IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-8

No. COA21-45

Filed 4 January 2022

Cabarrus County, No. 09 CVD 2893

TERRA ANN DOTSON (Formerly Boddy), Plaintiff,

v.

GRAIG THOMAS BARBER, Defendant.

Appeal by defendant from order entered 9 March 2020 by Judge D. Brent Cloninger in District Court, Cabarrus County. Heard in the Court of Appeals 24 August 2021.

Epperson Law, PLLC, by James L. Epperson, for defendant-appellant.

No brief filed for plaintiff-appellee.

STROUD, Chief Judge.

¶ 1 Because defendant filed an untimely notice of appeal, this Court does not have jurisdiction to consider his arguments on appeal. Therefore, this case is dismissed.

I. Background

¶ 2 On 5 December 2018, plaintiff-mother and defendant-father entered into a consent order for permanent child custody with the parties sharing joint legal and physical custody of their child. On 15 January 2020, Mother moved the court to

appoint a parenting coordinator as the prior appointment had expired. The trial court held a hearing on 20 February 2020, where both parties were represented by counsel. On 9 March 2020, the trial court entered an order re-appointing a parenting coordinator "due to the multiple issues that have been brought before the Court and/or the level of conflict between the parties in this case is negatively affecting the parties' child[.]" On 19 August 2020, more than six months after entry of the order, defendant appealed.

¶ 3 Generally, an order must be appealed within 30 days of entry of the order. *See* N.C. R. App. P. 3(c) ("In civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period . . . ").

¶ 4 Here, Father alleges in his notice of appeal he "has not yet been served with a copy of the filed Order." The record on appeal was settled under North Carolina Rule of Appellate Procedure 11(b), as Mother made no response to the proposed record, and Mother has filed no brief with this Court. Thus, the only information we have about service of the order at issue is Father's allegation in his notice of appeal which he does not address in his brief.

¶ 5 Father filed notice of appeal over six months after entry of the order but did not provide any information or argument regarding how his right to appeal may have been preserved; how he received notice of the order if he was never served with it; and most importantly, when exactly he received notice of entry of the order he appeals. Based upon Father's argument, a party who is not properly served with an order can file a notice of appeal *at any time* after entry of the order just by claiming he was not properly served with the order.

¶ 6 Assuming *arguendo* that Father was never properly served with the order, we note that the trial court rendered its ruling on the re-appointment of the parenting coordinator in his attorney's presence at the hearing on 20 February 2020. The trial court directed that Mother's attorney would draft the order and send it to Father's attorney, who noted she would be filing a notice of substitution as Father would be represented by new counsel. Our record does not include a notice of substitution, but we note Father's attorney on appeal is a different attorney than his attorney at the hearing.

II. Notice of Appeal

¶ 7 In *E. Brooks Wilkins Family Medicine, P.A. v. WakeMed*, 244 N.C. App. 567, 574, 784 S.E.2d 178, 183 (2016), the plaintiff-appellant contended that the 30 days for filing a notice of appeal from entry of the order was tolled because it was not properly served with the order:

> Plaintiff also contends service of the discovery sanction orders was invalid pursuant to Rule 5 of the Rules of Civil Procedure because the certificates of service did not specify the date on which the documents were served and did not specify the means of service. Plaintiff argues that defects in the certificates of service tolled the time for filing an appeal such that its appeal was timely.

¶ 8 In *E. Brooks Wilkins*, this Court looked to prior case law and determined that "actual notice . . . triggers Rule 3(c)," regardless of the status of service:

> This Court has held a litigant's actual notice of a final order within three days of its entry triggers Rule 3(c) and notice of appeal must be filed within thirty days of the date of entry. *See Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014) ("[W]hen a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service."); *see also Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d 781, 784 (2011) (explaining that when a party receives actual notice "the party has been given fair notice . . . that judgment has been entered"), *see also Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 425, 667 S.E.2d 309, 312 (2008) (holding that this Court "do[es] not believe the purposes of Rule 58 are served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service"). So, even if service of the discovery sanction orders was improper for any of the reasons asserted by Plaintiff, if Plaintiff had actual notice of the orders within three days of their entry, but waited more than thirty days (from the date the orders were entered) before filing the notice of appeal, its notice would be untimely.

Id. at 574–75, 784 S.E.2d at 183–84 (alterations in original).

¶ 9 While in *E. Brooks Wilkins*, the plaintiff-appellant had argued the service issue

before the trial court, this Court focused on the fact that it had "presented no evidence that might have supported a finding that it did not receive actual notice within the time period designated by Rule 3(c)(1)." *Id.* at 575, 784 S.E.2d at 184. Here too, Father presents no evidence or argument that he "did not receive actual notice within the time period designated by Rule 3(c)(1)." *Id.* Father's notice of appeal filed over 150 days after entry of the order is "untimely" and "deprives this Court of jurisdiction over the appeal." *Id.* at 575-76, 784 S.E.2d at 184 ("The untimely nature of Plaintiff's notice of appeal from the discovery sanction orders deprives this Court of jurisdiction over the appeal. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted) ('The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal.'); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ('[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [N.C. R. App. P.] 2.'). Therefore, we dismiss Plaintiff's appeal from the discovery sanctions orders." (alterations in original)). As Father has failed to address his late notice of appeal with this Court or seek any other avenue for his appeal to be heard, such as a petition for writ of certiorari, we must dismiss Father's appeal. *See id.*

III. Conclusion

¶ 10 Accordingly, this appeal is dismissed.

DISMISSED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).