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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-121

No. COA21-367

Filed 15 February 2022

Mecklenburg County, No. 19CVD11612

NOELLE E. WOOTEN, Plaintiff,

v.

JOHN F. WOOTEN, III, Defendant.

Appeal by Defendant from order entered 28 January 2021 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 11 January 2022.

Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellant.

Nelson Mullins Riley & Scarborough, LLP, by Fred M. Wood, Jr., for Plaintiff-Appellee.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1

Defendant John F. Wooten, III (“Defendant-Husband”) and Noelle E. Wooten (“Plaintiff-Wife”) were married in 1997 and divorced in 2016. In 2015, the parties entered into a Separation, Property Settlement, Alimony, and Higher Education Agreement (the “Contract”). Pursuant to the terms of the Contract, Defendant-

Husband agreed to pay alimony to Plaintiff-Wife in the sum of \$4,000 monthly. Defendant-Husband's alimony obligations were non-modifiable, absent certain conditions tied solely to his income. Defendant-Husband also agreed to contribute \$8,500.00 to each child's 529 plan annually. On 11 June 2019, Plaintiff-Wife filed a verified complaint initiating a breach of contract action against Defendant-Husband after Husband stopped complying with his obligations to pay alimony and contribute to the children's 529 college savings accounts. On 19 June 2020, Plaintiff-Wife served a Motion and Supporting Memorandum for Summary Judgment and Affidavit of Plaintiff-Wife on Defendant-Husband.

¶ 2

On 19 August 2019, Defendant-Husband filed a verified Answer, Defenses and Counterclaims, and on 8 October 2020, he filed an affidavit in opposition to Plaintiff-Wife's motion for summary judgment. Defendant-Husband admitted in his verified Answer he had discontinued payment of alimony as of April 2019, he intended to continue to refuse to pay alimony in future months, and he did not make contributions to his children's 529 college savings accounts due by March 2019. Defendant-Husband alleged his non-performance was excused by Plaintiff-Wife's alleged breaches, including contentions Plaintiff-Wife did not distribute savings bonds to the oldest child, did not use the 529 accounts for the higher education of the oldest child, and did not make a complete disclosure of her income at the time Defendant-Husband entered the Contract.

¶ 3 In his affidavit, Defendant-Husband informed the trial court:

When I first discovered [Plaintiff-Wife] had lied to me, I thought about having my attorney file suit seeking rescission of the Agreement immediately, but I held off because we already were in litigation over child support (eventually resolved in mediation, with [Plaintiff-Wife] agreeing to accept less in child support, mainly because she was earning more income and could contribute a higher percentage of the children's needs and expenses). I even kept paying the \$4000 per month, though I did not (and still do) think I have an obligation to pay it, until [Plaintiff-Wife] intentionally breached the agreement herself in other ways.

¶ 4 Plaintiff-Wife filed a reply denying the allegations in Defendant-Husband's counterclaim. Defendant-Husband has never disputed the fact he discontinued compliance with his obligations under the Contract. The only dispute before the trial court was whether Defendant-Husband was justified in his decision to stop complying with his obligations under the Contract.

¶ 5 On 19 October 2020, Plaintiff-Wife's motion for summary judgment was heard by the Honorable Jena P. Culler. The trial court granted Plaintiff-Wife's motion for summary judgment, ordered Defendant-Husband to specifically perform by making the alimony payments and 529 deposit obligations as set forth in the Contract, and ordered Plaintiff-Wife to specifically perform reimbursement obligations and, going forward, to use 529 plan funds for qualified higher education expenses as set forth in the Contract. On 5 February 2021, Defendant-Husband filed a notice of appeal.

II. Jurisdiction

¶ 6 The trial court’s order granting summary judgment is a final judgment and appeal therefore lies to the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Standard of Review

¶ 7 This Court reviews a trial court’s grant of summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). “An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law.” *Smith v. Cnty. of Durham*, 214 N.C. App. 423, 429, 714 S.E.2d 849, 854 (2011) (citation omitted).

¶ 8 The burden in an appeal from a grant of summary judgment is on the movant to establish there are no triable issues of fact. *Fairview Devs., Inc. v. Miller*, 187 N.C. App. 168, 170, 652 S.E.2d 365, 367 (2007), *disc. rev. denied*, 362 N.C. 176, 658 S.E.2d 484 (2008). On appeal, this Court views the record in the light most favorable to the non-moving party, drawing all reasonable inferences in the nonmovant's favor. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. rev. denied*, 355 N.C. 211, 559 S.E.2d 801 (2002).

IV. Analysis

A. Summary Judgment

¶ 9 On appeal, Defendant-Husband argues summary judgment for Plaintiff-Wife should not have been granted, as a genuine issue of material fact exists as to whether Plaintiff-Wife “breached the warranty of disclosure when she failed to disclose her income and whether that constituted fraud.” *See Fairview Devs.*, 187 N.C. App. at 170, 652 S.E.2d at 367. Specifically, Defendant-Husband contends Plaintiff-Wife’s breach invalidated the Contract, excusing him from his obligations under its terms. For the following reasons, we agree with the trial court’s conclusion Defendant-Husband could not rescind the Contract based his allegation of fraud.

¶ 10 An unincorporated separation agreement is enforced in the same manner as any other contract. *Herring v. Herring*, 231 N.C. App. 26, 27, 752 S.E.2d 190, 192 (2013) (citing *Gilmore v. Garner*, 157 N.C. App. 664, 669, 580 S.E.2d 15, 19 (2003)). The elements of breach of contract are: (a) the existence of a valid contract and (b) breach of the terms of the contract. *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)). For Defendant to prevail on an appeal from the trial court’s grant of Plaintiff-Wife’s motion for summary judgment, there must be a triable issue of fact as to whether the Contract was valid, and if it was valid, if the terms of the Contract were breached. *See Long*, 160 N.C. App. at 668, 588 S.E.2d at 4.

¶ 11 Defendant-Husband must do more than broadly allege fraud to survive entry of summary judgment against him; he must set forth specific facts showing there is

a genuine issue for trial. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021). Even if the Contract was invalid because of Plaintiff-Wife’s alleged fraud, it is deemed validated if Defendant-Husband subsequently ratifies the Contract. Ratification can occur where a party accepts benefits and performs under an agreement. *See Lowry v. Lowry*, 99 N.C. App. 246, 254, 393 S.E.2d 141, 146 (1990) (wife ratified agreement by signing it, incorporating it into consent judgment, and receiving benefits for three years); *see also Hill v. Hill*, 94 N.C. App. 474, 479, 380 S.E.2d 540, 544 (1989) (wife ratified agreement accepting from \$1,000.00 monthly, as well as other benefits, from husband under their agreement even after she became aware of alleged wrongdoing); *Ridings v. Ridings*, 55 N.C. App. 630, 632-33, 286 S.E.2d 614, 616 (husband ratified agreement by paying alimony for four months and accepting title and possession of property transferred under an agreement), *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

¶ 12 A contract is ratified if it is not rescinded within a reasonable time after fraud is discovered. *See Honeycutt v. Honeycutt*, 208 N.C. App. 70, 82-83, 701 S.E.2d 689, 697 (2010). In the case of *Honeycutt v. Honeycutt*, this Court found:

In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence, and he is not allowed to rescind in part and affirm in part; he must do one or the other. And as a general rule, a party is not allowed to rescind where he is not in a position to put the other in status quo by restoring

the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end.

Honeycutt, 208 N.C. App. at 82-83, 701 S.E.2d at 697 (quoting *Bolich v. Ins. Co.*, 206 N.C. 144, 155–56, 173 S.E. 320, 326–27 (1934)). Similar to the plaintiff in *Honeycutt*, instead of acting “promptly and within a reasonable time after the discovery of the [alleged] fraud,” Defendant-Husband continued to accept and retain benefits under the Contract long after he became aware of the alleged improprieties related to the Contract. Because Defendant-Husband did not act promptly and within a reasonable time after the discovery of the alleged fraud, he waived any right he may have had to rescind the Contract. Moreover, he was “not allowed to rescind [the Contract] in part and affirm in part; he must [have done] one or the other.” See *Honeycutt*, 208 N.C. App. at 82-83, 701 S.E.2d at 697. Based on the foregoing reasoning, even assuming, without finding, Plaintiff-Wife had committed fraud, the Contract was ratified notwithstanding such fraud by the action of Defendant-Husband. See *id.* at 82-83, 701 S.E.2d at 697.

¶ 13 The trial court correctly concluded Defendant-Husband could not rescind the Contract based upon a broad and untimely allegation of fraud. No genuine issue of material fact exists as to whether Plaintiff-Wife’s alleged breach invalidated the Contract, excusing Defendant-Husband from his obligations. Therefore, summary

judgment in favor of Plaintiff-Wife was properly granted by the trial court.

B. Specific Performance

¶ 14 Defendant-Husband asserts the trial court erred in its award of summary judgment on the issue of specific performance of ongoing obligations and of arrears because there was a genuine issue of material fact as to whether Defendant-Husband had the ability to comply with the terms of the Contract.

¶ 15 By way of his own admission, Defendant-Husband has the ability to make required payments. As correctly held by the trial court, while Defendant-Husband initially asserted an affirmative defense of inability to perform in his Answer, Defenses, and Counterclaims, he no longer contended he was unable to perform. Rather, in Defendant-Husband's Affidavit in Opposition to Plaintiff-Wife's Summary Judgment Motion, Defendant-Husband states:

My bonus was reduced for 2019 but I received a substantial bonus (\$150,000.00, less withholdings) for 2020. It is not now my contention that I am unable to pay Alimony or unable to deposit funds in the 529 Accounts for the children. Rather, it is my contention that Noelle's misrepresentations about her income and her various breaches of the Agreement have relieved me of my responsibility to comply with the Agreement, and that the Agreement is invalid and unenforceable.

¶ 16 The trial court's conclusion Defendant-Husband had the ability to pay was supported by its findings. Therefore, entry of specific performance was proper.

V. Conclusion

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Opinion of the Court

¶ 17

Because Defendant-Husband ratified the Contract by not attempting to rescind it within a reasonable time, he cannot now claim a genuine issue of material fact exists as to whether his obligations under the Contract are excused. The trial therefore court properly granted Plaintiff-Wife's motion for summary judgment on her breach of contract claims. Further, the trial court's conclusion Defendant-Husband had the ability to pay was supported by its findings, including Defendant-Husband's own admissions. Entry of an order for specific performance was therefore proper. For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).