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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-172

No. COA21-288

Filed 15 March 2022

Cabarrus County, No. 16 CVS 2797

DCW CLASSROOM DESIGNS, INC., and ANDREW J. DRUCKER, Plaintiffs,

v.

MARK SWARTZ, JOSEPH J. MURPHY, RUCKUS HOUSE HARRISBURG, LLC and RUCKUS HOUSE MOSS CREEK, LLC, Defendants.

Appeal by plaintiffs from judgment entered 16 May 2018 by Judge Kevin M. Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 15 December 2021.

*Raynor Law Firm, PLLC, by Kenneth R. Raynor, for plaintiffs-appellants.*

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for defendants-appellees.*

DIETZ, Judge.

¶ 1 Plaintiffs DCW Classroom Designs, Inc. and Andrew Drucker appeal the trial court's order granting summary judgment against them in this contract dispute. As explained below, the parties briefed and argued two distinct grounds for summary judgment in the trial court, and every indication in the record suggests that the trial court considered both of Defendants' arguments in its ruling. But Plaintiffs addressed

only the first of those two grounds in their appellants' brief and did not argue on appeal that the trial court declined to address the second issue. Thus, any challenge on the second ground is abandoned on appeal. As a result, we are constrained to reject Plaintiffs' arguments and affirm the trial court's judgment on the basis of this abandoned issue.

## Facts and Procedural History

¶ 2 In February 2013, Plaintiffs DCW Classroom Designs, Inc. and its principal Andrew Drucker entered into a "Confirmation of Relationship, Appointment and Fee Compensation Agreement" with Defendants Mark Swartz, Joseph Murphy, and their business entities Ruckus House Harrisburg, LLC and Ruckus House Moss Creek, LLC. Under the agreement, Plaintiffs received a fee for assisting Defendants with a sale of the two Ruckus House daycare businesses and the accompanying leases of the real property where the businesses operated.

¶ 3 The terms of the parties' agreement stated that Plaintiffs would "successfully broker and assist in the negotiation of a transaction (including the execution of a Lease Agreement and Acquisition of and for both Ruckus House locations) between [Defendants] and Learning Care Group, Inc., Tutor Time Learning Centers, LLC, or any other related entity, hereinafter referred to as the 'Buyer.'"

¶ 4 The "Fee Arrangement" section of the agreement provided that Defendants would pay Plaintiffs a fee for "services rendered on the above-referenced project" in

the event that "any deal or transaction is consummated between the [Defendants] and the Buyer," "either with or without the involvement of" Plaintiffs. The agreement set Plaintiffs' minimum fee at $100,000.

¶ 5 Initial negotiations between Defendants and these potential buyers did not result in an agreement. After that, Plaintiffs and Defendants had little contact. Several years later, in August 2016, Learning Care Group, Inc. agreed to buy Defendants' Ruckus House operations and lease the properties where those businesses operate. The following month, Plaintiffs brought this action for breach of contract, alleging that Defendants had "consummated a sale of their child care businesses" but refused to pay Plaintiffs' fee under their 2013 contract.

¶ 6 After discovery, Defendants moved for summary judgment, asserting that the parties' agreement was unenforceable under N.C. Gen. Stat. § 93A-1 because the services Plaintiffs offered to provide under the contract required a real estate broker's license and Plaintiffs did not have the necessary license. Defendants also argued that the agreement was unenforceable because there was insufficient consideration. Following a hearing, the trial court entered an order granting Defendants' motion for summary judgment and dismissing Plaintiffs' claims with prejudice. Plaintiffs timely appealed.

## Analysis

¶ 7 This Court reviews the grant of summary judgment *de novo*. *In re Will of Jones*,

362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment "is appropriate only when the record shows 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." *Id.* Because our review is *de novo*, we are not limited to reviewing the grounds on which the trial court actually ruled and may consider any basis for summary judgment that the movants presented to the trial court. *Steiner v. Windrow Ests. Home Owners Ass'n, Inc.*, 213 N.C. App. 454, 467, 713 S.E.2d 518, 528 (2011).

¶ 8 In the trial court, Defendants asserted two alternative grounds for invalidating the parties' agreement—(1) that the agreement was unenforceable because it violated N.C. Gen. Stat. § 93A-1 and (2) that the agreement was unenforceable for lack of adequate consideration. Defendants raised both of these arguments in their motion for summary judgment and discussed them in a lengthy brief to the trial court. Plaintiffs responded to both of these arguments in their own lengthy brief to the trial court.

¶ 9 The parties did not include a transcript or narrative of the summary judgment hearing in the record on appeal. After the hearing, the trial court granted Defendants' motion in a standard order stating that "there are no genuine issues of material fact in dispute and Defendants are entitled to summary judgment as a matter of law." The trial court's order—as is often the case in summary judgment rulings from our State's trial courts—did not specify the particular legal theory on which the court

relied in reaching this conclusion.

¶ 10 In their opening appellants' brief, Plaintiffs addressed only the first of Defendants' two arguments, the one concerning the application of N.C. Gen. Stat. § 93A-1. Plaintiffs did not address the alleged lack of consideration to support the contract. In their appellees brief, Defendants responded by asserting that Plaintiffs abandoned this consideration argument on appeal. Plaintiffs, in turn, responded in their reply brief by arguing that there was adequate consideration and that the consideration issue was properly before this Court because Rule 28(a) of the Rules of Appellate Procedure states that the "scope of review on appeal is limited to issues so presented in the *several* briefs." N.C. R. App. P. 28(a) (emphasis added). Plaintiffs asserted that the reply brief must be considered among the "several" briefs so referenced.

¶ 11 We are not persuaded by Plaintiffs' argument. The contents of an appellant's opening brief are governed by Rule 28(b) of the Rules of Appellate Procedure, which requires the appellant to include an argument section "to contain the contentions of the appellant with respect to each issue presented." N.C. R. App. P. 28(b)(6). The rule further provides that issues "not presented" in the appellant's brief "will be taken as abandoned." *Id.* Thus, "under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief." *Larsen v. Black Diamond French*

*Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015). This rule exists because the appellee cannot respond to the reply brief. Allowing appellants to argue a new issue for the first time in their reply brief would frustrate "the adversarial process by depriving defendants of the opportunity to respond to this argument." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 708, 682 S.E.2d 726, 740 (2009).

¶ 12 Plaintiffs contend that a strict interpretation of Rule 28(b)'s requirements would "place an appellant contesting an order granting summary judgment in the position of addressing every possible issue and defense which could have supported the trial court's order." That is not our holding today because that scenario is far removed from this case. Here, Defendants advanced two distinct legal grounds supporting summary judgment, and both parties addressed those two arguments at length in their trial court briefing. The trial court entered summary judgment without specifying which of those two grounds it relied upon.

¶ 13 Plaintiffs did not include a transcript of the summary judgment hearing or a narrative of it, leaving only the parties' written submissions as our basis for assessing the issues presented to, and considered by, the trial court. Notably, Plaintiffs do not argue on appeal that the trial court declined to address the consideration issue. Moreover, there is no indication in the record that Plaintiffs asked the court to indicate it had not ruled on the consideration issue, either through a proposed order or other communication with the court at the hearing or afterwards. Every indication

in the record on appeal suggests that the court addressed both of Defendants' arguments in its ruling.

¶ 14 In similar cases, this Court has held that when an appellant fails to address "an independent reason for granting defendants' motion for summary judgment" in the opening brief, the appellants abandon that argument and the trial court's ruling must be affirmed because summary judgment on that basis is "essentially unchallenged" on appeal. *White v. Schwartzman*, 155 N.C. App. 224, 573 S.E.2d 773, 2002 WL 31895004, at *1 (2002) (unpublished); *see Crumpler v. Avenir Dev., L.L.P.*, 208 N.C. App. 281, 702 S.E.2d 555, 2010 WL 5135874, at *2 (2010) (unpublished). We are persuaded by the text of Rule 28 and our reasoning in these cases that Plaintiffs abandoned the consideration issue on appeal. As noted above, we reach this conclusion based on the particular facts of this case—that there were two distinct issues presented to the trial court in lengthy briefing by the parties; that the record indicates the court considered both issues; and that Plaintiffs have not argued that the trial court's ruling was based solely on the issue they addressed in their appellant's brief.

¶ 15 Several months after the conclusion of briefing in this appeal and just weeks before the case was scheduled to be heard, Plaintiffs filed a "Motion for Lesser Sanctions and Motion to Amend Brief," asking this Court to invoke Rule 2 of the Rules of Appellate Procedure to either allow Plaintiffs to amend their opening brief or to

reach the merits of the consideration issue although it was not addressed in the appellant's brief.

¶ 16 As our Supreme Court recently reaffirmed, we may invoke Rule 2 only in exceptional circumstances when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest. *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 5. This case does not present the sort of manifest injustice or importance to the public interest that would justify the use of Rule 2. Plaintiffs are no different than other, similarly situated litigants who abandoned key issues by failing to timely address them on appeal. *See Larsen*, 241 N.C. App. at 79, 772 S.E.2d at 96; *Schwartzman*, 155 N.C. App. 224, 573 S.E.2d 773, 2002 WL 31895004, at *1; *Crumpler*, 208 N.C. App. 281, 702 S.E.2d 555, 2010 WL 5135874, at *2. Moreover, permitting an appellant to amend the opening brief to assert new issues would then require a new briefing schedule, as the appellee would be entitled to respond to the new arguments. Plaintiffs' motion, filed months after briefing closed and shortly before this case was scheduled to be heard, would have required this Court to remove the case from the calendar, which we do only in the most extraordinary situations. Again, this case does not present that sort of extraordinary situation. We thus deny Plaintiffs' motion and hold that any arguments concerning the consideration issue are abandoned on appeal.

¶ 17 We acknowledge that this is a harsh result. But our case law contains many

examples of litigants who abandoned arguments on appeal when they may not have intended to do so. "The public, and other jurisdictions that may be called on to recognize our State's court judgments, expect our courts to apply procedural rules uniformly to all litigants who appear before them. Thus, although we recognize that justice is best served when this Court reaches the merits of the underlying issues raised on appeal, we are obligated to enforce this well-settled procedural rule." *Martin v. Pope*, 257 N.C. App. 641, 645–46, 811 S.E.2d 191, 195 (2018). We therefore affirm the trial court's entry of summary judgment on the basis of the unchallenged consideration argument advanced by Defendants below.

## Conclusion

¶ 18 We affirm the trial court's order.

AFFIRMED.

Judge COLLINS concurs.

Judge JACKSON concurs in result only.

Report per Rule 30(e).