissenting opinion. “[W]hile the timely filing of the Notice is necessary to grant this Court subject matter jurisdiction over the appeal, the service of the Notice may be waived by the appellee without depriving this Court of subject matter jurisdiction.” *Hale*, 110 N.C. App. at 625, 430 S.E.2d at 460 (Wynn, J., dissenting).

While we acknowledge this precedent established by our Supreme Court, we must also note that “[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari.” *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) (citations omitted), quoted in *Mullis v. Se. Renal Assocs.*, No. COA10-763, 2011 N.C. App. LEXIS 609, at *1 (N.C. App. April 5, 2011), and *Carolina Tailors, Inc. v. Wagner*, No. COA07-776, 2008 N.C. App. LEXIS 361, at

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*2 (N.C. App. March 4, 2008). Therefore, as the trial court dismissed defendants' appeal for failure to comply with the Rules of Appellate Procedure resulting in a failure to properly perfect the appeal, no appeal can lie to this Court, and defendants' appeal is dismissed.

Even if we were to consider defendants' brief as a petition for a writ of certiorari to reach the merits of defendants' argument that the trial court erred in dismissing their appeal, *see* N.C. R. App. P. 21(a) (2014) (“[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court 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”), it is unlikely we would rule in defendants' favor.

Despite the language in the trial court's order that dismissal of defendants' appeal was mandated by the failure to timely serve plaintiff, the court also cited *Hale*, 335 N.C. 231, 436 S.E.2d 588. In its findings of fact, the trial court stated that plaintiff “ha[d] taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal.” Therefore, it would appear the trial court had sufficient basis to grant plaintiff's motion to dismiss defendants' appeal.

For the foregoing reasons, we dismiss defendants' appeal.

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DISMISSED.

Judges DILLON and DIETZ concur.