

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-716

No. COA21-193

Filed 21 December 2021

Macon County, No. 19 CVM 219

JOANNE P. SNIDER, Plaintiff,

v.

ELITE MOUNTAIN BUSINESS, LLC AND CAREY J. LANNON, Defendants.

Appeal by Defendant from Order entered 1 December 2020 by Magistrate Judge Joseph Brogden in Macon County Small Claims Division of District Court.

Heard in the Court of Appeals 2 November 2021.

*Carpenter & Guy, PLLC, by Kimberly N. Carpenter, for Plaintiff-Appellee.*

*Sloan & VanHook, PLLC, by Stuart Sloan, for Elite Mountain Business, LLC, Defendant-Appellant.*

*No Brief filed, for Carey J. Lannon, Defendant-Appellant.*

WOOD, Judge.

¶ 1 Elite Mountain Business LLC (“Defendant Elite”) directly appeals to this Court from an order issued by a magistrate judge setting aside judgment pursuant to N.C.

Gen. Stat. § 1A-1, Rule 60(b)(1).<sup>1</sup> Because this Court lacks jurisdiction to hear a direct appeal from a magistrate's order pursuant to Rule 60(b)(1), we dismiss this appeal.

### **I. Background**

¶ 2 On December 9, 2019, JoAnne Snider (Plaintiff) initiated a small claims suit against Elite Mountain Business, LLC, doing business as Ridgeline Homes, and Carey J. Landon for commission owed from a previous real estate transaction. A magistrate summons was served upon Carey Lannon for the purpose of service of process against Defendant Elite. The trial was held on January 14, 2020 where the magistrate judge dismissed Plaintiff's case and taxed the costs to Plaintiff (the "January 14 Order"). Plaintiff did not appeal. On October 30, 2020, Plaintiff made a Rule 60(b)(1) motion to set aside the January 14 Order arguing, 1) Defendant Elite was not properly served such that the magistrate judge lacked jurisdiction, and 2) the January 14 Order did not order any remedy or dismissal except taxing the costs to Plaintiff.

¶ 3 In support of Plaintiff's Rule 60(b)(1) motion, Plaintiff filed an affidavit stating during testimony for the January 14 Order, Carey Lannon testified "he had no

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<sup>1</sup> The record is unclear as to whether Elite Mountain Business, LLC and Carey J. Lannon are appealing, or only Elite Mountain Business, LLC or Carey J. Lannon is appealing. After a careful review of the record, we are confident Elite Mountain Business is appealing and therefore shall construe Elite Mountain Business, LLC as the only party who gave notice of appeal.

authority related to Elite Mountain Business, LLC, or Ridgeline Homes.” Plaintiff further provided in the affidavit he was informed on the date of the trial Defendant Elite had not been served. On December 1, 2020, the magistrate judge conducted a hearing concerning Plaintiff’s Rule 60(b)(1) motion and entered an order setting aside the January 14 Order because of mistake, inadvertence, surprise, or excusable neglect, furthering Defendant Elite was not served and no order should have been issued against Defendant Elite. Defendant Elite then gave notice of appeal in open court and proceeded to appeal directly to this Court. Subsequently, Plaintiff filed a motion to dismiss Defendant Elite’s appeal for lack of jurisdiction with this Court. We grant Plaintiff’s motion to dismiss as this court lacks jurisdiction.

## II. Discussion

¶ 4 We are guided in our decision to grant Plaintiff’s motion to dismiss by N.C. Gen. Stat. § 7A-228. Under N.C. Gen. Stat. § 7A-228, the “chief district court judge may authorize magistrates to hear motions to set aside an order or judgment pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate.” N.C. Gen. Stat. § 7A-228(a) (2021). Furthermore, “[a]fter final disposition before the magistrate, *the sole remedy* for an aggrieved party is appeal for trial de novo before a district court judge or a jury. Notice of appeal may be given orally in open court upon announcement or after entry of judgment.” *Id.* (emphasis added). In order to preserve an appeal from a magistrate’s order pursuant to N.C. Gen. Stat. § 7A-228,

the appellant must 1) make an “oral announcement of appeal in open court; or 2) . . . fil[e] [a] notice of appeal in the office of the clerk of the superior court within 10 days after entry of judgment” and serve upon all parties a copy of the notice. N.C. Gen. Stat. § 7A-228(b).

¶ 5 Here, Defendant Elite gave notice of appeal in open court at the hearing for Plaintiff’s Rule 60(b)(1) motion before the magistrate. Defendant Elite’s notice of appeal in open court perfected Defendant Elite’s right to appeal from the magistrate’s order. § 7A-228(a)-(b). However, Defendant Elite’s notice of appeal only allows Defendant Elite to appeal to the district court, not to this Court because N.C. Gen. Stat. § 7A-228 provides the only remedy for an aggrieved party is to appeal to the district court. § 7A-228(a). *See also In re M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012) (“When a specific statute addresses jurisdiction during an appeal, however, that statute controls over the general rule.”) Thus, the proper venue for appeal lies with the district court, not this Court.

### III. Conclusion

¶ 6 Since N.C. Gen. Stat. § 7A-228 does not permit a party to appeal directly to this Court from an order from a magistrate judge pursuant to Rule 60(b)(1), we must grant Plaintiff’s motion to dismiss for lack of jurisdiction. Because we are granting Plaintiff’s motion to dismiss, we need not reach the merits of Defendant Elite’s arguments.

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*Opinion of the Court*

DISMISSED.

Judges DILLION and GORE concur.

Report per Rule 30(e).