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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1041

Filed 18 June 2024

Craven County, No. 22 CVS 1525

JOSHUA ARNOLD, JOSHUA BRONER, ROBERT CLEMENT, THOMAS DEBATT, AUSTIN EUBANKS, GAUTHIER KABENGEELE, MATTHEW LAMBERT, and BRANDON MARSTELLER, Plaintiffs,

v.

TRADEWIND FLIGHT SERVICES, INC., D2 GOVERNMENT SOLUTIONS, LLC, DARRYL CENTANNI, DAVID RICKER, WALLY CALABRESE, and THE TRUSTEES OF CRAVEN COMMUNITY COLLEGE, Defendants.

Appeal by defendant from order entered 7 July 2023 by Judge Clinton Rowe in Craven County Superior Court. Heard in the Court of Appeals 30 April 2024.

*Milberg Coleman Bryson Phillips Grossman, PLLC, by Scott C. Harris, Lucy N. Inman, and Michael Dunn; Beechler Tomberlin, PLLC, by Allison Tomberlin; and Cheshire Parker Schneider, PLLC, by Elliot S. Abrams, for plaintiffs-appellees.*

*Cranfill Sumner, LLP by Steven A. Bader, Benton L. Toups, and Vince Eisinger, for defendant-appellant The Trustees of Craven Community College.*

DILLON, Chief Judge.

This appeal is brought by Trustees of Craven Community College (“CCC”). To the extent our Court lacks jurisdiction to hear this appeal, we hereby grant *certiorari*

in the aid of our jurisdiction/to assert jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023). We, therefore, deny Plaintiffs’ motion to dismiss the appeal and further deny their request for sanctions.

Plaintiffs sued *a number of* defendants, including CCC, in federal court. Plaintiffs later moved to dismiss their federal claim, wanting to bring the same claims in state court. However, before the federal action was dismissed, Plaintiffs filed this state court action against the same defendants.

CCC moved to dismiss Plaintiffs’ state action *against it* pursuant to the “prior pending action” doctrine. *See Eways v. Governor’s Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990) (“[W]here a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action.”). The trial court granted CCC’s motion and dismissed CCC as a party to the state court action. Two days later, Plaintiffs dismissed the federal action.

The next month, CCC filed a motion in this state court action pursuant to Rule 60 of our Rules of Civil Procedure asking the trial court to correct and/or clarify its order of dismissal, to reflect that the trial court was dismissing the state court action *in its entirety* against *all defendants*, rather than just the claims asserted against CCC. This motion was denied. CCC appeals.

Our Court reviews a denial of a Rule 60 motion for abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006).

The trial court did not abuse its discretion in denying CCC's motion. CCC failed to ask the trial court to dismiss the state action *in its entirety* in its original motion to dismiss. No other defendant moved for the claims against them to be dismissed, though it would have been proper for them to seek dismissal, as Plaintiffs' claims in federal court against these other defendants were still pending.

However, "[a] plea in abatement based upon a prior action pending is an affirmative defense and is waived unless pleaded by the party relying upon the same." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990) (citations omitted). As the other defendants<sup>1</sup> did not move for abatement, they waived their right to this affirmative defense. *See id.*

In any event, by the time CCC filed its Rule 60 motion, Plaintiffs had dismissed their federal action. Thus, the prior action pending doctrine no longer applied as a defense to this state court action. The trial court had no basis to dismiss the claims against the other defendants at that time. Accordingly, we conclude that the trial court did not err in denying CCC's Rule 60 motion.

AFFIRMED.

Judges TYSON and STADING concur.

Report per Rule 30(e).

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<sup>1</sup> We note that defendant Wally Calabrese also moved to dismiss the state action against him under the prior action pending doctrine, which the trial court granted; and he joined CCC in its Rule 60 motion to correct the order of dismissal. However, Mr. Calabrese is not a party to this appeal.