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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1020

Filed: 7 May 2019

Wayne County, No. 17 CVS 1550

DARRYL COLEY, Plaintiff,

v.

LATISHA COWAN & DARRYL COWAN, Defendants.

Appeal by Defendants from order entered 19 July 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 27 February 2019.

Everett, Womble & Lawrence, L.L.P., by Harry Lorello, for Plaintiff-Appellee.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and L. Lamar Armstrong, Jr., for Defendants-Appellants.

INMAN, Judge.

Defendants Latisha Cowan and Darryl Cowan ("Defendants") appeal from an order denying their motion to tax costs and attorney's fees brought against Plaintiff Darryl Coley ("Plaintiff"). After careful review, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Plaintiff hired Defendants to make improvements to a house at 101 Waters Circle in Goldsboro, North Carolina (the "House") in September of 2016. The scope of work in the original contract between the parties tasked Defendants with removing wallpaper, carpet, tile, moldy items, and wood paneling, removing and replacing sheetrock and windows, refinishing kitchen surfaces and cabinetry, repairing joists, and performing demolition and painting work. Defendants later agreed to additional work, including repairing pipes and toilets, enlarging a closet, and installing a new HVAC system. In exchange for these services, Plaintiff was to pay Defendants a set contract price of $12,000 for their labor while he provided the materials. Payment was due upon completion of work milestones.

Seven months after they started, Defendants had completed approximately 75 percent of the contract work. In April of 2017, Plaintiff issued a stop-work order and changed the locks on the House, preventing Defendants from reaching the milestones triggering the $12,000 payment. Plaintiff told Defendants he intended to sell the House as-is; when Defendants asked for payment, Plaintiff refused.

By June of 2017, Plaintiff had still not paid for Defendants' labor. Defendants filed a lien on the House on 7 June 2017 for the full $12,000 despite having only performed 75 percent of the contracted work. Although the lien was filed with an executed certificate of service, the certificate did not list the date of service.

Unaware of the lien, Plaintiff found a buyer for the House and attended a closing on 21 June 2017 at the office of the buyer's attorney, Jason Blackburn ("Mr. Blackburn"). At the closing, Mr. Blackburn informed Plaintiff and the buyer of the lien. The buyer then told Plaintiff that he would lose the sale if the lien was not immediately cancelled or satisfied.

Following the buyer's ultimatum, Plaintiff left Mr. Blackburn's office and contacted Defendants, who sent him an email demanding $6,747.11 to settle their dispute—$9,000 covering the percentage of work completed (75 percent of $12,000) less $2,252.89 for non-labor costs Plaintiff had already paid. Defendants informed Plaintiff that if he did not agree to settle on those terms, they would "continue to let our lawyer settle this for an amount that will include our lawyer fees." Plaintiff rejected the settlement proposal.

Plaintiff returned to the office of Mr. Blackburn and said he disputed the validity of the lien but wanted to complete the sale. Mr. Blackburn contacted Defendants' attorney, L. Lamar Armstrong, Jr., ("Mr. Armstrong"), and asked if Defendants would accept payment of less than $12,000 to resolve the lien. Mr. Armstrong told Mr. Blackburn that Defendants would accept $11,000 in satisfaction of the lien; Defendants also asked that Plaintiff have no further contact with them. Mr. Blackburn conveyed that offer to Plaintiff, who accepted. Mr. Blackburn then informed Mr. Armstrong via email (the "Settlement Email") that Plaintiff had

accepted the offer "as full and final payment of any and all claims between" the parties. Mr. Blackburn's email also stated that "I do not represent [Plaintiff] in any dispute he has with the [Defendants] and merely am representing the buyer in the purchase of the property and am therefore trying to get the lien cleared." The settlement money was pulled from the funds used to purchase the House, the sale of the House closed, and Defendants later received an $11,000 check from Mr. Blackburn's trust account. Defendants cancelled the lien on 30 June 2017. Plaintiff did not sign any documents memorializing a settlement.

On 5 July 2017, attorney Harry Lorello ("Mr. Lorello") sent Mr. Armstrong a letter on behalf of Plaintiff, threatening legal action for Defendants' alleged failure to perform under the construction contract and filing a false lien. Mr. Lorello acknowledged the $11,000 payment from Plaintiff to Defendants, stating it was made only "because otherwise, [Plaintiff] would not have been able to sell his house." Mr. Armstrong replied on 19 July 2017, asserting that the dispute had been fully settled by Plaintiff's $11,000 payment. Following further emails between counsel concerning whether Plaintiff's payment foreclosed legal action, Plaintiff filed suit against Defendants on 18 September 2017. In his complaint, Plaintiff alleged that Defendants: (1) breached the construction contract by failing to perform the agreed-upon work; (2) were negligent in filing a lien for an amount in excess of the amount owed for the work performed; and (3) engaged in unfair and deceptive trade practices

by filing an excessive lien after Plaintiff had secured a buyer for the House, having "coerced" and "forced the [P]laintiff to pay [Defendants] or risk losing the sale of the [House]."

After Defendants were served with the complaint, Mr. Armstrong sent an email to Mr. Lorello stating that he would be filing a motion for attorney's fees and costs under Rule 11 of the North Carolina Rules of Civil Procedure and Sections 6-21.5 and 75-16.1(2) of the North Carolina General Statutes. Mr. Lorello asked Mr. Armstrong to clarify his basis for seeking Rule 11 sanctions. Mr. Armstrong responded by claiming that documentary evidence clearly showed Plaintiff breached the construction contract by preventing Defendants from completing the job and refusing payment; he also asserted that the lien had been settled by compromise between the parties, was filed for a proper amount, and was not in or affecting commerce. Mr. Lorello rejoined, arguing that it was unclear from the Settlement Email whether Plaintiff agreed to a release given that Mr. Blackburn disclaimed any representation of Plaintiff. Mr. Lorello also stated that he believed that the filing of Defendant's lien was in or affecting commerce, as it directly impacted the sale of the House.

Defendants filed and served an answer asserting affirmative defenses, including accord and satisfaction and compromise and settlement, on 27 November 2017.

Following discovery, Defendants filed a motion for summary judgment on the ground that "[P]laintiff's claims are barred by the compromise and settlement agreement between the parties[.]" On 30 April 2018, the trial court entered summary judgment in favor of Defendants, dismissing Plaintiff's suit.[1] Defendants then filed a motion for costs and attorney's fees under Rule 11 and Sections 6-21.5, 6-20, and 7A-305. By order entered 19 July 2018, the trial court denied Defendants' motion, stating "it cannot find that there was a complete absence of a justiciable issue in Plaintiff's complaint against Defendants[.]" Defendants timely filed their notice of appeal from that order.

II. ANALYSIS

Defendants argue the trial court erred in: (1) failing to tax deposition costs to Plaintiff as required by Section 7A-305(d)(10); (2) denying an award of attorney's fees pursuant to Section 6-21.5; and (3) failing to impose Rule 11 sanctions.

Plaintiff concedes the trial court erred by failing to tax deposition costs against him. We reverse the trial court's order in that respect and remand for entry of an order awarding Defendants their "[r]easonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts." N.C. Gen. Stat. § 7A-305(d)(10) (2017). We address Defendants' remaining arguments in turn.

[1] Plaintiff did not appeal this order.

A. Standards of Review

A trial court "may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2017). "We review a denial of a motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5 for abuse of discretion. The presence or absence of justiciable issues in pleadings is, however, a question of law that this Court reviews de novo." *Free Spirit Aviation, Inc., v. Rutherford Airport Auth.*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010) (citations omitted). We have described justiciable issues as follows:

> A justiciable issue is one that is real and present, as opposed to imagined or fanciful. In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Under this deferential review of the pleadings, a plaintiff must either: (1) reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue; or (2) be found to have persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.

McLennan v. Josey, 247 N.C. App. 95, 98-99, 785 S.E.2d 144, 148 (2016) (internal citations and quotation marks omitted) (alterations in original).

As for whether Rule 11 sanctions are warranted, we review that question *de novo*. *Chafin v. Chafin*, ___ N.C. App. ___, ___, 791 S.E.2d 693, 701 (2016). In conducting that analysis:

> [T]he appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under [N.C. Gen. Stat.] § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

B. Availability of Fees Under Section 6-21.5

The trial court denied Defendants' motion for attorney's fees under Section 6-21.5, concluding that "it cannot find that there was a complete absence of a justiciable issue in Plaintiff's complaint against Defendants[.]" Defendants contend that Plaintiff should have known that his complaint raised no justiciable issue because Plaintiff had agreed to pay $11,000 out of the sale of the House to cancel Defendants' claim of lien. Reviewing this question *de novo*, we hold the trial court properly concluded that Plaintiff's complaint raised at least one justiciable issue.

Although the defenses of accord and satisfaction and compromise and settlement may bar a party's claims, those defenses are vulnerable to rejection by our courts where the underlying settlement is obtained by duress. *Fallston Furnishing, Inc. v. First Union Nat. Bank*, 76 N.C. App. 347, 361, 333 S.E.2d 321, 329 (1985). "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the

exercise of free will." *Radford v. Keith*, 160 N.C. App. 41, 43-44, 584 S.E.2d 815, 817 (2003) (citation and internal quotation marks omitted). The absence of free will may be determined from the following factors:

> [T]he age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship of the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation.

Stegall v. Stegall, 100 N.C. App. 398, 401-02, 397 S.E.2d 306, 308 (1990) (citation and internal quotation marks omitted). Whether duress exists "depends upon the totality of the circumstances." *Link v. Link*, 278 N.C. 181, 195, 179 S.E.2d 697, 705 (1971).

Plaintiff's complaint alleges that he "disputed the validity of the lien, . . . could not close on the sale of his house with a pending lien[,] and was coerced into paying the . . . lien or else he would lose his purchaser." Giving Plaintiff's complaint the appropriate "indulgent treatment," *McLennan*, 247 N.C. App. at 98, 785 S.E.2d at 148 (citation and quotation marks omitted), this language encompasses the justiciable issue of whether the settlement with Defendants was procured by duress. Defendants acknowledge that the complaint's allegations of coercion address the settlement of the lien and, although Defendants point out that Plaintiff's allegations of duress are not well-pleaded, they cite no authority providing that deficient pleading

renders the complaint without justiciable issue. To the contrary, the susceptibility of a pleading to dismissal under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure alone does *not* establish that issues raised therein are non-justiciable. *See* N.C. Gen. Stat. § 6-21.5 ("The . . . granting of any preliminary motion, such as . . . a motion to dismiss pursuant to . . . [N.C. Gen. Stat. §] 1A-1, Rule 12(b)(6) . . . is not in itself a sufficient reason for the court to award attorney's fees[.]"). Nor did Defendants test the sufficiency of Plaintiff's pleading; the record does not contain any motions to dismiss filed by Defendants, and their brief at summary judgment addressed the issue of duress on the merits. Defendants conclusively argue that Plaintiff "should reasonably have been aware that this [l]awsuit . . . contained no justiciable issue of law" without demonstrating how Plaintiff's claims of duress and coercion were non-justiciable. "It is not the role of this Court to construct arguments for the parties, or to flush out incomplete arguments[,]" *Estate of Hurst v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013) (citation omitted), and Defendants have not shown the absence of a justiciable issue sufficient to warrant fees under Section 6-21.5.

We also note that the facts known to Plaintiff prior to and during the lawsuit do not indicate the absence of any justiciable issue as to duress. The record reveals that Plaintiff agreed to pay Defendants $12,000 to perform certain renovations to the House, and Defendants, by their own estimation, had completed 75 percent of the

scope of work at the time Plaintiff issued his stop-work order. Defendants then filed a claim of lien under Section 44A-12 for $12,000—the payment due for 100 percent of the work. But the statute permits such a lien only "to secure payment of all debts owing *for labor done*[.]" N.C. Gen. Stat. § 44A-8 (2017) (emphasis added); *see also Embree Construction Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 921 (1992) ("The lien secures the right of the claimant to amounts *earned* whether or not the funds are due or the claimant's job is complete." (emphasis added)). Also, although Defendants filed a certificate of service with the lien, that certificate was undated, and it is unclear from the record whether Plaintiff was ever served as required to perfect the lien. N.C. Gen. Stat. § 44A-11 (2017).

It is undisputed that Plaintiff was unaware of the lien until the date of closing. When Plaintiff learned both that the lien existed and that it jeopardized the sale of the House, he grew afraid because he "had so much money tied up." Plaintiff, who is not an attorney, agreed to pay Defendants $11,000 without the advice of a lawyer. This evidence presents at least some colorable argument that settlement of the lien was procured by duress through an absence of free will under the totality of the circumstances.[2] As a result, Plaintiff's $11,000 payment to Defendants cancelling the

[2] Defendants assert that Plaintiff "could have deposited the disputed funds with the clerk and filed an action to set aside the [l]ien" without presenting any legal authority demonstrating how this avenue, considered under the totality of the circumstances, would render the issue of duress raised by the complaint non-justiciable. This bare assertion without authority is unavailing.

claim of lien does not necessarily render his complaint devoid of any justiciable issues, particularly when that complaint alleges that payment was made under duress.

C. Rule 11 Sanctions

Rule 11 requires that signors to a pleading "certif[y] that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, or a good faith argument for extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992) (internal quotation marks omitted). Sanctions may be imposed if any of the three certifications is determined by the trial court to be untrue. *Id.*

To determine whether a pleading is well grounded in fact, the trial court must consider "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (internal citation and quotation marks omitted). The legal sufficiency component requires the trial court to "look first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Bryson*, 330 N.C. at 661, 412 S.E.2d at 336. Finally, in

examining whether Rule 11 sanctions are proper under the improper purpose prong, the trial court must review the evidence to determine whether the pleading was filed for "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted). In each instance, the trial court is required to make findings of fact and conclusions of law in resolving whether Rule 11 sanctions are appropriate. *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

The trial court erred by denying Defendants' motion for sanctions without making necessary findings of fact or conclusions of law concerning Rule 11. *Id.* Thus, remand is required unless "there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper." *Id.* (citation omitted).

Reviewing the record, there appears to be at least some evidence, when considered in the light most favorable to Defendants, that Plaintiff's complaint may have violated Rule 11. Defendants point to two emails they received from Plaintiff following his payment of $11,000 with the subject line "Re: Claim of lien," in which he wrote, "Look [I] got money fuck that money [I] am money[,]" and "watch out for broke people[,] the main one . . . is your family[.] . . . [I] sold [the House] for pennies in [G]oldsboro[.] [I] was ready[.] [S]hit [I] lost but [it's] nothing when you got 1.4

mill[ion] last year." Considered in the light most favorable to the Defendants, these emails could be read to indicate that Plaintiff was not concerned with the money "lost" in the satisfaction of the lien and sale of the House, and was more interested in bringing suit out of animus toward Defendants in violation of Rule 11. *See, e.g., Bryson*, 330 N.C. at 663, 412 S.E.2d at 337 ("[A] represented party . . . will be held responsible [under Rule 11] if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." (citation omitted)). As a result, "we believe it necessary to remand the case to the trial court for entry of findings and conclusions in support of its denial of [Defendants'] motion for Rule 11 sanctions." *Tucker v. Blvd. at Piper Glen, L.L.C.*, 150 N.C. App. 150, 156, 564 S.E.2d 248, 252 (2002).

III. CONCLUSION

For the reasons explained in this opinion, we: (1) reverse the trial court's denial of costs under Section 7A-305(d)(10) and remand for entry of an order awarding Defendants' their reasonable and necessary deposition fees; (2) affirm the denial of attorney's fees pursuant to Section 6-21.5; and (3) remand to the trial court for entry of findings and conclusions in support of its denial of Defendants' motion for sanctions.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).