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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-640

Filed: 21 April 2020

Carteret County, No. 18 CVS 767

JAMES R. BARRINGTON, Plaintiff,

v.

JEAN CANDY DYER, EXECUTRIX FOR THE ESTATE OF WILLIAM D. BARRINGTON, JR., Defendant.

Appeal by Plaintiff from order entered 13 May 2019 by Judge William W. Bland in Carteret County Superior Court. Heard in the Court of Appeals 21 January 2020.

James R. Barrington, pro se.

Schulz Stephenson Law, by Bradley N. Schulz, for the Defendant-Appellee.

BROOK, Judge.

James R. Barrington (“Plaintiff”) appeals from the trial court’s order granting a motion to dismiss for failure to state a claim upon which relief can be granted in favor of Jean Candy Dyer (“Defendant”) as executor of the estate of William D. Barrington, Jr., the late father of Plaintiff and Defendant. We are unable to evaluate Plaintiff’s arguments in this appeal because the record on appeal does not include “so much of the litigation . . . as is necessary for an understanding of all issues presented

on appeal,” as Rule 9 of the North Carolina Rules of Appellate Procedure requires. *See* N.C. R. App. P. 9(a)(1)(e). We therefore dismiss the appeal.

I. Factual and Procedural Background

Because this appeal is from the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, our recitation of the facts is based on the allegations made by Plaintiff’s complaint.

The appeal originates from the dismissal of the third in a series of related complaints filed by Plaintiff against the estate of his late father, William D. Barrington, Jr., the lawyer representing his father’s estate, Janna M. Wallace, and his sister as the executor of their father’s estate. All three complaints involve several transactions in 2015 between William D. Barrington, Jr., and The William D. Barrington and Barbara L. Barrington Revocable Trust (“the Trust”), which was executed by William D. Barrington, Jr., and his wife, Barbara L. Barrington, on 8 June 2011. Plaintiff claims in all three complaints that this transaction constituted a breach of trust because (1) he was the beneficiary of the trust at the time of disputed transactions; (2) the trust had become irrevocable as to his mother upon her death; and (3) the terms of the trust required trust property to be conveyed for fair market value. No copy of the trust agreement is included in the record on appeal.

Plaintiff filed the first complaint in this trilogy on 6 February 2018. He voluntarily dismissed this complaint without prejudice on 26 February 2018. He filed

the second complaint that same day, which added the lawyer representing his father's estate as a defendant and removed Defendant as a defendant. A motion to dismiss the second complaint came on for hearing before the Honorable Albert D. Kirby in Carteret County Superior Court on 23 July 2018, which the trial court granted in an order entered 14 August 2018. Plaintiff entered untimely written notice of appeal from that order on 27 September 2018 and the trial court granted a motion withdrawing the motion and dismissing the appeal on 18 April 2019.

In the meantime, Plaintiff filed a third complaint, the dismissal from which this appeal is taken, on 27 July 2018. Defendant moved to dismiss the complaint under Rules 12(b)(6) and 41 of the North Carolina Rules of Civil Procedure on 1 October 2018. The motion came on for hearing before the Honorable William W. Bland in Carteret County Superior Court on 25 March 2019 and the trial court granted Defendant's motion to dismiss in an order entered 18 April 2018. Plaintiff entered written notice of appeal from this order on 13 May 2019.

II. Standard of Review

On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. A complaint should not be dismissed

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under Rule 12(b)(6) unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. We review the trial court's decision *de novo*, treating plaintiff's factual allegations as true.

Schlieper v. Johnson, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (internal marks and citations omitted).

III. Appellate Rule Violations

Defendant made a motion to dismiss the present appeal on 3 October 2019 for Plaintiff's failure to comply with Rules 11 and 18 of the North Carolina Rules of Appellate Procedure because Plaintiff did not settle the record on appeal by agreement or by requesting judicial settlement after receiving Defendant's objections to Plaintiff's proposed record, and for failing to prepare and file a Rule 18(d)(3) Supplement to the Record as requested by Defendant, which Defendant prepared and filed instead.

These appellate rule violations, while significant, are non-jurisdictional. *See Dogwood Dev. and Mgmt. v. White Oak Transp.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 364-65 (2008) (observing that jurisdictional rule violations consist of failures to comply with the rules "necessary to vest jurisdiction in the appellate court[,]” such as Rule 3 and Rule 4(a)(2)). “[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Id.* at 198, 657 S.E.2d at 365. We hold that Plaintiff's non-compliance with Rules 11 and 18 does not

rise to the level of a “substantial failure or gross violation” justifying the “extreme sanction” of dismissal because the non-compliance has not impaired our “task of review[,] and . . . review on the merits would [not] frustrate the adversarial process.” *Id.* at 200, 657 S.E.2d at 366-67.

However, Rule 9 of the North Carolina Rules of Appellate Procedure imposes a burden of production on appellants to include in the record on appeal “so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal[.]” N.C. R. App. P. 9(a)(1)(e). We are unable to determine in this appeal whether the trial court erred by dismissing Plaintiff’s complaint for failure to state a claim upon which relief can be granted for any of the reasons offered by Plaintiff in his appellate brief because the record on appeal does not include material that would enable us to evaluate Plaintiff’s arguments. Specifically, we are unable, based on this record, to evaluate Plaintiff’s arguments about the legal effect of his mother’s death as it related to the Trust and the trust property, his father’s conveyance of trust property to himself for nominal consideration after his mother’s death, and whether this conveyance constituted a breach of trust.

Plaintiff’s complaint alleges several documents attached as exhibits, including the Trust and deeds to real property to the Trust and to Defendant, support its allegations. “When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule

12(b)(6) motion without converting it into a motion for summary judgment.” *Schlieper*, 195 N.C. App. at 261, 672 S.E.2d at 551 (citation omitted). But the complaint in our record has no attached exhibits. For purposes of Rule 12(b)(6), our review is based solely upon the complaint, although we note that the alleged exhibits are not included elsewhere in our record either. Without the entire complaint, including the governing instrument creating the Trust or the deeds allegedly attached as exhibits, we cannot evaluate Plaintiff’s claims about the disputed transactions in 2015 between his father and the Trust in his personal capacity and as trustee of the Trust. Plaintiff cannot demonstrate that the trial court erred by dismissing his complaint for failure to state a claim upon which relief can be granted because he has failed to include “so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal[.]” N.C. R. App. P. 9(a)(1)(e).

This appeal therefore presents an exception to the general rule that “a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Dogwood Dev.*, 362 N.C. at 198, 657 S.E.2d at 365. Plaintiff’s non-compliance with Rule 9 of the Rules of Appellate Procedure impairs our “task of review” and, as a consequence, rises to the level of a “substantial failure or gross violation” justifying the “extreme sanction” of dismissal. *Id.* at 200, 657 S.E.2d at 366-67.

IV. Conclusion

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We dismiss this appeal because the record on appeal does not include “so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal[.]” *See* N.C. R. App. P. 9(a)(1)(e).

DISMISSED.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).