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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1228

Filed: 15 October 2019

Forsyth County, No. 15 CVS 6015

DORIS TUCKER, In Her Capacity as Administrator of THE ESTATE OF MARY ELLEN BRANNON THOMPSON, Plaintiff,

v.

THE CLERK OF COURT OF FORSYTH COUNTY, ex rel. SUSAN FRYE, BRYAN THOMPSON, WILLIAM M. SPEAKS, JR., and OHIO CASUALTY INSURANCE COMPANY, Defendants.

Appeal by Plaintiff from orders entered 29 February 2016, 3 March 2016, 5 January 2018, and 8 March 2018 by Judge John O. Craig, III, in Forsyth County Superior Court. Heard in the Court of Appeals 6 August 2019.

*Reginald D. Alston for Plaintiff-Appellant.*

*Sharpless McLearn Lester Duffy, P.A., by Molly A. Whitlach and Pamela S. Duffy, and Fitzgerald Litigation, by Andrew L. Fitzgerald, for Defendant-Appellee Thompson.*

*William M. Speaks, Jr., Defendant-Appellee, pro se.*

*Manier & Herod, by Jeffrey S. Price, for Defendant-Appellee Ohio Casualty Insurance Company.*

COLLINS, Judge.

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Plaintiff Doris Tucker (“Plaintiff”), administrator of the estate of Mary Thompson (the “Decedent”), appeals from the trial court’s: (1) 29 February 2016 order that, *inter alia*, granted Defendant Bryan Thompson’s (“Thompson”) motion to dismiss brought pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (“Rule 12(b)(6)”; (2) 3 March 2016 order that, *inter alia*, granted Defendant William M. Speaks, Jr.’s Rule 12(b)(6) motion to dismiss; (3) 5 January 2018 order that, *inter alia*, granted Defendant Ohio Casualty Insurance Company’s (“Ohio Casualty,” and together with Thompson and Speaks, “Defendants”) Rule 12(b)(6) motion to dismiss; and (4) 8 March 2018 order denying Plaintiff’s motions for reconsideration brought pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, and for sanctions brought pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. Plaintiff contends that the orders granting Defendants’ motions to dismiss were erroneous because Plaintiff stated claims sufficiently to proceed to trial, and that the 8 March 2018 order constituted an abuse of discretion because (1) Thompson’s counsel in prior stages of this litigation and extraneous litigation made incorrect assertions to this Court and (2) the trial court failed to make findings of fact in its order denying reconsideration. We affirm in part and vacate in part.

**I. Background**

This is the fourth time that litigation regarding the Decedent and her estate has reached this Court. *See In re Thompson*, 232 N.C. App. 224, 754 S.E.2d 168 (2014)

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(“*Thompson I*”); *In re Thompson*, 251 N.C. App. 138, 795 S.E.2d 395 (2016) (“*Thompson II*”), writ of certiorari denied, 369 N.C. 524, 797 S.E.2d 292 (2017); *Tucker v. Clerk of Ct. of Forsyth Cty.*, 254 N.C. App. 242, 801 S.E.2d 182, 2017 N.C. App. LEXIS 484 (2017) (unpublished) (“*Thompson III*”). An extensive background of the case may be gleaned from the opinions cited above.

In *Thompson I*, Decedent’s brother appealed from the denial of several motions contesting the validity of incompetency and guardianship orders concerning Decedent that purportedly had been entered by the trial court. *Thompson I*, 232 N.C. App. at 225, 754 S.E.2d at 169-70. This Court held that the order declaring Decedent incompetent had never been filed, and thus had never been entered as a matter of law. *Id.* at 228-29, 754 S.E.2d at 171-72. We accordingly held that the incompetency and guardianship orders were legally invalid, and remanded to the trial court for further proceedings consistent with our ruling. *Id.* at 227-29, 232, 754 S.E.2d at 171-72, 174.

On remand, the clerk of court on 9 April 2014 entered the incompetency and guardianship orders *nunc pro tunc* effective 3 May 2007, and we upheld those orders on appeal in *Thompson II*, 251 N.C. App. at 148, 795 S.E.2d at 401.<sup>1</sup>

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<sup>1</sup> Decedent died on 2 October 2014, and in *Thompson II* we held that the incompetency proceedings abated upon Decedent’s death. *Thompson II*, 251 N.C. App. at 146, 795 S.E.2d at 400.

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On 20 October 2015, while *Thompson II* was pending, Plaintiff<sup>2</sup> filed her complaint in the instant litigation. In her complaint, Plaintiff brought causes of action for fraud and violation of the North Carolina Racketeer Influenced and Corrupt Organizations (“NC RICO”) statute, N.C. Gen. Stat. § 75D, against Thompson; Speaks; Thompson’s counsel Dudley Witt; insurance carriers and agents who allegedly worked with Thompson, including Clinard Insurance Group, Inc. (“Clinard”) and Ohio Casualty;<sup>3</sup> the Clerk of Court of Forsyth County, ex rel. Susan Frye (“Clerk of Court”); and Decedent’s *guardian ad litem* Fred Flynt. Plaintiff’s complaint generally alleged that the defendants had conspired to steal Decedent’s assets through a pattern of fraudulent activity.

On 16 December 2015, Thompson and Witt filed answers including, *inter alia*, Rule 12(b)(6) motions to dismiss Plaintiff’s causes of action. On 4 January 2016, Speaks filed a Rule 12(b)(6) motion to dismiss, and Ohio Casualty filed an answer including a Rule 12(b)(6) motion to dismiss. Apparently, Flynt filed a Rule 12(b)(6) motion to dismiss on 6 January 2016, Clinard filed a Rule 12(b)(6) motion to dismiss

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<sup>2</sup> At the time the complaint was filed, the administrator of Decedent’s estate (and named plaintiff) was her brother Calvin Brannon, but by the time the 29 February 2016 and 3 March 2016 orders were entered, Plaintiff had replaced Calvin Brannon.

<sup>3</sup> The complaint initially named as defendant Liberty Mutual Group, Inc., but Ohio Casualty moved on 24 November 2015 to substitute itself as the proper defendant, and the trial court granted Ohio Casualty’s motion on 15 December 2015.

on 19 January 2016, and the Clerk of Court filed a Rule 12(b)(6) motion to dismiss on 29 January 2016.<sup>4</sup> *Thompson III*, 2017 N.C. App. LEXIS 484, at \*2.

Plaintiff voluntarily dismissed her causes of action against Witt, Flynt, and Clinard on 16 February 2016. On 29 February 2016, the trial court entered an order granting Thompson's motion to dismiss, and on 3 March 2016, the trial court entered an order granting Speaks' motion to dismiss. On 23 March 2016, Ohio Casualty filed a renewed Rule 12(b)(6) motion in light of the trial court's 29 February 2016 order dismissing Plaintiff's claims against Thompson.

On 28 March 2016, Plaintiff noticed appeal to this Court from the trial court's orders dismissing her causes of action against Thompson and Speaks, and moved to stay the proceedings pending the outcome of the appeal. The trial court granted Plaintiff's motion to stay on 23 May 2016.

We issued *Thompson III* on 20 June 2017, in which we dismissed Plaintiff's appeals of the 29 February 2016 and 3 March 2016 orders as impermissibly seeking review of interlocutory orders because there remained unsettled claims pending against Ohio Casualty and the Clerk of Court. *Thompson III*, 2017 N.C. App. LEXIS 484, at \*3, \*6.

On 5 January 2018, the trial court entered an order granting Ohio Casualty's motion to dismiss.

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<sup>4</sup> These three motions are not included in the record on appeal.

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On 23 February 2018, Plaintiff filed a motion seeking reconsideration of the trial court's dismissals of Plaintiff's claims against Defendants pursuant to Rule 60(b),<sup>5</sup> as well as a motion seeking sanctions against Thompson and his counsel pursuant to Rule 11. The trial court entered an order denying Plaintiff's motions for reconsideration and sanctions on 8 March 2018.

The trial court entered an order granting the Clerk of Court's motion to dismiss Plaintiff's claims pending against it on 23 March 2018, and in so doing disposed of the final claims remaining in the case.

On 20 April 2018, Plaintiff timely appealed the trial court's 29 February 2016, 3 March 2016, 5 January 2018, and 8 March 2018 orders to this Court.

## **II. Discussion**

Plaintiff contends that (1) the orders granting Defendants' Rule 12(b)(6) motions to dismiss were erroneous because Plaintiff stated claims sufficiently to proceed to trial and (2) the order denying her Rule 60(b) motion for reconsideration<sup>6</sup> constituted an abuse of discretion because (a) Thompson's counsel in prior stages of

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<sup>5</sup> While Plaintiff's motion for reconsideration did not specify the rule pursuant to which reconsideration was sought, the trial court assumed that Plaintiff's motion was brought pursuant to Rule 60(b). Because Plaintiff argues pursuant to Rule 60(b) in her brief on appeal, we will conduct our analysis accordingly.

<sup>6</sup> Plaintiff does not make any arguments concerning the denial of her Rule 11 motion for sanctions in her briefing, and we accordingly deem that aspect of her appeal abandoned. N.C. R. App. P. 28(b)(6) (2018) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

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this litigation and extraneous litigation made incorrect assertions to this Court and (b) the trial court failed to make findings of fact in its order denying reconsideration.

A. Analysis

1. *Motions to dismiss*

Plaintiff contends that she sufficiently pled fraud and NC RICO causes of action such that the trial court erred by granting Defendants' Rule 12(b)(6) motions to dismiss.

A Rule 12(b)(6) motion “tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.” *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). “A motion to dismiss pursuant to Rule 12(b)(6) should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (internal quotation marks, emphasis, and citation omitted). We review a trial court’s order granting a Rule 12(b)(6) motion to dismiss *de novo*. *USA*

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*Trouser, S.A. de C.V. v. Williams*, 812 S.E.2d 373, 376 (N.C. Ct. App. 2018), *disc. rev. denied*, 371 N.C. 448, 817 S.E.2d 199 (2018).

i. Allegations

The gravamen of Plaintiff's complaint is that Defendants individually and in concert defrauded Decedent and various third parties by pursuing and using the initial incompetency and guardianship orders we held legally deficient in *Thompson I* in a manner that unlawfully depleted Decedent's estate and enriched Defendants.

Specifically, Plaintiff alleges that Thompson: (1) sought and secured the "fictitious" guardianship order "to fraudulently obtain possession and control over [Decedent's] assets"; (2) thereafter "ma[d]e false representations to others that he had been duly appointed [as guardian] when, in fact, he had not"; (3) "used the May 1, 2007 guardianship appointment to deceive [Decedent], [Decedent's] Next of Kin, representatives of the judiciary, and others into believing that he had a claim of right to [Decedent's] assets"; (4) "used the May 1, 2007 guardianship appointment [to trick] [Decedent's] retirement account administrator and the administrator of the Social Security Department into giving [Decedent's] retirement and social security payments to him each month from about May of 2007 through about October of 2014, which sum was in excess of \$2,000 per month[.]" and "used the guardianship appointment to permit him to trick third parties into buying [Decedent's] real estate for his improper purposes"; (5) "used the fictitious bond dated May 1, 2007 to take



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\$20,000.00” from Decedent’s accounts “in violation of” N.C. Gen. Stat. § 14-100; (6) “converted [Decedent]’s funds to his own use by giving [Decedent]’s money to [Thompson’s attorney] Dudley Witt for payment of expenses [] Thompson was obligated to pay”; and (7) “combined [with various others alleged to have been party to the purported NC RICO enterprise, including Speaks, but not Ohio Casualty] to create the fictitious guardianship by pretending that the May 3, 2007 incompetence order was entered, when, in fact, it was not” and “cooperated” with members of the purported NC RICO enterprise to “unlawfully take” Decedent’s assets and expectancies in “multiple thefts by false pretenses” in an amount “in excess of \$1.6 million.”

Plaintiff alleges that Speaks—attorney for Leslie Parker, the petitioner in Decedent’s initial incompetency and guardianship proceedings—became party to the purported NC RICO enterprise by filing a \$2,500 claim for legal fees despite the fact that Speaks “knew that no order of incompetence was entered against [Decedent]” and, as a result, “knew that he could not legally petition for attorney’s fees” pursuant to N.C. Gen. Stat. § 35A-1116(a)(1). Plaintiff alleges that by doing so, Speaks was “taking money . . . by false pretenses in violation of [N.C. Gen. Stat. §] 14-100” and “fraudulent conduct[.]”<sup>7</sup>

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<sup>7</sup> Although it is not clear that Plaintiff intended to bring a cause of action for fraud against Speaks, we will assume for purposes of our analysis that Plaintiff did so, since this assumption does not change our conclusion that the trial court did not err by granting Defendants’ motions to dismiss.

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Plaintiff alleges that Ohio Casualty “fraudulent[ly] participat[ed] in the taking of [Decedent]’s assets” by issuing a bond that facilitated Thompson’s appointment as Decedent’s guardian that was “insufficient” in size by virtue of “a reckless disregard for the truth” regarding the value of Decedent’s assets and ran afoul of N.C. Gen. Stat. §§ 35A-1230 and -1231. Ohio Casualty is not alleged to have been party to the purported NC RICO enterprise.

ii. Fraud

“The essential elements of actionable fraud are as follows: (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that there resulted in damage to the injured party.” *Rosenthal v. Perkins*, 42 N.C. App. 449, 451-52, 257 S.E.2d 63, 65 (1979). Put another way: “The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss.” *Lillian Knitting Mills Co. v. Earle*, 237 N.C. 97, 105, 74 S.E.2d 351, 356 (1953) (quotation marks and citation omitted).

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Under N.C. Gen. Stat. § 1A-1, Rule 9(b), plaintiffs asserting fraud must plead the circumstances constituting the alleged fraud with particularity. Rule 9(b)'s particularity requirement is satisfied where a plaintiff "alleg[es the] time, place and content of the fraudulent representation, identity of the person making the representation[,] and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

Plaintiff's fraud allegations against Thompson and Speaks are based upon Thompson's allegedly "fictitious" guardianship appointment. As discussed above, we held in *Thompson I* that the initial order declaring Decedent incompetent had never been entered, and accordingly held the initial order appointing Thompson as Decedent's guardian was not legally valid. *Thompson I*, 232 N.C. App. at 227-29, 754 S.E.2d at 171-72. Based upon the legal invalidity of the initial incompetency and guardianship orders, Plaintiff alleges that (1) Thompson fraudulently held himself out as Decedent's guardian, and (2) Speaks fraudulently petitioned to be paid for legal services rendered on behalf of the petitioner in Decedent's initial incompetency and guardianship proceeding.

However, the 9 April 2014 order entered the incompetency and guardianship orders this Court vacated in *Thompson I nunc pro tunc* effective 3 May 2007, and we upheld those orders in *Thompson II*. When an order is entered *nunc pro tunc* to a certain date, the order is deemed to be legally effective as of that date. *See Hill v.*

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*Hill*, 105 N.C. App. 334, 340, 413 S.E.2d 570, 575 (1992) (*nunc pro tunc* orders “take effect on a date prior to the date actually entered”), *rev’d on other grounds*, 335 N.C. 140, 435 S.E.2d 766 (1993). Any misrepresentation that Decedent had been declared incompetent or that Thompson had been appointed as her legal guardian was accordingly rendered accurate, and thus not fraudulent, when the *nunc pro tunc* orders were entered on 9 April 2014. Plaintiff’s causes of action alleging fraud against Thompson and Speaks are therefore fatally deficient.

Even absent the *nunc pro tunc* orders, Plaintiff’s fraud claims against Defendants would fail. First, Plaintiff’s allegations that Thompson “fraudulently obtain[ed] possession and control over [Decedent’s] assets[,]” “deceive[d] [Decedent and various others] into believing that [Thompson] had a claim of right to [Decedent]’s assets[,]” “trick[ed] [Decedent]’s retirement account administrator and the administrator of the Social Security Department into giving [Decedent]’s retirement and social security payments to him each month[,]” “trick[ed] third parties into buying [Decedent]’s real estate for his improper purposes[,]” and “unlawfully t[ook]” Decedent’s assets and expectancies in “multiple thefts by false pretenses” in an amount “in excess of \$1.6 million[,]” are each attempts to paint the commonplace actions of a legal guardian with the brush of fraud. Plaintiff’s conclusory allegations that Thompson’s seemingly-legitimate exercise of his authority as Decedent’s guardian amounted to fraud cannot survive Defendants’ motions to dismiss. *See*

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*Sutton*, 277 N.C. at 98, 176 S.E.2d at 163 (noting that, in adjudging a Rule 12(b)(6) challenge to a complaint, “the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted” (quotation marks and citation omitted)). Moreover, the complaint does not adequately allege that Decedent (or any other party) suffered any actual damages or losses as a result of any of Thompson’s actions.<sup>8</sup> This shortcoming is also fatal to Plaintiff’s fraud claims against Thompson, particularly in light of Rule 9(b)’s heightened pleading requirements.

Second, Plaintiff fails to adequately allege that Speaks made any misrepresentation at all. While Plaintiff alleges that Speaks “knew that he could not legally petition for attorney’s fees” pursuant to N.C. Gen. Stat. § 35A-1116(a)(1), that statute only limits the court’s discretion to award attorney’s fees to a party to an N.C. Gen. Stat. § 35A incompetency/guardianship proceeding where “[t]he clerk finds that the petitioner did not have reasonable grounds to bring the proceeding.” N.C. Gen. Stat. § 35A-1116(a)(1) (2015). Even assuming *arguendo* that petitioning the court for attorney’s fees that are foreclosed by statute can somehow amount to an actionable misrepresentation, the complaint nowhere alleges that the clerk ever found that Speaks’ client lacked reasonable grounds to bring the N.C. Gen. Stat. § 35A

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<sup>8</sup> Plaintiff’s allegations that Thompson (1) took \$20,000 from Decedent in connection with the guardian’s bond and (2) paid for court costs in *Thompson I* with funds from Decedent’s estate are not argued as bases for reversal in Plaintiff’s brief on appeal, and we therefore do not consider them. N.C. R. App. P. 28(b)(6).

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proceeding, and Plaintiff thus fails to adequately allege that Speaks made a misrepresentation here.

Finally, Plaintiff's cause of action against Ohio Casualty fails for several reasons. Plaintiff alleges that Ohio Casualty "fraudulent[ly] participat[ed] in the taking of [Decedent]'s assets" by issuing a guardian's bond under N.C. Gen. Stat. §§ 35A-1230 and -1231 that was "insufficient" in size by virtue of "a reckless disregard for the truth" regarding the value of Decedent's assets. But even assuming *arguendo* that the issuance of a guardian's bond can be actionable as fraud, the complaint does not identify (1) any definite and specific misrepresentation Ohio Casualty made therein, (2) who was intended to and in fact did reasonably rely upon that misrepresentation, or (3) the damages or losses resulting therefrom. These omissions doom Plaintiff's fraud claims against Ohio Casualty.

For the aforementioned reasons, we conclude that Plaintiff's fraud causes of action are all fatally deficient, and that the trial court did not err by dismissing them.

iii. NC RICO

"To state a claim under the NC RICO Act, (1) an innocent person must allege (2) an injury or damage to his business or property (3) by reason of two or more acts of organized unlawful activity or conduct, (4) one of which is something other than mail fraud, wire fraud, or fraud in the sale of securities, (5) that resulted in pecuniary

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gain to the defendants.” *Gilmore v. Gilmore*, 229 N.C. App. 347, 356, 748 S.E.2d 42, 49 (2013) (internal quotation marks, brackets, and citation omitted).

NC RICO claims premised upon fraudulent conduct, like Plaintiff’s here, must be pled in accordance with Rule 9(b). *See Manuel v. Gembala*, No. 7:10-CV-4-FL, 2010 U.S. Dist. LEXIS 105167, at \*33 (E.D.N.C. Sept. 30, 2010) (Rule 9(b) applies to federal RICO claims); *Gilmore*, 229 N.C. App. at 357 n.2, 748 S.E.2d at 49 n.2 (noting that this Court has looked to federal caselaw interpreting the federal RICO statute when analyzing the NC RICO statute); *Kaplan v. Prolife Action League*, 123 N.C. App. 720, 729, 475 S.E.2d 247, 254 (1996) (“it is apparent the General Assembly did not intend to provide NC RICO with a broader remedial stroke than its federal counterpart”).

Plaintiff’s NC RICO causes of action against Thompson and Speaks fail for the same reasons that doom Plaintiff’s fraud causes of action. By definition, an NC RICO claim must be premised upon “two or more acts of organized *unlawful* activity or conduct.” *Gilmore*, 229 N.C. App. at 356, 748 S.E.2d at 49 (emphasis added) (quotation marks and citation omitted). The only law Plaintiff raises as having been broken in support of her NC RICO causes of action is N.C. Gen. Stat. § 14-100, which prohibits “[o]btaining property by false pretenses,” and which this Court has said requires proof of four elements: “(1) a false representation of a subsisting fact or a future fulfillment or event[;] (2) which is calculated and intended to deceive[;] (3) which does in fact deceive[;] and (4) by which one person obtains or attempts to

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obtain value from another.” *State v. Kelly*, 75 N.C. App. 461, 463-64, 331 S.E.2d 227, 230 (1985) (citing *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980)). Plaintiff alleges “multiple thefts by false pretenses” by Thompson and Speaks (among others) within the meaning of N.C. Gen. Stat. § 14-100 in support of her NC RICO claims.

But Plaintiff’s NC RICO/N.C. Gen. Stat. § 14-100 allegations are not meaningfully distinct from Plaintiff’s individual allegations of fraud. As this Court said in *Kelly*, “[a] key element of obtaining property by false pretenses is that an intentionally false and deceptive representation of a fact or event has been made. If this factor is not present, then there can be no conviction for violation of [N.C. Gen. Stat. §] 14-100.” *Id.* at 464, 331 S.E.2d at 230. Because we conclude that Plaintiff failed to adequately allege that Thompson or Speaks made any false representations for the reasons described in Section II(A)(1)(ii) above, and because Plaintiff raises no other alleged unlawful activity or conduct to support her NC RICO claims, we conclude that Plaintiff’s NC RICO claims also fail, and that the trial court did not err by dismissing them.

*2. Motion for Reconsideration*

Plaintiff also argues that the trial court erred by denying her Rule 60(b) motion for reconsideration of the trial court’s orders granting Defendants’ motions to dismiss.

Plaintiff filed her motion seeking reconsideration 23 February 2018, and the trial court denied the same on 8 March 2018. However, both Plaintiff’s motion for



reconsideration and the trial court's order denying the motion predated the trial court's order granting the Clerk of Court's motion to dismiss on 23 March 2018.

As we held in *Thompson III*, the orders granting Thompson and Speaks' motions to dismiss were interlocutory because claims remained outstanding against Ohio Casualty and the Clerk of Court. *Thompson III*, 2017 N.C. App. LEXIS 484, at \*3. Although Plaintiff did not appeal the trial court's order dismissing Ohio Casualty in *Thompson III*, that order—entered 5 January 2018—was also interlocutory by virtue of the outstanding claims remaining against the Clerk of Court. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”).

Because no final judgment had been entered at the time Plaintiff filed her motion seeking their reconsideration, the orders granting Defendants' motions to dismiss were not within Rule 60's reach at that time. *See O'Neill v. S. Nat'l Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 234 (1979) (noting that Rule 60 “appl[ies] only to final judgments and orders and clearly ha[s] no application to interlocutory orders”). We therefore conclude that the trial court lacked subject matter jurisdiction to review Plaintiff's Rule 60(b) motion, and that the trial court erred by denying, rather than

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dismissing, that motion.<sup>9</sup> *See id.* at 231, 252 S.E.2d at 234 (vacating order, noting that “[s]ince the denial of a Rule 12(b)(6) motion to dismiss is not a final judgment or order, the [defendant]’s motion for relief from the [order denying its motion to dismiss] could not, as a matter of law, have been proper under Rule 60(b), and the trial court should not have considered the motion.”); *In re J.T.*, 363 N.C. 1, 3, 672 S.E.2d 17, 18 (2009) (“[T]he proceedings of a court without jurisdiction of the subject matter are a nullity. When the record clearly shows that subject matter jurisdiction is lacking, the court will take notice and dismiss the action *ex mero motu* in order to avoid exceeding its authority.” (internal quotation marks, brackets, and citations omitted)).

### III. Conclusion

Because the claims appealed by Plaintiff are deficient, we conclude that the trial court did not err by granting Defendants’ motions to dismiss, and affirm the trial court’s 29 February 2016, 3 March 2016, and 5 January 2018 orders. Because the trial court lacked subject matter jurisdiction over Plaintiff’s motion for reconsideration, we vacate the trial court’s 8 March 2018 order.

AFFIRMED IN PART AND VACATED IN PART.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).

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<sup>9</sup> Because we vacate the trial court’s order denying Plaintiff’s motion for reconsideration, we do not reach Plaintiff’s arguments that the order constituted an abuse of discretion.