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NO. COA05-413

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

JOHN WAYNE SIMMONS and
wife SABLE SIMMONS,
Plaintiffs,

v.

Cabarrus County
No. 01 CVS 2578

PATRICIA E. KING,
Counselor and Attorney at Law,
and BETTY L. KELLY,
Defendants.

Appeal by Defendant Patricia E. King from judgment entered 14 October 2004 by Judge Albert Diaz in Cabarrus County Superior Court. Heard in the Court of Appeals 17 November 2005.

Hartsell & Williams, P.A., by J. Merritt White, III and Christy E. Wilhelm, for plaintiff-appellees.

Patricia E. King, defendant-appellant, pro se.

HUDSON, Judge.

Plaintiffs John Wayne Simmons and Sable Simmons brought this action for negligence, breach of fiduciary duty, and constructive fraud against defendant Patricia E. King, and breach of contract against defendant Betty Kelly. Defendant King answered and counterclaimed, then moved for a continuance, which motion the court denied. Following a bench trial, the court entered judgment against defendants and doubled damages against defendant King pursuant to N.C. Gen. Stat. § 84-13. The court also dismissed

defendant King's counterclaim with prejudice. Defendant King appeals. As discussed below, we affirm.

This case arose from a real estate closing involving plaintiff's purchase of property and a mobile home from defendant Kelly. Defendant King, an attorney representing Kelly in the transaction, failed to place \$2,500 into escrow as required, resulting in plumbing and repair costs to plaintiffs. Contrary to the terms of the offer to purchase and contract, King allocated closing costs to plaintiffs, failed to allocate the *ad valorem* costs between Kelly and plaintiffs, and overpaid the *ad valorem* taxes. King also failed to credit plaintiffs with earnest money and improperly dispersed funds. Plaintiffs alleged that King's actions resulted in a poor credit rating and larger loan balance for plaintiffs.

We begin by noting that defendant's brief violates several of the Rules of Appellate Procedure. Defendant's brief is single-spaced without the proper margins or font size, in violation of Rule 26(g). N.C. R. App. P. 26(g) (2003). In her reply brief, defendant has corrected these violations, but others remain. In arguments 1 and 3 of her brief, she fails to cite any authority in support of her assignments of error. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6) (2003). Thus, arguments 1 and 3 and the related assignments of error are deemed abandoned.

In her second argument, defendant King contends that the court erred in that conclusion of law 5 is not supported by the findings of fact. We disagree.

Defendant contends that although plaintiffs alleged constructive fraud, they failed to prove the required elements of actual fraud and failed to meet the special pleading requirements of actual fraud. Actual fraud "requires an allegation of facts to support the five elements of fraud." *Terry v. Terry*, 302 N.C. 77, 82-83, 273 S.E.2d 674, 677 (1981). However,

A constructive fraud claim requires even less particularity because it is based on a confidential relationship rather than a specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Id. at 85, 273 S.E.2d at 678-79 (internal citation and quotation marks omitted) (alteration in original). Here, plaintiffs allege constructive, rather than actual, fraud, contending that defendant King used her position of trust as their attorney to their detriment by improperly disbursing funds. Accordingly, the pleadings were sufficient and this assignment of error is overruled.

Defendant King next argues that the court erred by doubling the damages awarded to plaintiffs against her pursuant to N.C. Gen.

Stat. § 84-13 on the basis of fraud as the conclusions and findings do not support this award. We disagree.

King contends that because the elements of actual fraud were not proved against her, the court erred in doubling the award against her pursuant to N.C. Gen. Stat. § 84-13. King relies entirely on her argument in section 2 of her brief to support this contention. N.C. Gen. Stat. § 84-13 provides that:

If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

N.C. Gen. Stat. § 84-13 (2003). This Court has held that the statute applies in the case of constructive as well as actual fraud. *Estate of Smith ex rel. Smith v. Underwood*, 127 N.C. App. 1, 18, 487 S.E.2d 807, 818 (1997), *disc. review and motion to dismiss denied*, 347 N.C. 398, 494 S.E.2d 411 (1997). Having determined that the court did not err in concluding that Defendant King committed constructive fraud *supra*, we likewise overrule this assignment of error.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).