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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-860

Filed 21 March 2023

Wake County, No. 20 CVD 9071

MELBA SMITH, Plaintiff,

v.

TROY GREENWALD and TROY GREENWALD ENTERPRISES, LLC, d/b/a  
BELTONE OF THE TRIANGLE, Defendants.

Appeal by plaintiff from order entered 11 October 2021 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 8 February 2023.

*Attorney Gregory Stott, for plaintiff-appellant.*

*Troy Greenwald, pro se, for defendants-appellees.*

FLOOD, Judge.

Melba Smith (“Plaintiff”) appeals from the 11 October 2021 Order granting Defendants’ Motion for Summary Judgment. We hold Plaintiff’s violation of our procedural rules prevents us from conducting meaningful review of her case on the merits.

**I. Factual and Procedural Background**

On 6 July 2020, Plaintiff purchased Beltone hearing aids from Troy Greenwald Enterprises, LLC (“Defendant TGE”). Defendant TGE is a corporation organized under the laws of North Carolina and doing business in the State of North Carolina. Troy Greenwald (“Defendant Greenwald”) is the President of Defendant TGE and a licensed hearing aid dealer and fitter with over ten years of experience in Beltone products.

On 13 July 2020, Plaintiff requested to return the hearing aids, complaining they did not properly fit her ears or improve her hearing. Defendant TGE offered to exchange the allegedly ill-fitting hearing aids for ones custom-made to Plaintiff’s size and fit. Plaintiff agreed to this exchange and warranted to Defendant TGE she would accept the custom-made replacement. In reliance on Plaintiff’s agreement, Defendant TGE created the custom-made hearing aids; but Plaintiff refused to accept the product and demanded a refund, which Defendant TGE refused. The sales contract signed by Plaintiff stated she could not receive a refund for a previously worn hearing aids, and her only recourse was repair of the hearing aids under the warranty.

On 17 August 2020, Plaintiff filed a complaint against Defendants Greenwald and TGE (collectively “Defendants”) in Wake County District Court, alleging Defendants breached their duty of merchantability in violation of N.C. Gen. Stat. § 25-2-213 and N.C. Gen. Stat. § 25-2-314. On 1 December 2020, Defendants filed an Answer and asserted counterclaims against Plaintiff for common law fraud, unfair

and deceptive practices in violation of N.C. Gen. Stat. § 75-1.1, and common law breach of contract arising out of her refusal to accept the custom-made hearing aids.

On 2 September 2021, Defendants filed a Motion for Summary Judgment. In support of their Motion, Defendants presented to the trial court affidavits, Defendant TGE's customer file notes regarding Plaintiff, and the sales contract between Plaintiff and Defendant TGE. On 11 October 2021, in reliance on the documents submitted by Defendants, Judge Walczyk entered an Order granting Defendants' Motion. The Order stated Plaintiff "failed to allege or describe the nature or type of any defect in the hearing aids" and "made a bare allegation that hearing aids purchased from Defendant [TGE] were 'defective.'"

On 18 October 2020, Plaintiff filed timely notice of appeal, but this Court dismissed her appeal as interlocutory. On 2 September 2022, Defendants' counterclaims were voluntarily dismissed. On 15 September 2022, Plaintiff gave timely notice of appeal from the now-final judgment entered 11 October 2021. On 19 September 2022, Plaintiff tendered her proposed record on appeal, certifying the proposed record had been served on Defendants by sending an electronic copy via email to Defendants' attorney of record.

## **II. Jurisdiction**

This Court has jurisdiction to hear this appeal as a final order from a superior court pursuant to N.C. Gen. Stat. 7A-27(b) (2021).

## **III. Analysis**

The sole issue before this Court is whether the trial court erred in granting Defendants' Motion for Summary Judgment. Plaintiff's failure to include key documents in the Record in violation of Rule 9 of this Court's procedural rules prevent us from meaningfully reviewing the case on the merits. *See* N.C.R. App. P. 9(a)(1)(j).

**A. Plaintiff's Failure to Include Pertinent Documents in the Record**

Plaintiff failed to include several key documents on which the trial court relied in reaching their decision to grant Defendants' Motion for Summary Judgment, in violation of appellate Rule 9. "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). The Record before us does not include the necessary documents to allow us to determine if there is a genuine issue as to any material fact.

The record on appeal must contain "copies of all other documents filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in another component of the record on appeal[.]" N.C.R. App. P. 9(a)(1)(j). This Court has "long and consistently held that the . . . Rules of Appellate Procedure . . . are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress*

*v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). These rules are necessary to “enable the courts properly to discharge their duty of resolving disputes,” but they are also “devised to promote the ends of justice, not to defeat them.” *Dogwood Develop. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (citation and internal quotation marks omitted). Accordingly, not all violations of these rules warrant dismissal of an appeal. *Id.* at 195, 657 S.E.2d at 363. Failure to include documents required by rule 9(a)(1)(j) is a non-jurisdictional default, which should normally not lead to dismissal of an appeal. *See Id.* at 198, 657 S.E.2d at 365. “[N]on-jurisdictional defects subject an appeal to dismissal if they are ‘gross’ or ‘substantial.’” *In re Foreclosure of Deed of Trust Executed by Moretz*, 2022-NCCOA-840, ¶ 20.

In determining whether a party’s noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court’s task of review and whether and to what extent review on the merits would frustrate the adversarial process.

*Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366–67; *see also In re Foreclosure*, ¶¶ 20, 25 (holding failure to include necessary documents in the record frustrated the appellate review by rendering the Court unable to conclusively review the issue).

Absent from the Record in this case are affidavits provided to the trial court by Defendants, Defendant TGE’s customer file notes regarding Plaintiff, and the sales contract between Plaintiff and Defendant TGE. As a result, Plaintiff’s brief also

violates Rule 28 of the North Carolina Rules of Appellate Procedure because the statement of facts section is missing citations to the Record for every sentence except those stating the procedural history of the case. *See* N.C.R. App. P. 28(b)(5) (briefs shall include a full and complete statement of facts supported by references to pages in the record on appeal). Plaintiff could not have supported the facts by references to pages in the Record because no support exists.

The only factual documents referenced in the Record are Plaintiff's Complaint, Defendants' Answer, Plaintiff's Answer, and Defendants' Motion for Summary Judgment. Plaintiff's Complaint merely states the bare allegation that the hearing aids were defective without providing any more detail or facts. Because Plaintiff failed to include documents necessary for consideration of Defendants' Motion for Summary Judgment, this Court is unable to conclusively review the case on the merits. *See In re Foreclosure*, ¶¶ 20, 25.

This Court therefore finds the violation of Rule 9(a)(1)(j) of the North Carolina Rules of Appellate Procedure is substantial because it "impairs [our] task of review on the merits." *See Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366–67.

**B. Defendants' Failure to Respond to the Proposed Record**

Lastly, Plaintiff argues Defendants' failure to object or approve of the proposed record renders the proposed record binding on appeal pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure. Plaintiff is correct in arguing the proposed record becomes the settled record on appeal if it is not approved or objected

to by Defendants. *See Shropshire v. Shropshire*, 284 N.C. App. 92, 102, 875 S.E.2d 11, 19 (2022) (holding without evidence defendant objected or approved of the record, plaintiff's proposed record on appeal constituted the record on appeal). The relevant portion of Rule 11(b) provides: "the appellant shall . . . serve upon all other parties a proposed record on appeal constituted *in accordance with the provisions of Rule 9*." N.C.R. App. P. 11(b) (emphasis added). Plaintiff's record, however, was not filed in accordance with the provisions of Rule 9 for reasons discussed *supra*.

We therefore find Defendants' failure to object or approve of the proposed record rendered it binding on appeal, but this failure does not absolve Plaintiff of her responsibility to comply with the subparts of Rule 9. *See* N.C.R. App. P. 9; *see also* N.C.R. App. P. 11(b).

#### **IV. Conclusion**

We hold Plaintiff failed to follow North Carolina Rule of Appellate Procedure 9(a)(1)(j); the insufficient Record on appeal therefore prevents our meaningful review on the merits.

DISMISSED.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).