

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-482

Filed: 7 January 2020

Mecklenburg County, No. 17 CVS 14152

KANISH, INC., Plaintiff,

v.

KAY F. FOX TAYLOR and CALVIN TAYLOR, Defendants.

Appeal by plaintiff from judgment entered 22 August 2018 and order entered 29 October 2018 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2019.

J. Elliot Field for plaintiff-appellant.

Law Office of Paul H. Bass, PLLC, by Brian W. Tyson, for defendant-appellees.

TYSON, Judge.

Kanish, Inc. (“Plaintiff”) appeals from judgment entered 22 August 2018 and order entered 29 October 2018. We find no error in the jury’s verdict and judgment entered thereon. We affirm the trial court’s ruling on Plaintiff’s motion for judgment notwithstanding the verdict (“JNOV”) and new trial. The order and award of attorney fees is vacated and remanded.

I. Background

Kay F. Fox Taylor and Calvin Taylor (“Defendants”) own real property located at 2700 Coronet Way, Charlotte (“Property”). Plaintiff entered into negotiations to purchase the Property through its Vice President, Keith Williams. Mr. Williams, on behalf of Plaintiff, gathered information for a mortgage secured by the Property and recommended a closing attorney to close the transaction.

Mr. Williams informed Mrs. Taylor that Plaintiff could not close the purchase before 1 August 2017. Mrs. Taylor informed Mr. Williams that she needed to close prior to 1 August 2017 because an unpaid *ad valorem* tax sale was pending on her primary residence. Mr. Williams inquired about the amount of property taxes due. Mrs. Taylor responded \$16,000.00.

Mr. Williams offered to advance \$16,000.00 for Defendants to pay the taxes in lieu of earnest money, so that Defendants could wait until 1 August to close the purchase in accordance with Plaintiff’s lender’s timetable. As a part of the offer, the funds advanced to pay the taxes would be credited to the proceeds for the sale price at closing.

The parties drafted a promissory note, deed of trust, and a sale contract for the Property. Mrs. Taylor returned the offer to purchase and sale contract with Defendants’ signatures as attachments to Mr. Williams’ email. On 16 May 2017, a

deed of trust securing the promissory note in the amount of \$16,400.00 was recorded with the Mecklenburg County Register of Deeds.

The fees to close the transaction were \$400.00. Defendants agreed to pay this \$400.00, but the amount was included in the funds transferred to Defendants. The deed of trust named Defendants as grantors and Mr. Williams as the beneficiary. After the Deed of Trust was recorded, the funds were wired to Defendants.

On 25 May 2017, Mrs. Taylor sent a letter to Mr. Williams withdrawing her offer to sell. On 7 June 2017, Mr. Williams received a call from an attorney requesting a payoff amount for the Deed of Trust. Mr. Williams then contacted Mrs. Taylor via email concerning the payoff request phone call and forwarded her a fully executed copy of the offer contract. Purportedly, this was the first time the offer to purchase and contract were fully executed.

A. Plaintiff's Complaint

Plaintiff initiated this breach of contract and anticipatory repudiation action for specific performance by filing a complaint and motion for preliminary injunction on 28 July 2018. A *lis pendens* and a \$2,000.00 bond were filed with the Mecklenburg County Superior Court.

On 4 August 2017, notice of *lis pendens* was sent to Defendants. On 7 August 2017, Plaintiff was granted a temporary restraining order and notice of the temporary

restraining order was sent to Defendants the following day. Plaintiff was granted a preliminary injunction on 18 August 2017.

On 31 August 2017, Defendants filed and were granted a motion for extension of time to respond to the complaint until 2 October 2017. Defendants did not file an answer by this date.

On 4 October 2017 at 10:14 a.m., Plaintiff filed a motion for entry of default and affidavit. An order for entry of default was filed 4 October 2017 at 1:56 p.m. On 4 October 2017 at 2:13 p.m., Defendants filed a motion to dismiss, an answer, and affirmative defenses. On 4 January 2018, Plaintiff's counsel submitted a proposed Order Withdrawing Plaintiff's Motion for Default Judgment.

B. 16 July 2018 Trial

A jury trial was held from 16 July until 19 July 2018. At the opening of court before the jury entered the court room, the trial court sequestered all witnesses. During trial, both Defendants testified the transaction was not a valid contract to purchase, but was a loan without interest from Mr. Williams, who later pressured Defendants to sell their property to repay the \$16,400.00 loan. Defendants further testified Mr. Williams had not signed and returned the offer to purchase the Property, prior to the offer being withdrawn by Defendants.

Defendants also testified Mr. Williams was interested in purchasing another property they owned and the loan was made to allow them to close on another contract

from another company. Defendants testified another proposed buyer, which had offered to purchase the Property, had entered into a contract to purchase the Property, but had released them from that contract to resolve the *lis pendens* with Plaintiff. Before charging the jury, the trial court denied Plaintiff's motion for a directed verdict. The jury returned a verdict and found Plaintiff and Defendants did not enter into a contract to purchase.

On 4 September 2018, Plaintiff filed motions for JNOV and for new trial. Plaintiff submitted an affidavit of Ms. Lateisha Williams, a witness at trial, who asserted the court did not deliver its sequestration order to all witnesses, and she had been in contact with Mrs. Taylor. Plaintiff also alleged Mrs. Taylor had perjured herself during her testimony.

On 16 October 2018, Defendants filed a motion for costs with an attorney fee affidavit. The trial court denied Plaintiff's motions for JNOV and for new trial, discharged the *lis pendens*, and awarded Plaintiff's \$2,000.00 bond to Defendants to be applied toward costs and attorney's fees. The trial court also granted Defendants' motion for costs of \$152.00 and awarded attorney's fees in the amount of \$18,213.50. Plaintiff appealed.

II. Jurisdiction

This court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-26 (2017).

III. Issues

Plaintiff argues the trial court erred: (1) in its conclusion of law regarding Issue #1 on the verdict sheet; (2) by proceeding to trial without resolution of the order for entry of default; (3) in its jury instructions; (4) in awarding attorney's fees and costs to Defendants; and, (5) by denying Plaintiff's motion for JNOV and for a new trial.

IV. Jury's Verdict

A. Standard of Review

This Court will not disturb a jury's finding of fact and verdict except when shown to have been the result of a gross abuse of discretion. *See Pender v. North State Life Ins. Co.*, 163 N.C. 98, 101, 79 S.E. 293, 294 (1913).

B. Analysis

Plaintiff asserts the jury's verdict on Issue # 1, that the parties had not entered a contract, is contrary to both the facts and the law. It argues the transaction was governed by the Uniform Electronic Transaction Act, N.C. Gen. Stat. § 66-315 (2017).

The jury's verdict found that no valid contract to purchase existed between Plaintiff and Defendants. Plaintiff did not raise any theory before the trial court that the transaction was governed by the Uniform Electronic Transfer Act. "[I]ssues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. Of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d

634, 641 (2001). Our Court has long held: “the law does not permit parties to swap horses between courts in order to get a better mount.” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). “We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict.” *West v. Atlantic Coast Line R.R. Co.*, 174 N.C. 125, 130, 93 S.E. 479, 481 (1917). Plaintiff failed to preserve this issue for appellate review. This argument is dismissed.

V. Entry of Default

Plaintiff argues the trial court erred by proceeding to trial without resolving the effects of the order of entry of default.

A. Standard of Review

“A trial court’s decision of whether to set aside an entry of default, will not be disturbed absent an abuse of discretion.” *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009).

B. Analysis

On 31 August 2017, Defendants’ counsel signed and filed a motion for an extension of time to answer. On 2 October 2017, Defendants mailed their answer and affirmative defenses to the clerk and served them upon opposing counsel. Defendants’ answer and affirmative defenses were filed by the clerk on 4 October 2017. Plaintiff filed a motion for entry of default and an affidavit of default on 4 October 2017 at 10:14 a.m.

A Twenty-Sixth Judicial District Superior Court Division Civil Rule provides:

No attorney who knows that the opposing party in litigation is represented by an attorney, either by special employment in that litigation or generally on retainer, even if that law firm or attorney has not yet entered a formal appearance in the matter, shall move for entry of default against the opposing party so represented until 10 calendar days after written notice has been given to the attorney representing the opposing party against whom default is proposed.

26th Jud. Dist. R. 16.6.

Here, Plaintiff was on notice that Defendants were represented by counsel because Defendants' counsel had filed a motion for an extension of time. This notice triggered the requirement of ten-day prior written notice before default under the local rule.

Plaintiff's counsel stated he had no pre-trial matters to address with the trial court. Plaintiff did not raise the issue of the pending entry of default before the trial court. "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." N.C. R. App. P. 10(a)(1).

Even if the local rule did not preclude a valid entry of default, our review of the record does not find any objection or other request by Plaintiff to resolve the effects

of the entry of default prior to proceeding to trial. This issue has not been properly preserved and is dismissed.

VI. Jury Instructions

A. Standard of Review

“[W]here a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error.” *Madden v. Carolina Door Controls*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (citations and internal quotation marks omitted).

B. Analysis

Plaintiff argues the trial court’s jury instructions were contrary to law, because they failed to inform the jury that the acceptance of an electronic signature in an electronic transaction is a valid form of signature.

Plaintiff did not object to the proposed jury instructions. Plaintiff offered no addition or modification to the jury instructions to the trial judge regarding electronic transactions or electronic signatures. “If a party consents to the issues submitted or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal.” *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 690, 759 S.E.2d 696, 703 (2004) (citations and quotations omitted). Plaintiff has failed to preserve this issue for appellate review. This argument is dismissed.

VII. Plaintiff's JNOV Motion

A. Standard of Review

“On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury.” *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

B. Analysis

Plaintiff argues the trial court erred in denying its motion for JNOV and new trial, because of alleged perjured testimony by Mrs. Taylor and Defendant's alleged failure to follow the witness sequestration order.

In support of this motion, Plaintiff presented an affidavit of Leteisha Williams and an audio recording of a phone call between Mr. Williams and Ms. Williams where Ms. Williams alleges Defendants' witnesses were talking about the case outside the courtroom during the proceedings. Our analysis is guided by this standard:

In determining the sufficiency of the evidence to withstand 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. The non-movant is given the benefit of every reasonable inference which may legitimately be drawn from the evidence, resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Trantham v. Michael L. Martin, Inc., 228 N.C. App. 118, 122, 745 S.E.2d 327, 331-32 (2013) (citations and internal quotation marks omitted). Our review of the evidence, specifically the timing of Defendants’ revocation prior to the full execution of the contract for the Property, shows more than “a scintilla of evidence” to support the jury’s finding and verdict of no binding contract between parties. *See id.* Plaintiff’s argument is overruled.

VIII. Attorney’s Fees

A. Standard of Review

“A trial court’s decision whether or not to award attorney’s fees . . . is reviewed for abuse of discretion.” *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 247, 693 S.E.2d 723, 746 (2010) (citations omitted). “An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *Sowell v. Clark*, 151 N.C. App. 723, 727, 567 S.E.2d 200, 202 (2002) (citation and quotations omitted).

B. Analysis

Plaintiff argues the trial court’s award of attorney’s fees and costs is error. It asserts the trial court lacked statutory authority and the award was based upon inadequate, insufficient, and incorrect findings of fact. We agree.

N.C. Gen. Stat. § 6-19 provides:

Costs shall be allowed as of course to the defendant, in the actions mentioned in G.S. 6-18 unless the plaintiff be

entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them.

N.C. Gen. Stat. § 6-19 (2017).

Additionally, N.C. Gen. Stat. § 6-18(1) allows for attorney fees “[i]n an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.” N.C. Gen. Stat. § 6-18(1) (2017). Defendants, as the prevailing party, can recover their attorney fees and costs.

A trial court must make sufficient findings of fact to support an award of attorney’s fees. *See Bryson v. Cort*, 193 N.C. App. 532, 536, 668 S.E.2d 84, 87 (2008). Prior to awarding attorney’s fees, “the trial court must make specific findings of fact concerning: (1) the lawyer’s skill; (2) the lawyer’s hourly rate; and, (3) the nature and scope of the legal services rendered.” *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 588 (2008) (citations omitted).

The trial court failed to make any of the required findings of fact set forth in *Bryson* or *Williams* to support an award of attorney’s fees. The order granting attorney’s fees to Defendants is vacated. This issue is remanded to the trial court for additional findings of facts to support the award. *See id.*

IX. Conclusion

Opinion of the Court

The record evidence and testimony presented shows the trial court did not err submitting Issue # 1 on the verdict sheet of whether a valid contract existed between the parties. We dismiss Plaintiff's challenges to the trial court proceeding to trial without resolving the effects of the order for entry of default and submitting the jury instructions without objection from Plaintiff.

We find no error in the jury's verdict or in the judgment entered thereon. The orders of the trial court on Plaintiff's JNOV and new trial motion are affirmed. The attorney fee award is vacated and remanded for further findings. *It is so ordered.*

NO ERROR, JNOV AND NEW TRIAL RULING AFFIRMED, AWARD OF ATTORNEY FEES VACATED AND REMANDED.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).