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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-217

Filed: 17 December 2019

Caldwell County, No. 16 CVD 939

DISCOVER BANK, Plaintiff,

v.

RALEIGH ROGERS, Defendant.

Appeal by defendant from judgment entered 23 October 2018 by Judge Mark L. Killian in Caldwell County District Court. Heard in the Court of Appeals 4 June 2019.

*Smith Debnam Narron Drake Saintsing & Myers, LLP, by Caren D. Enloe and Zachary K. Dunn, for plaintiff-appellee.*

*Defendant-appellant Raleigh Rogers, pro se.*

ZACHARY, Judge.

Defendant Raleigh Rogers appeals from a monetary judgment entered against him. After careful review, we affirm the trial court's judgment.

**I. Background**

Discover Bank ("Plaintiff") mailed Defendant a new customer credit card promotional offer. Around 30 November 2008, Defendant applied for, and was

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granted, a credit card account with Plaintiff. The card-member agreement provided that it was “governed by applicable federal law and by Delaware law.” Over the life of the account, Defendant completed seven balance transfers for approximately \$51,000, purchased various goods and services, and obtained cash advances. Defendant made payments on the account, but those payments ceased around 27 August 2015, thereby breaching the parties’ agreement.

Plaintiff filed a complaint on 12 August 2016 demanding judgment for the unpaid balance on Defendant’s credit account, alleged to be \$24,553.04 as of 7 July 2016. On 12 October 2016, Defendant filed an answer asserting affirmative defenses and counterclaims for fraud and violation of the Federal Trade Commission Act. The case proceeded to arbitration; however, on 6 January 2017, Defendant filed a “Request for Trial De Novo.” On 24 April 2017, Plaintiff filed a motion for summary judgment, which the trial court denied on 23 May 2017.

The case proceeded to trial before the Honorable Mark L. Killian in Caldwell County District Court on 15 October 2018. The jury found that Plaintiff was entitled to recover \$24,580.52 from Defendant, and the trial court entered judgment in that amount plus costs and interest. The trial court dismissed Defendant’s counterclaims with prejudice. Defendant timely filed notice of appeal.

## **II. Discussion**

Defendant argues on appeal that the trial court erred by: (1) allowing Plaintiff to refer to the parties' court-ordered arbitration in its opening statements; (2) disregarding the contract's choice-of-law provision; (3) denying the admission of a promotional offer into evidence; and (4) granting Plaintiff's motion for directed verdict.

A. Opening Statement

Defendant first argues that the trial court erred by allowing Plaintiff to refer to the parties' court-ordered arbitration proceedings in its opening statement. However, Defendant waived appellate review of this argument by failing to preserve his objection.

Our General Assembly has provided for "court-ordered nonbinding arbitration as an alternative civil procedure" for civil cases in district court. N.C. Gen. Stat. § 7A-37.1(a), (c) (2017). The General Assembly tasked the Supreme Court of North Carolina with adopting rules governing this procedure. *See id.* § 7A-37.1(b). Rule 9(c) prohibits reference to arbitration before the jury:

*No Reference to Arbitration in Presence of Jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

Rules for Court-Ordered Arbitration in North Carolina, *Annotated Rules of North Carolina* 81 (2019).

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A party must make a timely objection before the trial court to any matter that it wishes to preserve for appeal unless it is otherwise preserved as a matter of law. N.C.R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”). Further, “a party must make a contemporaneous objection to evidence to preserve the issue for appellate review.” *Hamlet H.M.A., LLC v. Hernandez*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 600, 610 (2018), *disc. review denied*, 372 N.C. 61, 822 S.E.2d 637 (2019).

In the instant case, Plaintiff briefly referred to the court-ordered arbitration proceedings in its opening statement, but Defendant failed to object at that time. Plaintiff’s counsel stated, “So, up until today, we have gone to arbitration, and that arbitration, it was ruled in our favor, Discover Bank, that Discover Bank is entitled to receive the money owed for the complete amount.” Defendant did not object, but raised the issue with the trial court about five minutes later, after Plaintiff’s opening statement.

Defendant failed to lodge a contemporaneous objection to Plaintiff’s reference to the arbitration proceedings in the presence of the jury. As a result, Defendant waived appellate review of this issue, and this Court will not address Defendant’s argument.

B. Choice of Law

Defendant next argues that the trial court erred by disregarding the choice-of-law provision of the card-member agreement. Specifically, Defendant contends that the trial court should have applied Delaware law as provided in the contract. In response, Plaintiff argues that the trial court did not err in applying North Carolina law. Alternatively, Plaintiff argues that the trial court's decision to apply North Carolina law, if error, did not prejudice Defendant because breach-of-contract law in Delaware and North Carolina is "functionally identical." However, Defendant waived his argument on this issue by failing to provide an adequate transcript of the hearing.

"It is the duty of the appellant to ensure this Court has everything needed for a proper review of his issues on appeal." *Gilmartin v. Gilmartin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 822 S.E.2d 771, 774 (2018), *disc. review denied*, 372 N.C. 291, 826 S.E.2d 702 (2019).

Here, Defendant only requested that small portions of the trial be transcribed. The transcript notes that it "contains only the portions requested to be transcribed by Mr. Raleigh Rogers." The transcript provides, in relevant part:

THE COURT: Based on the holding of the Court of Appeals in 154 [N.C. App.] 639, Cable Television Services, or Telephone Services, Inc., versus Oberman, [sic] the Court has considered those factors stated in that case and will therefore order that the choice -- I'm going to ignore the Choice-of-Law provision in this contract and apply North Carolina law --

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MR. ROGERS: I object now to that.

THE COURT: Wait a minute. Let me finish, and you can make an objection for the record -- and therefore will apply North Carolina contract law in this matter, and note the Defendant's exception to that ruling.

It is clear that the trial court based its ruling on this issue on this Court's opinion in *Cable Tel Services v. Overland Contracting*, 154 N.C. App. 639, 574 S.E.2d 31 (2002), and that Defendant objected to the trial court's ruling. *See generally id.* at 643, 574 S.E.2d at 33-34 (noting that a choice-of-law provision will be disregarded if (1) "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," or (2) the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue").

Although the limited transcript ordered by Defendant provides us with evidence of the court's ruling on the choice-of-law provision and Defendant's objection preserving the issue for appellate review, it unfortunately does not contain the parties' substantive arguments that predicated the trial court's ruling. Because we do not have these relevant portions of the transcript, we cannot review Defendant's argument that the trial court failed to consider "[w]hether upholding Delaware law would be contrary to a state's fundamental policy[.]"

Moreover, Defendant fails to argue *how* this action by the trial court prejudiced or affected his case; he simply asserts that the trial court should have applied Delaware law as provided in the contract. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Plaintiff responds that because breach-of-contract law in Delaware and North Carolina is fundamentally the same, Defendant was not prejudiced. However, due to deficiencies in the record and transcript, and because Defendant has provided no argument for our review, we need not analyze this case under *Cable Tel*, nor compare the two states’ contract laws.

C. Admission of Evidence

Defendant next argues that the trial court erred in denying admission of a promotional offer into evidence. Defendant waived this argument by failing to include the document received as a proffer of evidence in the record on appeal.

Our review is based “solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.” N.C.R. App. P. 9(a). Further, it is well established that

[t]he exclusion of evidence will not be reviewed on appeal unless the record sufficiently shows what the evidence would have been. In order for a party to preserve for appellate review the exclusion of evidence, the significance of *the excluded evidence must be made to appear in the record* and a specific offer of proof is required unless the significance of the evidence is obvious from the record.

*Latta v. Rainey*, 202 N.C. App. 587, 604, 689 S.E.2d 898, 911-12 (2010) (emphasis added) (internal citations, brackets, and quotation marks omitted). When “the record on appeal fails to establish the essential content or substance [of the challenged evidence], this Court is unable to ascertain whether prejudicial error occurred.” *Id.* at 604, 689 S.E.2d at 912 (quotation marks omitted).

In the instant case, during cross-examination, Defendant attempted to admit a promotional offer sent to Defendant’s brother. Plaintiff objected to the admission of the document, and the trial court sustained the objection.

Defendant then made a proffer of evidence to the trial court, labeled “Defendant’s Exhibit 2.” However, this exhibit was not included in the record on appeal. “[A]n appellant has the duty to ensure the record and complete transcript are properly prepared and transmitted to this Court.” *Hill v. Hill*, 173 N.C. App. 309, 322, 622 S.E.2d 503, 512 (2005). In that the record on appeal does not contain Defendant’s Exhibit 2, we are “unable to ascertain whether prejudicial error occurred.” *Latta*, 202 N.C. App. at 604, 689 S.E.2d at 912 (internal quotation marks omitted).

D. Directed Verdict

Lastly, Defendant argues that the trial court erred in granting Plaintiff’s motion for a directed verdict as to his counterclaims. However, Defendant failed to preserve this argument for this Court’s review.



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This Court reviews a motion for directed verdict *de novo* on appeal. *Combs v. City Elec. Supply Co.*, 203 N.C. App. 75, 79, 690 S.E.2d 719, 722 (2010), *disc. review denied*, 365 N.C. 190, 706 S.E.2d 492 (2011). When reviewing a motion for a directed verdict, “this Court’s scope of review is limited to those grounds asserted by the moving party at the trial level.” *Freese v. Smith*, 110 N.C. App. 28, 34, 428 S.E.2d 841, 845-46 (1993).

“A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff.” *Combs*, 203 N.C. App. at 79, 690 S.E.2d at 722 (internal quotation marks omitted). In determining whether to grant a motion for a directed verdict, “all of the evidence which supports the non-movant’s claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant’s favor.” *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

Again, Defendant failed to provide this Court with sufficient record evidence to enable our review of his argument. Defendant provided this Court with a piecemeal transcript of the proceedings below that does not fully capture the parties’ arguments. Concerning the directed verdict, the transcript provides:

THE COURT: Thank you, sir. Madam Clerk, show the Plaintiff’s Motion for Directed Verdict at the end of all the

evidence issue [sic] of the Defendant's counterclaim for fraud is granted.

Plaintiff's arguments in favor of the motion for directed verdict and the "grounds asserted by [Plaintiff] at the trial level" are not included in the transcript. *Freese*, 110 N.C. App. at 34, 428 S.E.2d at 845-46. Moreover, Defendant neglected to include in the transcript any record of the proceedings regarding Defendant's counterclaims for fraud and violation of the Federal Trade Commission Act. Accordingly, Defendant waives this claim of error.

### **III. Conclusion**

Defendant failed to preserve appellate review of three of his arguments: (1) that the trial court erred in allowing Plaintiff to refer to the parties' court-ordered arbitration in its opening statement, (2) that the trial court erred in failing to admit a promotional offer into evidence, and (3) that the trial court erred in granting Plaintiff's motion for directed verdict on Defendant's counterclaims. Moreover, Defendant failed to provide an adequate transcript to enable our full review of his challenge to the trial court's failure to enforce the choice-of-law provision in the card-member agreement. Accordingly, we affirm the trial court's judgment.

**AFFIRMED.**

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).