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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-238

Filed: 18 December 2018

Buncombe County, No. 16 CVS 2735

MARY G. STILES, Plaintiff,

v.

SWINGING BRIDGE, LLC; MOENA GRESHAM; JACK GRESHAM, KATRYNA G. ELMER; KEITH GRESHAM; JOAN GRESHAM, Defendants.

Appeal by plaintiff from orders entered 26 July 2017 by Judge R. Gregory Horne and 15 September 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 19 September 2018.

Deutsch & Gottschalk, P.A., by Elizabeth A. Newman and Tikkun A.S. Gottschalk, for plaintiff-appellant.

Coward, Hicks & Siler, P.A., by Andrew C. Buckner, and Pavey Law Firm, P.A., by John J. Pavey, Jr., for defendants-appellees.

DAVIS, Judge.

Mary G. Stiles (“Plaintiff”) appeals from orders granting summary judgment in favor of Swinging Bridge, LLC (“Swinging Bridge”), Moena Gresham, Jack Gresham, Katryna G. Elmer, Keith Gresham, and Joan Gresham (collectively

“Defendants”) and an order denying Plaintiff’s motion to amend her complaint. After a thorough review of the record and applicable law, we affirm in part, vacate in part, and remand.

Factual and Procedural Background

Plaintiff and her late husband Alvin met and became friends with Jack Gresham and his wife Moena in 1962. During the late 1960s, the Stiles began investing in real estate in western North Carolina. The couple purchased a number of properties, including a tract of land consisting of 9.78 acres (the “Property”) located in Jackson County that forms the basis for this litigation. In 1974, the Stiles and the Greshams became business associates and began investing in real estate together when the Stiles conveyed a one-half interest in the Property to the Greshams.

The Stiles and Greshams initially intended to construct a hotel upon the Property, but those plans were abandoned “due to the energy crisis and resulting recession of 1974.” Beginning in the late 1990s, Jack Gresham expressed to the Stiles a renewed interest in developing the Property into either a hotel or a retirement home. In 2000, the Stiles and Greshams conveyed their respective interests in the Property to Riverview of N.C., Inc. (“Riverview”), a closely held corporation jointly owned by the two couples.

In 2001, after the Stiles informed the Greshams that they did not wish to further pursue development of the Property, the Greshams agreed to buy the Stiles’

one-half interest in the Property for \$400,000. That same year, Jack Gresham made an initial \$50,000 payment on the purchase price to the Stiles. On 1 December 2001, Riverview executed a \$350,000 promissory note in favor of the Stiles secured by a deed of trust on the Property. The deed of trust was subsequently recorded on 23 June 2003. In 2005, the Greshams formed Swinging Bridge and, with the Stiles' consent, conveyed the Property from Riverview to Swinging Bridge. As part of this transaction, Swinging Bridge assumed all of Riverview's obligations with regard to the \$350,000 promissory note and the deed of trust.

In a letter dated 28 July 2005, the Greshams asked the Stiles for a modification of the terms of the Greshams' purchase of the Stiles' interest in the Property. Specifically, they asked the Stiles to "consider a partial cash payout of \$100,000 now with \$25,000 annually with total payout of any balance of the note if [the Property] sells. This would involve cancellation of the deed of trust on [the Property] and accepting a non-secured note from [Swinging Bridge]." On 30 July 2005, Alvin Stiles responded to the Greshams' proposal via email, stating that "[W]e cannot accept your proposal. Our feeling is that we agreed on a fair price four years ago[.]" In response to Alvin Stiles' email, Jack Gresham wrote, "I understand your position. I do not believe you understand the costs I have incurred But I do believe that [y]ou should recover the \$350,000 we agreed on."

Later that year, the Greshams made another \$50,000 payment to the Stiles, reducing the amount owed under the promissory note to \$300,000. On 10 May 2006, Swinging Bridge — with Jack Gresham acting as its authorized agent — executed a new \$300,000 promissory note (the “10 May 2006 Note”) in favor of the Stiles. The 10 May 2006 Note stated, in pertinent part, as follows:

FOR VALUE RECEIVED the undersigned promise to pay to Alvin Jesse Stiles and Mary Ruth Stiles the principal sum of three hundred thousand and 00/100 U.S. dollars (\$300,000.00), interest free until paid or until default[.] The said principal and interest shall be paid as follows:

The parties hereto agree that the promissory note will be non-interest bearing and not due until either (a) the sale or lease of the property or (b) there is a signed commitment by a lending institution or party for development.

Upon receiving the 10 May 2006 Note, the Stiles canceled the deed of trust upon the Property.

Alvin Stiles died in March 2015. During the first week of January 2016, Plaintiff contacted Defendants to request that the 10 May 2006 Note be updated to reflect only her name. On 7 January 2016, Defendants recorded a quitclaim deed conveying the Property from Swinging Bridge to Keith and Joan Gresham, the Greshams’ son and daughter-in-law. On 5 February 2016, Keith Gresham filed articles of dissolution for Swinging Bridge. In the portion of the form asking for a description of the occurrence resulting in dissolution he wrote, “FORMED AS REAL ESTATE VENTURE. AS OF 1/7/16 NO FURTHER HOLDINGS.”

On 27 June 2016, Plaintiff filed a lawsuit against Defendants in Buncombe County Superior Court. In Count One of her complaint, Plaintiff sought to enforce the 10 May 2006 Note. Count Two alleged that Swinging Bridge's conveyance of the Property constituted a fraudulent conveyance, and Count Three sought the remedies of receivership and attachment. Defendants filed an answer and motion to dismiss on 19 September 2016 in which they also asserted counterclaims for breach of contract and unjust enrichment.¹

Plaintiff filed a motion for summary judgment on 5 May 2017 pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Defendants filed a cross-motion for summary judgment on 16 June 2017. A hearing was held on the motions before the Honorable R. Gregory Horne on 26 June 2017. On 26 July 2017, Judge Horne entered an order denying Plaintiff's motion and granting partial summary judgment to Defendants as to Count One of Plaintiff's complaint. The order stated, in pertinent part, as follows:

Based upon a review of the court file, relevant law, and arguments of counsel, the court concludes that the promissory note fails to adequately or sufficiently identify the property and that the limited description ("the property") is patently ambiguous. Therefore, parol evidence is not admissible to clarify the description and the note is void.

The court concludes that there remains no genuine issue of material fact relative to Plaintiff's first claim . . . and the

¹ Defendants later voluntarily dismissed their counterclaims against Plaintiff.

Opinion of the Court

Defendants' are entitled to judgment as a matter of law relative to said claim. The Rule 56 issue as to the remaining claims is not addressed by this order. The matter is continued to allow the parties an opportunity to further brief and argue the issue to include whether the two remaining causes of action survive this court's ruling that the Note is void.

On 8 August 2017, Plaintiff filed a motion to amend her complaint. In her proposed amended complaint, she included additional claims for breach of contract, unjust enrichment, and breach of fiduciary duty and requested an accounting of the partnership that had existed between the Stiles and the Greshams. Defendants filed a second motion for summary judgment as to Plaintiff's remaining claims in her original complaint on 1 September 2017. Plaintiff's motion to amend and Defendants' motion for summary judgment were both heard before the Honorable Alan Z. Thornburg on 11 September 2017.

On 15 September 2017, Judge Thornburg entered an order granting Defendants' motion for summary judgment as to Plaintiff's remaining claims for fraudulent conveyance and attachment/receivership. This order stated that it was being entered "without prejudice to the claims set forth in Plaintiff's proposed Amended Complaint[.]" On that same day, however, Judge Thornburg entered a separate order denying Plaintiff's motion to amend. Plaintiff filed a timely notice of appeal to this Court as to all three orders.

Analysis

“On an appeal from an order granting summary judgment, this Court reviews the trial court’s decision *de novo*.” *Mitchell, Brewer, Richardson, Adams, Burge & Boughman v. Brewer*, __ N.C. App. __, __, 803 S.E.2d 433, 443 (2017) (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d 161 (2018). Summary judgment is appropriate “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.” *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

It is well established that “[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that “[a]n issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

Plaintiff first contends that Judge Horne erred in granting summary judgment in favor of Defendants as to Count One of her complaint. At the outset, it is important to understand the arguments that Plaintiff is — and is not — making in this appeal.

In his order, Judge Horne set out the basis for his ruling, stating that “the promissory note fails to adequately or sufficiently identify the property and that the limited description (“the property”) is patently ambiguous. Therefore, parol evidence is not admissible to clarify the description and the note is void.”

In her appellate brief, Plaintiff makes no argument that Judge Horne’s ruling as to the invalidity of the 10 May 2006 Note was incorrect. Therefore, the correctness of Judge Horne’s determination that the Note was void is not before us. *See State v. Doisey*, 240 N.C. App. 441, 443, 770 S.E.2d 177, 179 (2015) (“Where a party makes no argument in his brief concerning a particular issue, it is deemed abandoned.”).² Because Count One of Plaintiff’s original complaint was premised entirely on her attempt to enforce the 10 May 2006 Note, we therefore affirm Judge Horne’s order granting summary judgment as to Count One.

Plaintiff instead argues that other evidence in the record — separate and apart from the 10 May 2006 Note — demonstrates the continued existence of a debt owed to her by Defendants. In support of this proposition, Plaintiff’s proposed amended complaint sought to allege additional theories in support of her efforts to recover the amount of the debt from Defendants.

² For this reason, we express no opinion as to whether Judge Horne’s order was legally correct.

In her amended notice of appeal, Plaintiff also sought to challenge the two orders entered on 15 September 2017 by Judge Thornburg. However, for the reasons set out below, we conclude that we are presently unable to review these rulings.

As noted above, on 15 September 2017 Judge Thornburg entered two orders. One of the orders granted summary judgment to Defendants on Plaintiff's claims for fraudulent conveyance and attachment and receivership and stated, in pertinent part, as follows:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Defendants' Motion for Summary Judgment is granted on the remaining causes of action asserted in Plaintiff's original complaint, *without prejudice to the claims set forth in Plaintiff's proposed Amended Complaint*[.]

(Emphasis added.) The other order, however, purported to summarily deny her motion to amend her complaint.

We believe these two orders are in conflict and that this conflict precludes us from ruling on the remaining issues in this appeal. The potential viability of the remedies sought by Plaintiff in Counts Two and Three of her complaint hinges on the question of whether she is owed a legally enforceable debt by Defendants. Plaintiff's proposed amended complaint sought to recover such a debt under various legal theories that were not dependent on the validity of the 10 May 2006 Note. The above-quoted language from the 15 September 2017 order granting summary judgment on Counts Two and Three suggests that the claims contained in Plaintiff's proposed

amended complaint (which include, among other things, the relief sought in Counts Two and Three of her original complaint) *would* be allowed to proceed. Conversely, the 15 September 2017 order denying Plaintiff's motion to amend indicates on its face that those very same claims will *not* be allowed to proceed.

Accordingly, we must vacate and remand these orders for clarification of these issues by the trial court. *See, e.g., In re K.S.*, 183 N.C. App. 315, 330-31, 646 S.E.2d 541, 549-50 (2007) (remanding for clarification of father's visitation rights where "[t]he trial court provided in its order that visitation was to take place according to the visitation schedule, but the record is devoid of such a visitation schedule or any other visitation plan in effect") (quotation marks and brackets omitted); *Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 512, 593 S.E.2d 808, 813 ("After a careful review of the record, we are unable to clearly determine if the trial court found that there was a valid arbitration agreement. Therefore, we respectfully remand this issue for the purpose of clarification."), *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004).

Conclusion

For the reasons stated above, we affirm Judge Horne's 26 July 2017 order, vacate the 15 September 2017 orders entered by Judge Thornburg, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; VACATED IN PART; REMANDED.

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Opinion of the Court

Judge ELMORE concurs.

Judge DILLON concurs in the result by separate opinion.

Report per Rule 30(e).

No. COA18-238 – *Stiles v. Swinging Bridge*

DILLON, Judge, concurring in result.

Plaintiff brought this action claiming Defendant Swinging Bridge, LLC, owed her \$300,000. Plaintiff brought this action upon learning that Defendant Swinging Bridge conveyed its only substantial asset to a related party for no consideration. Plaintiff's complaint set forth three claims: (1) recovery of the debt; (2) judgment declaring void the conveyance by Swinging Bridge of its only asset; and (3) attachment of the asset and an appointment of a receiver.

The trial court granted summary judgment for Defendants on all three claims in two orders.

In the first order, the trial court entered judgment against Plaintiff on her claim to recover the debt of Swinging Bridge, ruling that the written promissory note evidencing the debt was void. I agree that summary judgment was appropriate and therefore concur in the affirmance of that order, but for a different reason as explained below.

In the second order, the trial court entered judgment against Plaintiff on her remaining claims. I agree with the majority that this order should be vacated and the matter remanded, but write separately to articulate a separate ground to support the mandate.

I. Factual Background

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DILLON, J., concurring in result

The Stiles and the Greshams were partners in an undeveloped 9.78-acre tract of land (the “Property”), with the goal of developing it for a profit. In 2001, the Stiles were no longer interested in the venture, and the Greshams agreed to buy out the Stiles’ interest in the Property for \$400,000. The Greshams paid \$50,000 to the Stiles immediately and signed a promissory note for the remaining \$350,000.

In 2005, the Greshams transferred the Property to Swinging Bridge, LLC, a limited liability company owned by the Greshams. Also that year, the Greshams paid the Stiles another \$50,000 leaving a debt of \$300,000. The Greshams executed a new note (the “Note”) evidencing the remaining debt. This written Note stated that (1) Swinging Bridge (rather than the Greshams personally) was indebted to the Stiles for \$300,000 and (2) the money would become due *either* (a) when “the property” was sold or leased *or* (b) when Swinging Bridge obtained a signed commitment from a lender “for development” of “the property.” The Note does not expressly define “the property.” In any event, the debt was unsecured; that is, the debt was not secured by any real estate.

In 2016, the Greshams executed a quitclaim deed on behalf of Swinging Bridge conveying the Property to the Greshams’ son and daughter-in-law for estate-planning purposes.

II. Procedural Background

After learning of the quitclaim deed, Plaintiff Mrs. Stiles³ filed suit seeking (1) \$300,000 on the debt owed as evidenced by the Note, contending the debt became due when Swinging Bridge conveyed the Property to the Greshams' son and daughter-in-law; (2) a judgment voiding the conveyance; and (3) an order of attachment on the Property/appointment of a receiver.

Defendants moved for summary judgment. The trial court granted summary judgment for Defendants on the debt claim, holding that the Note was void because it “fail[ed] to adequately or sufficiently identify the property and that the limited description (“the property”) is patently ambiguous.” I note that the trial court seems to have erred in its reasoning. Specifically, though the term “the property” in the Note is patently ambiguous, the Note is not subject to the Statute of Frauds: The Note does not purport to convey an interest in any property nor is it secured by a lien on any real estate; the provision in the Note referencing “the property” merely defines when Swinging Bridge’s debt would become due. And to the extent that “the property” is ambiguous, such ambiguity can be resolved through parol evidence.⁴ *See Root v. Allstate Ins. Co.*, 272 N.C. 580, 587, 158 S.E.2d 829, 835 (1968) (“[Where] an ambiguity arises [in a written contact], [and the Statute of Frauds does not apply,]

³ Mr. Stiles is deceased.

⁴ For example, if the Note had stated that it would be due when the debtor’s son graduated college, and if the debtor had two sons, the note would not be void and the debt would be collectable. The debt would certainly still be owed. Rather, the parties would be allowed to introduce parol evidence to determine which son was being referred to.

parol or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of making the contract or executing the instrument[.]”). And the evidence before the trial court shows the ambiguity in the term “the property” in the Note has been resolved as a matter of law: Defendants admitted during discovery in a request for admission that “the property” as used in the Note refers to the Property.

In any event, based on the trial court’s holding that the Note was void, Defendants moved for summary judgment on Plaintiff’s other claims, contending that “[s]ince the Note is void as a matter of law, there is no debt and the Plaintiff cannot be a Creditor of Defendants.” The trial court granted Defendants’ motion for summary judgment as to Plaintiff’s remaining claims. Plaintiff appealed.

III. Analysis

A. Plaintiff’s First Cause of Action – Claim to Recover a Debt

In her appellate brief, Plaintiff never expressly argued that the trial court erred in declaring the Note void, failing to make any argument that the Statute of Frauds had no application to the Note. Plaintiff does, however, argue that there was *other* evidence before the trial court to create a genuine issue of fact that Swinging Bridge owed a legally enforceable debt to Plaintiff for \$300,000. It is obvious to me from the pleadings and discovery responses that the parties had an understanding that Swinging Bridge owed a debt of \$300,000 to Plaintiff which would be paid when Defendants sold or leased the Property or obtained a loan to develop the Property.

For instance, Defendants’ admitted during discovery that Swinging Bridge owes a debt, but that it is not yet due: “Admitted. The property has not been sold or leased, therefore, payment of the Note is not required at this time.” Also, Plaintiff’s sworn statements in response to interrogatories describe the circumstances by which Swinging Bridge came to owe her \$300,000.

Though Plaintiff’s complaint only refers to the Note itself as evidence of the \$300,000 debt, since Plaintiff offered other evidence of this same debt at summary judgment, the trial court should have considered this other evidence. Indeed, Rule 8 of our Rules of Civil Procedure only requires that the complaint contain a “short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.” N.C. Gen. Stat. § 1A-1, Rule 8(a) (2016). And our Supreme Court has stated with respect to Rule 8 that “[s]uch simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988).

Our Supreme Court’s holding in *Pyco* is instructive on this point. In *Pyco*, the plaintiff was owed money for materials it supplied to a general contractor. The

plaintiff filed suit to recover, citing to a particular contract as the basis of its claim in its complaint. However, after the statute of repose had run, the plaintiff filed an amended complaint claiming the same money was owed, but based on a *different* contract. Our Supreme Court held that the amendment was unnecessary because the first complaint was sufficient under Rule 8 to put the defendant on notice of the nature of the claim the plaintiff was seeking:

Though the amended complaint is more precise and represents a *preferred* method of alleging a claim of this type when a plaintiff is uncertain as to the identity of the underlying contract or contracts, to *require* the amended form would elevate form over substance and deny plaintiff its day in court simply for its imprecision with the pen. This would be contrary to the purpose and intent of notice pleading and the modern rules of civil procedure. We, therefore, hold that plaintiff's original complaint gave notice of the amended claim.

Id. at 443, 364 S.E.2d at 385 (emphasis in original). *See also* U.S. Bank Nat'l Ass'n v. Pinkney, 369 N.C. 723, 728, 800 S.E.2d 412 417 (2017) (quoting *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) (“[W]hen the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal”)).

In the present case, the complaint put Defendants on notice that Plaintiff was seeking to recover a \$300,000 debt owed to her by Swinging Bridge representing the remaining amount due on the sale of its interest in the Property. Evidence of this debt, outside of the written Note, argued by Plaintiff in its brief pertains to this same

\$300,000 debt. In *Pyco*, our Supreme Court concluded the plaintiff's citation in its original complaint to the wrong contract was not fatal where the debt the plaintiff was seeking to recover was apparent and obvious to the defendant. In the same way, Plaintiff's citation to the Note in its complaint to recover the \$300,000 debt allegedly owed by Swinging Bridge is not fatal to Plaintiff's reliance on other evidence to prove the existence of this \$300,000 debt to survive summary judgment.

Therefore, even assuming that Plaintiff has waived any reliance on the written Note itself to prove the existence of the debt, there was other evidence sufficient to create a genuine issue of fact that Swinging Bridge is indebted to Plaintiff.

Notwithstanding that I believe there is evidence of a valid debt, I conclude that Plaintiff has otherwise failed to create a genuine issue of fact that the debt is owed *at this time*. The evidence before the trial court conclusively established that the debt would not be owed until the Property was sold or leased. The evidence conclusively established that Swinging Bridge has not sold or leased the property, but rather the Property was transferred by the Greshams' LLC to the Greshams' son and daughter-in-law for purposes of estate planning without consideration. Accordingly, I concur in result only as to the debt claim.

B. Plaintiff's Second and Third Causes of Action –
Void Transfer/Receivership and Attachment

I agree with the majority's reasoning that the order granting summary judgment to Defendants on Plaintiff's remaining claims conflicts with another order

entered that same day denying Plaintiff's motion to amend her complaint and that, therefore, both orders should be vacated. Further, I conclude that the trial court's order granting summary judgment to Defendants on Plaintiff's remaining claims should be vacated and the matter remanded for another reason. Specifically, because I conclude that there is a genuine issue of fact that Swinging Bridge is indebted to Plaintiff, I conclude that there is a genuine issue of fact with respect to Plaintiff's remaining claims, namely her claim for relief to set aside the quitclaim deed by Swinging Bridge to the Greshams' son and daughter-in-law, her claim for an attachment on the Property, and her claim for the appointment of a receiver, pursuant to N.C. Gen. Stat. § 39-23.7(a)(1)(2)(3) (2016).

IV. Conclusion

I join the majority in voting to affirm the order for summary judgment for Defendants on Plaintiff's claim on the \$300,000 debt. However, I base my vote on a reason which is different than advocated by the trial court and the majority. I do not believe that the debt claim is invalid, even if Plaintiff is bound by the trial court's determination that the Note is void. Rather, I believe that there is other evidence sufficient to create a genuine issue that a debt exists, but that the debt simply is not yet owed *at this time* as a matter of law.

I join the majority in voting to vacate the order for summary judgment for Defendants on Plaintiff's remaining claims and remand for further proceedings.

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DILLON, J., concurring in result

However, in addition to the issues pointed out by the majority, I conclude that there is a genuine issue of material fact as to these claims.