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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1262

Filed: 2 July 2019

Mecklenburg County, No. 17 CVS 3348

CHARLES D. JOHNSON, Plaintiff,

v.

PG MANAGEMENT GROUP, LLC and JAMES F. SCHULER, Defendants.

Appeal by plaintiff from order entered 9 July 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 May 2019.

*Stott, Hollowell, Palmer & Windham, L.L.P., by Aaron C. Low, for plaintiff-appellant.*

*Parker Poe Adams & Bernstein LLP, by Jessica C. Dixon, for defendant-appellee PG Management Group, LLC.*

*James W. Surane, Esq., for defendant-appellee James F. Schuler.*

YOUNG, Judge.

Where plaintiff's voluntary dismissal could only have been made in bad faith, the trial court did not err in vacating it, and denying plaintiff's motion to set aside its order vacating the dismissal. Where plaintiff could not show that the trial court's decision was manifestly unsupported by reason, the trial court did not err in denying

plaintiff's motion to set aside its order vacating the dismissal of his complaint. We affirm the order of the trial court.

## I. Factual and Procedural Background

On 22 February 2017, Charles D. Johnson (plaintiff) filed a verified complaint against landlord James F. Schuler (Schuler) and his property manager, PG Management Group, LLC (PG Management) (collectively, defendants). Plaintiff contended that he had rented a property from defendants, and upon moving in discovered mold which adversely affected his health. Plaintiff alleged that defendants had failed to provide fit premises in violation of N.C. Gen. Stat. § 42-42, that defendants' failure to inspect or maintain the premises constituted negligent and wanton behavior, that defendants negligently misrepresented the condition of the property, and that defendants' conduct constituted unfair or deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq*.

On 12 May 2017, PG Management filed its answer, crossclaims, and motion to dismiss. Specifically, PG Management moved to dismiss pursuant to Rules 12(b)(6) and (b)(7) of the North Carolina Rules of Civil Procedure. PG Management raised defenses of contributory negligence, failure to notify, estoppel, unclean hands and waiver, parole evidence, economic loss, assumption of risk, lack of duty, the statute of frauds, and failure to mitigate damages, as well as the terms of the lease. PG Management also brought crossclaims against Schuler, alleging that the terms of the

lease required him to indemnify PG Management, or in the alternative, seeking contribution against Schuler as a joint tortfeasor. On 18 May 2017, Schuler likewise filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The matter was heard on 27 June 2017. At this hearing, the trial court orally dismissed plaintiff's complaint, holding that plaintiff lacked standing to bring his claims, as he was not the tenant of record. The following day, plaintiff filed notice of voluntary dismissal without prejudice. The trial court entered its written order on 20 July 2017 (the First Dismissal), in which it granted defendants' motions to dismiss, but contrary to plaintiff's notice, did so with prejudice. PG Management subsequently voluntarily dismissed its crossclaims against Schuler without prejudice.

On 14 August 2017, plaintiff filed written notice of appeal of the First Dismissal. On 8 December 2017, PG Management filed a motion to dismiss the appeal, alleging plaintiff's failure to prosecute the appeal within the required timeframe. Schuler likewise filed a motion to dismiss the appeal. On 15 March 2018, the trial court entered a written order, allowing defendants' motions and dismissing plaintiff's appeal.

On 6 June 2018, plaintiff filed a motion to set aside or modify the First Dismissal pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure.

Plaintiff alleged that the trial court lacked jurisdiction to enter the First Dismissal, as it was "entered after the Plaintiff had filed a Notice of Voluntary Dismissal[,]" or alternatively that the First Dismissal may have effectively foreclosed the rights of the real party in interest. On 9 July 2018, the trial court entered a written order (the Second Order), denying plaintiff's motion.

From the Second Order, plaintiff appeals.

## II. Rule 60 Motion

In two separate arguments, plaintiff contends that the trial court erred in denying his Rule 60 motion to set aside the judgment. We disagree.

### A. Jurisdiction

Pursuant to Rule 60(b), a party may seek relief from a judgment or order when the judgment is "void." N.C.R. Civ. P. 60(b)(4). "A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012). Plaintiff contended in his Rule 60 motion, and contends now on appeal, that the trial court "was without jurisdiction" to enter the First Dismissal. Specifically, plaintiff contends that, because he filed his notice of voluntary dismissal on 28 June 2017, the trial court was divested of jurisdiction to enter the First Dismissal on 20 July 2017.

In support of his position, plaintiff cites this Court's decision in *Schnitzlein v. Hardee's Food Sys., Inc.*, 134 N.C. App. 153, 516 S.E.2d 891, *disc. review denied*, 351 N.C. 109, 540 S.E.2d 365 (1999). In *Schnitzlein*, the trial court notified the defendants on 15 June 1998 of its intent to dismiss the case. However, on 16 June 1998, the plaintiff filed a voluntary dismissal. The trial court nonetheless entered an order on 19 June 1998, dismissing the complaint with prejudice. On appeal, this Court held that the motion to dismiss "did not address the merits of the allegations set out in plaintiff's complaint[,]" and that plaintiff's voluntary dismissal was timely. We therefore held that the trial court "did not have jurisdiction to enter subsequent orders in the case[,]" and vacated the trial court's order dismissing the complaint with prejudice. *Id.* at 158, 516 S.E.2d at 893.

Plaintiff is correct that a voluntary dismissal, timely taken, would ordinarily divest the trial court of jurisdiction to enter a subsequent dismissal order. However, an exception exists to this general rule. This exception was cited in *Market America, Inc. v. Lee*, ___ N.C. App. ___, 809 S.E.2d 32 (2017), which was relied upon by the trial court in entering the Second Order.

In *Market America*, the plaintiff brought an action against the defendants, who filed a motion to dismiss. A hearing was held, at the close of which the trial court indicated that it would grant the motion and dismiss the complaint. A few hours later, the plaintiff filed a notice of voluntary dismissal without prejudice. The trial

court then entered an order vacating the voluntary dismissal, and dismissing the complaint, in part without prejudice and in part with prejudice. The plaintiff appealed. On appeal, this Court first observed that "two limitations exist on the general rule permitting voluntary dismissals. First, voluntary dismissals may not be taken in bad faith. Second, a voluntary dismissal cannot be taken after the plaintiff has rested its case." *Id*. at ___, 809 S.E.2d at 37. This Court noted the trial court's finding of bad faith, rejected the plaintiff's attempt to limit the bad faith exception, and affirmed the order vacating the voluntary dismissal. *Id*. at ___, 809 S.E.2d at 39.

Our decision in *Market America* was quite explicit:

> While Rule 41(a)(1) clearly permits plaintiffs to voluntarily dismiss their claims for a multitude of reasons, such a dismissal must be taken in good faith. Taking a voluntary dismissal based on concerns about the *potential* for a future adverse ruling by the Court is permissible. Dismissing an action after such a ruling has actually been announced by the court is not. Once the trial court has informed the parties of its ruling against the plaintiff on the defendant's dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in a written order and filed with the clerk of court. To hold otherwise would "make a mockery of" the court's ruling. *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978).

*Id*. at ___, 809 S.E.2d at 38. And while the Court in *Market America* made clear that "scenarios may exist where the taking of a voluntary dismissal after the trial court

has announced its ruling does not constitute bad faith," it noted that circumstances could nonetheless be used to infer it. *Id.* at ___, n. 4, 809 S.E.2d at 39, n. 4.

Nonetheless, plaintiff contends that this precedent is inapplicable, because unlike the order in *Market America*, the Second Order lacked any findings on bad faith. Our courts have long held that should a party request findings of fact be made, it is the trial court's duty to do so, and that failure to make requested findings is error. *Sprinkle v. Sprinkle*, 241 N.C. 713, 714, 86 S.E.2d 422, 424 (1955).

In this case, plaintiff did indeed request findings. Specifically, after the trial court announced its intent to deny plaintiff's Rule 60 motion, counsel stated, "Your Honor, I would ask that there be findings in this matter just to -- but other than that, Your Honor, you're welcome to look at the order, but we just make a general objection." The trial court acknowledged this request, noting, "You have made a request for findings."

We recognize that the Second Order does not make a finding on bad faith. However, that finding is implicit. In the Second Order, the trial court entered findings with respect to the timeline of events, specifically that (1) the trial court orally granted defendants' motion to dismiss, (2) plaintiff filed a voluntary notice of dismissal, (3) the trial court entered an order dismissing the complaint with prejudice, (4) plaintiff appealed, and his appeal was dismissed, and (5) plaintiff returned to court with his Rule 60 motion. The trial court then determined that the

matter was "controlled by Market America, Inc. v. Lee," and summarily denied the Rule 60 motion.

Our decision in *Market America* cited another decision by this Court, *Eubank v. Van-Riel*, 221 N.C. App. 433, 727 S.E.2d 25 (2012) (unpublished), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 380 (2013). Quoting *Eubank*, this Court in *Market America* noted that

> The timing of Plaintiff's motion permits no conclusion other than that he was attempting to prevent the trial court from dismissing his complaint. A voluntary dismissal taken under these circumstances cannot possibly be said to have been taken in good faith, so that the purported voluntary dismissal by plaintiffs is void and is hereby vacated.

*Market America*, ___ N.C. App. at ___, 809 S.E.2d at 38 (citation omitted). In *Eubank*, the plaintiff's voluntary dismissal was filed the day after the trial court announced that it would grant the defendants' motion to dismiss. Although *Eubank* is not a published decision of this Court, and therefore does not constitute binding precedent, we held in *Market America*, and do so in the case before us, that its reasoning is sound. As in *Eubank*, plaintiff in this case filed his voluntary dismissal the day after the trial court announced its intent to dismiss plaintiff's complaint. And as we did in *Eubank*, we hold that "[a] voluntary dismissal taken under these circumstances cannot possibly be said to have been taken in good faith[.]"

While it would have been the better practice for the trial court to have entered a finding that plaintiff's dismissal was made in bad faith, we recognize that no other

conclusion could be reached based upon the facts before us. Accordingly, we hold that the trial court did not err in vacating plaintiff's purported voluntary dismissal, in accordance with *Market America* and *Eubank*. The trial court therefore did not err in entering the Second Order, and denying plaintiff's motion to set aside its initial decision to vacate plaintiff's purported voluntary dismissal.

B. Real Party in Interest

Plaintiff further argues that the trial court should not have dismissed the complaint with prejudice, as the claim was not brought in the name of the real party in interest. In support of his position, plaintiff cites Rule 17 of the North Carolina Rules of Civil Procedure, which provides:

> Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. *No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection* for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

N.C.R. Civ. P. 17(a) (emphasis added). Plaintiff contends that reasonable time was not allowed for plaintiff to join the tenant of record as a real party in interest, and therefore dismissal was inappropriate.

However, the rule relied upon by plaintiff is not universal. This Court examined the issue of dismissal of a party who was not a real party in interest in the case of *Street v. Smart Corp.*, 157 N.C. App. 303, 578 S.E.2d 695 (2003). In *Street*, the trial court dismissed the plaintiff's complaint for lack of standing, specifically due to the fact that the plaintiff was not the real party in interest. The plaintiff appealed, and on appeal raised several arguments as to why he was the real party in interest, or alternatively why the trial court did not grant him a reasonable amount of time to amend his complaint before dismissing. We disagreed, noting with regard to a reasonable amount of time that "[p]laintiff was aware of the real party in interest defense for approximately seven months before the hearing based on defendant's answer and for approximately three weeks based on the motion to dismiss." *Id.* at 309, 578 S.E.2d at 700. We therefore affirmed the trial court's dismissal of the plaintiff's complaint.

In this case, plaintiff filed his complaint on 22 February 2017. In its answer and crossclaims dated 12 May 2017, PG Management cited plaintiff's failure to join a necessary party, namely the real party in interest. Accordingly, plaintiff filed his motion to amend the complaint on 24 May 2017, less than two weeks later.

While plaintiff may certainly dispute whether the amount of time afforded him to amend his complaint was reasonable, our standard of review is a deferential one. Plaintiff appeals from the trial court's denial of his Rule 60 motion, which is "addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Thus, the question is not whether we may disagree with the trial court's determination of whether the time afforded plaintiff was reasonable, but whether the trial court's determination was "so arbitrary that it could not have been the result of a reasoned decision." Pursuant to our deferential standard of review, we hold that plaintiff has failed to show that the trial court's determination was manifestly unsupported by reason. Accordingly, we hold that the trial court did not err in denying plaintiff's motion to set aside or modify its dismissal.

AFFIRMED.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).