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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1191

Filed: 3 September 2019

Randolph County, No. 18 CVD 614

JUDY TOMPKINS, Plaintiff,

v.

CHRISTINE LAUGHLIN and SUSAN SELLERS BRILLHART, Defendants.

Appeal by plaintiff from order entered 27 June 2018 by Judge Jayrene R. Maness in Randolph County District Court. Heard in the Court of Appeals 9 April 2019.

Judy Tompkins, pro se.

No appellee brief filed.

BERGER, Judge.

Judy Tompkins ("Plaintiff") filed an action in Randolph County District Court against Christine Laughlin ("Laughlin") and Susan Brillhart ("Brillhart"; collectively, "Defendants"). Plaintiff alleged that she was granted ownership and possession of "Snuffy", a Shetland sheepdog, by virtue of an oral contract between the parties. On June 27, 2018, the trial court denied Plaintiff's claims and dismissed the action.

Plaintiff appeals, asserting that the trial court erred in finding that either an oral or implied agreement had existed between the parties for the breeding of a litter of sheepdogs, and that this agreement granted Laughlin ownership of one of the puppies from this litter as payment for her care of the litter. Plaintiff also argues that the trial court erred in finding that, regardless of whether an oral or implied contract existed, the parties' customs and course of dealing established an enforceable agreement in which Defendants would have the right to one of the sheepdog puppies in exchange for the joint whelping, maintaining, and selling of the litter of sheepdogs from which the puppy came.

In her assertion of error, Plaintiff claims the trial court's findings were not supported by competent evidence because the trial court did not rely on *her* evidence in making its findings. However, this Court will only review findings of fact to ensure they are supported by competent evidence, and then we review *de novo* the conclusions of law to ensure that the findings support the conclusions and are legally correct; we do not assess evidentiary choices of the trial court. *See Crews v. Crews*, ___ N.C. App. ___, ___, 826 S.E.2d 194, 200 (2019) ("Ultimately, the trial court made its findings on the evidence it deemed credible; those findings are supported by the evidence and we do not review the trial court's determinations of credibility.") While Plaintiff may stridently disagree with the outcome of her lawsuit, we find no basis on which the order of the trial court should be disturbed. We therefore affirm.

Factual and Procedural Background

Plaintiff and Defendants first began breeding sheepdogs together in 2012. "Abby" was purchased by Plaintiff from Defendants for the purposes of breeding. Abby's first litter contained four puppies, one of which was kept by Plaintiff and the other three were kept by Defendants as consideration for the whelping and maintenance of the litter. Plaintiff asserted that her acquiring sole ownership of Abby had been part of this original agreement. Lisa Wells ("Wells"), who was active with Plaintiff and Defendants in breeding and showing Shetland sheepdogs, was listed as owner on Abby's American Kennel Club registration. This was done so that Wells could show Abby in competitions.

Plaintiff again entered into an agreement with Defendants in 2016 to breed Abby. Plaintiff located a stud for Abby, and paid approximately $2,800.00 for stud services. On May 16, 2018, Abby gave birth to a litter at Laughlin's home, of which seven puppies survived. Defendants cared for the puppies at Laughlin's home and distributed or sold six of the seven puppies. Laughlin retained one of the puppies.

Plaintiff testified that Wells had contributed over $2,600.00 to the breeding and care of the puppies. In exchange, Wells received the first pick of the litter. The remaining puppies were sold, and Plaintiff claims that the proceeds from one of the sales, $850.00, was given to Laughlin for her care of the puppies. However, Laughlin testified that she did not recall why Plaintiff had given her the money and did not

count the money when she received the envelope of cash. Laughlin further testified that this payment did not affect their agreement regarding Snuffy.

> [Laughlin]. Whether or not there was the supposed eight hundred and fifty dollars would have no bearing on the fact that Snuffy was our puppy for whelping the litter. One would have nothing to do with the other.
>
> [Plaintiff]. Okay. So it's your contention that you could have a puppy solely for the whelping of the litter and taking care of the puppies for fifteen weeks, in spite of making no financial contribution and getting eight hundred and fifty dollars in cash?
>
> [Laughlin]. Yes. The puppy is for the whelping, not raising; it's the whelping. Whelping for three weeks is the puppy.

According to Laughlin, the "second-pick" of the litter was to be her consideration for the whelping of the litter and that, because Defendants had cared for the litter for longer than usual, the cash payment was likely additional compensation for these extended services.

Laughlin further testified that, during a conversation she had with Plaintiff, they had agreed that Defendants would keep Snuffy as consideration for whelping and maintaining Abby's litter. Laughlin had been breeding dogs for thirty years, and testified that it was common practice for those who assist in the whelping and care of a litter to be allowed to keep a "second-pick" of the litter, and that it should have been clear to Plaintiff that Snuffy was this "second-pick." Brillhart testified that she had whelped puppies for twelve years, and she corroborated this practice of keeping the "second-pick" in exchange for the whelping.

Additionally, Laughlin testified that Plaintiff should have known about the practice of keeping a "second-pick" because of prior occasions in which Plaintiff had used Defendants' services, and Laughlin had kept a puppy in exchange for these services on those occasions. Brillhart testified to conversations with Plaintiff in which this arrangement was discussed, and asserted Plaintiff should have been aware given that Brillhart had previously performed whelping services for Plaintiff in exchange for a "second-pick" puppy.

In this instance, Laughlin kept Snuffy after Plaintiff sold the other six puppies from the litter. Plaintiff claimed that Snuffy had been left at Laughlin's house to see how she would continue to grow, due to concerns about her size compared to competition standards, and that she had approached Laughlin in 2017 about taking possession of her. Plaintiff also claims that throughout 2017 she repeatedly requested that Laughlin bring Snuffy to the veterinarian and train the dog to walk on a leash, ride in a car, and other things that would make the dog more marketable or competitive. In the summer of 2017, Plaintiff asked that Snuffy begin training for agility competitions. When Laughlin was told this would require that Snuffy go elsewhere for the training, she told Plaintiff she would send Snuffy to Brillhart's home in South Carolina if Plaintiff tried to take possession of Snuffy.

Laughlin allegedly called Plaintiff in January 2018 and asked her to come get Snuffy, but when Plaintiff called back a few days later, Laughlin backed out of that

agreement. Finally, on January 30, 2018, Plaintiff went to Laughlin's home out of concern for the dog's health. When it appeared Plaintiff might be trying to take Snuffy, Laughlin grabbed Snuffy from Plaintiff's arms. The police were then called, and Plaintiff left without Snuffy.

On February 2, 2018, Plaintiff filed a small claims action against Defendants for ownership of Snuffy. On March 20, the case was heard, and the magistrate ruled in favor of Defendants. Plaintiff appealed on March 30 for a *de novo* trial in district court. The trial court again ruled in favor of Defendants and filed its order on June 27. It is from this order that Plaintiff appeals.

Analysis

Plaintiff asserts several arguments on appeal, but the most discernable argument is that the trial court erred when it found that Plaintiff had failed to prove her conversion claim, after not proving that she was the rightful owner of Snuffy. Plaintiff argues that the trial court erred in finding that the parties' course of dealing or custom tended to establish an implied agreement whereby Defendants would receive ownership of Snuffy, as the "second-pick" puppy in the litter, in exchange for their assistance in whelping and maintaining the litter.

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and

> effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Bldg. Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citations omitted).

Plaintiff's amended complaint states one claim for relief against Defendants: conversion. "[C]onversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986).

> The general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property. Therefore, two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant.

Bartlett Milling Co. v. Walnut Grove Auction & Realty Co., 192 N.C. App. 74, 86, 665 S.E.2d 478, 488-89 (2008) (*purgandum*). If an agreement existed between the parties, whether implied or explicit, which gave ownership of Snuffy to anyone other than Plaintiff, her claim for conversion must necessarily fail.

The trial court found that an implied agreement existed between the parties that was established by "the parties' custom and course of dealing with each other." In North Carolina, "the rule is that there can be no implied agreement where an express one exists. It is only when the parties do not expressly agree that the law

may raise an implied promise." *McLean v. Keith*, 236 N.C. 59, 72, 72 S.E.2d 44, 53 (1952) (citations omitted).

> A 'contract implied in fact' arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. An implied contract is valid and enforceable as if it were express or written. Apart from the mode of proving the fact of mutual assent, there is no difference at all in legal effect between express and contracts implied in fact. Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact. The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. This mutual assent and the effectuation of the parties' intent is normally accomplished through the mechanism of offer and acceptance. In the formation of a contract an offer and acceptance are essential elements. With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

Snyder v. Freeman, 300 N.C. 204, 217-18, 266 S.E.2d 593, 602 (1980) (*purgandum*).

Here, competent evidence supports the trial court's findings of fact that establish an implied agreement between the parties whereby Laughlin received Snuffy in consideration for her work in whelping the litter from which Snuffy had come. Plaintiff has countered this finding with her testimony about the $850.00 she had given to Laughlin as consideration. However, Laughlin testified that she did not

remember what the money was for, or what the amount was, and the trial court found that "it is not clear from the testimony of the parties what the money was for."

In resolving the conflicts within the evidence, the trial court made Findings of Fact ten and eleven that Snuffy had not been distributed or sold in 2016, as the rest of the litter was, but had remained at Laughlin's house. Furthermore, the trial court found no evidence tending to show Plaintiff had claimed ownership of Snuffy prior to January 2018.

According to testimony at trial, the parties had known each other for many years and had been friends and business associates. They were also involved in, or at least quite familiar, with the dog-breeding and dog show communities, particularly with Shetland sheepdogs. The record also tended to show that Plaintiff was aware that Defendants would be keeping at least one dog from any litter they whelp. For example, in 2012, the parties first bred Abby, and Defendants kept three puppies from the resulting litter. Additionally, on at least one other occasion, Plaintiff had purchased a dog that had been whelped and raised by Defendants. This course of dealing, evidenced by the familiarity that the parties had with each other, supports the conclusion that there was an implied agreement under which Defendants would keep a puppy from the litter as consideration for their work with the litter.

Plaintiff claims that she had never relinquished ownership of Snuffy, but had left the dog with Laughlin waiting to see if Snuffy would grow to the proper size for

competitions. Plaintiff also claimed that she was in poor health at the time, and claimed that Laughlin was only taking care of Snuffy to keep Plaintiff from being burdened by the dog. However, if the findings of the trial court are supported by competent evidence, they are binding on appeal, even though there may be evidence to the contrary. In addition, the findings of fact support the conclusions of law, and this Court will not disturb these conclusions. In sum, there was sufficient, competent evidence to support the trial court's findings that Snuffy was not owned by Plaintiff. Plaintiff is unable to sustain her claim for conversion.

Conclusion

The trial court did not err in finding an implied agreement existed between Plaintiff and Defendants, and that under this agreement Defendants would receive Snuffy in exchange for their work whelping the litter of puppies. The parties' actions reflected this agreement. Therefore, Plaintiff's claim for conversion must fail, and the order of the trial court dismissing this claim is affirmed.

AFFIRMED.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).