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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-360

No. COA20-624

Filed 20 July 2021

Ashe County, No. 16 CVS 283

DLL FINANCE LLC, f/k/a AGRICREDIT ACCEPTANCE, Plaintiff,

CRAIG SULLIVAN, Judgment Creditor,

v.

STEVEN A. WARNER and BLUE RIDGE GOLF CARS & UTILITY VEHICLES, INC., Defendants.

Appeal by Judgment Creditor and cross-appeal by Defendants from order entered 10 December 2019 by Judge Michael Duncan in Ashe County Superior Court. Heard in the Court of Appeals 12 May 2021.

*Miller & Johnson, PLLC, by Nathan A. Miller, for Judgment Creditor-Appellant/Cross-Appellee.*

*Capua Law Firm, PA, by Paul A. Capua and Joshua J. Teague, for Defendants-Appellees/Cross-Appellants.*

GRIFFIN, Judge.

¶ 1 Steven A. Warner and Blue Ridge Golf Cars & Utility Vehicles, Inc. (“BRGC”) (together, “Defendants”), appeal from the trial court’s order denying their Motion for Relief from Judgment, denying their Motion to Dismiss Judgment Creditor Craig

Sullivan’s petition to determine ownership of funds, and declining to award them a reasonable attorney’s fee. The trial court did not abuse its discretion in denying Defendants’ Motion for Relief from Judgment and was not statutorily required to award reasonable attorney’s fees. While Defendants’ Motion to Dismiss should have been granted, the Defendants were not prejudiced by the error. As such, we affirm.

### **I. Factual and Procedural History**

¶ 2

On 1 July 2016, DLL Finance LLC f/k/a Agricredit Acceptance, LLC (“DLL Finance”), docketed in Ashe County Superior Court an action to domesticate a foreign judgment (the “DLL Judgment”) it obtained in Iowa against Steven Warner and BRGC. The DLL Judgment was obtained in Polk County, Iowa, pursuant to a forum selection clause in a financing agreement between DLL Finance and BRGC. The DLL Judgment totaled \$80,077.90 with an interest rate of 18% annually. Defendants were served with the action to domesticate the judgment in Ashe County. Defendants did not oppose or respond to the motion to domesticate.

¶ 3

BRGC, Steven Warner, and Shirley Warner filed a complaint against Craig Sullivan in Ashe County Superior Court. Sullivan filed two counterclaims against the Warners. On 20 July 2018, the court granted summary judgment in favor of Sullivan on all of the Warners’ claims. Sullivan filed a voluntary dismissal on one of his two counterclaims. This left a remaining counterclaim for conversion.

¶ 4

A jury rendered a unanimous verdict for BRGC. The jury found that (1) BRGC

was an intended third-party beneficiary of the contract, (2) Sullivan breached the contract, (3) Sullivan breached the implied covenant of good faith and fair dealing in the contract, and (4) BRGC was entitled to special damages. On Sullivan's counterclaim against Steven Warner and Shirley Warner for conversion, the jury found that the Warners converted Sullivan's construction materials in the amount of \$9,000. On 8 April 2019, the trial court entered a judgment, under which (*inter alia*) Sullivan was to pay BRGC an amount of \$134,000 with post-judgment interest of 8% annually until paid in full.

¶ 5

Sullivan then purchased the DLL Judgment, acquiring it by assignment. He filed the assignment on 9 April 2019 in Ashe County. On or about 12 April 2019, Sullivan was also assigned a judgment against BRGC and Steven Warner from Club Car, LLC. On 8 May 2019, Sullivan paid \$134,881.10 ("the Funds") to the Ashe County Clerk of Superior Court in satisfaction of the judgment against himself. Sullivan then caused to be issued Writs of Execution against BRGC in regard to both judgments he acquired by assignment. The Ashe County Sheriff sought to enforce the Writs of Execution and collect the Funds held by the Clerk of Court. The Clerk of Court refused to allow the Sheriff to levy on the Funds. The Clerk of Court requested an Order in Aid of Execution before she would release the Funds to the Sheriff. On 9 May 2019, Sullivan filed a Motion for Order in Aid of Execution, asking the Clerk of Court to release the Funds to him as the assignee.

¶ 6 Capua Law Firm, PA, represented BRGC throughout the trial proceedings. Defendants and Capua Law filed various motions and petitions upon receipt of Sullivan's Motion for Order in Aid of Execution. Among these was Defendants' Motion for Relief from Judgment. On 10 June 2019, Sullivan filed a petition pursuant to N.C. Gen. Stat. § 1-339.71 to determine ownership of the Funds. Defendants filed a Motion to Dismiss Sullivan's petition, pursuant to Rule 12(b)(6). The Motion to Dismiss was denied.

¶ 7 The motions were heard on 22 August 2019. On 10 December 2019, the trial court entered an Order on Motions Hearing. The court found jurisdiction to be proper in the matter. The court allowed Sullivan's Motion for Order in Aid of Execution and directed the Clerk of Superior Court of Ashe County to distribute the Funds. The Funds were to be distributed first to satisfy a lien of Capua Law's; then the judgments owned by Sullivan; and, if any such funds should remain, then to BRGC. Defendants timely appeal.

## II. Analysis

¶ 8 Defendants argue that the trial court erred by denying their Motion for Relief from Judgment on the basis of Sullivan's unclean hands as well as for a lack of personal jurisdiction. Defendants additionally allege that the trial court erred by denying their Motion to Dismiss Sullivan's petition to determine ownership of the funds and by declining to award Defendants reasonable attorney's fees. After review,

we affirm.

### **A. Motion for Relief from Judgment**

¶ 9 Defendants allege the trial court erred by denying their Motion for Relief from Judgment on the basis of the unclean hands doctrine and by enforcing a judgment that was void for lack of personal jurisdiction. We disagree.

#### *1) Standard of Review*

¶ 10 Defendants filed their Motion for Relief from Judgment pursuant to Rules 12(f), 60(b)(4), and 60(b)(6) of the North Carolina Rules of Civil Procedure. “[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion.” *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

#### *2) Unclean Hands*

¶ 11 Sullivan’s Motion for Order in Aid of Execution was made under Article 31, § 1-359 of the North Carolina General Statutes. Article 31 proceedings are equitable proceedings. *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968).

¶ 12 Under the unclean hands doctrine, a person requesting equitable relief must

not have “caused the injuries or threat of them, of which he complains[.]” *Tobacco Growers Co-op. Asso. v. Bland*, 187 N.C. 356, 360, 121 S.E. 636, 638 (1924). However, if “the alleged misconduct giving rise to the assertion of unclean hands arises out of matters which are merely collateral to the transaction for which equitable relief is sought, the equitable remedy is not barred.” *S.T. Wooten Corp. v. Front St. Constr. LLC*, 217 N.C. App. 358, 362, 719 S.E.2d 249, 252 (2011) (citation omitted).

¶ 13 Sullivan lawfully purchased the DLL Judgment from DLL Finance for consideration. His alleged misconduct did not create his ownership of the DLL Judgment. To prevent Sullivan from recovering the amount of the DLL Judgment from BRGC would grant double recovery to BRGC against Sullivan. Sullivan’s purchase did not change the amount of money that BRGC owed; the purchase simply changed the party to which BRGC was required to pay the money. Sullivan’s alleged misconduct is merely collateral to his ownership of the DLL Judgment. Therefore, the trial court did not abuse its discretion as the unclean hands doctrine did not apply in this matter.

### *3) Personal Jurisdiction*

¶ 14 “A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered.” *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992)

(citations omitted). A court may establish personal jurisdiction over a party either by consent to the jurisdiction or by minimum contacts with the forum state. *Bell Atl. Tricon Leasing Corp. v. Johnnie’s Garbage Serv.*, 113 N.C. App. 476, 479, 439 S.E.2d 221, 224 (1994).

¶ 15 Here, Defendants consented to the jurisdiction of Polk County, Iowa, by signing an agreement with DLL Finance which contained a clause entitled “CHOICE OF LAW / VENUE / WAIVER OF JURY TRIAL”. This clause established that Iowa court as the proper venue for any dispute under the agreement. “[F]orum selection clauses are valid in North Carolina unless the litigant demonstrates that the clause was ‘the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.’” *Id.* at 480, 439 S.E.2d at 224 (quoting *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992)).

¶ 16 Defendants dispute jurisdiction by arguing that the consent obtained through the forum selection clause was “neither the product of negotiation nor equal bargaining power between the parties.” Defendants made this motion on 12 July 2019.

¶ 17 Defendants did not file an affidavit supporting this motion until 20 August 2019. This filing was two days prior to the 22 August 2019 hearing. Rule 6(d) of the North Carolina Rules of Civil Procedure provides “[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion[.]” N.C. Gen. Stat. § 1A-1, Rule

6(d) (2019). While a court may allow affidavits to be filed after the motion they support, allowance of such is at the discretion of the trial court. *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 641, 279 S.E.2d 918, 924 (1981). The trial court did not abuse its discretion in striking the affidavit as it was not introduced with the motion it supported and Defendants presented no legitimate reason for the delay.

¶ 18 Defendants introduced no evidence beyond the stricken affidavit supporting a conclusion that that the clause was the product of fraud or unequal bargaining power, or that enforcement of the clause would be unfair or unreasonable. Sullivan did not offer evidence in response; therefore, “the court considers (1) any allegations in the complaint that are not controverted by the defendant’s evidence and (2) all facts in the defendant’s evidence, which are uncontroverted because of the plaintiff’s failure to offer evidence in response[.]” *McCullers v. Lewis*, 265 N.C. App. 216, 220, 828 S.E.2d 524, 530 (2019) (citation omitted).

¶ 19 Here, uncontroverted evidence showed that Defendants signed a financing agreement with DLL Finance, that the agreement provided Iowa law would govern any dispute, and that the parties consented to litigation of the contract in Iowa. As discussed *supra*, this consent is sufficient to establish personal jurisdiction. Therefore, the judgment was not void and the trial court did not abuse its discretion in denying Defendants’ Motion for Relief from Judgment on this ground.



**B. Motion to Dismiss**

¶ 20 Defendants allege that the trial court erred by denying their Motion to Dismiss Sullivan’s petition to determine ownership of the Funds and that they should have been awarded reasonable attorney’s fees pursuant to N.C. Gen. Stat. § 1-339.71(d).<sup>1</sup> We agree the trial court erred by not granting the dismissal of Sullivan’s petition. The trial court, however, did not abuse its discretion in choosing not to award attorney’s fees pursuant to N.C. Gen. Stat. § 1-339.71(d).

¶ 21 Pursuant to Rule 12(b)(6), Defendants moved to dismiss Sullivan’s petition to determine ownership of disputed funds. “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). “A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting ‘the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.’” *Forsyth Mem’l Hosp., Inc. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425–26 (1994)

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<sup>1</sup> Defendants cite non-existent N.C. Gen. Stat. § 1-339.70(d), however N.C. Gen. Stat. § 1-339.71(d) references reasonable attorney’s fees resulting from § 1-339.71 motions to determine ownership of funds. Therefore, § 1-339.71(d) is assumed to be the statute Defendants intended to cite and our analysis will reflect such.

(quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991) (alteration in original)).

¶ 22 On 10 June 2019, Sullivan filed a petition pursuant to N.C. Gen. Stat. § 1-339.71 to determine ownership of the Funds. Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) in response. This motion was denied by the trial court.

¶ 23 The granting of a Rule 12(b)(6) motion to dismiss is proper when “the [petition] on its face reveals that no law supports the [petitioner’s] claim.” *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). Taking every part of Sullivan’s petition as true on its face as admitted, there is no law introduced in the petition which supports the determination of ownership of the Funds. N.C. Gen. Stat. § 1-339.71 provides that:

A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk’s office under G.S. 1-339.70 or G.S. 105-375(q)(6), to determine who is entitled thereto.

N.C. Gen. Stat. § 1-339.71 (2019). However, such special proceedings are for money from execution sales and tax foreclosures. *See* N.C. Gen. Stat. §§ 1-339.70 (2019) (execution sales), 105-374(q)(6) (2019) (foreclosures of tax liens). Sullivan’s motion sought to determine ownership of money paid in satisfaction of a judgment, not money from an execution sale or a tax foreclosure. Defendants’ Motion to Dismiss Sullivan’s petition should have been granted.

¶ 24 However, the outcome of the proceedings would not have differed had the Motion to Dismiss been properly granted. Sullivan’s petition was for a determination of ownership of the Funds. Other motions, such as Sullivan’s Motion for Aid of Execution and Capua Law’s Petition to Enforce Attorney Charging Lien, required a determination of ownership of the Funds and were both filed prior to Sullivan’s § 1-339.71 petition. The trial court did err by denying Defendants’ Motion to Dismiss but Defendants were not prejudiced by this error.

¶ 25 Had Defendants’ motion been properly granted, pursuant to N.C. Gen. Stat. § 1-339.71(d), the trial court was not statutorily required to award Defendants attorney’s fees related to Sullivan’s § 1-339.71 petition. *See* N.C. Gen. Stat. § 1-339.71(d) (2019) (“The court *may, in its discretion*, allow a reasonable attorney’s fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy[.]” (emphasis added)). Such an allowance is reviewed upon an abuse of discretion standard; however, no allowance was ever decided on as Defendants’ Motion to Dismiss was denied. Assuming *arguendo* that the Defendants’ Motion to Dismiss had been properly granted, the trial court would not have abused its discretion had it not awarded Defendants reasonable attorney’s fees as it was under no statutory obligation to do so. Therefore, the trial court did not err by declining to award Defendants reasonable attorney’s fees in relation to Sullivan’s § 1-339.71 petition.

### **III. Conclusion**

¶ 26 Based on the foregoing reasons, we hold that the trial court did not commit reversible error in denying the Defendants' motions. We affirm.

AFFIRMED.

Judges DILLON and JACKSON concur.

Report per Rule 30(e).