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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1121

Filed: 21 August 2018

Mecklenburg County, No. 14-CVS-5143

RICKY EDWARD EMERT, Individually, and on behalf of PRODIGY ALLSTARS OF CONCORD, INC. and PRODIGY ALLSTARS CORPORATION, Plaintiffs,

v.

AMANDA LEIGH SMITH and husband, CODY R. SMITH; UNITED SPIRIT, INC.; KEVIN BRUBAKER; LEIGH ANN BARGER a/k/a LEIGH ANN FOWLKES; JEFFREY L. FOWLKES; CHARLOTTE ALLSTARS CHEERLEADING AND DANCE; CHARLOTTE ALLSTAR CHEERLEADING BOOSTER CLUB; CHEERSPORT, CORP.; SPIRIT HOLDINGS, INC.; CHARLOTTE ALLSTAR CHEERLEADING; CHARLOTTE ALLSTAR CHEERLEADING, INC.; CHARLOTTE ALLSTARS; CHARLOTTE ALLSTARS, INC.; CHEERSPORT, JENNIFER BRUBAKER; JULIA O'BRIEN; and ISC GYMNASTICS AND CHEERLEADING, LLC, Defendants,

v.

HOPE EMERT and NORTH CAROLINA YOUTH FOOTBALL LEAGUE, Third-Party Defendants.

Appeal by defendants Leigh Ann Barger and Jeffrey L. Fowlkes from order entered 22 May 2017 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2018.

Weaver, Bennett & Bland, P.A., by Michael David Bland and Bo Caudill, for plaintiffs-appellees.

Sellers, Ayers, Dortch & Lyons, P.A., by Michelle Massingale Dressler and Brett E. Dressler, for defendants-appellants.

ZACHARY, Judge.

Defendants-appellants Leigh Ann Barger and Jeffrey L. Fowlkes appeal from the trial court's 22 May 2017 order granting summary judgment in favor of plaintiffs. For the reasons that follow, we affirm.

Background

In early 2009, plaintiff Ricky Emert ("plaintiff") and his wife, Hope Emert, approached Amanda and Cody Smith about starting a cheerleading program for children. On 15 February 2009, Articles of Incorporation were filed with the Secretary of State, forming Prodigy Allstars Corporation ("Prodigy I"). The Smiths and Emerts formally agreed that each couple would own 50% of the corporation's shares. It was also agreed that Hope would handle finances, and that Amanda would serve as the general manager and corporate director. Neither plaintiff nor Cody was to be involved in the day-to-day operations of the program.

By 2012, Prodigy I was $23,000 in debt. Plaintiff, who had not previously paid attention to finances, began reviewing the corporation's bank account statements and other records. He concluded that both Hope and Amanda were misusing funds.

By mid-2012, Prodigy I's financial troubles and plaintiff's accusations of financial improprieties resulted in tension between the shareholders. In August of 2012, Amanda formed a new corporation, Prodigy Allstars of Concord, Inc. ("Prodigy

II"). Amanda withdrew approximately $48,000 from Prodigy I's bank account—the total balance—and deposited these funds into a new bank account opened for Prodigy II. Prodigy II conducted the same business in the same location as Prodigy I; however, under the new corporate charter, Amanda was the president, sole shareholder, and sole officer. Amanda was also the only person with access to the new bank account. Plaintiff demanded access to Prodigy II's bank account and his appropriate number of shares in the corporation. Amanda initially denied plaintiff access to the bank account, but eventually granted plaintiff account access and transferred 50% of the shares to plaintiff after his lawyer sent Amanda a letter threatening to sue.

In early 2013, Amanda and Leigh Ann Barger began discussions about a merger between Prodigy II and Charlotte Allstars, another cheerleading program. Barger managed Charlotte Allstars, which was run by her father, Jeffrey Fowlkes, and owned by her father's corporation, United Spirit, Inc. In March 2013, plaintiff, Amanda, Barger, and Fowlkes met to discuss a possible merger. After the meeting, Fowlkes told Barger that he expected the merger would be successful. Ostensibly because the cheerleading season runs from March to April every year, Barger and Amanda acted quickly to inform parents and children of the merger before the season began. Amanda and Barger began distributing flyers and other advertisements of the upcoming merger. Both Barger and Fowlkes individually emailed Amanda to keep her informed of progress regarding the merger. By 21 March 2013, prior to any deal

being reached between plaintiff and United Spirit, Inc., Amanda was given the email address amandasmith@charlotteallstars.com.

On 23 March 2013, Fowlkes sent plaintiff a written proposal offering $55,000 for plaintiff's 50% ownership interest in Prodigy II. Fowlkes also offered $115,000 to acquire Prodigy II. After plaintiff accepted the offer, Fowlkes demanded additional terms; specifically, he asked plaintiff to sign a two-year non-compete agreement. Plaintiff refused to accept the changes.

Three days later, on 26 March 2013, Barger notified Amanda that the deal was off. Amanda, who was becoming increasingly frustrated with plaintiff, emailed Barger, "We are working on it . . . I'm going to try to get it figured out. I have a meeting with an attorney tomorrow . . . so I will call you right after . . . . SCREW [plaintiff] RICK!!!" Barger responded, "This will be better for us in the long run anyways!!!" Amanda had the Prodigy II staff "sign employment packages" with Charlotte Allstars. According to Amanda, plaintiff was aware this was happening, as demonstrated by plaintiff's own daughter completing an application to work for Charlotte Allstars. However, according to plaintiff, it was around this time that he grew concerned that Amanda was conspiring with Cody, Fowlkes, and others to recruit the students and staff, and to steal business from Prodigy II.

On 9 April 2013, plaintiff rejected another demand from Fowlkes. The following day, Amanda emailed her attorney to ask

> [If] we decide to go forward with [Fowlkes] without [plaintiff] . . . what liabilities would we face? [Fowlkes] does not want to pay [plaintiff] for anything . . . . [Fowlkes] said he is willing to buy every athlete in our gym a new uniform if we will just go on without him having to pay [plaintiff]. [R p 387]

Although plaintiff reconsidered Fowlkes's proposal and sent an email on 11 April 2013 accepting the amendment, Amanda applied for employment at Charlotte Allstars/United Spirit, Inc. on 15 April 2013. Amanda was hired as a Charlotte Allstars/United Spirit, Inc. director effective 7 May 2013. Three days later, on 18 April 2013, Fowlkes informed plaintiff that he was permanently ending negotiations. Fowlkes, on behalf of his business United Spirit, Inc., then entered into a commercial lease for the business space occupied by Prodigy II effective 6 May 2013, without the knowledge or consent of plaintiff. Fowlkes's cheerleading outfit was operating out of the Prodigy II space, with Prodigy II equipment, staff and customers. Prodigy II had lost most of its staff, clients, and the property lease to United Spirit, Inc. without receiving any compensation in return.

Plaintiff, individually and on behalf of the Prodigy corporations, instituted this action against Fowlkes, Barger, Amanda Smith, Cody Smith, and United Spirit, Inc. Plaintiff brought individual claims against defendants for, *inter alia*, facilitation of fraud, civil conspiracy, unfair and deceptive trade practices, and usurping a corporate opportunity. Derivative claims were brought for, *inter alia*, facilitation of fraud, conspiracy, and unfair and deceptive trade practices.

On 5 April 2017, plaintiffs moved for summary judgment. Plaintiffs filed an affidavit in support of their motion for summary judgment that same day, attaching transcripts of the depositions taken of Emert, Fowlkes, Amanda, and Barger. Other affidavits in support of plaintiffs' motion for summary judgment were filed prior to the hearing. Without filing any counter-affidavits, Fowlkes, Barger, Amanda Smith and Cody Smith appeared *pro se* at the hearing on plaintiffs' motion for summary judgment, where they made oral statements arguing their case. There is no indication that these oral statements were sworn. On 22 May 2017, the trial court granted summary judgment in favor of plaintiffs. Plaintiff was individually awarded $55,000 in compensatory damages. Pursuant to N.C. Gen. Stat. § 75-16, that award was trebled to $165,000. The trial court also awarded Prodigy II $115,000 in compensatory damages, trebled to $345,000.

Fowlkes and Barger timely appealed. They argue that (1) the trial court erred in granting plaintiffs' motion for summary judgment on every claim; and (2) alternatively, the amount of damages awarded to Prodigy II was improper.

Discussion

I. Standard of Review

This Court reviews orders granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is properly entered 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) (2017). "Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Initially, "the party moving for summary judgment bears the burden of establishing there is no triable issue of material fact." *Blackmon v. Tri-Arc Food Sys.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 744 (2016) (quoting *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). "The trial judge must consider all the presented evidence in a light most favorable to the nonmoving party, and all inferences of fact must be drawn against the movant and in favor of the nonmovant." *DeWitt*, 355 N.C. at 682, 565 S.E.2d at 146 (citations and quotation marks omitted). When the movant files a testimonial affidavit arguing there is no triable issue, "the opposing party pursuant to Rule 56(e) and (f), must file papers which show there is a triable issue or the moving party will be entitled to summary judgment." *Nye v. Lipton*, 50 N.C. App. 224, 227, 273 S.E.2d 313, 315, *disc. review denied*, 302 N.C. 630, 280 S.E.2d 441 (1981); *accord Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 604-05, 676 S.E.2d 79, 83 (2009).

II. Consideration of Deposition Transcripts and Oral Arguments

Barger and Fowlkes first assert that the trial court erred by failing to consider (1) the deposition transcripts submitted by plaintiffs in support of their motion for summary judgment, and (2) Barger's and Fowlkes's oral arguments and statements at the hearing.

Neither Barger nor Fowlkes responded to plaintiffs' affidavits with either "counter affidavits or other proof as required by our Rules of Civil Procedure." *Cox v. Haworth*, 54 N.C. App. 328, 330, 283 S.E.2d 392, 394 (1981); N.C. Gen. Stat. § 1A-1, Rule 56(e) (2017). However, counsel for plaintiffs provided the judge with transcripts of the parties' depositions.

At the hearing, Judge Caldwell stated, "I'm limited about what I can take into account with what you all are saying. In all candor, I don't have to let you say any of this stuff since you do not have affidavits." Barger and Fowlkes now assert that these statements are controlling on appeal. However, based on the court's written findings and conclusions, it is clear that the depositions and oral statements were considered in granting plaintiffs' summary judgment motion:

> Having considered the Plaintiffs' Motion for Summary Judgment, *the arguments of the parties with respect to same*, and the pleadings, *depositions*, answers to interrogatories, and admissions on file . . . the Court [finds]

> and [concludes] that there are no genuine issues of material fact and that Plaintiff[s] [are] entitled to judgment as a matter of law . . . .

(emphasis added). A court's written order supersedes any comments a trial judge makes during a hearing. *Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) (citation omitted). Therefore, despite any statements made by the court at the hearing, we must respect the trial court's written order, which unmistakably includes the arguments of the parties together with the depositions as integral parts of the basis for the judge's decision in this matter.

Barger and Fowlkes further contend that the trial court could not have reviewed hundreds of pages of depositions and concluded plaintiffs were entitled to summary judgment. This argument ignores the court's written order setting forth the award of damages. The trial court found Prodigy II was valued at $115,000, but this value of the corporation does not appear in plaintiffs' affidavits; rather, it appears in Fowlkes's deposition. On pages 51-52 of his deposition, Fowlkes discussed offering plaintiff $115,000 for Prodigy II. Thus, it is evident from Judge Caldwell's written order that he reviewed and considered the deposition transcripts.

Moreover, admission of Barger's and Fowlkes's oral statements at the hearing on plaintiffs' motion for summary judgment was within the court's discretion. *See Hillman v. United States Liab. Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 308 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983) (citation omitted)

("Furthermore, we note that while oral testimony is permissible on a motion for summary judgment, the admission of such testimony is in the court's discretion. Defendant gives no reason why he failed to present his evidence by affidavit. There was no abuse of discretion in the denial of defendant's motion for an evidentiary hearing."). Here, Barger and Fowlkes did not move for an evidentiary hearing and gave no reason for their failure to present counter-affidavits in support of their contentions prior to the hearing. Even had they done so, "the admission of such testimony is in the court's discretion."

We conclude that the trial court's conclusions of law were supported by the affidavits and depositions provided to the court. Barger and Fowlkes's assertion of error is therefore without merit.

III. Unfair and Deceptive Trade Practices

Barger and Fowlkes next assert that it was error to grant summary judgment to plaintiffs on the claim of unfair and deceptive trade practices. Barger and Fowlkes's brief devotes only a single paragraph to this issue, arguing that summary judgment was granted solely on the basis of mere allegations. We disagree.

"An action for unfair or deceptive acts or practices is . . . 'neither wholly tortious nor wholly contractual in nature.' " *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984) (quoting Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704, 322 N.E. 2d 768, 779 (1975)). "To succeed on a claim for

[unfair and deceptive trade practices], a plaintiff must prove: '(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby.' " *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 82, 665 S.E.2d 478, 486 (2008) (quoting *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007)). This Court has defined an unfair practice as one that "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Griffith*, 184 N.C. App. at 217, 646 S.E.2d at 558. Accordingly, a plaintiff must show the act "possessed the tendency or capacity to mislead, or created the likelihood of deception"; deliberate acts of bad faith or deceit are not necessary. *Forsyth Memorial Hosp. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992), *disc. review denied*, 333 N.C. 344, 426 S.E.2d 705 (1993) (citation and quotation marks omitted).

The trial court was presented with ample evidence to support the conclusion that Barger, Fowlkes, and Amanda, among others, "engaged in the facilitation and conspiracy to commit fraud and obtained the property of [Prodigy II] for Defendant United Spirit, Inc., by false pretenses. . . ."

While merger discussions were ongoing, Fowlkes, Barger, Amanda, and others reduced Prodigy II to a shell of a company. Barger and Amanda dedicated significant effort to preparing flyers and other advertisements of the merger. They notified the

parents and children of the new program Prodigy II was joining, advised them to sign up with Charlotte Allstars, and then actually enrolled the children in the Charlotte Allstars program. In addition, Amanda had the Prodigy II employees apply for employment with United Spirit, Inc. Barger, Amanda, and Fowlkes were in email communication throughout the negotiations, and thus Amanda and Barger were fully aware that the merger discussions were unsuccessful. This is evident from the emails exchanged on 26 March 2013, when Barger alerted Amanda that plaintiff had rejected a demand. Barger's statement that "[t]his will be better for us in the long run" implies that Amanda, Fowlkes, and Barger planned to eventually be in business together in some capacity. Moreover, Amanda's email to her attorney on 10 April 2013 inquiring about possible liability for "moving forward without [plaintiff]" because "[Fowlkes] doesn't want to pay [plaintiff]" supports the trial court's finding that Fowlkes and Barger were using Amanda as an intermediary to engage in unfair and deceptive practices. Fowlkes, on behalf of his business United Spirit, Inc., then entered into a commercial lease for the Prodigy II business space effective 6 May 2013, without the knowledge or consent of plaintiff. Ultimately, Fowlkes's business United Spirit, Inc. took possession of Prodigy II's lease space, customer contacts, and employees. In short, Prodigy II was left with no customers, no employees, and no building in which to operate; therefore, there was nothing left for Fowlkes to buy from

plaintiffs. Fowlkes opened his own business in place of Prodigy II, with no need for a merger.

Based on the depositions, affidavits, and other information before the trial court, we agree that Barger and Fowlkes did not present facts showing any issue of triable fact on the claim of unfair and deceptive trade practices. Accordingly, we affirm the trial court's grant of summary judgment to plaintiffs.

IV. Damages

The North Carolina Unfair and Deceptive Trade Practices Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal." N.C. Gen. Stat. § 75-1 (2017). Damages for violations of § 75-1 are found in § 75-16:

> If any person shall be injured or the business of any person . . . shall be broken up, destroyed or injured by reason of any act . . . done by any other person . . . or corporation in violation of the provisions of this Chapter, such person . . . so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. Gen. Stat. § 75-16 (2017). Further, we have held that where the award of damages is supported by evidence, "the benefit of the bargain damage rule applies

which entitles the plaintiff to be placed in the position he would have been in if the representation had been true." *Strickland v. A & C Mobile Homes*, 70 N.C. App. 768, 770-71, 321 S.E.2d 16, 19 (1984) (citing *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) and *Lee v. Payton*, 67 N.C. App. 480, 313 S.E.2d 247 (1984)).

As previously discussed, the actions of Barger and Fowlkes constituted an unfair and deceptive practice. Based on the amounts Fowlkes offered to pay plaintiff, the trial court awarded plaintiff $55,000 and Prodigy II $115,000 in compensatory damages. Nevertheless, Barger and Fowlkes argue that, "[e]ven if you valued Appellee Emert's 50% share at $55,000, an award of $115,000 to Prodigy values the same 50% share at $57,500, making the order internally inconsistent." Again, Barger and Fowlkes assert that "there was, at best, conflicting evidence of value" for Prodigy II, and that this would essentially "amount to a double damage award for Appellee Emert."

Barger and Fowlkes mistakenly conflate plaintiff's award of damages with Prodigy II's damages. Prodigy II is a separate and distinct legal entity from plaintiff. There appears before us no indication that plaintiff would individually receive 50% of the $115,000 awarded to Prodigy II, as that money belongs to the corporation itself. Fowlkes made separate offers to plaintiff and Prodigy II, and surely Fowlkes had no intention for plaintiff to receive double what he was individually offered for his ownership interest. Although Amanda testified that neither Prodigy I nor Prodigy II

ever made a profit, this does not invalidate the evidentiary value of Fowlkes's offers. Even if Amanda's contentions were correct, Fowlkes's offer to Prodigy II may have been to satisfy creditors of the corporation. Accordingly, we affirm the trial court's award of damages to both plaintiff and Prodigy II.

V. Other Claims

In that plaintiffs' award of damages was correctly entered against Barger and Fowlkes, in accordance with the Unfair and Deceptive Trade Practices Act, we need not delve into any other claims being appealed. *See Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 74, 529 S.E.2d 676, 684 (2000) ("Having decided that defendant violated N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11), we need not address plaintiffs' contention that defendant committed acts proscribed under N.C.G.S. § 58-63-15(11) . . . .").

VI. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment for plaintiffs and that its order should be affirmed.

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).