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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-469

No. COA21-430

Filed 5 July 2022

Durham County, No. 19-CVS-3668

NORTHSTAR BROADCASTING CORPORATION, Plaintiff,

v.

AROHI MEDIA LLC, Defendant.

Appeal by Defendant from order entered 30 December 2020 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 26 January 2022.

Hatcher Legal, PLLC, by Nichole M. Hatcher, for the Plaintiff-Appellee.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr., for the Defendant-Appellant.

DILLON, Judge.

¶ 1 This case involves a contract dispute over whether notice (a condition precedent to breach under the terms of the contract) was waived. We affirm.

I. Background

¶ 2 Plaintiff and Defendant operate different radio stations. In December 2016, they entered into a “Simulcast and Joint Sales Agreement” (the “Contract”). Under

the term of the Contract, Defendant agreed to rebroadcast a portion of Plaintiff's programming on Defendant's FM radio station, and Plaintiff agreed to share in the advertising revenue by making periodic payments to Defendant. A year later, in December 2017, Defendant notified Plaintiff that it considered the Contract terminated.

¶ 3 This interlocutory appeal concerns only the trial court's grant of summary judgment for Plaintiff on Defendant's breach of contract counterclaim. The facts herein are, therefore, presented in the light most favorable to Defendant. *See Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (describing summary judgment standard).

¶ 4 The Contract contained a term requiring Defendant to pay Plaintiff a \$25,000 fee (the "Termination Fee") if Defendant terminated the Contract. The Contract also contained a provision obligating Defendant to maintain in full force all authorizations to continue operating its FM station.

¶ 5 In September 2017, nine months after entering the Contract, Defendant received a notice from the Federal Communications Commission (the "FCC") ordering Defendant to "Cease and Desist" from operating its FM channel based on complaints unrelated to the Contract. Defendant complied with the FCC order, and its FM channel went off the air before the end of that month.

¶ 6 Accordingly, Plaintiff made no payments for rebroadcast services for any time periods after September, as Defendant was no longer rebroadcasting Plaintiff's programming. Plaintiff made its last payment under the Contract in late October 2017, for the rebroadcasting that occurred through September.

¶ 7 In early December 2017, Defendant's General Manager sent an email to Plaintiff stating: "I will consider our [Contract] VOID effective immediately as there is no hope of going back on air with 983FM in the near future." In response, Plaintiff demanded the \$25,000 Termination Fee from Defendant. Defendant, however, refused to pay the Termination Fee.

¶ 8 Plaintiff filed suit for breach of contract for failure to pay the Termination Fee.¹ Defendant answered and counterclaimed for breach of contract (for failing to make at least the minimum required payments for the period after its FM station went off the air and the December 2017 e-mail.) Plaintiff filed a motion for summary judgment on Defendant's counterclaim. The trial court granted the motion. Defendant timely appealed.

II. Appellate Jurisdiction

¹ Plaintiff also has sued for constructive fraud and breach of implied covenant of good faith and fair dealing, based on allegations that Defendant failed to disclose at the time of entering the Contract that the FCC had notified Defendant of complaints it was investigating concerning Defendant's operation of its FM station.

¶ 9 As Plaintiff's claims are still pending, this appeal is interlocutory. We, nonetheless, conclude that we have jurisdiction. The dismissal of Defendant's counterclaim creates the potential for inconsistent verdicts, which we recognize is a substantial right. *See Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). Specifically, whether Plaintiff breached the contract.

III. Standard of Review

¶ 10 "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.'" *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). We review the trial court's order allowing summary judgment *de novo*. *Id.* at 88, 637 S.E.2d at 530.

IV. Analysis

¶ 11 This appeal only concerns Defendant's counterclaim, alleging Plaintiff breached the Contract by not making monthly payments thereunder *after* Defendant's radio station went off the air. The trial court granted summary judgment for Plaintiff on Defendant's counterclaim, reasoning that Plaintiff could not have been in breach under the terms of the contract because Defendant never gave *proper notice* of any breach as required by the Contract. Indeed, the Contract provides as follows:

[A]n Event of Default *shall not be deemed to have occurred* until twenty (20) calendar days after the nondefaulting party has provided the defaulting party with notice

specifying the event or events which would constitute an Event of Default and specifying the action necessary to cure the Defaulting within such period, and such default shall have remained uncured.

(Emphasis added). The Contract later states, “All notices . . . pertaining to this agreement shall be in writing and shall be given by hand delivery, by prepaid registered or certified mail with return receipt requested, or by an established overnight courier[.]” In sum, in order for a party to be considered in default, proper notice must be given through specified means followed by a cure period.

¶ 12 Defendant admits to not providing notice by any of the specified ways. And Defendant made no argument that Plaintiff waived notice. *See* N.C. R. App. P. Rule 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”). There was no mention of Plaintiff’s waiver during the General Manager’s deposition; Defendant did not make any allegation in its counterclaim that Plaintiff waived notice; and, though a broad waiver defense was included in Defendant’s answer, Defendant failed to assert any facts as to how Plaintiff’s acts or words constituted waiver.

¶ 13 In addition, Defendant has admitted it had failed to maintain authorizations from the FCC to continue operating its FM station—authorizations that the Contract

required Defendant to maintain—and that its FM station went off the air in late September based on a “Cease and Desist” order from the FCC. And again, Defendant’s counterclaim is for Plaintiff’s nonpayment under the Contract for the period that Defendant’s station was off the air.

¶ 14 We have carefully reviewed the record and conclude that Judge Davis did not err in granting Plaintiff’s summary judgment on Defendant’s counterclaim.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).