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121 N.C.App. 72
Court of Appeals of North Carolina.

The FARM CREDIT BANK OF COLUMBIA, Plaintiff
v.
Seth H. EDWARDS, Administrator of the Estate of Mary H. Van Dorp and Seth H. Edwards, Administrator of the Estate of A.H. Van Dorp, Defendants.

No. COA94–1307.
|
Dec. 5, 1995.

Synopsis

Bank, as deed of trust beneficiary, brought action to recover deficiency following foreclosure sale. After deficiency award was vacated, 110 N.C.App. 759, 431 S.E.2d 222, and judgment was entered in favor of bank on remand, attorney of record for settlors, who were then deceased, filed notice of appeal. Administrator of settlors' estates moved to dismiss appeal. The Superior Court, Craven County, James E. Ragan, III, J., dismissed appeal, and settlors' attorney appealed. The Court of Appeals, Walker, J., held that: (1) motion to dismiss appeal was properly made to trial court rather than to the Court of Appeals; (2) notice of appeal was a nullity; (3) settlors' attorney consented to trial court's authority to decide matter outside county and district; and (4) any objection to personal jurisdiction was waived.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (9)

[1] Appeal and Error Power to order dismissal

Motion to dismiss appeal was properly made to the trial court, not to the Court of Appeals, where at the time the motion was made, notice of appeal had been filed with the trial court but had not yet been filed or docketed in the Court of Appeals. Rules App.Proc., Rule 25.

3 Cases that cite this headnote

[2] Executors and Administrators Representation of decedent

Mortgages and Deeds of Trust Right of review; standing; parties

Decision whether to appeal judgment in action to recover deficiency following foreclosure sale of decedents' property was within the powers granted to administrator as personal representative of decedents' estates. G.S. § 28A–13–3(a)(7, 15).

[3] Attorneys and Legal Services Particular Subjects of Authority

Attorney must be sensitive to his or her professional duty and assume responsibility for clearly defining attorney/client relationships and initiating necessary attorney/client communication.

[4] Mortgages and Deeds of Trust Taking and Perfecting Appeal

Finding that notice of appeal, filed by decedents' attorney of record following judgment in action to recover deficiency after foreclosure sale of decedents' property, was a nullity was supported by evidence that administrator of decedents' estates did not authorize attorney to proceed with appeal, that attorney did not notify administrator of his decision to give notice of appeal, that administrator opposed appeal on grounds that it was unlikely to benefit the estate and would instead erode the estate's assets, and that attorney was not employed by administrator until after the time for giving properly authorized notice of appeal had expired.

2 Cases that cite this headnote

[5] Judges Powers after expiration of term

Although there is general rule that judge may not enter orders out of session in another district,

exception exists for judge to exercise judicial authority after the expiration of the term upon the parties' consent.

[6] **Courts** Consent of Parties as to Jurisdiction

By requesting trial judge who was holding court in another district to consider objections to the proposed record and settle the record on appeal, party consented to the court's authority, even though the court ultimately dismissed party's appeal, where one of the objections to the record concerned dismissal of the appeal.

3 Cases that cite this headnote

[7] **Courts** Estoppel arising from submitting to or invoking jurisdiction

Seeking affirmative relief from court on any basis other than lack of jurisdiction constitutes waiver of jurisdictional objections.

1 Case that cites this headnote

[8] **Courts** Of the person

Courts Estoppel arising from submitting to or invoking jurisdiction

Objections to lack of jurisdiction over the person, including notice, may be waived by voluntary appearance or consent.

1 Case that cites this headnote

[9] **Motions** Oral motions

When case is on court calendar for trial, oral motions are in order.

****306** ***73** Appeal by defendants from order entered 19 August 1994 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 31 August 1995.

Attorneys and Law Firms

***74** Everett, Warren, Harper & Swindell by Edward J. Harper, II, Greenville, for plaintiff-appellee.

Lee E. Knott, Jr., Washington, for defendant-appellants.

Opinion

WALKER, Judge.

This action was brought by the plaintiff, Farm Credit Bank of Columbia, to recover the deficiency following a foreclosure sale of the Van Dorp property in Hyde County. Mary H. Van Dorp and A.H. Van Dorp denied that there was any deficiency alleging that the plaintiff purchased the property at the foreclosure for substantially less than its fair market value. On 31 October 1989, Judge Thomas S. Watts found that the defendants waived their statutory defense by signing a deed of trust which contained express language of waiver and granted plaintiff a partial summary judgment.

At a hearing on 18 March 1992, Judge William C. Griffin signed a judgment outside of the county and district awarding plaintiff $164,957.85 which included the amount of the deficiency, interest, and attorneys' fees. Defendants appealed and this Court vacated the decision of the trial court in an opinion filed 6 July 1993.

A.H. Van Dorp was acting as administrator of the estate of Mary H. Van Dorp until his death on 11 November 1992. On 17 December 1993, Seth H. Edwards (Edwards), attorney, was appointed administrator of the estates of the Van Dorps. When this case was called for trial on 2 May 1994 in Hyde County Superior Court, plaintiff orally moved that Edwards, as the duly appointed administrator of the estates of Mary H. Van Dorp and A.H. Van Dorp, be substituted as a party defendant. Edwards was present at this hearing when he was substituted as a party defendant and judgment was entered for the plaintiff. Thereafter, the attorney of record for the Van Dorps, Lee E. Knott, Jr. (Knott), filed notice of appeal in the case on 22 June 1994. On 23 June 1994, Edwards met with plaintiff's counsel and learned for the first time that notice of appeal had been filed.

Plaintiff's counsel filed a motion to dismiss the appeal on 19 July 1994 which was supported by an affidavit from Edwards. In the affidavit Edwards stated that Knott was not authorized to proceed with the appeal and that an appeal "is unlikely to

benefit either estate and will in fact seriously erode the assets of the estate."

On 21 July 1994, Knott filed a request to settle the record on appeal. At the hearing to settle the record on appeal, Judge James ***75** Ragan dismissed the appeal by an order filed 19 August 1994, finding that the notice of appeal filed on 22 June 1994 was a nullity because it was not authorized by and was expressly repudiated by Edwards as administrator of both estates.

By way of their first assignment of error, defendants argue that the trial court did not have jurisdiction to entertain and grant the plaintiff's motion to dismiss the defendants' appeal without notice at a hearing held for the purpose of settling the record on appeal. We disagree.

[1] Rule 25 of the N.C. Rules of Appellate Procedure provides that:

> [p]rior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court.

While Knott filed notice of appeal on 22 June 1994, the appeal was not filed in this Court until 21 November 1994 and was not docketed until 28 November 1994. Accordingly, plaintiff properly made its motion to dismiss the appeal to the trial court.

[2] **[3]** **[4]** Plaintiff relies on *Saieed v. Bradshaw,* 110 N.C.App. 855, 859, 431 S.E.2d 233, 235 (1993), as support for its argument that a ****307** trial court has jurisdiction to dismiss appeals for failure to comply with the N.C.Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. *See Estrada v. Jaques,* 70 N.C.App. 627, 321 S.E.2d 240 (1984). In *Bradshaw,* this Court upheld the trial judge's dismissal of an appeal when the notice of appeal was not timely filed. In this case, Edwards filed an affidavit on 13 July 1994 which expressly stated that "[a]t no time has he, as administrator of either of such decedent's estate, authorized the said Lee E. Knott, Jr., to proceed with such appeal." Furthermore, it was Edwards' opinion, as administrator of the estates, that the prosecution of such appeal would not benefit either estate but would in fact seriously erode the assets of the estates. Knott was not employed by the administrator until on or about 2 August 1994, after the time for giving a properly authorized notice of appeal had expired. This evidence supports the finding that the 22 June 1994 notice of appeal was a nullity.

In response, Knott, as attorney of record for the Van Dorps, asserts he had the authority to file the notice of appeal and that Edwards, as administrator, subsequently ratified this action by filing ***76** an affidavit on 2 August 1994. As such, defendants apparently argue that the trial court improperly found that the notice of appeal was a nullity. This argument is without merit.

A close examination of the record reveals that Knott did not notify Edwards of his decision to give notice of appeal. Edwards first learned of the appeal on 23 June 1994 in a meeting with counsel for the plaintiff. Thereafter on 13 July 1994, Edwards gave the following sworn statement:

> 4. After an examination of the record on appeal and the briefs of the parties in a previous appeal, he, as administrator of each such estate, is of the opinion that the prosecution of such appeal is unlikely to benefit either estate and will in fact seriously erode the assets of the estate for that, even if such appeal is successful, the result could only be remanded to the Superior Court of Hyde County for trial, which would even further erode the estates' assets.

Edwards was of the opinion that such appeal was not in the best interests of the estates.

The decision of whether to appeal the judgment filed 25 May 1994 was clearly within the powers granted Edwards as personal representative under N.C.Gen.Stat. § 28A–13–3a(7) (1994) which provides that an administrator shall have the authority "[t]o abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of

no benefit to the estate." Further, N.C.Gen.Stat. § 28A–13–3a(15) grants a personal representative the authority "[t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate." The record supports the trial court's findings that Knott was not employed by the administrator until on or about 2 August 1994 and was not authorized to file the notice of appeal. An attorney must be sensitive to the attorney's professional duty and assume responsibility for clearly defining attorney/client relationships and initiating necessary attorney/client communication. Accordingly, the trial court properly concluded that the notice of appeal was a nullity.

[5] **[6]** **[7]** In a related argument, defendants contend that the trial judge lacked the authority to dismiss the appeal while holding court outside the county and district. An exception to the general rule that a judge ***77** may not enter orders out of session in another district, is that a judge may exercise judicial authority after the expiration of the term upon the parties' consent. *Edmundson v. Edmundson,* 222 N.C. 181, 186, 22 S.E.2d 576, 580 (1942). In this case, defendant requested the trial judge, who was holding court in another district, to consider the objections to the proposed record and settle the record on appeal. One of the objections to the record concerned the dismissal of the appeal. Both parties participated in the hearing to settle the record without objection. Defendant, by requesting the court to settle the record on appeal, consented to the court's authority.

****308** Also, it is well established that seeking affirmative relief from a court on any basis other than lack of jurisdiction constitutes a waiver of jurisdictional objections. *M.G. Newell Co. v. Wyrick,* 91 N.C.App. 98, 100, 370 S.E.2d 431, 433–434 (1988). In sum, the trial judge in settling the record on appeal had the authority to consider the dismissal question as an objection to the proposed record. Further, defendants waived any objection they may otherwise have had by seeking affirmative relief.

[8] **[9]** In their last assignment of error, defendants contend that the findings of fact and conclusions of law made by the court in the order dismissing the appeal entitle defendants to relief from the judgment pursuant to Rule 60(b) of the Rules of Civil Procedure. Defendants argue that the judgment filed 25 May 1994 is void because Edwards was not served with process or given notice of the hearing, but was made a party to the action upon oral motion. We disagree.

Objections to lack of jurisdiction over the person, including notice, may be waived by voluntary appearance or consent. *Glesner v. Dembrosky,* 73 N.C.App. 594, 596, 327 S.E.2d 60, 62 (1985). In the present case, Edwards and Knott were present for the hearing and did not object to the administrator of both estates being substituted as a party defendant or to judgment being entered against defendants.

Also, it is well established that when a case is on a court calendar for trial, oral motions are in order. Our Supreme Court has held that "where an oral motion is appropriately made under Rule 7, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during the session of court at which the cause is regularly calendared is preserved." *Wood v. Wood,* 297 N.C. 1, 6, 252 S.E.2d 799, 802 (1979). In sum, any objection to personal jurisdiction was waived by Edwards appearing at the hearing and consenting ***78** to the substitution of the administrator as party defendant and the subsequent entry of judgment against the defendants.

Accordingly, we affirm the trial court's order dismissing the appeal.

Affirmed.

COZORT and McGEE, JJ., concur.

All Citations

121 N.C.App. 72, 464 S.E.2d 305