IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-621

No. COA22-245

Filed 6 September 2022

Wake County, No. 21 CVS 6076

Leilei Zhang, Plaintiff,

v.

Wen Zhang, Defendant.

Appeal by Plaintiff from order entered 29 November 2021 by Judge Mark A Davis in Wake County District Court. Heard in the Court of Appeals 24 August 2022.

Leilei Zhang, pro se.

Wake Law Office, by Judy Y. Tseng, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Leilei Zhang appeals from the trial court's order granting Defendant Wen Zhang's motion for summary judgment against Plaintiff's claims for defamation and negligence. Plaintiff contends the trial court erred by granting summary judgment against her because (1) the court failed to consider evidence from a witness and (2) Defendant's submitted evidence did not erase material issues of fact. We affirm.

I. Factual and Procedural History

¶ 2 This case concerns Plaintiff's involuntary commitment resulting from a commitment petition filed by Defendant, her then-husband. Plaintiff has a history of mental health concerns beginning in 2015. Plaintiff has repeatedly insisted that Mr. Sutton, Defendant's neighbor at the time, hacked their home's technology, surveilled them, poisoned her, stalked her, and caused other damage to their home. Between 2015 and 2020, Plaintiff was committed to the hospital three times: twice voluntarily because she believed she had been poisoned, and once involuntarily following an act of larceny caused by paranoia.

¶ 3 In May 2020, Plaintiff and Defendant were married and living together in Cary. On 15 May 2020, Mr. Sutton reported to police that Defendant had scattered broken glass in his driveway. Officer Spell with the Cary Police Department reported to the scene that evening. Officer Spell spoke with Mr. Sutton, then informed Defendant that Mr. Sutton witnessed and had video footage of Plaintiff scattering glass in his driveway. Officer Spell encouraged Defendant to seek involuntary commitment of Plaintiff before her condition worsened.

¶ 4 The following day, Defendant initiated proceedings to have Plaintiff involuntarily committed. Plaintiff underwent an evaluation at WakeMed, resulting in her involuntary commitment at Triangle Springs hospital until 22 May 2020.

¶ 5 On 4 May 2021, Plaintiff filed a complaint in district court alleging that Defendant acted negligently and committed defamation by initiating proceedings to

have Plaintiff involuntarily committed.

¶ 6 On 11 October 2021, Defendant filed a motion for summary judgment against each of Plaintiff's claims. In support of his motion, Defendant submitted an affidavit stating that Plaintiff had a lengthy history of mental illness, typically manifesting in paranoia regarding Mr. Sutton. Defendant explained that, though he "did not actually see [Plaintiff] putting glass in [Mr. Sutton's] driveway, . . . [he] knew that she had been leaving the house and was out in the neighborhood." Defendant then "filed the involuntary commitment petition based on all the years of troubling behaviors exhibited by [Plaintiff]."

¶ 7 On 21 November 2021, the trial court held a hearing on Defendant's motion for summary judgment. Plaintiff did not attend the hearing or otherwise present any arguments on her behalf. On 29 November 2021, the trial court entered a written order granting Defendant's motion for summary judgment against each of Plaintiff's claims. Plaintiff timely appeals.[1]

II. Analysis

¶ 8 Plaintiff contends the trial court erred by granting Defendant's motion for

[1] Plaintiff's notice of appeal purported to appeal the district court's decision to the superior court. Defendant filed motions to dismiss Plaintiff's appeal, for sanctions, and for a gatekeeper order with the superior court on 30 December 2021. The superior court found that Plaintiff's appeal to superior court was a "clerical error made in good faith" with an intent to appeal to this Court. The superior court held that Defendant's motion to dismiss was premature and denied all three motions.

summary judgment because the court ruled without first hearing testimony from Officer Spell, and because it improperly relied on insufficient evidence from Defendant. We are not persuaded by either argument.

¶ 9 "We review de novo a trial court's order granting summary judgment." *Da Silva v. WakeMed*, 375 N.C. 1, 10, 846 S.E.2d 634, 640–41 (2020) (citation omitted). "Summary judgment is appropriate '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.'" *Id.* (quoting N.C. R. Civ. P. 56(c)). "The evidence must be considered 'in a light most favorable to the non-moving party.'" *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (citation omitted).

A. Consideration of Witness Evidence

¶ 10 Plaintiff first contends that the "[t]rial court erred in entering a ruling without demanding testimony from key witness, Cary Police Officer, Benjamin Spell." Plaintiff asserts that she made repeated requests for "interrogatories and affidavit[s]" from Officer Spell and obtained a subpoena demanding Officer Spell appear. However, the record in this case does not show any attempt by Plaintiff to obtain information from Officer Spell. Rather, Plaintiff subpoenaed Officer Spell to appear at an earlier, June 2020 hearing in a separate case she filed against Mr. Sutton. The

trial court specifically ordered that this subpoena not be included in the record on appeal because it was not a part of the present case.

¶ 11 It is axiomatic that a Plaintiff must provide evidence to support her claims. *See Keith v. Health-Pro Home Care Servs., Inc.*, __ N.C. __, 2022-NCSC-72, ¶ 27. Plaintiff's case was pending before the trial court for six months before the hearing on Defendant's motion for summary judgment. During that time, Plaintiff never subpoenaed Officer Spell or otherwise attempted to obtain his testimony in this case. Further, Plaintiff did not attend the summary judgment hearing to present any evidence, much less evidence of Officer Spell's conduct. Even if Officer Spell could have provided evidence or testimony material to the resolution of Plaintiff's claims, Plaintiff may not now assign error to the trial court's inability to review evidence that was not before it. The trial court properly considered the evidence before it at the summary judgment hearing and was under no duty to consider evidence not presented.

B. Summary Judgment

¶ 12 Plaintiff next contends the "[t]rial court erred in allowing inadmissible evidence from [] Defendant" because it considered the affidavit he submitted in support of his motion for summary judgment. Plaintiff asserts that Defendant "produced no evidence other than his affidavit to support his defense that he was not negligent," while she "presented sufficient evidence to prove that Defendant is guilty

of defaming [] Plaintiff, and [Defendant] behaved negligently and recklessly on the night of the incident."

¶ 13 "The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). "The movant may meet this burden by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). "If the movant carries his burden of establishing prima facie that he is entitled to summary judgment then his motion should be granted unless the opposing party responds and shows either that a genuine issue of material fact exists or that he has an excuse for not so showing." *Steel Creek Dev. Corp. v. Smith*, 300 N.C. 631, 637, 268 S.E.2d 205, 209–10 (1980) (citation omitted); *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427 ("By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.").

¶ 14 It is well-settled that, "[w]hen there is a motion for summary judgment pursuant to Rule 56, the court may consider evidence consisting of admissions in the

pleadings, depositions, answers to interrogatories, *affidavits*, admissions on file, oral testimony, and documentary materials." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972) (emphasis added). Defendant's affidavit was admissible alongside his motion for summary judgment. It was proper for the trial court to consider Defendant's affidavit.

¶ 15 At the time of the summary judgment hearing, it was undetermined whether Plaintiff scattered glass in Mr. Sutton's driveway and whether Mr. Sutton actually had video footage. However, this dispute of fact is immaterial to the resolution of Plaintiff's suit against Defendant. Considering Defendant's affidavit together with Plaintiff's complaint, and taking each allegation in Plaintiff's complaint as true, the undisputed and material facts show that Plaintiff did not plead compensable claims.

¶ 16 "[T]o recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 41, 846 S.E.2d 647, 661 (2020).

¶ 17 Plaintiff pled that Defendant's statements in the commitment order were "inherently libelous." The record before this Court reflects that Defendant stated he had been informed by Officer Spell that Plaintiff scattered glass in Mr. Sutton's driveway. Defendant explained in his affidavit that Plaintiff had a history of mental health concerns, had been committed before, and Officer Spell had informed him of a

recent incident suggesting Plaintiff needed additional treatment. Plaintiff does not dispute that Officer Spell informed Defendant of his belief that Plaintiff had scattered glass. The record shows that Defendant's challenged statements were not false. The trial court did not err in determining that there were no issues of material fact with respect to Plaintiff's defamation claim.

¶ 18 "'To recover damages for actionable negligence, [a] plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.'" *Matthieu v. Piedmont Nat. Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967) (citation omitted).

¶ 19 Plaintiff pled that, by incorporating Officer Spell's statements into the commitment petition, Defendant "acted recklessly and negligently by writing down a false statement without verifying that it was true." Through this assertion, Plaintiff pled that Defendant had a duty not to recklessly rely on secondhand information before filing a commitment petition. Plaintiff's arguments for Defendant's negligence thereby turn on the same evidence as her claim for defamation.

¶ 20 Defendant's affidavit explains that he partially relied on Officer Spell's statement that Plaintiff had scattered glass because of his knowledge of Plaintiff's prior behavior. Defendant informed the court that he filed the commitment order because it was what he "believed to be the best under the circumstances" following Officer Spell's statements and "based on all the years of troubling behaviors exhibited

by [Plaintiff]." These "troubling behaviors" included Defendant's firsthand knowledge that Plaintiff had persistent paranoia around Mr. Sutton and Plaintiff "had been leaving the house and was out in the neighborhood" several nights before. Plaintiff submitted no additional pleadings or affidavits to rebut this evidence, nor did she appear at the hearing on Defendant's motion to argue evidence in opposition to the motion. Assuming Defendant did have a duty not to recklessly file a commitment petition, Plaintiff forecast no evidence to show Defendant breached that duty notwithstanding his reliance on years of experience with Plaintiff. The trial court did not err in determining that there were no issues of material fact remaining in this case, and that the undisputed facts showed that Plaintiff failed to plead compensable claims.

III. Conclusion

¶ 21 We conclude that the trial court did not err by holding that no genuine issue of material fact remained and that Defendant was entitled to summary judgment as a matter of law.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).