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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-712

Filed: 3 March 2020

Durham County, No. 16 CVS 4615

BRITTANEY-BELLE ELIZABETH GORDON, Plaintiff,

v.

JUSTIN RAY HANCOCK, Defendant.

Appeal by Defendant from summary judgment entered 22 April 2019 by Judge Cindy Sturges in Durham County Superior Court. Heard in the Court of Appeals 21 January 2020.

No brief filed by Plaintiff-Appellee.

Mark Hayes for Defendant-Appellant.

INMAN, Judge.

Defendant Justin Ray Hancock appeals from an order entering summary judgment in favor of Plaintiff Brittney-Belle Elizabeth Gordon. On appeal, Defendant contends that the trial court erred in: (1) overlooking his verified answer as an affidavit to be considered at summary judgment; and (2) treating his failure—by apparent scrivener’s error—to deny a single allegation in the Plaintiff’s verified

complaint as an admission warranting the entry of summary judgment in Plaintiff's favor on all claims. After careful review, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a verified complaint against Defendant, his brother, and Essential Property Professionals LLC ("EPP") on 6 October 2016. In that verified complaint, Plaintiff alleged that Defendant and his brother were joint owners of EPP and had sought several loans for the business from Plaintiff in 2014 and 2015. The complaint further alleged that Defendant and his brother induced Plaintiff to make several loans totaling \$41,000 by representing that EPP "was viable and generating revenues of more the \$30,000.00 USD per month[,] and "had secured lucrative contracts . . . that would provide ample future cash flow from which Plaintiff would be repaid." Plaintiff's verified complaint also contained the following allegations:

17. Defendants have repaid the following sums on the corresponding dates:

- a. \$500.00 USD on or about 17 April 2015;
- b. \$400.00 USD on or about 29 June 2015;
- c. \$500.00 USD on or about 13 July 2015;
- d. \$500.00 USD on or about 6 November 2015; and,
- e. \$1,000.00 USD on or about 26 August 2016.

18. Defendants have made no further payments on the loan amount at the time of the filing of this Complaint.

. . . .

20. Upon information and belief, the representations made by Defendants to induce Plaintiff to initially provide the loan were false.

Based on these allegations, Plaintiff sought recovery for breach of contract, unjust enrichment, fraud, negligent misrepresentation, unfair and deceptive trade practices, and civil conspiracy. Plaintiff's complaint made clear that allegations made upon information and belief were not made upon actual, personal knowledge.

Defendant filed a *pro se* combined motion to dismiss and verified answer on 31 March 2017. In that verified answer, Defendant responded to each of the complaint's enumerated allegations by setting forth a correspondingly numbered paragraph denying or admitting Plaintiff's factual allegations—with one exception. By apparent scrivener's error, Defendant's answer did not deny specifically Paragraph 17 but instead denied Paragraph 18 of Plaintiff's complaint twice. Taken as written, Defendant's answer did not respond to Plaintiff's allegation of repayment in Paragraph 17 but nonetheless directly denied: (1) owning, creating, or serving as a member-manager of EPP with his brother; (2) seeking or accepting a loan from Plaintiff; (3) failing to make payments on any alleged loans; and (4) making any statements to induce Plaintiff to make any loans, fraudulent or otherwise. The verified answer included a verification page with Defendant's signed attestation and the signature and seal of a notary public.

On 9 April 2018, Plaintiff filed an affidavit attesting to a conversation and several emails between Plaintiff and Defendant's brother in which he discussed receiving a loan from Plaintiff and making payments toward it. Plaintiff later settled her claims against EPP and Defendant's brother and, on 1 April 2019, moved for summary judgment against Defendant.¹ Plaintiff filed another affidavit in support of summary judgment on 9 April 2019, asserting that Defendant was a "co-owner, co-manager, and co-member" of EPP and that she had created EPP's website at his direction. The affidavit further declared that Defendant was a recipient and beneficiary of the loans alleged in the complaint and that "[u]pon information and belief, the Defendant contributed to the \$2,900.00 I was repaid as identified in Paragraph 17 of the Verified Complaint."

The trial court heard Plaintiff's motion on 15 April 2019 and entered summary judgment against Defendant on all claims on 22 April 2019. In its order, the trial court concluded that because Defendant's verified answer failed to deny Paragraph 17 of Plaintiff's verified complaint, "those allegations are . . . admitted and constitute undisputed evidence that a valid debt is due and owing from the Defendant to the Plaintiff." The trial court then went on to note in its order that it considered Plaintiff's verified complaint and two affidavits, but that "[n]o opposing affidavits

¹ It appears that Plaintiff had dismissed her claims against Defendant's brother and EPP at the time her motion for summary judgment was filed, as the caption in the motion for summary judgment lists only Plaintiff and Defendant as parties to the suit.

have been filed by or received from the Defendant.” It next concluded that no genuine issues of material fact remained for trial and granted summary judgment in Plaintiff’s favor on all claims, including treble damages for unfair and deceptive trade practices. Defendant appeals.

II. ANALYSIS

A. *Standard of Review*

A trial court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c) (2019). “The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact.” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). We review the grant of summary judgment *de novo*, examining the issue anew. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

B. *Defendant’s Appeal*

On appeal, Defendant points out that the trial court did not treat his verified answer as an affidavit. He argues that when considered as such, the evidence demonstrates genuine issues of material fact that preclude summary judgment. We agree.

A verified pleading may be treated as an affidavit on summary judgment when it is “made on personal knowledge, . . . set[s] forth such facts as would be admissible in evidence, and . . . show[s] affirmatively that the affiant is competent to testify to the matters stated therein.” N.C. R. Civ. P. 56(e). A verified answer, like a verified complaint, may receive that treatment under our precedents. *See, e.g., Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (“[T]here is nothing in the rules which precludes the judge from considering a verified answer as an affidavit in the cause.” (citation and quotation marks omitted)).

Defendant’s answer included a verification stating that the allegations in his answer “are true to [his] knowledge, except as to those matters stated on information and belief[.]” The answer directly denied several of Plaintiff’s key assertions, including those claiming he owned, created, or served as a member-manager of EPP with his brother, sought or accepted a loan from Plaintiff, failed to make payments on the alleged loans, or made any statements to induce Plaintiff to make the loans. To the extent that Defendant’s verified answer does not strictly conform to Rule 56(e)’s requirements to allege specific facts, it does not appear from the record that Plaintiff moved to strike Defendant’s answer as an affidavit. *See Whitehurst v. Corey* 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (“[W]hile defendants’ verified pleadings arguably do not conform to the formal requirements of Rule 56(e), plaintiff’s failure to move to strike these allegations waives any objection to their formal

defects.” (citations omitted)). Even if such a motion were made, the record does not disclose a ruling by the trial court striking the answer as an affidavit. The summary judgment order does not acknowledge the answer’s verification and simply states “[n]o opposing affidavits have been filed by or received from the Defendant.”

In light of the averments in Defendant’s verified answer, we hold the trial court erred in granting summary judgment solely because Defendant, by apparent scrivener’s error, failed to deny Paragraph 17 of Plaintiff’s verified complaint. As quoted above, Paragraph 17 simply alleged that the defendants repaid certain sums to Plaintiff. Paragraph 17 does not itself describe what indebtedness those payments were intended to satisfy, nor does it state that any debts ultimately remained unsettled. Given that Defendant’s verified answer denied both accepting the business loans from Plaintiff and a failure to pay any indebtedness in full, an admission to Paragraph 17 on Defendant’s part would not—contrary to the summary judgment order—“constitute undisputed evidence that a valid debt is *due and owing* from the Defendant to the Plaintiff.”² (emphasis added). In other words, a mere admission that Defendant made the payments in Paragraph 17 does not compel either conclusion that those repayments were intended to satisfy the debts sued upon or that the debts were not later paid in full. The trial court therefore erred in granting

² We note that although Paragraph 17 of the verified complaint alleged that the collective “[d]efendants ha[d] repaid the following sums[.]” Plaintiff’s affidavit filed at summary judgment states that any allegation that Defendant contributed \$2,900 towards those repayments was “upon information and belief” rather than on actual knowledge.

summary judgment solely because Defendant neglected to deny Paragraph 17 of Plaintiff's complaint.

Reversal is also warranted here for another reason: although Plaintiff did introduce evidence via affidavit that Defendant was connected to EPP, Plaintiff presented no evidence that Defendant engaged in civil conspiracy, negligently misrepresented material facts, or defrauded Plaintiff such that treble damages for unfair and deceptive trade practices would be available. Plaintiff's allegations in her verified complaint that the defendants engaged in a civil conspiracy and made false representations were "upon information and belief[.]" not actual knowledge, and neither of her other affidavits demonstrated that Defendant defrauded her, misrepresented material facts, or conspired with his brother and EPP to accomplish either act. Mere breach of contract is insufficient to support a claim for unfair and deceptive trade practices, *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992); thus, even presuming *arguendo* that summary judgment was appropriate on Plaintiff's breach of contract claim, the award of treble damages for unfair and deceptive trade practices was not.

III. CONCLUSION

For the foregoing reasons, the trial court's order for summary judgment is reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED.

GORDON V. HANCOCK

Opinion of the Court

Judges DIETZ and TYSON concur.

Report per Rule 30(e).