IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-308

No. COA21-719

Filed 3 May 2022

Catawba County, No. 19 CVD 3653

DALE ROBERT FUCHS, Plaintiff,

v.

ALISON LYNN STORRY, et al., Defendants.

Appeal by Defendant from orders entered on 25 May 2021, 20 July 2021, and 30 August 2021 by Judge Sherri W. Elliott in Catawba County District Court. Heard in the Court of Appeals 6 April 2022.

Wesley E. Starnes for the Plaintiff-Appellee.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for the Defendant-Appellant.

JACKSON, Judge.

¶ 1 Alison Lynn Storry ("Defendant") appeals from the trial court's orders granting summary judgment in favor of Dale Robert Fuchs ("Plaintiff") and awarding him attorney's fees. We affirm the orders of the trial court.

I. Background

¶ 2 The parties were married on or about 7 April 2009. On 10 September 2018, they separated. On 5 August 2019, they entered into a separation agreement.

Amongst other things, the separation agreement required Defendant to sell three pieces of real property titled in a former name of her business and to pay Plaintiff $45,000 of the proceeds from each sale. The separation agreement also authorized an award of attorney's fees in the event either party breached the agreement. The separation agreement was recorded on 6 August 2019 at the Lincoln County Register of Deeds.

¶ 3 After entering the separation agreement, Defendant sold the real property. However, she refused to pay Plaintiff $45,000 from the proceeds of the third sale.

¶ 4 On 7 November 2019, Plaintiff initiated an action in Lincoln County District Court for specific enforcement of the separation agreement and for attorney's fees. In his verified complaint, Plaintiff asserted a claim for breach of contract and moved the trial court to enter a preliminary injunction and temporary restraining order to prevent the waste, disappearance, destruction, conversion, or secreting away of assets in Defendant's personal and business bank accounts. That same day, the trial court entered an *ex parte* order freezing Defendant's personal and business bank accounts. The *ex parte* order set a review date of 20 November 2019 to determine whether the order would remain in effect pending the resolution of Plaintiff's claims, or as soon thereafter as was possible.

¶ 5 On 20 November 2019, in lieu of an answer, Defendant filed a motion to dismiss and for attorney's fees. One of the bases for the motion to dismiss was that venue in

Lincoln County District Court was improper.

¶ 6 On 22 November 2019, the motions for a preliminary injunction and temporary restraining order and to dismiss came on for hearing before the Honorable Micah Sanderson. The parties announced in open court that they had stipulated that Defendant would deposit $45,000 in her counsel's trust account; that the *ex parte* order freezing Defendant's bank accounts would be dismissed; and that venue would be transferred to Catawba County. The court entered an order to that effect on 26 November 2019.

¶ 7 On 8 January 2020, Defendant answered and asserted counterclaims to set aside the 5 August 2019 separation agreement on the grounds of undue influence and unconscionability and for equitable distribution of the marital estate. On 5 March 2020, Plaintiff answered Defendant's counterclaim.

¶ 8 On 11 December 2020, Plaintiff moved for summary judgment. Plaintiff filed an affidavit in support of his motion for summary judgment and an affidavit of his counsel in support of an award of attorney's fees that day, and Defendant filed an affidavit in opposition to Plaintiff's motion for summary judgment on 12 February 2021.

¶ 9 Plaintiff's motion for summary judgment came on for hearing before the Honorable Sherri W. Elliott in Catawba County District Court on 7 May 2021. The trial court awarded Plaintiff summary judgment in an order entered on 25 May 2021.

¶ 10 On 4 June 2021, Plaintiff moved the trial court under Rule 60 of the North Carolina Rules of Civil Procedure to amend the decretal portion of its summary judgment order to specifically direct that the $45,000 being held in Defendant's counsel's trust account be transferred to Plaintiff's counsel's trust account. On 24 June 2021, while the Rule 60 motion was still pending, Defendant filed a Notice of Intention to Appeal to the North Carolina Court of Appeals from the 25 May 2021 summary judgment order.

¶ 11 On 19 July 2021, the trial court heard Plaintiff's motion for attorney's fees. The next day, the court entered an amended summary judgment order directing that the $45,000 in Defendant's counsel's trust account be transferred to Plaintiff's counsel's trust account. On 30 August 2021, the court entered an order awarding Plaintiff attorney's fees.

¶ 12 On 23 September 2021, Defendant noticed appeal from the 25 May 2021 summary judgment order, the 20 July 2021 amended summary judgment order, and the 30 August 2021 order awarding Plaintiff attorney's fees.

II. Analysis

¶ 13 Defendant makes essentially two arguments on appeal: (1) genuine issues of material fact precluded summary judgment in Plaintiff's favor because there was evidence that both her consent to the separation agreement and her performance under the agreement was procured by undue influence; and (2) genuine issues of

material fact precluded summary judgment in Plaintiff's favor because there was evidence that Defendant's performance of her obligations under the separation agreement was procured by undue influence and thus cannot be considered ratification of the agreement as a matter of law.[1] We hold that Plaintiff has not made a sufficient forecast of admissible evidence that either her consent to the separation agreement or performance under the agreement was procured by undue influence, and that summary judgment in Plaintiff's favor was therefore proper.

A. Introduction and Standard of Review

> Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is proper 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. An issue is genuine if it is supported by substantial evidence. An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. Substantial evidence is evidence a reasonable mind might accept as

[1] Defendant also argues that the award of attorney's fees must be vacated because summary judgment was improper but does not offer any independent argument that there was error in the trial court's award of attorney's fees other than arguing that it must be vacated where it was predicated on an erroneous summary judgment ruling. Because we hold that the trial court's grant of summary judgment was proper, we do not address the derivative claim that the award of attorney's fees must be vacated where summary judgment was improper. Any error in the award of attorney's fees not based solely on the trial court awarding summary judgment in favor of Plaintiff is abandoned because of the absence of any independent argument about error in the attorney's fee award. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

> adequate to support a conclusion.
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> However, when ruling on a motion for summary judgment or reviewing such a ruling on appeal, all facts asserted by the adverse party are taken as true and their inferences must be viewed in the light most favorable to that party. The Court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences. The party moving for summary judgment bears the burden of establishing the lack of a triable issue of fact.

Stevens v. Heller, 268 N.C. App. 654, 658-59, 836 S.E.2d 675, 678-79 (2019) (cleaned up).

¶ 14 Thus, while as a general proposition, "[t]he court should not resolve issues of credibility on a motion for summary judgment[,]" *Hendrix v. Guin*, 42 N.C. App. 36, 39, 255 S.E.2d 604, 606 (1979), "[w]hen the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment." *Wachovia Bank & Trust Co. v. Grose*, 64 N.C. App. 289, 292, 307 S.E.2d 216, 217-18 (1983). "Judges are not required to submit a case to the jury . . . unless the evidence is of such a character as to warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Mickles v. Duke Power Co.*, 342 N.C. 103, 111-12, 463 S.E.2d 206, 212 (1995) (cleaned up). *See also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021) ("When a motion for summary judgment is made . . . , an adverse party . . . must set forth

specific facts showing that there is a genuine issue for trial."). Accordingly, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021). Furthermore, under the constraints of Rule 602 of the North Carolina Rules of Evidence, fact witness testimony is inadmissible unless a foundation is laid demonstrating the witness "has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2021).

¶ 15 On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012) (citation omitted).

B. Undue Influence

¶ 16 Plaintiff alleges that her consent to and performance under the separation agreement was procured by undue influence. Our Supreme Court has held that fraud, duress, and undue influence can constitute grounds for recission of a separation agreement. *Joyner v. Joyner*, 264 N.C. 27, 33, 140 S.E.2d 714, 719 (1965). Undue influence thus qualifies as legal defense to an action for specific performance of a separation agreement.

> Undue influence is defined as a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.
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> Something must operate upon the mind of a person allegedly unduly influenced which has a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others. It is the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, causing him to make the instrument which he otherwise would not have made.
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> There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.

Seagraves v. Seagraves, 206 N.C. App. 333, 341, 698 S.E.2d 155, 162-63 (2010) (cleaned up).

¶ 17 There is no forecast of admissible evidence in this case that meets the elements of undue influence, even viewing the evidence in the light most favorable to Defendant. Plaintiff's verified complaint alleged that after the parties separated on 10 September 2018, they entered into a separation agreement, a copy of which was attached as an exhibit to the complaint and thus became a part thereof. *See* N.C. Gen. Stat. § 1A-1, Rule 10(c) (2021) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). The separation agreement required Defendant to sell real property located at 3850 Sunshine Drive in Lincolnton

and pay Plaintiff $45,000 from the proceeds of the sale. Plaintiff alleged in his verified complaint that Defendant sold the property but did not pay him the $45,000, as agreed.

¶ 18 Plaintiff's counsel took Defendant's deposition on 17 November 2020. At deposition, Defendant acknowledged signing the separation agreement on or about 5 August 2019. She testified that she read the agreement before signing it and that she signed it even though an attorney she had spoken to advised her against doing so. She also admitted that she sold the home located at 3850 Sunshine Drive for $280,999, but that she did not pay Plaintiff the $45,000 from the proceeds as agreed, despite repeated requests by him that she do so.

¶ 19 Defendant went on to testify that approximately two months before entering into the separation agreement, Plaintiff "advised that he was going to go back down to Florida and talk to his old friends, to his old family." Defendant then volunteered that Plaintiff has been or is involved in organized crime, information she said she was unaware of prior to the marriage. This line of questioning followed:

> Q. In what way was that, whatever you're describing, coercive?
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> A. That I needed to pay him because otherwise it would be – all of those people were going to be brought back either into his life and indirectly into my life.
>
> Q. And you say "all of those people." Who are those people?

A. The mob.

Q. The mob. Have you ever met the mob?

A. No.

Q. I mean, has he ever injected any of those people into your life while you all were married?

A. No.

Q. So it's just a statement he made to you about being –

A. No, it's a lot more than that. It's – he was surveillance for them. He, in fact, admitted to putting surveillance on me. My son and I had to – he, for three months, made like that he didn't have a listening device on me, and it took me three months for me thinking I was going freaking crazy. And then he admitted that he did purchase a listening device, so yeah. No, it's a little bit more than just the mob.

Q. Did you ever see a listening device on you?

A. Mr. Fuchs admitted to purchasing the device. He also admitted to installing devices on former employees that had worked for him and – at a former company, ASC, and for business deals and transactions. That is what he did, yeah. I don't know if – Mr. Fuchs is capable of a lot of things. And when he's done, he said, he's done with people. So yeah, I've been a little nervous.

Q. So you believe he's a member of the mob?

A. He had been, and I don't know. He was going back down and talking with old friends is what he had told me.

Q. Did he ever actually go back to Florida?

A. Absolutely, yeah. His parents live down there, but

> yet he did not visit with them, and he told me to mind my business and that he should never have told me.
>
> Q. But to your knowledge he's never introduced someone to you and said, "This is somebody from the mob"?
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> A. (No response.)
>
> Q. No one from the mob ever showed up at your house, is that correct?
>
> A. That is correct, that I know of.

Later, when asked whether it was accurate that Defendant had performed all of her obligations under the separation agreement with the exception of paying Plaintiff $45,000 for the 3850 Sunshine Drive property, Defendant testified: "I feel that he has received above and beyond. I feel that everything is even, yes. I feel that that [(referring to the separation agreement)] is a piece of paper that was signed – but without legal representation – was signed in a – not a good state."[2] Defendant then admitted that paying Plaintiff the $45,000 was the only remaining performance due by either party under the separation agreement.

¶ 20 On redirect examination, Defendant testified about a trip she took with Plaintiff where they were unable to cross the border into Canada because of Plaintiff's criminal record, and that she later learned that Plaintiff had a felony conviction, which he revealed to her when he was "very drunk, very high[.]" Defendant testified

[2] Defendant testified that she did not retain the attorney who advised her against signing the separation agreement.

as follows regarding this conversation:

> Q. What did he tell you about his felony conviction?
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> A. That it was him and a girlfriend of his, they were driving up from Florida, and he had had a radar detector in the car and they had – I forget what it was called, crank or whatever it was, that they were running up 95 for the people down in Florida. He had had a couple of guns on him, and he was pulled over in Pennsylvania, because I believe you can't have a radar detector in PA, so it was a routine stop that ended up with drug trafficking with intent – or possession of drugs, intent to sell, possession of, I guess, whatever handguns.
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> And I because he was – I believe it was the mob boss's attorney that helped get him off or reduce sentence [sic], and he served in a – I don't know what it's called, like a lower – lower prison where it's not as severe or whatever.
>
> But right off of 95, and one time he even pointed out on another trip up to Pennsylvania that that was where he served.

Defendant offered no other testimony regarding the basis for her belief that Plaintiff was or is involved in organized crime.

¶ 21 There is no transcript of Defendant's counsel's deposition of Plaintiff in the record on appeal, which suggests that Defendant's counsel chose not to take Plaintiff's deposition.

¶ 22 In Defendant's 12 February 2021 affidavit in opposition to Plaintiff's motion for summary judgment, Defendant made various averments related to her belief that Plaintiff was or is involved in organized crime based on alleged statements made by

Plaintiff during the marriage. For example, Defendant averred that

> [t]he Plaintiff explained, in detail, his rank within the organized crime and his level of involvement in criminal activity. The Plaintiff told me that he moved to North Carolina after being released from prison to leave the organized crime. The Plaintiff told me that shortly after moving, he woke up to find a deer head on his front porch.

Defendant also averred that Plaintiff "refused to go to Greenville, South Carolina because he said a division of 'the Family' operated there." Defendant also made various averments related to alleged drug use by Plaintiff and Plaintiff's possession "of electronic tracking devices which are easily installed on vehicles[,]" which she was "informed and believe[d] that he utilized . . . to illicitly track [her] location." In the affidavit, Defendant also reiterated her deposition testimony regarding her execution of the separation agreement:

> Shortly before separation the Plaintiff told me he needed money. The Plaintiff told me he had calculated the amount of money he needed and was having his attorney prepare a Separation Agreement. The Plaintiff told me I needed to sign the agreement and pay him his money or he would go to, "the Family" for money. I believed the Plaintiff because I knew that later that [] week, he had a trip planned for Florida and Georgia to "raise money." I tried to talk the Plaintiff out of reconnecting with "the Family" as it put not only his life but my life and my son's life in jeopardy. The Plaintiff's only response was that I need to, "just sign the document and pay him."

¶ 23 In sum, Defendant admitted that she breached the parties' separation agreement by refusing to pay Plaintiff $45,000 of the proceeds from the sale of the

3850 Sunshine Drive property because she felt that Defendant had "received above and beyond" and that "everything [was] even" between her and Defendant even though she admitted that paying Plaintiff the $45,000 was the only remaining performance due by either party under the separation agreement. Defendant also made numerous statements about her motivation for entering into the separation agreement—her stated belief, based on statements she claims Plaintiff made to her during the marriage, that Plaintiff was or is involved in organized crime. However, Defendant's statements in support of this belief are conspicuously lacking in any particularity about the underlying details of the events or occurrences related to Plaintiff's alleged association with organized crime and Defendant's personal knowledge of such an association.

¶ 24 For example, although Defendant recounted an occasion when Plaintiff allegedly confessed to her while "very drunk, very high" that he had spent time in prison in Pennsylvania for controlled substances and weapons violations and testified that "the mob boss's attorney [] helped get him off or reduce[d] [his] sentence[,]" she offered no testimony about the basis for this belief aside from references to alleged statements made by Plaintiff during the marriage.[3] As previously noted, Defendant

[3] Under North Carolina Rule of Evidence 201, we take judicial notice of the fact that Plaintiff does not appear to have either a Pennsylvania or federal prison record, based on searches of the offender records websites of the Pennsylvania Department of Corrections and

averred in her affidavit in opposition to Plaintiff's motion for summary judgment that Plaintiff "explained, in detail, his rank within the organized crime and his level of involvement in criminal activity"; that he "told [her] that he moved to North Carolina after being released from prison to leave the organized crime"; and that he told her "that shortly after moving, he woke up to find a deer head on his front porch." Yet, there is no detail about Plaintiff's alleged "rank within the organized crime and level of involvement in criminal activity" in the affidavit, or elsewhere in the record, nor are any of the statements offered by Defendant in support of her stated belief that Plaintiff was or is involved in organized crime based on anything she personally observed or knew about firsthand. Rather than personal knowledge, Defendant's averment related to Plaintiff's possession of electronic tracking devices that she claimed he used to track her location was made upon information and belief. Similarly, her deposition testimony that Plaintiff performed surveillance for "them," that is, "the Family," or "the mob," was based on Plaintiff's alleged admissions to purchasing a listening device and to using a listening device on former employees and for business deals. Notably, when Defendant was asked directly about whether she had ever actually seen one of these listening devices, Defendant deflected; she did not

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the Federal Bureau of Prisons. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2021). *See, e.g.*, *State v. Harwood*, 243 N.C. App. 425, 427 n.2, 777 S.E.2d 116, 118 n.2 (2015) (taking judicial notice of a defendant's criminal convictions based on North Carolina Department of Public Safety offender search results).

respond in the affirmative or explain the basis for her beliefs about the listening devices. Instead, she spoke in generalities about knowing what Plaintiff is capable of. Finally, to reiterate, Defendant admitted that she had never met anyone associated with organized crime (besides Plaintiff, presumably) and that she was not aware of anyone associated with organized crime ever visiting her home (again, besides Plaintiff, presumably).

¶ 25 We hold that Defendant's belief that Plaintiff was or is associated with organized crime and her sworn statements in connection with this belief are inadmissible because the record before us does not demonstrate that this belief is based on Defendant's personal knowledge. Faced with an adequately supported motion for summary judgment, Defendant bore the burden in responding to "come forward with facts, not mere allegations, which controvert[ed] the facts set forth in the moving party's case[.]" *Wachovia Bank & Trust Co.*, 64 N.C. App. at 292, 307 S.E.2d at 217-18. Under Rule 56(e) of the North Carolina Rules of Civil Procedure, Defendant's affidavit in opposition to Plaintiff's motion for summary judgment was required (1) to be "made on personal knowledge," (2) to "set forth [] facts as would be admissible in evidence," and (3) "show affirmatively that [] [Defendant] [was] competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021). Moreover, under Rule 602 of the North Carolina Rules of Evidence, Defendant's deposition testimony was inadmissible to the extent it lacked any

foundation demonstrating it was based on her personal knowledge. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2021). Defendant's statements about Plaintiff's alleged involvement in organized crime and her fears related to her beliefs that Plaintiff was or is involved in organized crime in her deposition testimony and in her affidavit do not constitute substantial evidence supporting a defense of undue influence because these statements were not based on "evidence . . . sufficient to support a finding that [Defendant] ha[d] personal knowledge of the matter[,]" *id.*, and are therefore inadmissible under Rule 602 of the North Carolina Rule of Evidence, and with respect to the affidavit in opposition to the motion for summary judgment, violated Rule 56(e) of the North Carolina Rules of Civil Procedure.

¶ 26 The admissible record evidence demonstrates that Defendant admitted entering into the separation agreement with Plaintiff and that the parties had performed all that was required by the agreement except for Defendant's intentional breach of the agreement by refusing to pay Plaintiff $45,000 of the proceeds from the sale of the 3850 Sunshine Drive property. Accordingly, the trial court did not err in awarding Plaintiff summary judgment and attorney's fees.

III. Conclusion

¶ 27 For the reasons stated above, we affirm the orders of the trial court.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).