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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-187

Filed: 3 September 2019

Guilford County, No. 18 CVD 4641

FIRST TECHNOLOGY FEDERAL CREDIT UNION, Plaintiff/Counterclaim Defendant,

v.

RONNIE LEE SANDERS, Defendant/Counterclaim Plaintiff.

Appeal by defendant from order entered 20 December 2018 by Judge Jonathan Kreider in Guilford County District Court. Heard in the Court of Appeals 21 August 2019.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal, for plaintiff-appellee.

Law Office of Jonathan R. Miller, PLLC, d/b/a Salem Community Law Office, by Jonathan R. Miller, for defendant-appellant.

ZACHARY, Judge.

Defendant Ronnie Sanders appeals from the trial court's order dismissing his counterclaims for violations of the notice provisions under Article 9 of the Uniform Commercial Code ("UCC") against Plaintiff First Technology Federal Credit Union (the "Credit Union"). Because there was not a valid and enforceable security

agreement between the parties, the trial court correctly concluded that the Credit Union could not be held liable for its failure to comply with the pertinent notice provisions under Article 9. Accordingly, we affirm the trial court's order dismissing Defendant's counterclaims.

Background

Defendant and seller entered into a Retail Installment Sale Contract for the purchase and finance of a vehicle, which the seller assigned to the Credit Union shortly after execution. Defendant then returned the vehicle to the seller upon discovering that the seller had made various misrepresentations concerning the vehicle's features and condition. Thereafter, the Credit Union repossessed the vehicle from the seller, and sent Defendant its "Notice of Intent to Sell Property." The notice provided that "[t]he money that we get from the sale, after paying our costs, will reduce the amount you owe. If we get less than you owe, you will or will not, as applicable, still owe us the difference."

The Credit Union sold the vehicle for $11,829.41 less than the amount owed under the installment agreement, and commenced the instant action for recovery of the deficiency. Defendant filed an answer asserting various affirmative defenses, including (1) that he was fraudulently induced into signing the installment agreement and, thus, was not liable for any sum owing thereunder, and (2) that the

Credit Union was not entitled to recover the deficiency, in that its Notice of Intent to Sell Property was insufficient under N.C. Gen. Stat. § 25-9-614.

Defendant also filed a class action counterclaim against the Credit Union, in which he challenged the Credit Union's "unlawful and harassing practices . . . related to its use of a standardized post-repossession notice, which fails to contain the required information [under N.C. Gen. Stat. § 25-9-614], prior to selling vehicles repossessed from consumers." Defendant sought actual and statutory damages pursuant to N.C. Gen. Stat. § 25-9-625, as well as injunctive and declaratory relief, including (1) "a declaration that he and members of the class are not liable to [the Credit Union] for any deficiency balance following such sale"; (2) "an injunction prohibiting [the Credit Union] from attempting to collect, directly or indirectly, any deficiency balance and requiring [the Credit Union] to refund any claimed deficiency balance it has collected from the class"; and (3) an "injunction requiring [the Credit Union] to remove any adverse credit information which may have been wrongfully reported on the consumer credit reports of the Class members."

The Credit Union filed a motion to dismiss Defendant's counterclaims, which came on for hearing before the Honorable Jonathan Kreider in Guilford County District Court. At the hearing, the parties stipulated that the installment agreement was not a valid and binding contract.

On the basis that there existed no valid and binding contract between the parties, the trial court concluded that the Credit Union's complaint for deficiency judgment failed as a matter of law. The trial court also concluded that Defendant's counterclaims failed as a matter of law, in that, absent a valid and binding security agreement, the Credit Union was not a "secured party" subject to enforcement of the UCC's notice provisions. Accordingly, the trial court dismissed with prejudice all claims between the parties. Defendant timely appealed from the trial court's order dismissing his counterclaims.[1]

On appeal, Defendant argues (1) that the trial court abused its discretion in declining to continue the hearing in order for Defendant to research and brief the issue of whether the Credit Union had a duty to comply with Article 9 of the UCC in light of the installment agreement having been canceled, (2) that the trial court erred in dismissing Defendant's counterclaims, in that the duty to comply with Article 9's notice provisions is not dependent upon the existence of a valid and binding contract, and (3) that the trial court erred in holding that Defendant failed as a class representative in the absence of a pending class certification motion.

Discussion

The Uniform Commercial Code is codified in Chapter 25 of North Carolina's General Statutes. Article 9, Part 6, Subpart 1 governs the default and enforcement of

[1] The Credit Union has not appealed the trial court's dismissal of its complaint.

security interests. In the event that a debtor defaults on his obligations under a security agreement, the secured party is permitted to take possession of the collateral, N.C. Gen. Stat. § 25-9-609(a)(1) (2017), and thereafter, to sell or otherwise dispose of the collateral in order to satisfy the outstanding debt owed under the terms of the security agreement, *id.* § 25-9-610(a).

Before disposing of collateral pursuant to N.C. Gen. Stat. § 25-9-610, the secured party must "send to the [debtor] a reasonable authenticated notification of disposition." *Id.* § 25-9-611(b). In the context of a consumer-goods transaction, the notification of disposition must include, among other things, "[a] description of any liability for a deficiency of the person to which the notification is sent." *Id.* § 25-9-614(1)(b). In the event that a secured party fails to comply with the applicable notice requirements, section 25-9-625 entitles the debtor to recover both actual and statutory damages. *Id.* § 25-9-625.

Although a "particular phrasing of the notification is not required," *id.* § 25-9-614(2), section 25-9-614 provides the following sample notification form, which, "when completed, provides sufficient information" as to notify a debtor of his liability for any deficiency pursuant to subsection (1)(b):

> The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [<u>will or will not, as applicable</u>] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

Id. § 25-9-614(3).

In the instant case, the Credit Union's notice of intent sought to notify Defendant of his liability for any deficiency following the sale by including a verbatim recitation of the above form language, without electing between the bracketed alternative language, as follows:

> The money that we get from the sale, after paying our costs, will reduce the amount you owe. If we get less than you owe, you will or will not, as applicable, still owe us the difference. If we get more than you owe, you will get the extra money, unless we must pay it to someone else.

Defendant asserted as an affirmative defense to the Credit Union's complaint for deficiency judgment that this language failed to provide Defendant with sufficient notice that the Credit Union would seek to hold him liable for a deficiency. Defendant also asserted the same as the basis for a class action counterclaim on behalf of the other individuals to whom the Credit Union had sent the inadequate notice, pursuant to N.C. Gen. Stat. § 25-9-625. The trial court, however, dismissed Defendant's counterclaims, concluding that the Credit Union was not a "secured party" subject to enforcement of the UCC's notice provisions. We agree.

The notice requirements under Article 9 apply only to secured parties. *See* N.C. Gen. Stat. § 25-9-611(b). A "secured party" is defined as "[a] person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding." *Id.* § 25-9-102(a)(75)(a); *see also id.*

§ 25-9-102 (Official Comment) ("This definition controls, among other things, which person has the duties and potential liability that part 6 imposes upon a secured party."). A " '[s]ecurity interest' means an interest in personal property . . . which secures payment or performance of an obligation." *Id.* § 25-1-201(b)(35). Thus, a plain reading of the applicable definitions quite plainly reveals that there can be no "secured party" in the absence of an enforceable security interest, and where the parties' security agreement is canceled, so too is the security interest that was created thereunder. *See id.* § 25-9-102 (Official Comment) ("The secured party is the person in whose favor the security interest has been created, as determined by reference to the security agreement.").

Accordingly, in that the parties conceded that the only security agreement between them was no longer valid and enforceable, the trial court correctly concluded that the Credit Union was not a "secured party" subject to liability for its failure to comply with the notice provisions under Article 9. We therefore affirm the trial court's order dismissing Defendant's counterclaims. Because we affirm the trial court's dismissal of Defendant's counterclaims, we do not address Defendant's remaining argument that this Court should "vacate the district court's holding and remand for further proceedings including, in due course, a motion for class certification by Defendant."

Lastly, Defendant argues that the trial court deprived him of his due process rights when it declined to allow a continuance of the hearing in order for him to research and brief the issues upon which the trial court based its dismissal. Specifically, Defendant takes issue with the fact that it was not until the hearing that the Credit Union stipulated that the installment agreement was unenforceable, at which time the Credit Union "argued, for the first time, that the result of this was that [it] owed no duty to comply with Article 9's Notice of Intent requirement."

We are unable to review these arguments, however, in that no transcript of the proceedings was taken in this matter, nor was a narration of the hearing provided to this Court. *See* N.C.R. App. P. 9(c) ("[S]tatements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in [narrative form pursuant to] Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3).").

"The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). In the absence of a transcript or narration in the instant case, we are unable to confirm whether Defendant did in fact move for a continuance as to preserve his due process argument for appellate review, or that he did not otherwise waive a

challenge thereto. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("Elementary consideration for efficient and just administration of the legal processes involved in the adjudication of a lawsuit, criminal or civil, requires that an appellate court have in the record before it a complete account of the action by the trial court of which the appellant complains. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court."); *see also Miller v. Miller*, 92 N.C. App. 351, 353-54, 374 S.E.2d 467, 468 (1988) ("[A] review of the evidence is necessary for this Court to properly determine whether the trial court erred in denying the motion for a continuance.").

Accordingly, we decline to find reversible error in the absence of the record revealing one.

Conclusion

For the reasons stated herein, the trial court's order dismissing Defendant's counterclaims is affirmed.

AFFIRMED.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).