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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-871

Filed: 20 June 2017

Iredell County, No. 15 CVD 202

THOMAS J. McLEOD, Plaintiff,

v.

SANDRA A. McLEOD, Defendant.

Appeal by Plaintiff from judgment entered 18 May 2016 by Judge Deborah P. Brown in District Court, Iredell County. Heard in the Court of Appeals 9 February 2017.

*Patricia L. Riddick for Plaintiff-Appellant.*

*Melanie Stewart Cranford for Defendant-Appellee.*

McGEE, Chief Judge.

*I. Facts and Procedural History*

Thomas J. McLeod (“Plaintiff”) and Sandra A. McLeod (“Defendant”) were married 11 June 2006. Plaintiff and Defendant separated, and purportedly agreed upon a separation agreement (“agreement”), the last page of which Plaintiff signed on 11 April 2014, and Defendant signed on 21 June 2014. The agreement purportedly

MCLEOD V. MCLEOD

*Opinion of the Court*

addressed equitable distribution and, therefore, foreclosed both parties' right to file a claim for equitable distribution. However, Plaintiff filed the current action for equitable distribution on 29 January 2015.

As Plaintiff acknowledges in his brief, he signed the agreement, held onto it for over two months, altered the agreement by making certain terms more favorable to himself, and then "tricked Defendant into signing [Plaintiff's] [altered] version of the agreement[.]" According to Defendant, subsequent to her signing the agreement, she realized that Plaintiff had altered the agreement. At a hearing on the matter, Defendant's attorney testified that "[a]s a protection to my client," "I went ahead and recorded at the Register of Deeds" the original agreement with the signature page from the altered agreement attached. As justification for why the filing of his claim for equitable distribution was appropriate, Plaintiff stated in his complaint:

The parties to this action tricked each other into executing a Separation Agreement and Property Settlement Agreement; however, there was no meeting of the minds. The Plaintiff tricked the Defendant into signing his version of the Separation Agreement, and the Defendant took Plaintiff's signature page and attached it to her version.

In response to Plaintiff's complaint for equitable distribution, Defendant filed "Motions, Answer and Counterclaim" on 14 May 2015. Defendant argued that (1) Plaintiff's complaint failed to state a claim upon which relief could be granted and, therefore, should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); (2) asked the trial court to sanction Plaintiff for filing the complaint; and (3)

MCLEOD V. MCLEOD

*Opinion of the Court*

counterclaimed for absolute divorce and attorney's fees. This matter was heard 29 March 2016, and an order was entered 18 May 2016. At the hearing, the trial court heard testimony from Defendant, Defendant's attorney Richard Webb ("Mr. Webb"), and Ashley Poteet, a notary from Mr. Webb's office.

The trial court made the following relevant findings of fact and conclusions of law in its 18 May 2016 order:

5. Prior to the date of separation, the parties had sat down with one another and made a list of items that each party was to receive upon the parties' separation.

6. [ ] Defendant subsequently took the list of items to [her] Attorney Richard Webb for the purpose of having a Separation Agreement drawn up.

7. The parties engaged in subsequent negotiations, and modifications were made to the original Separation Agreement.

8. On several occasions, Plaintiff indicated a willingness to sign the Separation Agreement. On one occasion, the parties agreed to meet at Mr. Webb's office to sign the Separation Agreement, and [ ] Plaintiff did not show up to sign the Agreement.

9. [ ] Defendant learned that [ ] Plaintiff had left North Carolina and was moving to Mississippi.

10. The parties met on another occasion at a car dealership in South Carolina, and [ ] Plaintiff signed the Separation Agreement prepared by Mr. Webb but took the copies with him telling [ ] Defendant that he wanted to think about them. He later texted her a picture of him burning the Separation Agreement.

MCLEOD V. MCLEOD

*Opinion of the Court*

11. Finally on April 11, 2014, [ ] Plaintiff appeared at the law offices of Attorney Richard Webb and signed the Separation Agreement in the presence of notary, Ashley Poteat. Plaintiff had come there on more than one occasion to review the Separation Agreement prior to April 11, 2014.

12. On April 11, 2014, [ ] Plaintiff insisted on taking the Separation Agreement that he had signed with him, and [ ] Defendant consented to him taking the Separation Agreement.

13. [ ] Plaintiff then told [ ] Defendant that he was going to hold onto the copies for two (2) months while they attempted to work things out between them and that if they could not, then she could sign the Separation Agreement and the matter would be concluded.

14. That on or about June 21, 2014, [ ] Plaintiff and Defendant met with each other for the purpose of signing the Agreement. The meeting took place in the office of Defendant's supervisor, who was a notary.

15. That [ ] Plaintiff had the Separation Agreement detached on the signature pages and provided the signature pages to [ ] Defendant for her signature. She signed them in the presence of the notary, and they were notarized. Plaintiff then attached the Agreements and provided her with a copy.

16. After the documents were signed, [ ] Plaintiff sent [ ] Defendant a message that he had tricked her into signing the Separation Agreement; that he had modified the Agreement prepared by Mr. Webb, inserted his own pages into the Agreement, and had her sign the original notary page from the original Agreement.

17. [ ] Defendant took the executed copy of the Separation Agreement to Mr. Webb, and Mr. Webb's office removed the signature page from the doctored Separation Agreement, attached it to the Agreement that Mr. McLeod had signed

MCLEOD V. MCLEOD

*Opinion of the Court*

on April 11, 2014, and filed it with the Register of Deeds on July 10, 2014.

18. That the Agreement that [ ] Plaintiff acknowledges tricking his Wife into signing removes one provision that he did not want in the Agreement, changes who is to pay the equity line on certain property, and changes the personal property distribution section and allows for a \$10,000 payment to himself be paid by [ ] Defendant. All of the changes were for the benefit of [ ] Plaintiff.

19. The Court finds that Defendant's Exhibit One (1) was the original Separation Agreement and Property Settlement prepared by Mr. Richard Webb and was accepted by [ ] Plaintiff on April 11, 2014.

20. That [ ] Defendant accepted that Agreement on June 21, 2014, and that is the Contract between the parties which is enforceable as that was the Agreement which was reached between the parties.

21. That both the original Agreement and the Agreement that [ ] Plaintiff tricked [ ] Defendant into signing both waive any right to equitable distribution of the marital property as the Separation Agreement distributes the property to the Husband and Wife.

**BASED UPON FOREGOING FINDINGS OF FACTS, THE COURT CONCLUDES AS A MATTER OF LAW:**

.....

2. The original Separation Agreement, which is a valid and enforceable contract between the parties, provides that the parties waive equitable distribution of their marital property in that "the division and distribution of marital property set forth herein is just, fair and reasonable and is deemed by the parties to be equitable and that this Agreement shall be binding on the parties."

*Opinion of the Court*

3. The document contained in Defendant's Exhibit Two (2) is not an enforceable agreement and Property Settlement as there was no meeting of the minds regarding that Agreement.

4. That based upon the admissions of [ ] Plaintiff in his complaint regarding the method by which the document contained in Defendant's Exhibit Two (2) was signed, the Court finds that sanctions are appropriate.

The trial court then purported to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and sanctioned Plaintiff \$2,500.00 for costs and attorney's fees. Plaintiff appeals.

II. *Analysis*

Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss pursuant to Rule 12(b)(6). For the reasons stated below, we vacate the 18 May 2016 order and remand to the trial court for further action.

"Our Supreme Court has long recognized that '[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed.'" *Brittian ex rel. Hildebran v. Brittian*, \_\_ N.C. App. \_\_, \_\_, 776 S.E.2d 867, 871 (2015) (citation omitted).

[U]nlike a motion to dismiss under Rule 12(b)(6), the purpose of summary judgment under Rule 56 is not to test the legal sufficiency of the pleadings, but rather, in reviewing evidentiary material from outside the pleadings, "to provide an efficient method for determining whether a material issue of fact actually exists."

MCLEOD V. MCLEOD

*Opinion of the Court*

*Id.* (citation omitted). In the present matter, the trial court considered evidence outside the pleadings at the 29 March 2016 hearing, including the testimony of three witnesses.

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). Therefore, we treat the trial court's 18 May 2016 order as one granting summary judgment in Defendant's favor pursuant to Rule 56, and not as one dismissing Plaintiff's complaint pursuant to Rule 12(b)(6). *Id.*

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

We review the trial court's grant of summary judgment *de novo*. Summary judgment is proper when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that no genuine issue of material fact exists between the parties with respect to the controversy being litigated and the moving party is entitled to judgment as a matter of law. In considering such a motion, the court must view the evidence in the light most favorable to the nonmovant. The party moving for summary judgment bears the burden of establishing the lack of any triable issue of fact. This burden may be met "by proving that an essential element of the opposing party's claim is non-existent, or by showing through

*Opinion of the Court*

discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]”

*Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 410–11, 618 S.E.2d 858, 860–61 (2005) (citations omitted). Generally, oral testimony is not given at a summary judgment hearing. However:

We recognize that in limited cases, our Court has also allowed the trial court to consider avenues outside the previously cited methods of proof. Oral testimony at a hearing on a motion for summary judgment may be offered; however, the trial court is *only to rely on such testimony in a supplementary capacity*, to provide a “small link” of required evidence, but not as the main evidentiary body of the hearing. The trial court may also consider arguments of counsel as long as the arguments are not considered as facts or evidence. *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976) (“Information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under Rule 56(c).”). However, supplemental discovery, as submitted by plaintiffs, has not been recognized as an accepted method of proof in determining a motion for summary judgment and we decline to do so in this case.

*Strickland v. Doe*, 156 N.C. App. 292, 296–97, 577 S.E.2d 124, 129 (2003) (emphasis added) (citations omitted); *see also Insurance Co. v. Chantos*, 21 N.C. App. 129, 131, 203 S.E.2d 421, 424 (1974) (“Undoubtedly, Rule 56(e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. However, this provision presupposes that an affidavit or affidavits have already been served. The rule speaks only of supplementing or opposing. Clearly, it does not intend to authorize filing, on the day

MCLEOD V. MCLEOD

*Opinion of the Court*

of the hearing, the only affidavits supporting the motion for summary judgment.”); *Id.* at 132, 203 S.E.2d at 424 (“The provisions of Rule 43(e) can be used in supplementing a summary judgment hearing through the use of oral testimony. This procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial.”) (citation omitted).

First, no affidavits were filed in the present case. The parties, and the trial court, relied in the first instance upon the testimony of witnesses and, therefore, the substance of this testimony was first known the day of the hearing. The filings and hearing conducted 29 March 2016 were not sufficient for making a decision on summary judgment. *Id.*

Second, the trial court was required to make determinations of material fact in order to reach its decisions and make its ruling. The trial court’s order is dependent on its conclusions that there was a meeting of the minds between Plaintiff and Defendant with regard to the original agreement, and that there was no meeting of the minds with regard to the altered agreement. In order to reach these conclusions, the trial court necessarily decided material facts surrounding the “execution” of those “agreements,” and relied upon those findings of fact to support its ultimate conclusions regarding “meeting of the minds.” Those determinations were not

MCLEOD V. MCLEOD

*Opinion of the Court*

properly made on summary judgment. *Wallen*, 173 N.C. App. at 410–11, 618 S.E.2d at 860–61.

We must vacate the trial court’s 18 May 2016 order and remand for further action consistent with this opinion. Because we have held that this matter was not appropriate for summary judgment, we also hold that it was error, pursuant to the 18 May 2016 order, to sanction Plaintiff for filing the complaint in this matter. Appropriate sanctions, if any, must be determined following a valid final ruling in this matter.

VACATED AND REMANDED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).