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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-695

Filed: 18 February 2020

Mecklenburg County, No. 17CVS16155

THE CHERRY COMMUNITY ORGANIZATION, a North Carolina non-profit corporation, and STONEHUNT, LLC, Plaintiffs,

v.

STONE D. SELLARS, MIDTOWN AREA PARTNERS HOLDINGS, LLC, and MIDTOWN AREA PARTNERS II, LLC, Defendants.

Appeal by plaintiff from judgment entered 31 December 2018 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by Kerry A. Shad, Scott A. Miskimon, and J. Mitchell Armbruster, for plaintiff-appellant Cherry Community Organization.*

*Moon Wright & Houston, PLLC, by Richard S. Wright, for plaintiff-appellee StoneHunt, LLC.*

*K&L Gates, LLP, by Matthew T. Houston, for defendant-appellee Midtown Area Partners II, LLC.*

*Alexander Ricks PLLC, by Roy H. Michaux, Jr., for defendants-appellees Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC.*

BERGER, Judge.

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Cherry Community Organization (“CCO”) appeals from a judgment entered on December 31, 2018, following a bench trial, which found that Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC (collectively, “MAP”) were good faith purchasers of property from StoneHunt, LLC (“StoneHunt”).<sup>1</sup> On appeal, CCO argues that the trial court erred by concluding MAP was a good faith purchaser. CCO also contends that the trial court abused its discretion by denying CCO’s motion to amend its complaint to assert an additional claim against Midtown Area Partners Holdings under the North Carolina Unfair or Deceptive Trade Practices Act (“UDTPA”). We disagree.

Factual and Procedural Background

On April 18, 2005, StoneHunt purchased ten parcels of land from CCO, including a half-acre parcel located at the corner of Cherry Street and Luther Street in Charlotte, North Carolina (the “Cherry Street Parcel”). Pursuant to the land-sale contract, StoneHunt agreed to build a certain number of affordable housing units on the parcels. Until May 2014, the principals and owners of StoneHunt were Stoney D.

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<sup>1</sup> As noted by the trial court below, both Midtown Area Partners entities have the same ownership structure and are both controlled by Roy Goode, Steve McLeod and Buddy Kirk. Moreover, while the contract concerning the property was developed between StoneHunt and Midtown Area Partners II, the rights and obligations under the contract were later assigned to Midtown Area Partners Holdings. The judgment from which CCO appeals treats both Midtown Area Partners entities as one and the same. For consistency and ease of understanding, we follow the same practice on appeal. Therefore, except where factual or legal distinction is required, the actions of either entity will be attributed to “MAP.”

Sellars (“Sellars”) and Anthony Hunt. From May 2014 forward, Sellars was the sole principal and manager of StoneHunt.

In 2013, MAP approached StoneHunt to purchase the Cherry Street Parcel. MAP intended to add to the land to a mixed-use development project. Midtown Area Partners II and StoneHunt subsequently entered into an operating agreement in which they agreed to jointly pursue a rezoning of several parcels owned by MAP, the Cherry Street Parcel, and another parcel owned by StoneHunt. Pursuant to that operating agreement, if the rezoning was approved and the parties secured an anchor tenant, MAP and StoneHunt would form a new company and transfer their respective properties to that company before beginning construction on the mixed-use development project. On September 21, 2015, the rezoning was approved; however, MAP and StoneHunt never formed a new company and never transferred their respective properties to a new company.

In May 2014, StoneHunt sold nearly all of the land purchased from CCO to a homebuilder, without having built all of the promised affordable housing units. Of the property originally purchased from CCO, StoneHunt only retained the Cherry Street Parcel. On September 10, 2015, CCO filed a complaint against StoneHunt in Mecklenburg County Superior Court alleging breach of contract and violation of the UDTPA and seeking money damages, partial rescission of its contract and deed, and re-conveyance of the Cherry Street Parcel. CCO also filed a notice of *lis pendens*

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against the Cherry Street Parcel. In that case, the jury ultimately found for CCO and the trial court entered a final consent judgment on the verdict for \$7,039,858.00. The trial court also cancelled CCO's notice of *lis pendens* against the Cherry Street Parcel. CCO initially appealed the trial court's cancellation of its notice to this Court but later moved to have that appeal dismissed.

In September 2016, Sellars, who by this time was the sole principal and owner of StoneHunt, met with Roy Goode ("Goode"), a principal of MAP, to discuss selling the Cherry Street Parcel and another adjoining parcel (collectively, the "Subject Property"). The meeting occurred at Sellars' request. Sellars advised Goode that he had a child with serious medical problems, that he wanted to spend his time and resources growing a different business, and that he did not want to be involved in a long-term real estate development project. For these alleged reasons, Sellars informed Goode that StoneHunt would sell the Subject Property to MAP for a price of \$1,100,000.00. On December 8, 2016, Midtown Area Partners II entered into an agreement with StoneHunt to purchase the Subject Property for \$1,100,000.00, with \$200,000.00 payable in cash at closing and \$900,000.00 due one year after closing.

The purchase agreement was assigned to Midtown Area Partners Holdings on January 31, 2017. Subsequently, on February 2, 2017, the joint operating agreement between Midtown Area Partners II and StoneHunt was dissolved and StoneHunt conveyed the Subject Property to Midtown Area Partners Holdings for \$200,000.00

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and a promissory note in the amount of \$900,000.00 payable on February 2, 2018. Shortly thereafter, StoneHunt notified the North Carolina Court of Appeals and CCO that the Subject Property had been conveyed to MAP.

On August 30, 2017, CCO filed a complaint against Sellars, StoneHunt, Midtown Area Partners Holdings, and Midtown Area Partners II alleging violations of the North Carolina Uniform Voidable Transactions Act (“UVTA”), pursuant to Section 39-23.5 of the North Carolina General Statutes. Midtown Area Partners Holdings served its answer on November 7, 2017. On November 8, 2017, Midtown Area Partners II filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Then, on May 21, 2018, CCO filed a motion to supplement and amend its complaint to add a claim against Midtown Area Partners Holdings under the UDTPA. On May 24, 2018, CCO amended its complaint as of right to add a claim against Midtown Area Partners II under the UDTPA.

On July 16, 2018, CCO voluntarily dismissed its claims against Sellars. Subsequently, on July 18, 2018, this case was heard by bench trial. On July 19, 2018, the trial court entered an order denying CCO’s motion to amend its complaint against Midtown Area Partners Holdings and denying Midtown Area Partners II’s motion to dismiss.

On December 31, 2018, the trial court entered its final judgment concluding StoneHunt violated the UVTA when it conveyed the Subject Property to MAP.

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However, the trial court also found that MAP was a good faith purchaser of the Subject Property and paid a reasonably equivalent value for the Subject Property. As a result, the trial court found that CCO was not entitled to recover the Subject Property from MAP and dismissed CCO's claim against MAP with prejudice.

On appeal, CCO argues that the trial court erred when it concluded MAP was a good faith purchaser of the Subject Property. CCO also contends that the trial court abused its discretion when it denied CCO's motion to amend its complaint to assert an additional claim against Midtown Area Partners Holdings under the UDTPA.

Analysis

I. MAP as a Good Faith Purchaser

On appeal, CCO contends that MAP could not be a good faith purchaser because MAP failed to make reasonable inquiries to determine StoneHunt's fraudulent intent. CCO further contends that MAP could not be a good faith purchaser because knowledge of StoneHunt's fraudulent intent was imputed to MAP under agency principles. We disagree.

"In a bench trial in which the superior court sits without a jury, the standard of review 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." *Hinnant v. Philips*, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation and quotation marks omitted). In reviewing the trial court's findings of fact, our task is

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to determine “whether any competent evidence exists in the record to support them.” *Wiseman Mortuary v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (citation and quotation marks omitted). “Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary.” *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004). The trial court’s conclusions of law, based upon those findings, are reviewable *de novo*. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

A transfer made by a debtor is voidable by a creditor if the debtor made the transfer either:

- (1) With intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
  - (a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
  - (b) Intended to incur, or believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.

N.C. Gen. Stat. § 39-23.4(a) (2017). In an action for relief against a transfer made in violation of the UVTA, a creditor may obtain, among other things, “[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim.” N.C.

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Gen. Stat. § 39-23.7(a)(1) (2017). However, a creditor's ability to void a transfer is subject to the limitations of Section 39-23.8. N.C. Gen. Stat. § 39-23.7(a).

Pursuant to Section 39-23.8, a transfer that would otherwise be voidable under Section 39-23.4(a)(1), is not voidable against a transferee "that took in good faith and for a reasonably equivalent value given the debtor." N.C. Gen. Stat. 39-23.8(a) (2017). The UVTA does not itself define "good faith." Therefore, we must look to our case law.

Under long-established principles of North Carolina law, within the context of property transfers, "good faith" exists where a transferee takes pursuant to a conveyance in which he is neither aware of nor involved in the grantor's intent to defraud any creditor. *Aman v. Walker*, 165 N.C. 224, 227-28, 81 S.E. 162, 164 (1914). Courts in our State have looked for certain "badges of fraud" in determining whether a debtor made a transfer with the intent to defraud any creditor of the debtor. See *Royster v. Stallings*, 124 N.C. 55, 65-66, 32 S.E. 384, 386-87 (1899); *Helms v. Green*, 105 N.C. 251, 265, 11 S.E. 470, 475 (1890) (describing "badges of fraud" as "suspicious circumstances that overhang a transaction"). As such, the determination of whether a transferee takes in good faith turns on whether the transferee was aware of or involved in those same badges of fraud. *Doby v. Lowder*, 72 N.C. App. 22, 28, 324 S.E.2d 26, 30 (1984).



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As noted by the official comments to the UVTA, Section 39-23.4(b) contains a non-exhaustive list of factors to consider when determining whether a transfer has violated the Act. N.C. Gen. Stat. § 39-23.4, cmt. 6. As relevant here, those factors include (1) the transfer occurring to an insider; (2) the transfer being concealed; (3) the debtor being sued before the transfer was made; (4) the transfer being all or substantially all of the debtor's assets; (5) the value of consideration received being less than a reasonable equivalent to the value of the asset transferred; and (6) the debtor being insolvent at the time of the transfer or shortly after the transfer. N.C. Gen. Stat. § 39-23.4(b).

Where a transfer would otherwise be voidable under Section 39-23.4(a)(1), the determination of a transferee's good faith under Section 39-23.8(a) presents a question properly addressed to the fact finder. *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003); *Southern Com. Co. v. Porter*, 122 N.C. 692, 698, 30 S.E. 119, 120 (1898). The transferee bears the burden of proving by a preponderance of the evidence that he took in good faith. N.C. Gen. Stat. § 39-23.8(g)(1), (h).

As an initial matter, we note that the trial court's conclusion of law concerning good faith should instead have been labeled as a finding of fact. *Bledsole*, 357 N.C. at 138, 579 S.E.2d at 382 (noting that "[w]hether a party has acted in good faith is a question of fact for the trier of fact"). However, "[w]hen this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we

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may reclassify them, where necessary, before applying our standard of review.” *Cox v. Cox*, 238 N.C. App. 22, 31, 768 S.E.2d 308, 314 (2014) (citation and quotation marks omitted). As previously noted, in reviewing a trial court’s findings of fact, our Court must determine whether those findings are supported by competent evidence. *Hinnant*, 184 N.C. App. at 245, 645 S.E.2d at 870 (2007). If the trial court’s findings of fact are supported by competent evidence, then they are conclusive on appeal; regardless of whether the evidence could also have supported the trial court finding to the contrary. *Oliver*, 163 N.C. App. at 169, 592 S.E.2d at 710.

In the case at hand, the trial court found in Conclusion of Law #23 that “MAP has established and met its burden of proof to show that it was a good faith purchaser of the Subject Property and that it paid reasonably equivalent value for the Subject Property.” Properly reframed as a finding of fact, our task is to determine whether this finding of good faith is supported by competent evidence.

At trial, MAP produced evidence tending to show that it entered into an operating agreement with StoneHunt on March 14, 2014 pursuant to which both parties sought to have the Subject Property and other properties owned by MAP rezoned for mixed-use development. Under the terms of that same agreement, both MAP and StoneHunt would convey their respective properties to a new entity upon a successful rezoning and securing of an anchor tenant for the new development.

However, although the Subject Property was successfully rezoned, the new entity was never formed, and the properties were never conveyed to a new entity.

MAP also produced evidence tending to show that Sellars contacted Goode to meet and discuss the Subject Property in September 2016. Goode testified that Sellars offered to sell the Subject Property to MAP because Sellar's son was experiencing health issues and Sellar's wanted to redirect his energies to his family and his growing company. At the time of the offer, MAP was aware of CCO's lawsuit and its notice of *lis pendens* on the Subject Property but also that the lawsuit had been dismissed and the notice cancelled. MAP was also aware that both decisions were being appealed by CCO. According to Goode, there was nothing about Sellar's \$1,100,000.00 offer to sell that Goode considered suspicious or worrisome, although Goode did consider the price to be high.

To counter MAP's evidence of good faith, CCO produced evidence tending to show that MAP provided some assistance to StoneHunt in defense of CCO's lawsuit, including (1) an email, sent by Goode to Sellars, containing research into the authority of CCO's officers to file the lawsuit; (2) an affidavit, sent by Goode to StoneHunt and at StoneHunt's request, that detailed the adverse impact of CCO's notice of *lis pendens* on the proposed rezoning; and (3) an estimate, sent by MAP to StoneHunt, of potential money damages resulting from the filing of the notice of *lis pendens* on the Subject Property. CCO also produced evidence of a letter sent by CCO

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to MAP's litigation counsel reminding MAP of CCO's action against StoneHunt and stating that "any acquisition or development of the [Subject Property] by Mr. Goode, any of his companies, StoneHunt and/or the joint venture, . . . will be done with actual knowledge of CCO's claim to title to the [Subject Property]." Lastly, CCO produced evidence tending to show that MAP concealed its purchase of the Subject Property until after the conveyance was concluded.

Based on the forgoing evidence, the trial court ultimately found that MAP was a good faith purchaser of the Subject Property, despite StoneHunt transferring the Subject Property with the intent to hinder, delay, or defraud CCO. In so finding, the trial court accepted as true testimony produced by MAP which explained several of the badges of fraud alleged by CCO, assigned little weight to CCO's assertions of coordination between MAP and StoneHunt, and concluded that MAP's concealment of the transfer was insufficient to overcome MAP's showing of good faith, in light of the other facts and circumstances of the case.

After careful review of the record, and cognizant of the trial court's special duty as fact finder "to pass upon the credibility of witnesses" and decide "what weight shall be given to testimony and the reasonable inferences to be drawn therefrom," we conclude that the trial court's finding of MAP's good faith under Section 39-23.8(a) is supported by competent evidence. *Gen. Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979).

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Alternatively, CCO argues that MAP cannot be a good faith purchaser of the Subject Property as a matter of law because knowledge of StoneHunt's fraudulent intent is imputed to MAP under agency principles. As previously noted, we review the trial court's conclusions of law *de novo*. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36 (2017). Moreover, every partner in a partnership is an agent of the partnership for the purpose of its business. N.C. Gen. Stat. § 59-39(a) (2017). As a general rule, the principal in an agency relationship is chargeable with the knowledge of his agent. *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 261-62, 523 S.E.2d 720, 725 (1999). "When, however, the agent has a reason or motive to withhold facts from his principal, the knowledge of the agent is not imputed to the principal." *Id.* at 262, 523 S.E.2d at 725 (citation and quotation marks omitted).

In the instant case, MAP and StoneHunt were members to a partnership that existed for the purpose of rezoning and developing several parcels of land including the Subject Property. However, rather than continuing in the partnership, StoneHunt ultimately decided to sell the Subject Property to MAP. As noted above, under Section 39-23.4(a), a transfer made by a debtor with the intent to hinder, delay, or defraud a creditor is voidable by the creditor. N.C. Gen. Stat. § 39-23.4(a). As

such, if MAP had knowledge of StoneHunt's fraudulent intent, then MAP would be liable to lose the Subject Property as a result of the transfer being deemed void. N.C. Gen. Stat. §§ 39-23.4(a); 39-23.8(a).

For this reason, in order to entice MAP into purchasing the Subject Property, StoneHunt undoubtedly had "a reason or motive to withhold facts" concerning its fraudulent intent from MAP. In fact, evidence in the record indicates that Sellars did withhold facts relating to StoneHunt's fraudulent intent from MAP, by informing Goode that he wanted to sell the property in order to redirect his energies to his family and his growing company. Accordingly, we conclude as a matter of law that knowledge of StoneHunt's intent to hinder, delay, or defraud CCO should not be imputed to MAP under agency principles.

Therefore, the trial court did not err in finding that MAP purchased the Subject Property in good faith because this finding is supported by competent evidence and knowledge of StoneHunt's fraudulent intent was not imputed to MAP as a result of their partnership.

## II. Denial of CCO's Motion to Amend

CCO next argues that the trial court abused its discretion by denying CCO's motion to amend its complaint to include a claim against Midtown Area Partners Holdings under the UDTPA. We disagree.

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We review a trial court's denial of a party's motion to amend for abuse of discretion. *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (1999). 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." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"[P]roper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party." *Delta Envtl. Consultants*, 132 N.C. App. at 166, 510 S.E.2d at 694. Our Court has previously found that a nine-month delay between a party's original filing and its motion to amend amounts to undue delay. *Doub v. Doub*, 68 N.C. App. 718, 720, 315 S.E.2d 732, 734 (1984).

In this case, the trial court denied CCO's motion to amend its complaint against Midtown Area Partners Holdings because of CCO's "undue delay with respect to pursuing this claim." As evidenced in the record, CCO filed its original complaint on August 30, 2017. Midtown Area Partners Holdings filed its answer on November 7, 2017. Then, nearly nine months later, on May 21, 2018, CCO filed its motion to add a claim against Midtown Area Partners Holdings for violations of the UDTPA. CCO acknowledges in its brief on appeal that the claim it sought to add against Midtown Area Partners Holdings was "predicated on proof of the claims originally asserted in the Complaint" and that "[n]o new facts or witnesses were required" for

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the additional claim. Given the length of the delay between filing and bringing the motion to amend at the trial level and CCO's failure to provide any justification for the delay below, CCO has failed to carry its burden of proving the trial court's ruling on the motion was manifestly unsupported by reason. We conclude the trial court did not abuse its discretion by denying CCO's motion to amend.

Conclusion

For the reasons stated herein, the trial court did not err by finding that MAP was a good faith purchaser of the Subject Property. Nor did the trial court abuse its discretion by denying CCO's motion to amend its complaint against Midtown Area Partners Holdings.

AFFIRMED.

Judges ZACHARY and YOUNG concur.

Report per Rule 30(e).