

JOHNSON V. SUN PRODUCTS INC.

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JOHNNIE JOHNSON,
Plaintiff-Appellee,
v.
SUN PRODUCTS, INC. and GUY
COURTNEY,
Defendants-Appellants.

NO. 30,025

COURT OF APPEALS OF NEW MEXICO

May 20, 2010

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY, Henry R. Quintero,
District Judge

COUNSEL

Frederick H. Sherman, Deming, NM, for Appellee

John D. Wheeler & Associates, P.C., John A. Frase, Alamogordo, NM, for Appellants

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, LINDA M. VANZI, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

Defendants appeal a final judgment entered in favor of Plaintiff and awarding damages, costs, and interest. [RP 752] We proposed to dismiss in a notice of proposed summary disposition because the district court had yet to rule on Defendants' motion to

reconsider. Defendants filed an untimely memorandum in opposition and a copy of a district court order filed February 1, 2010. We are not persuaded that Defendants' appeal is sufficiently final and thus dismiss the appeal.

In our notice, we observed that Defendants filed a notice of appeal from the underlying September 28, 2009, judgment on October 28, 2009. [RP 781] However, they also filed a motion to reconsider the final judgment on October 19, 2009, [RP 772] and Plaintiff filed a response to the motion to reconsider on October 29, 2009. [RP 783]

Defendants filed their docketing statement on November 30, 2009, and at that point, the district court had not yet ruled on Defendants' motion to reconsider. The district court is required to rule on Defendants' motion and it is not deemed denied by the passage of time. See Rule 1-059(E) NMRA; *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 15, 142 N.M. 527, 168 P.3d 99. In the absence of an order denying their motion, we proposed to dismiss Defendants' appeal as premature. See *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶¶ 4-6, 147 N.M. 303, 222 P.3d 675 (dismissing under similar circumstances).

Review of Defendants' memorandum in opposition and the attachment thereto indicates that Defendants filed an "emergency motion to say enforcement of judgment pending resolution of motion to reconsider" which was denied by the district court on February 1, 2010. In the order denying Defendants' emergency motion, the district court also denied Defendants' motion to reconsider. However, given that Defendants' appeal was pending at the time the order was entered, the district court was without jurisdiction to deny the motion for reconsideration. See *generally Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶¶ 9-11, 139 N.M. 625, 136 P.3d 1035 (stating the well-recognized rule that once an appeal is pending in this Court, the district court is divested of jurisdiction except to determine matters that are collateral to the issues involved in the appeal).

Therefore, we dismiss Defendants' appeal because it is not sufficiently final for purposes of appeal and the order denying their motion for reconsideration is of no effect because the district court did not have jurisdiction at the time it entered that order.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

LINDA M. VANZI, Judge