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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-210

Filed 19 November 2024

Durham County, No. 22 CVS 4120

HENRY WEST and GERALDINE WEST, Plaintiffs,

v.

THEODORE A. GREVE; TED A. GREVE & ASSOCIATES, P.A.; and JUSTIN L. LOWENBERGER, Defendants.

Appeal by plaintiffs from order entered 17 November 2023 by Judge Michael J. O’Foghludha in Durham County Superior Court. Heard in the Court of Appeals 24 September 2024.

Law Office of Hayes Hofler, P.A., by R. Hayes Hofler, III, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Shameka C. Rolla, James K. Dorsett, III, and J. Mitchell Armbruster, for defendants-appellees.

ZACHARY, Judge.

Plaintiffs Henry and Geraldine West appeal from the trial court’s order denying their motion to reconsider the court’s order awarding Defendants attorneys’ fees and costs in this matter. Although Plaintiffs raise arguments concerning several

prior orders in this matter, the only order from which they properly noticed appeal was the trial court's order denying their motion to reconsider; accordingly, that is the sole order properly before this Court. After careful review, we affirm.

I. Background

This matter arises out of Plaintiffs' suits against Defendants Theodore A. Greve, Justin L. Lowenberger, and Ted A. Greve & Associates, P.A., regarding a legal action that Defendants filed on behalf of their client against Plaintiffs. On 17 May 2022, Plaintiffs filed a complaint against Defendants, which Defendants later moved to dismiss. One day before Defendants' motion came on for hearing, Plaintiffs filed a voluntary dismissal of their complaint. On 22 November 2022, Plaintiffs filed another complaint against Defendants, presenting the same claims as in their first complaint.

On 13 December 2022, Defendants filed a motion to dismiss the second complaint, and also sought to "recover their costs of this action including their reasonable attorneys' fees as by law may be provided[.]" Defendants' motion to dismiss came on for hearing on 27 February 2023. By order entered on 9 March 2023, the trial court granted Defendants' motion to dismiss but denied Defendants' motion for attorneys' fees and costs "at this time." Plaintiffs chose not to appeal this order.

On 24 May 2023, Defendants filed a motion for attorneys' fees pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-21.5 (2023). By consent of the parties, Defendants' motion was set to come on for hearing on 26 June 2023. On 21 June 2023, Plaintiffs filed a motion to continue the hearing, seeking

additional time to obtain the transcript of the 27 February hearing.

On 26 June 2023, Plaintiffs' motion to continue and Defendants' motion for attorneys' fees came on for hearing as scheduled. On 15 August 2023, the trial court entered two orders: one denying Plaintiffs' motion to continue, and one granting Defendants' Rule 11 motion for attorneys' fees. On 28 August 2023, Plaintiffs filed a motion to reconsider pursuant to Rules 59(a)(8) and (e) of the North Carolina Rules of Civil Procedure. Although this motion was titled "MOTION TO RECONSIDER ORDER FOR ATTORNEY FEES AND COSTS[.]" Plaintiffs presented arguments for reconsidering both the continuance and attorneys' fees orders in their motion.

Plaintiffs did not notice their motion for hearing. On 17 November 2023, Defendants filed their memorandum in opposition to Plaintiffs' motion to reconsider.

That same day, having considered the submissions of the parties, the trial court entered an order denying Plaintiffs' motion to reconsider. The court concluded that (1) "Rule 59 is not a proper means to challenge" the orders denying Plaintiffs' motion to continue and granting Defendants' motion for attorneys' fees and costs, and (2) if Rule 59 were a proper means for such a challenge, the trial court "did not err in entering" either of the challenged orders. On 15 December 2023, Plaintiffs filed a notice of appeal from the trial court's order denying their motion to reconsider.

II. Scope of Appeal

As an initial matter, we address the scope of our review. In addition to arguing that the trial court erred by denying their motion to reconsider, Plaintiffs also

advance arguments concerning the trial court's orders denying their motion to continue and granting Defendants' Rule 11 motion for attorneys' fees. However, Plaintiffs have failed to properly invoke our appellate jurisdiction with respect to these underlying orders, and therefore, we may only review the trial court's order denying Plaintiffs' motion to reconsider.

The notice of appeal "shall designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d). This Court has held that a "[n]otice of appeal from [the] denial of a motion to alter or amend a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Strauss v. Hunt*, 140 N.C. App. 345, 350, 536 S.E.2d 636, 639 (2000) (cleaned up).

We acknowledge that "a mistake in designating the judgment" from which appeal is taken "should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Id.* (citation omitted). However, this principle cannot rescue Plaintiffs' arguments concerning the trial court's continuance and attorneys' fees orders, from which Plaintiffs did not file notice of appeal. *See, e.g., Raymond v. Raymond*, 257 N.C. App. 700, 703, 811 S.E.2d 168, 170 (2018) ("A timely notice of appeal is required to confer jurisdiction upon this Court."). Because Plaintiffs filed their notice of appeal 122 days after the entry of the 15 August 2023 orders, well beyond the 30-day deadline required by N.C.R. App. P. 3(c), there can be no fair

inference from the 15 December notice of appeal that Plaintiffs intended to appeal from the 15 August 2023 orders.

Neither could the tolling provision of Rule 59—were Plaintiffs’ motion in fact a proper Rule 59 motion—render Plaintiffs’ 15 December 2023 notice of appeal timely with regard to the 15 August orders. “Although a timely motion made pursuant to Rule 59 will toll the time for taking an appeal, when a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled.” *N.C. All. for Transp. Reform, Inc. v. N.C. Dep’t of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 (citation omitted), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812 (2007). This Court has recognized that a Rule 59(e) motion “cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made” and that a motion that does so “cannot be treated as a Rule 59(e) motion.” *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Yet that is precisely what Plaintiffs did in their motion to reconsider in this case. Accordingly, Plaintiffs’ motion to reconsider “cannot be treated as a Rule 59(e) motion[,]” and “the time to file an appeal from the [15 August 2023 orders] was not tolled.” *Id.* at 606–07, 481 S.E.2d at 417. Thus, Plaintiffs’ 15 December 2023 notice of appeal was not timely as to the 15 August 2023 orders.

Additionally, “Plaintiff[s] ha[ve] not petitioned for a writ of certiorari so that th[is] Court can exercise appellate jurisdiction” to enable our review of the 15 August

2023 orders. *Vaitovas v. City of Greenville*, 271 N.C. App. 578, 580, 844 S.E.2d 317, 318 (2020). We therefore limit our review solely to the order from which Plaintiffs properly noticed their appeal: the 17 November 2023 order denying Plaintiffs’ motion to reconsider.

III. Discussion

Plaintiffs argue on appeal that “[t]he trial court’s denial of Plaintiffs’ Rule 59 motion to reconsider its order . . . without a hearing was fundamentally erroneous.” Even assuming that Plaintiffs’ motion to reconsider was a proper Rule 59 motion, we disagree.

“Our review of a trial court’s denial of a Rule 59 motion is limited to a determination of whether the trial [court] abused [its] discretion.” *Ollo v. Mills*, 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000). Similarly, “[o]ur review of the trial court’s decision to enter an order on [Plaintiffs’] motion . . . without notice or a hearing is limited to whether the trial [court] abused [its] discretion.” *Id.* at 625, 525 S.E.2d at 217.

The trial court entered its 17 November 2023 order denying Plaintiffs’ motion without conducting a hearing. Plaintiffs presumably contend that the court abused its discretion by entering an order on their motion without a hearing, but their argument on this issue in their appellate brief consists of a bare citation to a case regarding the standard of review. Plaintiffs make “no actual argument in [their] appellate brief as to *why* the trial court’s ruling on this motion was erroneous or how

[they were] prejudiced by it.” *Shearin v. Reid*, 258 N.C. App. 42, 53, 812 S.E.2d 381, 389 (2018). Thus, Plaintiffs have not demonstrated that the trial court abused its discretion by denying their motion to reconsider “without notice or a hearing.” *Olló*, 136 N.C. App. at 625, 525 S.E.2d at 217. Moreover, to the extent that any Rule 59(a)(8) argument is properly before us, it is abandoned. *See id.*; *see also* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

The rest of Plaintiffs’ arguments on appeal amount to a relitigation of the prior orders of the trial court that are not properly before us. To wit: at the conclusion of their principal appellate brief, Plaintiffs request that this Court “reverse the trial court’s order granting Defendants attorney fees[,]” and at the conclusion of their reply brief, Plaintiffs assert that “[t]he judgment of the trial court dismissing the complaint with prejudice should be reversed.” We are without jurisdiction to address any contentions beyond the trial court’s order denying Plaintiffs’ motion to reconsider, as to which Plaintiffs have raised no meritorious argument for reversal. Consequently, the trial court’s order is affirmed.

IV. Conclusion

For the foregoing reasons, the trial court’s order denying Plaintiffs’ motion to reconsider is affirmed.

AFFIRMED.

Judges STROUD and HAMPSON concur.

WEST V. GREVE

Opinion of the Court

Report per Rule 30(e).