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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-294

Filed 19 March 2025

Iredell County, No. 20CVS2678

BEACON POINTE OWNERS ASSOCIATION, INC, Plaintiff,

v.

PATRICK J. CORRIGAN, and KRISTEN A. CORRIGAN, Defendants.

Appeal by plaintiff from judgment entered 17 November 2023 by Judge William A. Wood in Superior Court, Iredell County. Heard in the Court of Appeals 24 September 2024.

Kenneth Love for plaintiff-appellant.

No brief filed for defendants-appellees.

STROUD, Judge.

Plaintiff appeals from a jury verdict contending the trial court committed reversible error in granting Defendants' motion *in limine* and motions for directed verdict. But as Plaintiff failed to include a certificate of service for its Notice of Appeal and Defendants have not appeared in this appeal, we must dismiss the appeal.

I. Background

Plaintiff filed a complaint on or about 20 October 2020 seeking a declaratory judgment and asserting claims of breach of contract, unjust enrichment, and attorney fees arising out of a dispute for late payments involving a boat slip in the Beacon Pointe community in Iredell County, North Carolina. On 17 May 2021, a default judgment was entered against Defendants in the amount of \$1,990.56. Defendants filed an answer to the complaint on or about 22 July 2021 and an order setting aside the default judgment was entered on 14 March 2022.¹ On or about 24 February 2022, Defendants filed an amended answer and counterclaims asserting affirmative defenses, denying the substantive claims in Plaintiff's complaint, and alleging claims of trespass to chattels and conversion against Plaintiff. Plaintiff filed a reply on 17 March 2022 denying the allegations in Defendants' counterclaims. While our record does not include any motions for summary judgment, the trial court entered an order denying Plaintiff's motion for summary judgment on 21 November 2022 and an order denying Defendants' "motion for partial summary judgment" on 4 August 2023.

The matter came on for jury trial on 13 November 2023. Defendants' attorney made a pretrial motion arguing the order entering default judgment should not be allowed into evidence and the trial court granted the motion ruling "mention of those documents [the default judgment, motion to set aside the default judgment, and order setting aside the default judgment] and the content of those documents at this trial

¹ The trial transcript in this case notes there was a motion to set aside the default judgment filed on 26 July 2021 but that motion is not included in our record.

is not going to be allowed.” After Plaintiff rested its case, Defendants moved for a directed verdict on the declaratory judgment and the trial court ruled in favor of Defendants. Defendants also moved for a directed verdict on the attorney fees issue and the trial court likewise ruled in favor of Defendants.

The jury found in favor of Plaintiff on the unjust enrichment claim and in favor of Defendants on the trespass and conversion claims. On 17 November 2023, the trial court entered a “Judgment by Jury Verdict” in the amount of \$1,200.00 in favor of Plaintiff and \$2.00 in favor of Defendants.² Plaintiff filed Notice of Appeal on 14 December 2023 but did not include a certificate of service for the Notice of Appeal. The page after the Notice of Appeal in our record shows a copy of a “U.S. Postal Service Certified Mail Receipt” addressed to Defendants’ attorney. There is no indication of what was sent with the certified mail receipt. The receipt is blank except for the address and our record does not include the date it was sent or any confirmation of delivery.

II. Service of the Notice of Appeal

Rule 3(a) our Rules of Appellate Procedure provides a party “may take appeal by filing notice of appeal with the clerk of superior court *and serving copies thereof upon all other parties[,]*” N.C. R. App. P 3(a) (emphasis added), and Rule 3(e) states

² Defendants’ Notice of Appeal states that the verdict was “rendered in open court on November 16, 2023 and reduced to written order on January 17, 2023.” Since the Notice of Appeal was filed on 14 December 2023, and the Judgment by Jury Verdict was filed on 17 November 2023, it appears that the reference to “January 17, 2023” is a typographical error.

“[s]ervice of copies of the notice of appeal may be made as provided in Rule 26[.]” N.C.

R. App. P. 3(e). Rule 26(c) outlines “[p]roof of [s]ervice” and provides

[p]apers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. *Proof of service shall appear on or be affixed to the papers filed.*

N.C. R. App. P. 26(d) (emphasis added).

This Court discussed the effect of these rules in *Ribble v. Ribble*, where

[t]he record before this Court contain[ed] a copy of the notice of appeal filed by [the] defendant; however, there [was] no certificate of service of the notice of appeal as required by our Appellate Rules 3 and 26 and [the] plaintiff ha[d] not waived [the] defendant’s failure to include proof of service of his notice of appeal.

180 N.C. App. 341, 343, 637 S.E.2d 239, 240 (2006). Due to this defect, we dismissed the appeal. *See id.* This Court has repeatedly relied on *Ribble* and dismissed cases where the record fails to include a certificate of service with the notice of appeal. *See In re C.T.*, 182 N.C. App. 166, 168, 641 S.E.2d 414, 415 (2007) (“We find *Ribble* indistinguishable from the case before us, and therefore dismiss [the r]espondent’s appeal. Because this defect is fatal to [the r]espondent’s appeal, we do not determine whether the notice of appeal was timely filed.”); *see also McQuillin v. Perez*, 189 N.C. App. 394, 396-97, 657 S.E.2d 924, 926 (2008) (dismissing the appeal where the plaintiff “fail[ed] to comply with Rule 3” and Rule 26 by not containing a certificate of service with the notice of appeal).

And while *In re C.T.* and *McQuillin* each involved a case where the opposing party filed a motion to dismiss the appeal based on the lack of a certificate of service, see *In re C.T.*, 182 N.C. App. at 167, 641 S.E.2d at 415, *McQuillin*, 189 N.C. App. at 397, 657 S.E.2d at 926, we nonetheless note Defendants in this case did not file a brief or any other document which could arguably waive this defect, see *Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). In *Hale*, this Court dismissed an appeal where

the record on appeal contained the proper notice of appeal, [but] “nothing in the notice shows that [the] plaintiff was given notice of the appeal through service as required by Appellate Rule 26(b).” The majority concluded that this was a jurisdictional defect which both the parties and the court were powerless to remedy.

Id. (brackets and ellipses omitted). Our Supreme Court reversed this Court and adopted Judge Wynn’s dissenting opinion, which

concluded that failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here. Judge Wynn concluded that [the] plaintiff had thereby waived service of the notice of appeal and that the Court of Appeals had jurisdiction of the appeal and should consider the case on its merits.

Id.

Here, Defendants did not file any motions or briefs with this Court. Plaintiff

filed a Notice of Appeal but did not include a certificate of service for the Notice.³ The page after the Notice of Appeal in the record is a copy of a certified mail receipt with no confirmation of mailing or delivery. Even if we assume the certified mail receipt was intended to indicate that the Notice of Appeal was mailed to Defendants' attorney, there is no information regarding the date it was mailed and no confirmation of delivery. This is not sufficient to fulfill the requirements under our Rules of Appellate Procedure since it is not "in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service." N.C. R. App. P. 26(d). And as Defendants did not appear in any manner in this appeal, they have not waived service of the Notice of Appeal.

III. Conclusion

As Plaintiff failed to include a certificate of service with its Notice of Appeal as required by Rules 3 and 26 of the North Carolina Rules of Appellate Procedure, we must dismiss the appeal.

DISMISSED.

³ We also note there is no indication Plaintiff properly settled the record on appeal in accord with Rule of Appellate Procedure 18(d) as there is no certificate of settlement of the record included in our record. Plaintiff includes a certificate of service of the purported certificate of settlement of the record, stating "I hereby certify that the foregoing Settled Record on Appeal was served upon the parties listed below" and lists Defendants' attorney, but this does not indicate whether or how the record was actually settled. See R. App. P. 18(d)(2). Especially in combination with the lack of certificate of service of the Notice of Appeal, as we do not know whether Defendants received the Notice of Appeal or whether or how the record was settled, this is a substantial violation of our rules such that it substantially impairs our review of the merits of the case as we have no way of knowing if there has been a full and fair presentation of the record. See N.C. R. App. P. 25 ("Penalties for Failure to Comply with Rules"); N.C. R. App. P. 34 ("Frivolous Appeals; Sanctions").

BEACON POINTE OWNERS ASS'N, INC. V. CORRIGAN

Opinion of the Court

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).