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NO. COA01-1138

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

HOLLY P. COOPER, RICHARD
M. EVANS, MARILYN R.
HADLEY, ERIKA S. GOODMAN,
JULIA ANN DAVIS, TRENT G.
TAYLOR, NANCY WILSON,
ELIZABETH NEW, MELISSA
WOODRUFF, and SHERI
LYNN WITHORN,
Plaintiffs

v.

Pender County
No. 00 CVS 00169

CREATIVE HOMES OF
DISTINCTION, L.L.C.,
COASTLINE PROPERTIES,
L.L.C., SOUTH ATLANTIC
HOMES, L.L.C., and
POCOTALICO, L.L.C.,
Defendants

Appeal by defendants from judgment entered 9 March 2001 by Judge Ola M. Lewis in Pender County Superior Court. Heard in the Court of Appeals 22 May 2002.

Robert W. Kilroy for plaintiff-appellees.

Ray C. Blackburn, Jr., for defendant-appellants.

THOMAS, Judge.

Defendants, Creative Homes of Distinction, L.L.C., Coastline Properties, L.L.C., South Atlantic Homes, L.L.C., and Pocatamico, L.L.C., appeal from a judgment finding them liable for unpaid wages, liquidated damages, attorneys' fees and court costs, to

plaintiffs Holly P. Cooper, Richard M. Evans, Marilyn R. Hadley, Erika S. Goodman, Julia Ann Davis, Nancy Wilson, Elizabeth New, and Sheri Lynn Withorn. For the reasons discussed herein, we affirm in part and reverse in part.

The pertinent facts are as follows: Plaintiffs were employed by defendant Creative Homes which was engaged in the business of purchasing, developing, and selling real property. Tammy Quick ("Quick"), a member of Creative Homes of Distinction, L.L.C., who was also manager of the limited liability company, directly hired plaintiffs in 1999 and 2000. However, Quick was terminated as manager by letter to her dated 3 January 2000. Pocatalico, L.L.C., was subsequently designated the new manager.

Defendants contend that plaintiffs were told by Quick prior to Christmas 1999 that they were also to be terminated at the end of 1999. Plaintiffs, however, claim defendants did not inform them of their firing until 31 March 2000. Pocatalico, L.L.C., had become aware that plaintiffs were still working but not being paid sometime in February or March 2000. Plaintiffs filed the instant action for compensation on 13 March 2000.

On or about 28 March 2000, Creative Homes conveyed all of its real property located in Pender County, as well as some real property located in Onslow County, to defendant Coastline Properties. Defendant Coastline Properties subsequently transferred this real property to defendant South Atlantic Homes.

In its 9 March 2001 judgment, the trial court concluded that these transfers of real property were fraudulent conveyances in

violation of N.C. Gen. Stat. § 39-23.5.

The trial court entered judgment against defendants, jointly and severally, for unpaid wages. Specifically, the trial court awarded the following: (1) \$5,537.76 plus interest to Holly Cooper; (2) \$8,605.87 plus interest to Richard M. Evans; (3) \$5,384.61 plus interest to Marilyn R. Hadley; (4) \$4,134.32 plus interest to Erika S. Goodman; (5) \$7,179.48 plus interest to Julia Ann Davis; (6) \$4,480.42 plus interest to Nancy Wilson; (7) \$5,380.00 plus interest to Elizabeth New; and (8) \$3,150.00 plus interest to Sheri Lynn Withorn. Liquidated damages were also awarded to the individual plaintiffs in an amount equal to their individual awards for unpaid wages. Defendants, jointly and severally, were further ordered to pay attorneys' fees in the amount of \$14,215.56 and court costs in the amount of \$578.50. Finally, defendants Coastline Properties, South Atlantic Homes, and Pocatamico, were ordered, jointly and severally, to reimburse defendant Creative Homes for losses incurred as a result of the unlawful distribution of assets in violation of N.C. Gen. Stat. § 57C-4-06. Defendants appeal.

By their first assignment of error, defendants argue the trial court erred in denying their motion to dismiss made at the close of plaintiffs' evidence and again at the close of all the evidence. We disagree.

The North Carolina General Statutes provide the following:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in

the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2001). Defendants contend that plaintiffs' claims for unpaid wages should have been dismissed because plaintiffs did not show sufficient evidence of the established salary, length of employment, and length of time worked without pay for each plaintiff.

Plaintiffs brought suit for unpaid wages under the North Carolina Wage and Hour Act. See N.C. Gen. Stat. § 95-25.22 (2001). The North Carolina Wage and Hour Act is modeled after the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201. *Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997). Similar to the FLSA, the Wage and Hour Act makes employers responsible for keeping accurate records of the wages and hours of all employees. N.C. Gen. Stat. § 95-25.15(b) (2001). Factors used by federal jurisdictions in determining the proper amount of unpaid wages in cases where the employer fails to maintain or produce proper records are therefore useful in the context of the Wage and Hour Act. See *Laborers' Int'l*, 127 N.C. App. at 314, 488 S.E.2d at 634 (stating that factors used by federal jurisdictions to determine "employee" status under the FLSA are useful in the context of the Wage and Hour Act).

The United States Supreme Court has held that an employer's failure to keep accurate records should not be used to penalize an employee from an adequate recovery.

[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88, 90 L. Ed. 1515, 1523 (1946), *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir. 1972). Therefore, evidence showing the amount and extent of the work performed by the employee as a matter of just and reasonable inference gives the trial court sufficient grounds to award damages, even if the damages are approximate. *Id.*

In the instant case, testimony established plaintiffs' terms of employment, the type of work plaintiffs engaged in, and the date of their termination. Testimony further established a promise of specific compensation which was not received. Defendants, meanwhile, failed to introduce contrary testimony or employment

records. The trial court's findings are thus supported by the evidence and are sufficient to base an award of unpaid wages. Plaintiffs have shown an adequate basis upon which relief could be granted and the trial court did not err in denying the motions to dismiss. Accordingly, we reject defendant's initial assignment of error.

By assignments of error two through six, defendants argue that Pocatalico, L.L.C., should not be held jointly and severally liable for unpaid wages, liquidated damages, attorneys' fees, court costs and losses from the unlawful distribution of assets, because Pocatalico was not an employer of plaintiffs and did not take part in the unlawful distribution of assets. We find merit in defendants' argument.

If the trial court's findings of fact are supported by competent evidence they are binding on appeal. *Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001). The trial court found as fact that Pocatalico became manager of Creative Homes in January 2000, allowed Quick to operate Creative Homes under apparent authority and failed to secure the assets of Creative Homes after Quick's employment as manager was terminated. Section 57C-3-30 of the North Carolina General Statutes states that:

(a) A person who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or

control of the business. A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.

(b) A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or liability to the limited liability company.

N.C. Gen. Stat. § 57C-3-30(a), (b) (2001). In the instant case, Pocatalico served as manager for the principal, Creative Homes. "An agent acting within the scope of his authority is not liable upon a contract made for his principal, absent an agreement to be bound by the contract." *Scott v. United Carolina Bank*, 130 N.C. App. 426, 434, 503 S.E.2d 149, 154 (1998). The trial court did not find that Pocatalico had an agreement with plaintiffs to be bound by the employment contracts with Creative Homes. The trial court also did not find that Pocatalico employed, terminated, failed to make wage payments to, or was indebted to, any of the plaintiffs. The trial court did, however, find that Creative Homes had employed, failed to pay wages to and was indebted to plaintiffs.

Additionally, the trial court did not find that Pocatalico was involved in any fraudulent transfers of property between Creative Homes, Coastline Properties, and South Atlantic Homes. There was a finding, however, that Donald Berg. Sr., Donald Berg II, and P. Rodney Jackson, Creative Homes' majority interest members, were involved.

Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires that "[i]n all actions tried upon the facts without a jury

or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001). Such findings and conclusions allow for appellate review.

"The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment--and the legal conclusions which underlie it--represent a correct application of the law."

Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). A trial court's conclusions of law are reviewed *de novo* on appeal. *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 471, 540 S.E.2d 383, 386 (2000).

In the instant case, the findings of fact and conclusions of law regarding Pocatamico do not support the judgment entered. The trial court's findings of fact establish Pocatamico's role as a manager of Creative Homes. However, they do not establish Pocatamico's personal liability so as to provide the basis for joint and several liability for unpaid wages, liquidated damages, attorneys' fees and court costs. See N.C. Gen. Stat. § 57C-3-30(a). Further, the trial court made no findings of fact or conclusions of law that Pocatamico was involved in the unlawful distribution of assets which would support joint and several liability to Creative Homes for the losses incurred. Accordingly, we reverse the trial court as to the liability of Pocatamico, L.L.C.

By their seventh and eighth assignments of error, defendants contend the trial court erred in concluding that 1) defendants took no action to strip the apparent authority of Quick; 2) defendants had knowledge of her activities; 3) defendants are estopped from denying Quick was an agent of Creative Homes; and 4) Quick continued to operate Creative Homes under apparent authority during January, February and March of 2000. We disagree.

When the trial court sits as a fact-finder, its findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence which would support alternative findings Conclusions of law are entirely reviewable on appeal.

Creech, 146 N.C. App. at 100, 551 S.E.2d at 227.

The trial court found that Quick was terminated as manager by letter dated 3 January 2000 and that creditor banks, the real estate agent and the supplier of modular homes were all informed. However, this finding relates to Quick's actual authority under the operating agreement for Creative Homes rather than her apparent authority.

This Court has held that "[a]pparent authority is 'that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses.'" *Capitol Funds, Inc. v. Royal Indemnity Co.*, 119 N.C. App. 351, 357, 458 S.E.2d 741, 745 (1995) (citations omitted). The liability of a principal to a third person who has dealt with that principal's agent "must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances,

conferred upon his agent." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974).

In the instant case, there was ample evidence of Quick's apparent authority. In her deposition, Quick stated that Donald Berg, Sr., Donald Berg, II, P. Rodney Jackson, and Joe Marquerite, the other principal money investors who were also members of the limited liability company, knew that she was still operating Creative Homes and attempting to secure more investors. Donald Berg, II, testified that, after her termination as member manager, Quick continued to have access to checking accounts and was still listed as the registered agent for Creative Homes. He also noted that her power of attorney was never formally terminated, with efforts being made to maintain positive relations with Quick due to negotiations for a possible buyout. Plaintiffs were never informed by defendants that Quick had been stripped of authority under the operating agreement. Such evidence supports the finding that Quick was acting with apparent authority.

Further evidence indicates that all defendants other than Pocatamico had knowledge of Quick's activities in continuing to operate Creative Homes, but failed to stop her from acting with such authority. Although claiming he believed there were no employees after December 1999, Donald Berg, II, admitted that he received calls from employees about their paychecks following Quick's official termination on 3 January 2000.

There is competent evidence to support the finding of fact that Quick continued to operate Creative Homes with apparent

authority and to support the conclusion drawn by the trial court that defendants were aware of this operation and failed to revoke the apparent authority of Quick. We therefore reject defendants' argument.

Accordingly, the portion of the trial court's judgment relating to Pocatalico's joint and several liability is reversed. The remainder of the judgment is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).