

NO. COA14-527

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

BRYANT & ASSOCIATES, LLC d/b/a
Bryant Enterprises, LLC,
Plaintiff,

v.

Wake County
No. 13-CVD-00536

ARC Financial Services, LLC, d/b/a
ARC RISK AND COMPLIANCE, and
LORENZO MASI,
Defendants.

Appeal by plaintiff from order entered 27 January 2014 by
Judge Louis Meyer in District Court, Wake County. Heard in the
Court of Appeals 9 October 2014.

John M. Kirby, for plaintiff-appellant.

*Brown Law LLP by Justin M. Osborn and Seth D. Beckley, for
defendants-appellees.*

STROUD, Judge.

Bryant & Associates, LLC d/b/a Bryant Enterprises, LLC
("plaintiff") appeals from an order granting ARC Financial
Services, LLC d/b/a ARC Risk and Compliance ("ARC") and Lorenzo
Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12
(2013). Finding no error, we affirm.

I. Background

On 1 May 2011, plaintiff and ARC executed a Master Services Agreement ("MSA") in which plaintiff agreed to perform anti-money laundering consulting services for ARC. The parties agreed that the MSA is to be construed according to Delaware law. On 3 September 2012, plaintiff sent an invoice of \$3,825 to ARC in connection with work performed for ARC's customer Detica NetReveal ("Detica"). On 1 December 2012, after ARC had failed to respond to plaintiff's communications, Kenneth Bryant, plaintiff's principal and managing director, sent Masi, ARC's managing member, a letter indicating that plaintiff would sue ARC to recover the unpaid amount. Masi responded and exchanged voicemails with plaintiff's counsel. On 27 December 2012, plaintiff gave Masi a few days to consider a settlement offer. A few days later, Masi requested additional time to respond. Over the next few days, the parties negotiated over Masi's deadline to respond, but the parties failed to reach an agreement. On 4 January 2013, plaintiff threatened that it would file suit three days later, on 7 January 2013.

A. North Carolina Action

On 10 January 2013, plaintiff sued ARC and Masi for unjust enrichment and quantum meruit in Wake County District Court. On 4 March 2013, ARC and Masi were properly served. On or about 19

March 2013, plaintiff served interrogatories and its first request for production of documents to ARC. On 20 March 2013, plaintiff amended its complaint to add claims for breach of contract and fraud and sought an additional \$4,400. On or about 8 April 2013, plaintiff served its second request for production of documents to ARC. ARC requested an extension of time to respond to plaintiff's requests, to which plaintiff consented.

On 22 April 2013, ARC and Masi moved to dismiss plaintiff's action or, in the alternative, moved to stay further proceedings because of a contemporaneous New Jersey action. Masi averred that plaintiff had performed all its work for ARC outside North Carolina. On or about 21 June 2013, plaintiff moved to compel ARC and Masi to respond to its discovery requests. On 16 August 2013, the Wake County District Court compelled ARC and Masi to respond to plaintiff's discovery requests. On 24 September 2013, Bryant averred that plaintiff's principal place of business is in North Carolina and plaintiff performed its work for Detica in North Carolina. Bryant also averred that Detica is headquartered in Massachusetts.

On or about 15 October 2013, the Wake County District Court denied ARC and Masi's motion to dismiss but refrained from ruling on ARC and Masi's motion to stay in order to allow the

parties to supplement the record regarding the New Jersey action.¹ A hearing on the motion to stay was set for 15 November 2013.² On or about 12 November 2013, ARC and Masi's counsel averred that some witnesses reside in New York, New Jersey, and Massachusetts. On or about 13 November 2013, Bryant averred that he and Masi would be the only necessary witnesses.

B. New Jersey Action

On 11 January 2013, ARC sued plaintiff and Bryant in New Jersey Superior Court for breach of the MSA's confidentiality and non-compete provisions, interference with ARC's contract with Detica, wrongful disclosure of proprietary and confidential information, breach of duty of loyalty, and civil conspiracy. In its complaint, ARC certified that: "The matter in controversy is not the subject of any other action in any Court. . . . No other action or arbitration proceeding is contemplated in regard to the matter in controversy." ARC asserts that plaintiff was properly served in the New Jersey action on or about 16 January 2013. Plaintiff contends that service was not proper. On or about 18 January 2013, the New Jersey Superior

¹ The Wake County District Court, however, granted Masi's motion to dismiss plaintiff's claims against him that were based on piercing the corporate veil.

² We do not have a transcript of this hearing in the record on appeal.

Court entered temporary restraints on plaintiff. On or about 8 February 2013, plaintiff and Bryant moved to dissolve the temporary restraints and dismiss ARC's complaint for lack of personal jurisdiction. On 24 May 2013, the New Jersey Superior Court denied plaintiff and Bryant's motion to dismiss.

On or about 24 June 2013, plaintiff and Bryant answered ARC's complaint and included counterclaims that mirrored plaintiff's claims against ARC in the North Carolina action. Plaintiff and Bryant also mentioned the North Carolina action in their answer. On 28 June 2013, ARC answered plaintiff and Bryant's counterclaims. On or about 3 July 2013, the New Jersey Superior Court ordered the parties to mediate.

On 20 September 2013, plaintiff and Bryant filed a third-party complaint against Masi and included claims that mirrored plaintiff's claims against Masi in the North Carolina action. On or about 19 November 2013, the parties failed to reach an agreement at mediation.

C. Wake County District Court's Order Granting Stay

On 27 January 2014, the Wake County District Court, after making many detailed findings of fact, granted ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12. On 21 February 2014, plaintiff gave a timely notice of appeal.

II. Motion to Stay

A. Standard of Review

We review a trial court's grant of a motion to stay for an abuse of discretion. *Muter v. Muter*, 203 N.C. App. 129, 132, 689 S.E.2d 924, 927 (2010).

We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's [grant] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 134, 689 S.E.2d at 928 (citations and quotation marks omitted).

B. Analysis

Plaintiff challenges the trial court's grant of ARC and Masi's motion to stay pursuant to N.C. Gen. Stat. § 1-75.12, which provides:

If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C. Gen. Stat. § 1-75.12(a). In determining whether trying a case in North Carolina would work a "substantial injustice" on the moving party, the trial court may consider the following factors:

(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Muter, 203 N.C. App. at 132, 689 S.E.2d at 927 (citing *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371, *appeal dismissed and disc. rev. denied*, 301 N.C. 93, 273 S.E.2d 299 (1980)).

In considering whether to grant a stay under [N.C. Gen. Stat. § 1-75.12], the trial court need not consider every factor and will only be found to have abused its discretion when it abandons any consideration of these factors. In addition, this Court has held that it is not necessary that the trial court find that all factors positively support a stay.

Id. at 132-33, 689 S.E.2d at 927 (citations and quotation marks omitted). A trial court, however, must find that (1) a substantial injustice would result if the trial court denied the

stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair. *Wachovia Bank v. Harbinger Capital Partners Master Fund 1, Ltd.*, 201 N.C. App. 507, 520, 687 S.E.2d 487, 495 (2009).

Plaintiff first complains that, in its order granting the motion to stay, the trial court erred in (1) considering the fact that plaintiff had not moved to stay the New Jersey action; (2) finding that mediation had failed due to ARC and Masi's motion to stay; (3) misstating ARC's claims against plaintiff and Bryant; (4) finding that most of the parties' contact with each other and with Detica occurred outside North Carolina; (5) finding that ARC and Masi would likely call witnesses from New Jersey, Massachusetts, and New York; and (6) concluding that granting a stay would avoid potentially conflicting results. We, however, do not review these issues individually; rather, we address plaintiff's contentions as a single issue: whether the trial court abused its discretion in granting the motion to stay. See *Muter*, 203 N.C. App. at 131, 689 S.E.2d at 926 (addressing a party's five assignments of error as a single argument that the trial court abused its discretion in denying a motion to stay). In its order, the trial court addressed many of

the *Motor Inn Management* factors in its findings of fact and conclusions of law:

9. At present, there are parallel lawsuits in New Jersey and North Carolina involving the same parties and essentially the same causes of action[], which are based upon the same subject matter and facts.

10. The New Jersey lawsuit also contains the claims raised by ARC Financial Services, LLC regarding [plaintiff] and Kenneth Bryant's services performed for Detica pursuant to a Master Services Agreement entered into between the parties and [plaintiff's] relationship with Detica. These claims have not been raised as counterclaims in the North Carolina action, and while it is conceivable that they could be raised in the North Carolina lawsuit, the New Jersey lawsuit, at present, includes these claims plus all claims raised by both sides of parties in the North Carolina lawsuit and, therefore, is slightly broader than the North Carolina action.

11. [Plaintiff's] contacts with ARC Financial Services, LLC and Lorenzo Masi in New Jersey pertaining to the subject matter of the parallel litigation were minimal. Similarly, ARC Financial Services, LLC's and Lorenzo Masi's contacts with [plaintiff] in North Carolina pertaining to said subject matter were minimal. Most of the parties' contacts with each other and Detica pertaining to said subject matter were in states other than North Carolina and New Jersey, including Detica's home state of Massachusetts as well as New York.

12. The Master Services Agreement between the parties pertaining to the services [plaintiff] performed for ARC Financial

Services, LLC's customer Detica, which are at issue in the parallel lawsuits, is governed by Delaware law, so each side's breach of contract claims will be governed by Delaware law, and the New Jersey state court is well capable of applying Delaware law as well as any North Carolina law that may apply to [plaintiff's] other claims.

13. [Plaintiff's] principal, Kenneth Bryant, likely will be the sole witness from [plaintiff] in any trial of the parallel lawsuits, and he resides in North Carolina. ARC Financial Services, LLC and Lorenzo Masi likely will call Mr. Masi and at least 1 or 2 other witnesses from ARC Financial Services, LLC in any trial of the parallel lawsuits, and they reside in New Jersey. ARC Financial Services, LLC and Lorenzo Masi intend to call witnesses, located in Massachusetts and employed by Detica, in any trial of the parallel lawsuits, and there may be another witness who resides in New York.

14. The parties have conducted a minimal amount of discovery in each of the respective parallel lawsuits. The New Jersey state court has denied [plaintiff's] motion in the New Jersey lawsuit to dismiss for lack of personal jurisdiction and lack of service of process, and the New Jersey appellate courts denied an appeal of that decision. A mediation was conducted in the New Jersey action but it was impass, largely due to the motion[] to stay in the North Carolina action not being resolved. This Court is unable to conclude that one of the parallel lawsuits is more or less advanced in progress than the other; however, at present, there is no pending motion in the New Jersey lawsuit, nor has there been any effort in the New Jersey lawsuit, to request the New Jersey state

court to stay the New Jersey action in favor of the parties proceeding with their dispute in the North Carolina action.

15. The matters being litigated by the parties in the parallel lawsuits are not matters of unique local concern to either North Carolina or New Jersey. There is equal or closely comparable availability to all parties in both the North Carolina and New Jersey forums of compulsory process to produce non-party witnesses at any trial of the parallel lawsuits. All parties have equal or closely comparable access in both the North Carolina and New Jersey forums to sources of proof.

16. [Plaintiff] contends that ARC Financial Services, LLC filed the New Jersey lawsuit knowing the North Carolina action was being filed and in an effort to lay groundwork to have the North Carolina action stayed in favor of the New Jersey lawsuit; however, this Court is unable to conclude that ARC Financial Services, LLC engaged in inequitable conduct in filing the New Jersey lawsuit. Further, this Court is unable to conclude whether or not either party or set of parties on opposing sides of these disputes may have filed their respective lawsuits for an inequitable purpose; rather, it appears that, on their face, each of the parallel lawsuits was filed for a legitimate purpose.

17. ARC Financial Services, LLC and Masi, through their attorneys in the North Carolina action, have represented to the Court in the above-captioned action and stipulated during the most recent court hearing in the above-captioned North Carolina action that ARC Financial Services, LLC and Lorenzo Masi consent and will submit to the jurisdiction of the New Jersey state

court for purposes of proceeding with [plaintiff] and Kenneth Bryant's claims that have been asserted against them in the North Carolina action and the New Jersey lawsuit.

In light of the trial court's reasoned analysis of the *Motor Inn Management* factors and consequent detailed findings of fact and conclusions of law, we hold that the trial court's grant of the motion to stay was not "a patently arbitrary decision, manifestly unsupported by reason." See *id.* at 134, 689 S.E.2d at 928.

Plaintiff next contends that the doctrine of judicial estoppel prevented ARC from asserting, in its 22 April 2013 motion to stay, that the New Jersey action directly related to the subject matter of the North Carolina action, because it had certified, in its 11 January 2013 complaint, that the matter in controversy in the New Jersey action was not the subject of any other action or contemplated action. Judicial estoppel protects the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Powell v. City of Newton*, 364 N.C. 562, 568, 703 S.E.2d 723, 728 (2010). In determining whether to invoke the doctrine, we consider, among other factors, whether a party's subsequent position is "clearly inconsistent" with its earlier position. *Id.* at 569, 703 S.E.2d at 728.

ARC certified its complaint one day after plaintiff filed its action in North Carolina. ARC was not served with the North Carolina action until 4 March 2013, almost two months later. ARC's certification that the matter in controversy was not the subject of any other action thus accurately reflected ARC's knowledge at the time it was made. It is unclear whether ARC's additional certification that "[n]o other action . . . is contemplated in regard to the matter in controversy" refers to the contemplations of the certifying party or the opposing party. (emphasis added). We interpret this certification to require a party to certify its own contemplations, rather than those of the opposing party. We therefore hold that, at the very least, ARC never adopted a position that was "clearly inconsistent" with its position that the New Jersey action directly related to the subject matter of the North Carolina action. See *id.*, 703 S.E.2d at 728. Accordingly, we hold that ARC was not judicially estopped from arguing in its motion to stay that the New Jersey action directly related to the subject matter of the North Carolina action. See *id.* at 568, 703 S.E.2d at 728.

Plaintiff further contends that ARC initiated the New Jersey action in bad faith as a "tactical maneuver." But, in

its order, the trial court found that ARC had not engaged in "inequitable conduct" and had filed its lawsuit for a "legitimate purpose." Nothing in the record suggests that ARC's complaint is a sham pleading. Accordingly, we hold that the trial court did not abuse its discretion in granting ARC and Masi's motion to stay.

III. Conclusion

Because the trial court did not abuse its discretion in granting ARC and Masi's motion to stay, we affirm the trial court's order.

AFFIRMED.

Judges GEER and BELL concur.