

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-812

Filed: 6 March 2018

Buncombe County, No. 15 CV 00719

TODD ROBERT MAHAFFEY, Plaintiff,

v.

CHRISTOPHER C. BOYD, Executor for the Estate of DOROTHY COE BOYD,
Defendant.

Appeal by Plaintiff from order entered 10 October 2016 by Judge Alan Z.
Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 28
November 2017.

Todd Robert Mahaffey, Plaintiff-Appellant, pro se.

*McGuire, Wood & Bissette, P.A., by Matthew S. Roberson, for the Defendant-
Appellee.*

DILLON, Judge.

I. Background

In February 2015, Todd Robert Mahaffey filed a complaint alleging that Christopher C. Boyd (the “Executor”), the executor for the estate of Dorothy C. Boyd, owed him payment for renovations Mr. Mahaffey made to Ms. Boyd’s home.

The record shows as follows:

Ms. Boyd died in July 2014. However, in the years before she died, she engaged Mr. Mahaffey to perform work on her home and yard. Mr. Mahaffey continued to

perform work on the property at Ms. Boyd's direction, and after Ms. Boyd's death, at the direction of the Executor.

In September 2014, two months after Ms. Boyd's death, Mr. Mahaffey delivered documents to the Executor's law firm consisting of receipts, bills, and time sheets relating to projects he completed at Ms. Boyd's property. Shortly thereafter, an employee at the law firm asked Mr. Mahaffey to provide clearer documentation of the work he had completed and any payments which had already been made.

In a letter dated 19 November 2014, the Executor informed Mr. Mahaffey that, based on his lack of response to the law firm's request, he was denying Mr. Mahaffey's claim in accordance with N.C. Gen. Stat. § 28A-19-16, which requires that a claim against a decedent's estate be "in writing and state the amount or item claimed[.]" N.C. Gen. Stat. § 28A-19-1 (2013).

Three months later, in February 2015, Mr. Mahaffey commenced this action. In April 2015, the Executor answered the complaint and served requests for admissions, to which Mr. Mahaffey failed to respond in a timely fashion.

In May 2015, the Executor moved for summary judgment, contending that Mr. Mahaffey (1) failed to comply with the requirements of N.C. Gen. Stat. § 28A-19-1 in order to preserve his claim against Ms. Boyd's estate, and (2) performed illegal

contracting services because he was not a licensed contractor¹ and undertook a project for which the cost of improvement was greater than \$30,000.²

In June 2015, after a hearing on the matter, the trial court entered an order granting the Executor's summary judgment motion, based in part on Mr. Mahaffey's failure to respond to the requests for admissions. Mr. Mahaffey timely appealed from the order (the "Summary Judgment Order"); however, he failed to take steps to properly perfect the appeal.

Three months later, in September 2015, the Executor filed a motion to dismiss the appeal. In October 2015, after a hearing, the trial court entered an order dismissing Mr. Mahaffey's appeal of the Summary Judgment Order, concluding that Mr. Mahaffey had failed to comply with "the deadlines for presenting the appeal for decision under the North Carolina Rules of Appellate Procedure."

About a year later, on 9 September 2016, Mr. Mahaffey filed a motion titled "Rule 59 Motion for New Trial; Amend Judgment" (the "Rule 59 Motion"). In his Rule 59 Motion, Mr. Mahaffey requested that the trial court reverse its October 2015 order

¹ Section 87-1 of our General Statutes provides that a person who undertakes "the construction of any building . . . or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more, . . . shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina." N.C. Gen. Stat. § 87-1 (2015). A person acting as a general contractor in North Carolina must be authorized and licensed by the State. N.C. Gen. Stat. § 87-13.

² In his complaint, Mr. Mahaffey contended that Ms. Boyd requested that he undertake nine consecutive, separate projects on her property, none of which cost more than \$30,000. We acknowledge that there certainly existed a material issue of fact as to whether Mr. Mahaffey completed one large project totaling \$53,740 or nine separate projects which did not exceed \$30,000 per project.

dismissing his appeal of the Summary Judgment Order. In October 2016, the trial court entered an order denying Mr. Mahaffey's Rule 59 Motion (the "Rule 59 Order"). Mr. Mahaffey timely appealed from the Rule 59 Order.

II. Analysis

This matter involves three orders: (1) the Summary Judgment Order entered June 2015; (2) the order entered in October 2015 dismissing Mr. Mahaffey's appeal of the Summary Judgment Order; and (3) the Rule 59 Order.

In his brief on appeal, Mr. Mahaffey seeks review of two of these orders: the Summary Judgment Order and the Rule 59 Order. However, he failed to properly perfect his appeal of the Summary Judgment Order. Our review is therefore limited to consideration of the Rule 59 Order. *See Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006) ("Appellate review of a denial of a Rule 59 motion for a new trial is distinct from review of the underlying judgment or order upon which such a motion may be based."). And after careful review, we affirm the trial court's Rule 59 Order.

A trial court's ruling on a motion for new trial under Rule 59 is reviewed for abuse of discretion:

It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Davis, 360 N.C. at 523, 631 S.E.2d at 118.

A motion for a new trial under Rule 59 must be served “not later than 10 days after entry of the judgment.” N.C. R. Civ. P. 59(b). Here, Mr. Mahaffey exceeded the time permitted for serving and filing a Rule 59 Motion by approximately nine months. *See id.* Therefore, we hold that the trial court did not abuse its discretion in denying Mr. Mahaffey’s motion.

We further hold, in the alternative, that Mr. Mahaffey’s Rule 59 Motion was not an appropriate method of challenging the trial court’s order dismissing his appeal from the Summary Judgment Order. Our Court has concluded that a “Rule 59(a) motion is not a proper ground for relief from an entry of summary judgment.” *Bodie Island Beach Club Ass’n v. Wray*, 215 N.C. App. 283, 294-95, 716 S.E.2d 67, 77 (2011) (holding that “[b]ecause both Rule 59(a)(8) and (9) are *post-trial* motions and because the instant case concluded at the summary judgment stage, the court did *not* err by concluding that it [would be improper] to set aside default against [the] Defendant [] and vacate the summary judgment pursuant to Rule 59(a)(8) and (9)” (emphasis added)); *see also Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 538 (2016) (“All of the enumerated grounds in Rule 59(a), and the concluding text addressing ‘an action tried without a jury,’ indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a

case on the merits.’ ”).³ Because the order dismissing the appeal was based on Mr. Mahaffey’s failure to perfect his appeal from the Summary Judgment Order within the proper time period – a procedural matter – it could not possibly be considered a judgment ending the case on its merits. *See id.*

Accordingly, we conclude that a Rule 59 motion was an inappropriate method of challenging the trial court’s order dismissing Mr. Mahaffey’s appeal in this case. In order to properly appeal the order dismissing his appeal, Mr. Mahaffey should have filed a petition for writ of *certiorari* with our Court. *See State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980). Recently, in *E. Brooks Wilkins Family Medicine, P.A. v. WakeMed*, ___ N.C. App. ___, 784 S.E.2d 178 (2016), our Court concluded that it has no jurisdiction to review an order dismissing an appeal, and thus there is no right of appeal from such an order. *E. Brooks Wilkins Family Medicine*, ___ N.C. App. at ___, 784 S.E.2d at 185. The proper remedy to obtain review of an order of the trial court dismissing an appeal for failure to perfect it within the appropriate time period is “by petition for writ of *certiorari*[.]” *Evans*, 46 N.C. App. at 327, 264 S.E.2d at 767 (emphasis added).

³ Between our decisions in *Bodie Island* and *Tetra Tech*, a different panel of our Court held that a trial court erred in denying a party’s Rule 59 motion to amend a partial summary judgment order, thus sanctioning the use of a motion under Rule 59 to challenge a summary judgment order. *See Rutherford Plantation, LLC v. Challenge Golf Grp. of Carolinas, LLC*, 225 N.C. App. 79, 737 S.E.2d 409 (2013). On this point, *Rutherford* is clearly in direct conflict with *Bodie Island* and *Tetra Tech*. However, although *Rutherford* was affirmed *per curiam* by our Supreme Court, it was affirmed “without precedential value,” with three Justices voting to affirm and three voting to reverse. *See Rutherford Plantation, LLC v. Golf Grp. of the Carolinas, LLC*, 367 N.C. 197, 753 S.E.2d 152 (2014). We conclude that the present case is controlled by *Bodie Island* and *Tetra Tech* on this issue.

MAHAFFEY V. BOYD

Opinion of the Court

In light of the foregoing, we are unable to conclude that the trial court abused its discretion in denying Mr. Mahaffey's Rule 59 Motion. We therefore affirm the ruling of the trial court.

AFFIRMED.

Judges BRYANT and DIETZ concur.