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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-819

Filed 20 June 2023

Cabarrus County, No. 18 CVS 2531

ADIL AZIZ and GLADYS AZIZ, Plaintiffs,

v.

HEATHERSTONE HOMEOWNERS ASSOCIATION, INC., Defendant.

Appeal by Plaintiffs from final judgment entered 30 December 2021, order entered 27 April 2022, and order entered 29 July 2022, all by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 12 April 2023.

*Kenneth P. Andresen, PLLC, by Kenneth P. Andresen, for Plaintiff-Appellants.*

*Rossabi Law Partners, by Gavin J. Reardon, and Law Firm Carolinas, by Harmony W. Taylor, for Defendant-Appellee.*

GRIFFIN, Judge.

Plaintiffs appeal from final judgment entered after a jury found Plaintiffs breached their obligation under the Declaration and Architectural Guidelines, arguing the trial court erred in converting issues of law into issues of fact for the jury to decide. We hold the trial court did not commit reversible error in submitting the challenged issues to the jury. Further, we dismiss Plaintiffs' additional appeals after

vacating the orders on which Plaintiffs' contentions are based.

### **I. Factual and Procedural Background**

In April 2017, Plaintiffs Adil and Gladys Aziz purchased a home located within the Heatherstone subdivision at 7701 Woodmere Drive in Harrisburg, North Carolina. Upon moving into their home, Plaintiffs found the backyard had drainage issues and was frequently flooded and soggy. Grass would not grow and all other vegetation in the backyard was either dead or dying. In an attempt to fix the problem, Plaintiffs decided to build a decorative retention wall in the yard to capture the water. In the process, Plaintiffs discovered a pipe, originating in their next-door neighbors', the Libenspergers, yard, which effectively directed a large amount of run-off water into Plaintiffs' yard.

On 4 December 2017, Defendant, the Heatherstone Homeowners Association, emailed Plaintiffs asking they stop building the wall as they had not submitted a request for approval pursuant to the Architectural Standards and the Declaration of Covenants, Conditions, and Restrictions for Heatherstone ("Declarations"). On 15 December 2017 and 18 December 2017, Plaintiffs submitted two written requests to install a decorative retention wall and a fence. On 25 January 2018, Defendant approved Plaintiffs' requests while also imposing conditions. Plaintiffs completed the retaining wall and fence with a footing for support.

On 14 May 2018, the Libenspergers sent a letter to Defendant claiming the concrete footing or support installed by Plaintiffs violated the Declarations or the

approval by Defendant. On 5 July 2018, Defendant held a hearing on the matter. On 25 July 2018, Defendant determined three items did not meet its initial approval, noting: (1) the fence support must be removed, (2) the fence must be twelve feet from the curb, and (3) the wall must be lowered to one foot, six inches in height. Defendant also notified Plaintiffs they would be fined \$50 per day until the issues were remedied.

In August 2018, Plaintiffs filed a complaint against the Libenspergers seeking damages as a result of the Libenspergers' intentional channeling and draining of rainwater into Plaintiffs' backyard. In October 2018, the Libenspergers filed motions, answers, counterclaims, and brought a third-party complaint against Defendant. On 21 December 2018, Plaintiffs filed an amended complaint naming Defendant as an additional defendant. Plaintiffs answered the Libenspergers. On 4 March 2019, Defendants answered Plaintiffs' amended complaint and brought counterclaims against Plaintiffs. On 20 March 2019, Plaintiffs answered Defendant's counterclaims. On 4 November 2021, Defendant filed an amended counterclaim against Plaintiffs. Plaintiffs settled their dispute with the Libenspergers.<sup>1</sup>

On 16 November 2021, the matter between Plaintiffs and Defendant came on for trial by jury before the Honorable Martin B. McGee in Cabarrus County Superior Court. The jury returned a unanimous verdict finding Plaintiffs breached their

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<sup>1</sup> The record on appeal does not contain the Settlement Agreement and Release by and between Plaintiffs and the Libenspergers. However, Plaintiffs counterclaim only against Defendant and not the Libenspergers. Further, we deny Plaintiffs' Rule 9(b)(5) motion to amend the record as the opinion of this Court does not depend on any evidence not contained within the record on appeal.

obligation under the Declaration by constructing a concrete support without approval, but did not breach their obligation by constructing a fence nearer than twelve feet from the curb, or by constructing a retaining wall that exceeded the approved height. Further, the jury found Defendant was entitled to recover \$4,350 from Plaintiffs for violations of the Declaration. Following this verdict, the trial court entered judgment in favor of Defendant on 30 December 2021, ordering Plaintiffs pay Defendant \$4,350, with interest accruing from 26 October 2018.

On 25 January 2022, Plaintiffs filed a notice of appeal from the trial court's judgment. The record on appeal also reflects Plaintiffs filed a second notice of appeal on 27 June 2022 from the trial court's order denying Plaintiffs' Rule 50 and 59 motions and a third notice of appeal on 3 August 2022 from the trial court's order awarding attorney's fees and costs in favor of Defendant.<sup>2</sup>

## **II. Standard of Review**

The North Carolina Declaratory Judgment Act “explicitly grants trial courts the discretion to determine whether entry of a declaratory judgment is appropriate[.]”

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<sup>2</sup> The record on appeal does not include Plaintiffs' Rule 50 or Rule 59 motions nor does it include Plaintiffs' or Defendant's motions for attorney's fees and costs following the November 2021 jury trial in this matter. The record only includes the trial court's orders on each of the motions and Plaintiffs' appeals of the trial court's orders as to the motions. Again, we deny Plaintiffs Rule 9(b)(5) motion to amend the record as the opinion of this Court does not depend on any evidence not contained within the record on appeal.

In addition to their motion to amend the record, Plaintiffs filed a motion to suspend the rules pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, motions for sanctions, and attorney's fees. Defendant filed a motion to dismiss Plaintiffs' appeal and for monetary sanction pursuant to Rule 34(a) of the North Carolina Rules of Appellate Procedure. We deny all motions by both Plaintiffs and Defendant.

*New Bar P'ship v. Martin*, 221 N.C. App. 302, 308, 729 S.E.2d 675, 681 (2012); *see also* N.C. Gen. Stat. § 1-257 (2021) (“The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]”). Thus, we review the trial court’s decision to grant or deny a declaratory judgment for abuse of discretion. *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 17, 569 S.E.2d 287, 299 (2002). “A matter left to the trial court’s discretion ‘will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. A trial judge’s decision only amounts to an abuse of discretion if there is no rational basis for it.’” *Martin*, 221 N.C. App. at 308, 729 S.E.2d at 681 (quoting *State v. Mutakbbic*, 317 N.C. 264, 273–74, 345 S.E.2d 154, 158–59 (1986) (citations and quotation marks omitted)).

### **III. Analysis**

Plaintiffs contend the trial court committed reversible error in converting issues of law for the court into issues of fact for the jury to determine. We disagree.

#### **A. Converting Issues of Law into Issues of Fact**

Plaintiffs argue the trial court erred in converting a cause of action which sought a declaratory judgment on matters requiring contractual interpretation into issues of fact for the jury to decide. Specifically, Plaintiffs contend the trial court should have issued judicial declarations as to their Third and Fifth Causes of Action alleged in the Amended Complaint.

Under the North Carolina Declaratory Judgment Act, “[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the instrument[.]” N.C. Gen. Stat. § 1-254 (2021). However, “[w]hen a proceeding under [our Declaratory Judgment Act] involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.” N.C. Gen. Stat. § 1-261 (2021).

In their Third Cause of Action, Plaintiffs alleged, on 15 December 2017, they submitted requests for architectural approval, pursuant to their contractual obligations with Defendant under the Declaration, to relocate their fence and install the wall. Further, Plaintiffs alleged on 25 January 2018, more than thirty days after their request was submitted, Defendant approved the requests but imposed conditions on each approval.

Plaintiffs sought a judicial determination of their rights and duties with respect to the automatic approval of their requests and whether the conditions included in Defendant’s untimely approval were valid or applicable. The trial court did not issue a declaratory judgment as to this issue but instead submitted the issue to the jury as reflected in questions 2 and 3 on the verdict sheet:

2. Did Plaintiffs breach their obligations under the Declaration and Architectural Guidelines by constructing a fence nearer than 12 feet from the curb?
3. Did Plaintiffs breach their obligations under the

*Opinion of the Court*

Declaration and Architectural Guidelines by constructing  
a retaining wall that exceeded the approved height?

The jury found in favor of Plaintiffs, answering “No” to both questions. Although the trial court submitted Plaintiffs’ issues to the jury instead of issuing a declaratory judgment, Plaintiffs fail to demonstrate prejudice as the jury returned a verdict in favor of Plaintiffs on both issues. Further, before instructing the jury, the trial court discussed the reasons it believed the issues were ones which should be determined by the jury, stating: “whether or not 6 inches above is essentially compliant with [Plaintiffs’] request, consistent with [Plaintiffs’] request, or inconsistent with [Defendant’s] approval seems to me to be a jury issue” and “[w]hether or not the fence was 12 feet from the curb . . . [t]hat’s an issue of judgment, you know, where you measure—where you start the measurement from, which I think is a jury issue.”

Because it is within the trial court’s discretion to issue a declaratory judgment and there is no clear abuse of discretion here, the trial court did not err in submitting the issues contained within Plaintiffs Third Cause of Action to the jury.

Additionally, in their Fifth Cause of Action, Plaintiffs sought a judicial determination of their rights and duties with respect to (a) whether the Fence Support required prior written approval from [Defendant], and (b) whether the Fence Support [impeded] upon or otherwise [disturbed] the desired drainage system of the Heatherstone subdivision.

With regard to this cause of action, the trial court did not issue a declaratory

judgment but submitted the question to the jury:

Did Plaintiffs breach their obligation under the Declaration and Architectural Guidelines by constructing a mounded concrete support or barrier on their property without architectural approval?

The jury found in favor of Defendant answering, “Yes.” While Plaintiffs contend this issue was one to be determined by the trial court, the trial court believed the issue to be one of fact, stating: “without architectural approval, I think that the Plaintiffs can argue that it was approved by the passage of time, their application” and “I think that [Defendant] can argue that . . . [Plaintiffs’] request did not permit them to create this sort of structure at the bottom. And that’s a jury issue.” Further, the trial court stated: “I think it’s for you all to argue whether or not it’s a concrete barrier or whether it’s a support for the fence.” Again, because it is within the trial court’s discretion to issue a declaratory judgment and because the trial court made a reasoned decision in submitting the issue to the jury, the trial court did not abuse its discretion.

The trial court did not commit reversible error in submitting the above issues to the jury.

## **B. Plaintiffs’ Additional Appeals**

Plaintiffs noticed appeal from the trial court’s order denying Plaintiffs’ Rule 50 and Rule 59 motions, and from the trial court’s order awarding attorney’s fees and costs in favor of Defendant. For the following reasons, we vacate these orders as the



trial court was without jurisdiction to enter either.

Under section 1-294 of our North Carolina General Statutes, unless otherwise provided by the Rules of Appellate Procedure, “[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]” N.C. Gen. Stat. § 1-294 (2021). Consequently, upon perfection of an appeal, the lower court is divested of jurisdiction and becomes *functus officio*. *Ponder v. Ponder*, 247 N.C. App. 301, 305, 786 S.E.2d 44, 47 (2016); *see also Rpr & Assocs. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 346–47, 570 S.E.2d 510, 513 (2002) (“As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*.”); *Functus Officio*, *Black’s Law Dictionary* 815 (11th ed. 2019) (“[W]ithout further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”). An appeal is not perfected until docketed in the appellate court. *Ponder*, 247 N.C. App. at 305, 786 S.E.2d at 47 (citing *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011)). However, perfection relates back to the time of notice of appeal. *Id.* Thus, “any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.” *Id.* (citations omitted). However, “the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294.

Here, the trial court entered final judgment on 30 December 2021. Plaintiffs

filed a notice of appeal of the trial court's final judgment on 25 January 2022. Therefore, as of 25 January 2022, the trial court was divested of jurisdiction to proceed on any issue related to the final judgment from which Plaintiffs appealed. Nevertheless, the trial court entered an order on 27 April 2022, denying Plaintiffs' Rule 50 and 59 motions; and on 29 July 2022, granting attorney's fees and costs in favor of Defendant. Both of the trial court's orders entered after Plaintiffs' appeal of the final judgment are affected by the judgment appealed from. Thus, the trial court was *functus officio* at the time these orders were entered and should not have proceeded as such for lack of jurisdiction.

We therefore vacate the trial court's orders entered after 25 January 2022.

#### **IV. Conclusion**

For the aforementioned reasons, we hold the trial court did not err in declining to issue a declaratory judgment, but instead submit the questions to the jury. Further, we vacate the trial court's orders entered 27 April 2022 and 29 July 2022, denying Plaintiffs' Rule 50 and 59 motions and granting attorney's fees and costs in favor of Defendant, respectively.

NO ERROR IN PART AND VACATED IN PART.

Judge ARROWOOD and HAMPSON concur.

Report per Rule 30(e).