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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-927

No. COA22-559

Filed 29 December 2022

Wake County, No. 21 CVD 5634

NEW VISION TRUST, Plaintiff,

v.

ELIZA, LLC and TATSIANA SHTAL, Defendants.

Appeal by Defendant Shtal from judgment entered 1 March 2022 by Judge Margaret Eagles in Wake County District Court. Heard in the Court of Appeals 16 November 2022.

Stam Law Firm, PLLC, by R. Daniel Gibson, for plaintiff-appellee.

Adams, Howell, Sizemore & Adams, P.A., by Jeremy Jackson, Ryan J. Adams, and William F. Braziel III, for defendant-appellant Shtal.

MURPHY, Judge.

¶ 1 Plaintiff was a proper party under Rule 17 to initiate suit and was entitled to summary judgment. We affirm the trial court's order.

BACKGROUND

¶ 2 This appeal arises out of the trial court's grant of New Vision Trust's motion for summary judgment. Consistent with our standard of review for an order for

summary judgment, we rely on the following facts from the verified *Complaint* and Shtal's affidavit. Additionally, where the facts are in conflict, we rely only upon those forecasted by Shtal as the non-moving party.

¶ 3 In September 2017, Eliza, LLC, acquired real property in Durham. The property was encumbered with several liens at the time of the acquisition, including a prior deed of trust. Following the acquisition of the property, Eliza, LLC, received a loan from "New Vision Trust Custodian FBO James R. Hiseler IRA" that was secured by the property and evidenced by a secured promissory note. In exchange for \$150,000.00, Eliza, LLC, agreed to repay New Vision Trust with 12% interest per annum by 3 January 2019. Additionally, Tatsiana Shtal, a member of Eliza, LLC, signed a guaranty of the note.

¶ 4 On 19 June 2019, New Vision Trust foreclosed on the property after Eliza, LLC, defaulted on its obligation to pay New Vision Trust; however, the foreclosure was not completed because on 30 October 2019 the prior deed of trust was foreclosed on.

¶ 5 New Vision Trust subsequently sued Eliza, LLC, and Shtal for failing to timely pay the amount owed pursuant the note. Shtal filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6) and 17 of the North Carolina Rules of Civil Procedure.¹ New

¹ The sole ground from Shtal's motion to dismiss stated:

Plaintiff purports to be a Trust. While there is a foreign corporation registered in North Carolina named New Vision

Vision Trust filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. After a hearing, the trial court considered New Vision Trust's verified *Complaint* and Shtal's affidavit and granted the motion for summary judgment. Shtal timely appeals.²

ANALYSIS

¶ 6

On appeal, Shtal contends (A) the trial court erred by allowing the motion for summary judgment because (1) New Vision Trust is not the real party in interest in this case; (2) there is a genuine issue of material fact as to whether New Vision Trust is the same entity that Shtal entered into the guaranty with and provided the promissory note to Eliza, LLC; and (3) that the *Complaint* is unverified because the signature stamp on the affidavit states "on Behalf of New Vision Trust Company"; and further contends (B) the trial court erred by not entering summary judgment in favor of Shtal due to the expiration of the statute of limitations provided by N.C.G.S. § 1-54(6).

¶ 7

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue

Trust Company, upon information and belief, there is no trust as referenced in paragraph 1 of Plaintiff's Complaint. See Exhibit "A" attached hereto and incorporated by reference.

² We note that Eliza, LLC, does not appeal from the trial court's order granting the motion for summary judgment.

as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524 (2007))

The principles of law pertaining to summary judgment are well established. A party moving for summary judgment must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Summary judgment is a drastic measure which should be used with caution, and awarded only where the truth is quite clear. All of the evidence before the court must be construed in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial. Where matters involving the credibility and weight of the evidence exist, summary judgment should ordinarily be denied.

Miller v. Talton, 112 N.C. App. 484, 486 (1993) (internal citations omitted).

A. Error in Allowing New Vision Trust’s Motion for Summary Judgment

1. Real Party in Interest

¶ 8 Shtal argues that New Vision Trust is not the real party in interest entitled to sue Defendants because New Vision Trust is seeking to recover on a promissory note entered into by “New Vision Trust Custodian FBO James R. Hiseler IRA.” This same name appears on the amended operating agreement for Eliza, LLC, the deed of trust granting New Vision Trust a security interest in the property, and the settlement statement.

¶ 9 Rule 17(a) of the North Carolina Rules of Civil Procedure provides that “[e]very

claim shall be prosecuted in the name of the real party in interest; but . . . a party . . . in whose name a contract has been made for the benefit of another . . . may sue in his own name without joining with him the party for whose benefit the action is brought” N.C.G.S. § 1A-1, Rule 17(a) (2021); *see also* N.C.G.S. § 1-57 (2021) (“Every action must be prosecuted in the name of the real party in interest, except as otherwise provided”). “The real party in interest is the party who by substantive law has the legal right to enforce the claim in question. More specifically, a real party in interest is a party who is benefitted or injured by the judgment in the case.” *See Land v. Tall House Bldg. Co.*, 150 N.C. App. 132, 135 (2002) (citation and marks omitted).

¶ 10 We are unconvinced by Shtal’s argument. N.C.G.S. § 1A-1, Rule 17(a) specifically contemplates that “a party . . . in whose name a contract has been made for the benefit of another . . . may sue in his own name without joining with him the party for whose benefit the action is brought.” N.C.G.S. § 1A-1, Rule 17(a) (2021). Relatedly, the use of “FBO” in “New Vision Trust Custodian FBO James R. Hiseler IRA” is a clear abbreviation for “for the benefit of.” As a result, the interactions between the parties that led to this lawsuit were between Eliza, LLC, and New Vision Trust, a custodian acting for the benefit of James R. Hiseler IRA. Rule 17 permits New Vision Trust to sue in its own name, without joining James R. Hiseler IRA, as was done here. Furthermore, New Vision Trust contends that it is a custodial trust

pursuant to N.C.G.S. § 33B-2 and, as such, has the right to sue for the beneficiary and trust under caselaw. See N.C.G.S. § 33B-2 (2021); *Slaughter v. Swicegood*, 162 N.C. App. 457, 464 (2004) (stating “the property placed in a trust may only be redressed by the trustee”).³

2. Issue of Material Fact

¶ 11 Shtal argues there is an issue of material fact, making summary judgment inappropriate, due to the uncertainty in whether New Vision Trust Custodian FBO James R. Hiseler IRA and New Vision Trust are the same entity and therefore whether New Vision Trust was entitled to payment on the note.

¶ 12 As stated above, “[a] party moving for summary judgment must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.” *Miller*, 112 N.C. App. at 486. When considering the evidence, it “must be construed in the light most favorable to the non-moving party.” *Id.* Furthermore, “[t]he slightest doubt as to the facts entitles the non-moving party to a trial.” *Id.*

¶ 13 Here, despite our standard of review, the lack of an explicit statement by New Vision Trust that it is the same party with which Eliza, LLC, and Shtal entered into

³ Shtal makes issue of the lack of allegations in the *Complaint* that New Vision Trust is a custodial trustee or is acting on behalf of another. However, the attached exhibit of the secured promissory note, which states “New Vision Trust Custodian FBO James R. Hiseler IRA,” is sufficiently clear to implicate the provisions of Rule 17(a).

a contract does not create a genuine issue of material fact. New Vision Trust’s *Complaint* against Eliza, LLC, and Shtal attached the secured promissory note and personal guaranty that Defendants entered into. As discussed previously, each of these contracts unambiguously contemplates that New Vision Trust was a custodian acting for the benefit of James R. Hiseler IRA. The *Complaint* states explicitly in multiple provisions that Eliza, LLC, contracted with New Vision Trust on the secured promissory note. Additionally, Shtal’s affidavit indicated that New Vision Trust appointed a substitute trustee to commence foreclosure on the property, and attached the publicly filed document as an exhibit to her affidavit. The appointment of substitute trustee, which Shtal unequivocally attributes to “New Vision Trust Custodian FBO James R. Hiseler IRA,” is signed by Erika Wilson, “on Behalf of New Vision Trust Company.” Similarly, here, the verification of the *Complaint* was signed by Nicki Yim, on behalf of “New Vision Trust Company.” In light of Shtal’s sworn affidavit attributing the actions of “New Vision Trust Company” to the party she claims to have been contracting with—“New Vision Trust Custodian FBO James R. Hiseler IRA”—we have no concerns similarly treating New Vision Trust’s *Complaint* and concluding that there was no genuine issue of material fact as to the identity of Plaintiff.

3. Verification of Complaint

Vision Trust is that the *Complaint* was not properly verified due to it having been signed by a representative of “New Vision Trust Company” and, therefore, should not have been considered by the trial court on summary judgment.

¶ 15 Shtal is correct that the *Complaint* must have been verified in order to be properly considered by the trial court. *See Tew, P.A. v. Brown*, 135 N.C. App. 763, 767 (1999) (stating “the trial court may not consider an unverified pleading when ruling on a motion for summary judgment”). Rule 11 governs the method of verification for pleadings. *See generally* N.C.G.S. 1A-1, Rule 11 (2021).

¶ 16 We are similarly unconvinced by this argument, however. As indicated above, Rule 17 permits New Vision Trust to sue on behalf of “New Vision Trust Custodian FBO James R. Hiseler IRA.” The verification at issue here indicates that Nicki Yim “is an authorized agent of New Vision Trust.” Although her subsequent signature stamp also states “on Behalf of New Vision Trust Company,” it does not negate Yim’s sworn statement that Yim is an authorized agent of New Vision Trust. Shtal does not challenge the verification on any other ground, and we decline to invalidate the sworn content of a verification on the basis of an unsworn signature stamp.

B. Error in Not Entering Summary Judgment in Shtal’s Favor

¶ 17 Shtal contends that the trial court should have granted summary judgment to her based on the expiration of the statute of limitations. More specifically, she argues that the relevant statute of limitations in N.C.G.S. § 1-54(6) is triggered whenever

any deed of trust securing a debt on the subject property is delivered pursuant to a foreclosure sale. *See* N.C.G.S. § 1-54(6) (“Within one year an action or proceeding-- . . . For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale[.]”).

¶ 18 However, we need not reach this question. After the filing of New Vision Trust’s *Complaint* and Shtal’s motion to dismiss, but prior to the filing of an answer, New Vision Trust filed its motion for summary judgment.

¶ 19 Although, generally, the statute of limitations is an affirmative defense to be set forth in a responsive pleading, *see* N.C.G.S. 1A-1, Rule 8(c) (2021), our Supreme Court has held that where a “responsive pleading is not yet due” a party may raise an affirmative defense in a motion for summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 442 (1981).

Nevertheless, as noted in *Dickens*, an affirmative defense sought to be raised for the first time in a motion for summary judgment must ordinarily refer expressly to the affirmative defense relied upon. In the absence of an expressed reference in the motion for summary judgment, if the affirmative defense was clearly before the trial court, the failure to expressly mention the defense in the motion will not bar the trial court from granting the motion on that ground.

Cnty. of Rutherford v. Whitener, 100 N.C. App. 70, 74 (1990) (marks and citations omitted). “This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence.” *Miller*, 112 N.C. App. at 487. “Furthermore, where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties.” *Rutherford*, 100 N.C. App. at 74.

¶ 20

Applying these principles in *Rutherford*, we held:

Here, neither the defendant’s answer nor the motion to dismiss made any reference to the defense of *res judicata*. However, the record is clear that evidence was before the trial court that the defendant had been tried previously in the criminal courts of Rutherford County and had been adjudicated not to be the father of the child. Introduction of this evidence at the hearing on summary judgment indicates that the affirmative defense of *res judicata* was clearly before the trial court with the consent of both parties and the pleadings are deemed amended.

Id. Similarly, in *Miller*, we held:

Although neither [the] defendants’ answer nor their motion for summary judgment referred to the affirmative defense of the statute of limitations, the record reflects that the issue was clearly before the trial court. In the order granting [the] defendants leave to amend their answer, entered more than a year before summary judgment was granted, the [trial] court ordered that [the] “defendants’ Answer be amended to plead the defense of Statute of Limitations in bar to the trial of this cause.” [The] [p]laintiffs were not surprised by the limitations defense

and made no argument that they were prejudiced. The various depositions and affidavits offered in support of, and in opposition to, [the] defendants' motion indicate that the limitations issue was before the court. [The] [p]laintiffs' affidavits also raised the issue of equitable estoppel indicating that they perceived that a limitations defense was before the [trial] court. Thus, the statute of limitations was before the [trial] court by implied consent, and the pleadings are deemed amended.

Miller, 112 N.C. App. at 487-88.

¶ 21

However, here, Shtal did not file any responsive pleading; instead, she filed a motion to dismiss and an affidavit. She did not file an opposing motion for summary judgment either. Her affidavit contains no reference to the statute of limitations, whether explicit or implicit. Finally, we see nothing in the Record indicating that the parties consented, expressly or implicitly, to the consideration of the statute of limitations at the hearing on the motion for summary judgment. In fact, when the statute of limitations issue was raised at the hearing by Shtal's counsel, New Vision Trust's counsel stated:

[A]s far as the statute of limitations issue, I mean, it's just not been raised as an affirmative defense anywhere, and so we don't think that that applies. I mean, I think you've got to sort of strain interpretation of the statute to make it fit this circumstance, but it's certainly not been ready so I think that -- you know, I'm not even going to get excited about arguing that because it's just not been properly put in front of the Court.

Based on New Vision Trust's response, the statute of limitations issue was not before

the trial court by express or implied consent of the parties. Additionally, in light of the unconventional application of the statute of limitations proposed by Shtal, which appears to be a matter of first impression at the Court, we cannot conclude that New Vision Trust was not surprised and had a full opportunity to argue and present evidence.

¶ 22 The statute of limitations issue was not properly before the trial court and the trial court rightly refused to grant summary judgment in Shtal's favor on this basis.

CONCLUSION

¶ 23 The trial court properly concluded that New Vision Trust was a real party in interest and that there were no issues of material fact, and properly considered the verified *Complaint*. Furthermore, the trial court properly declined to grant summary judgment to Shtal on the basis of the statute of limitations.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).