NO. COA01-1496

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

BOBBY R. HAYES AND ALINDA H. HAYES,
Plaintiffs,

v. Wake County
No. 00 CVS 13289

DAVID H. ROGERS, HENRY H. ROGERS II, ANNE C. ROGERS, SUSAN C. ROGERS AND REBECCA C. ROGERS,
Defendants.

Appeal by defendant from orders entered 14 August 2001 and 5 September 2001 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 28 October 2002.

Poyner & Spruill, LLP, by Robin T. Morris and Kacey C. Sewell, for plaintiff-appellees.

David H. Rogers, pro se, for defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals from orders granting summary judgment for plaintiff, Rule 11 sanctions against defendant, and denial of defendant's motion to dismiss. After careful consideration of the briefs and record, we affirm.

Bobby Hayes and his wife, Alinda Hayes ("plaintiffs") acquired the property located at 1112 Shetland Court in Raleigh on or about 4 October 1971. David Rogers ("Rogers") and his wife, Pemerl Rogers, acquired the property at 1108 Shetland Court on or about 2

December 1971. The Hayes property and the Rogers property share a boundary line. The driveways for each property are parallel to each other with a grassy strip of land ("the strip") between the driveways. The property line is located in the strip. Rogers planted a river birch tree in the strip in 1972. Both the Rogers and the Hayes maintained the land in the strip and each party mowed a portion of the strip. Rogers and his wife divorced in 1973. Mrs. Rogers retained a one-half interest in the property which the Rogers children inherited upon her death in 1991.

In August 2000, the plaintiffs planned to build a fence and plant a hedgerow along the common property line. Plaintiffs hired a surveyor to identify and stake the property line. This survey showed that the river birch tree was located within the plaintiffs' property line. In September 2000, the plaintiffs planted the hedgerow on their side of the property line in a portion of the strip. Rogers removed some of the stakes from the property line and threw them into the plaintiffs' yard. Rogers wrote a letter to the plaintiffs dated 26 September 2000 alleging that he owned the river birch tree by adverse possession. Plaintiffs' attorneys located two deeds which purported to show that Rogers transferred his interest in the property to his children. The deeds were dated 25 September 1991 and 14 July 2000. A subsequent letter by Rogers dated 18 October 2000 provided that Rogers transferred his interest in the Rogers property to his children on 14 July 2000 but that Rogers was the "agent and attorney-at-law for [his] children."

Plaintiffs commenced this action to quiet title against the Rogers children: Henry H. Rogers, II, Anne C. Rogers, Susan Glendenning, and Rebecca C. Rogers. The Rogers children answered and denied: that Rogers was their attorney; that they had asserted a claim for adverse possession; and that Rogers conveyed any of his interests in the property to them in 1991 or 2000. Plaintiffs then moved to amend their complaint to name Rogers as a necessary party. With the consent of the Rogers children, the trial court allowed the plaintiffs' motion by order dated 19 February 2001. The plaintiffs then served Rogers and his children by certified mail with an amended complaint and a summons issued 8 March 2001. Rogers moved for an extension of time to answer and then moved to dismiss on the last day of the extension. The trial court denied Rogers' motion to dismiss and entered summary judgment in favor of plaintiffs. The trial court granted plaintiffs' motion for Rule 11 sanctions against Rogers and awarded plaintiffs $12,000.00. Rogers appeals.

On appeal, Rogers contends that the trial court erred in: denying Rogers' motion to dismiss; granting plaintiffs' motion for summary judgment; and granting sanctions against Rogers. Rogers further contends that the findings of fact are not supported by the evidence and that the conclusions of law are not supported by the findings.

Rogers first contends that the trial court erred in denying his Rule 12(b)(4) and (5) motions to dismiss. Rogers argues that these motions were proper since he was not served until 99 days

after the date of issuance of the last valid summons and that the action had "abated for lack of service." We do not agree.

Here, plaintiffs served the original complaint and summons dated 17 November 2000 on the Rogers children at the end of November. Plaintiffs then served the first amended complaint with an alias and pluries summons issued 29 November 2000 on the Rogers children by certified mail on or about 30 November, 1 December and 4 December 2000. The trial court granted the plaintiffs' motion to amend their complaint to add Rogers as a necessary party on 19 February 2001. Plaintiffs then had a new summons issued on 8 March 2001. Plaintiffs then served this summons and the amended complaint on Rogers and his children by certified mail. The record shows that Rogers received service on 9 March 2001.

"'The Rule 4(d) provisions for an endorsement on the original summons or issuance of an alias or pluries summons *apply only when the original summons was not served*, and their purpose is to keep the action alive until service can be made.'" *Thomas v. Washington*, 136 N.C. App. 750, 755, 525 S.E.2d 839, 843, *disc. review denied*, 352 N.C. 598, 545 S.E.2d 223 (2000) (emphasis in original) (quoting *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982)). The action here commenced properly with the issuance, filing and service of the original and amended complaint on the Rogers children before Rogers was joined. This action had not abated or been discontinued. While Rogers received service of the amended complaint 99 days after the issuance of the alias and pluries summons issued on 29 November 2000, it was only

one day after the issuance of the new summons. The trial court properly denied Rogers' motions to dismiss.

Rogers next contends that the trial court erred in granting summary judgment for the plaintiffs. Rogers argues that he acquired the tree and the surrounding land by adverse possession and that there are genuine issues of material fact in dispute. We do not agree.

"Summary judgment is appropriate when the materials before the court reveal that there is no genuine controversy concerning any factual issue which is material to the outcome of the action so that resolution of the action involves only questions of law." *Headley v. Williams*, 150 N.C. App. 590, 592, 563 S.E.2d 630, 632 (2002). "All evidence before the court must be construed in the light most favorable to the non-moving party." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). "Once the movant demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial." *Orient Point Assoc. v. Plemmons*, 68 N.C. App. 472, 473, 315 S.E.2d 366, 367 (1984). "To survive a summary judgment motion, an adverse party may not rest upon the mere allegation of its pleadings." *Culler v. Hamlett*, 148 N.C. App. 389, 391, 559 S.E.2d 192, 194 (2002).

"To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven

years or twenty years) under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). Here, the evidence in the light most favorable to Rogers only shows that Rogers planted the tree in the early 1970s and performed yard maintenance to part of the strip including the area around the tree. However, the plaintiffs also performed yard maintenance in the strip. There is no evidence that Rogers actions were actual, open, hostile, or continuous to support his claim for adverse possession. The trial court properly granted summary judgment for the plaintiffs.

Rogers next contends that the trial court erred in granting the plaintiffs' motion for Rule 11 sanctions. Specifically, Rogers contends that the findings of fact are not supported by the evidence, that the conclusions of law are not supported by the findings of fact, and that the conclusions of law do not support the award of sanctions. We are not persuaded.

Rule 110 provides that:

> Every . . . motion . . . of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by him that he has read the . . . motion, . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper

> purpose . . . . If a . . . motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . . .

G.S. § 1A-1, Rule 11(a) (2001). "A trial court's order imposing Rule 11 sanctions is reviewable *de novo* under an objective standard." *Griffin v. Sweet*, 136 N.C. App. 762, 765, 525 S.E.2d 504, 506-07 (2000). "This *de novo* review requires the court to determine: (1) whether the findings of fact of the trial court are supported by a sufficiency of the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the conclusions of law support the judgment." *Tucker v. Blvd. At Piper Glen L.L.C.*, 150 N.C. App. 150, 155, 564 S.E.2d 248, 251 (2002).

Defendant argues that findings of fact # 6-7, 10-18 and 20 in the trial court's order imposing sanctions are not supported by the evidence. Defendant argues that there was no evidence of any kind submitted to the trial court during the hearing to support its findings. Defendant argues that "all that was heard by the judge was argument by counsel." We do not agree.

The pertinent findings of fact are:

> 6. Since at least the early 1970s, the [plaintiffs] and Mr. Rogers have jointly maintained the Strip. Also, in the early 1970s, Mr. Rogers had planted a river birch tree on the Strip. However, besides mowing in the summer and some limited maintenance to the tree in the early 1970s, Mr. Rogers has not done anything to maintain the Strip. Beyond the Strip toward the back of the properties, Mr. Rogers and the [plaintiffs] mowed to the point they

approximated the property line to be. Any sharing of this maintenance was a friendly understanding and where the [plaintiffs] mowed and where Mr. Rogers mowed was a mere estimate as to the true line. Any maintenance by Mr. Rogers of any portion of the [plaintiffs'] Property was performed under this understanding and was done with the [plaintiffs'] implicit permission. Mr. Rogers has never actually occupied or actively used any part of the Strip or any other parts of the [plaintiffs] Property. The [plaintiffs] have always intended and understood the dimensions of the [plaintiffs] Property to be as indicated on their deed and reflected by the survey.

7. In July or August of 2000, the [plaintiffs] decided to build a fence on a portion of the common property line between the Rogers Property and the [plaintiffs] Property. They also wanted to plant a hedgerow on their side of the line. In an effort to avoid encroaching on the Rogers Property, the [plaintiffs] hired a surveyor to identify the property line. The surveyor placed stakes along the line as indicated by the [plaintiffs'] deed and the survey. Those stakes showed the river birch tree to be on the [plaintiffs] Property. Once the stakes were set, Mr. Rogers commented to Mr. Hayes that the stakes showed that the line was "just about where we had always thought it was."

. . . .

10. Thus, despite Mr. Rogers' representations that he owned the Rogers Property and part of the [plaintiffs] Property, this was not the case.

11. Consequently, the [plaintiffs'] attorney sent a letter to Mr. Rogers dated October 11, 2000 asserting the [plaintiffs'] exclusive right to all of the property included in their original 1971 deed and pointed out to Mr. Rogers that, despite his representations to the [plaintiffs], he did not in fact own the Rogers

Property, and thus, had no claim against the [plaintiffs] for adverse possession.

12. Mr. Rogers responded with a letter dated October 18, 2001. That letter is also attached hereto and is incorporated herein by reference. In that letter, Mr. Rogers admitted his prior false statements, and further asserted that his children now owned the Rogers Property. However, Mr. Rogers claimed his children were claiming a part of the [plaintiffs] Property by adverse possession. Mr. Rogers stated: "You needn't be concerned about my 'standing.' As agent and attorney-at-law for my children, I can assert and defend their rights, interests and claims at any time they may desire, and in this matter they do." Mr. Rogers also stated that while he was giving the [plaintiffs] "permission" to keep their hedgerow on their own property, they were "not given permission" to put anything else on his alleged side of the strip. He closed the letter by challenging, "If you would like to test your comprehension of real estate law before a superior court judge, I will be glad to oblige you. In such even [sic], I would ask for an award of my attorney's fees pursuant to N.C.G.S. § 6-18(1) or § 6-19, against your clients." Plaintiffs thereafter filed this quiet title action.

13. Based on the fact that the Rogers Children appeared as the only owners on all deeds of record and Mr. Rogers' representation that he had transferred all his rights in the Rogers Property to them on July 14, 2000, the original Complaint named only the Rogers Children as defendants.

14. The Rogers Children answered the Original Complaint and asserted that while Mr. Rogers had attempted to convey all of his interests in the Rogers Property to them on September 25, 1991, the conveyance was not effective. The Rogers Children then affirmatively alleged "that by Order entered in the matter entitled Nye and Wicker vs. David Henry Rogers, et. al., Wake County File No.: 91 CVS 13156, on

September 26, 1995, said conveyance was set aside." The Court in that case found that Mr. Rogers had fraudulently conveyed the property to his children to avoid paying a court judgment.

15. The Rogers Children also admitted, upon information and belief, that on or around July 14, 2000 Mr. Rogers again attempted to convey all of his interests in the Rogers Property. However, they then affirmatively alleged, "that the Defendants were not informed of Mr. Rogers' intent to transfer the Rogers property to one or more of them on or prior to July 14, 2000, that neither original nor photocopied deeds have been delivered to any of the Defendants by Mr. Rogers and that the Defendants were not aware of the existence of the July 14, 2000 deed until copies of same were served upon the Defendants together with Plaintiffs' Complaint or Amended Complaint, whichever was first served on one or more of them."

16. The Rogers children denied "that Mr. Rogers properly or effectively conveyed any of his interests in the Rogers Property to them in 1991 and/or 2000." Additionally, the Rogers Children "denied that Mr. Rogers is the attorney for the Defendants with respect to any interests they may have" in the Rogers Property. Furthermore, they flatly denied that they "<u>have asserted a claim for adverse possession of Plaintiffs' real property or any portion thereof</u>." (emphasis added).

17. Thus, Mr. Rogers' representations that: 1) his children owned all of the Rogers Property; 2) he was his childrens' [sic] attorney; and 3) the Rogers Children claimed part of the [plaintiffs] Property by adverse possession, were all untrue.

18. After serving their Answer, the Rogers Children consented to granting the [plaintiffs] leave to amend their Complaint to join their father, David H. Rogers, as a necessary party. The [plaintiffs] did so and served their

> Amended Complaint on the Rogers Children and on Mr. Rogers via certified mail on March 8, 2001. Mr. Rogers' summons was proper in every respect.
>
> . . . .
>
> 20. The [plaintiffs] attorneys have submitted an Affidavit which shows the [plaintiffs] have incurred $15,000.00 in legal fees to date.

Here, in its order awarding sanctions, the trial court did state that it "considered the evidence submitted by the parties and the Briefs and arguments of counsel." However, "[t]he court may consider the arguments of counsel as long as the arguments are not considered as facts or evidence." *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 694 (1984). In addition to the pleadings, there were affidavits from Hayes and Rogers before the trial court, along with deeds affecting the two properties.

Finding of fact #13 is supported by evidence in the form of plaintiffs' complaint and their motion for leave to amend their complaint to join a necessary party. Findings of fact #11 and #12 are supported by competent evidence in the form of Rogers' letters to the plaintiffs which were attached to various pleadings in this matter. Findings of fact #14-17 are supported by competent evidence based on the answer and amended answer of defendants Henry H. Rogers II, Anne C. Rogers, Susan Glendenning, and Rebecca C. Rogers, and other pleadings. Finding of fact #18 is based on competent evidence in the form of plaintiffs' motion to amend their complaint. Findings of fact #6 and #7 are based on competent evidence in the form of the affidavit of the plaintiff, Bobby

Hayes. Finding of fact #20 is supported by an affidavit from plaintiffs' counsel. Finding of fact #10 is supported by competent evidence in the form of the pleadings and affidavits submitted in the matter.

Defendant next contends that conclusions of law #2-9 are not supported by the findings of fact and that these conclusions do not support an award of sanctions. We are not persuaded.

"The Rule 11 analysis contains three parts: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. 'A violation of any one of these requirements mandates the imposition of sanctions.'" *Page v. Roscoe, LLC*, 128 N.C. App. 678, 681, 497 S.E.2d 422, 424 (1998) (quoting *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994)).

The relevant conclusions of law are:

> 2. Mr. Rogers has misused his law license to threaten and intimidate the [plaintiffs] and has been dishonest throughout this dispute. For example, in his September 26, 2000 letter, Mr. Rogers stated that he owned the Rogers Property and had also acquired a portion of the [plaintiffs] Property by adverse possession. After being confronted with the two deeds filed with the Wake County Register of Deeds, both signed by Mr. Rogers and purporting to pass all of his rights and interests in the Rogers Property to the Rogers Children, Mr. Rogers admitted this misrepresentation. However, Mr. Rogers then claimed his children owned the Rogers Property and part of the [plaintiffs] Property. Mr. Rogers stated that with the Rogers Property, he had passed all his interests in the property, including rights to that portion of the [plaintiffs] Property that he had

acquired through adverse possession. Mr. Rogers asserted that he was attorney-in-fact for his children and was authorized to act for them in the dispute. As mentioned above, this proved to be untrue also.

3. Mr. Rogers made unfounded and frivalous [sic] legal threats against the [plaintiffs], including a right to recover attorney's fees under N.C. Gen. Stat. §§ 6-18 and 6-19, which do not authorize such an award under any circumstances.

4. After receiving the Rogers Childrens' Answer repudiating Mr. Rogers' efforts to deed his interest in the Rogers Property to them, the [plaintiffs] amended their complaint to join Mr. Rogers as a party on March 8, 2001. On that date, the first and only summons for Mr. Rogers in this action was properly issued. That summons was legally sufficient and lawful in all respects.

5. On March 8, 2001 the [plaintiffs] properly served this summons and the Amended Complaint on Mr. Rogers via certified mail. On March 9, 2001 Mr. Rogers properly received sufficient service of the summons and complaint and signed the green receipt for certified mail indicating receipt. This receipt was returned to the [plaintiffs'] attorney and she filed an Affidavit of Service with the Court.

6. Mr. Rogers' [sic] moved for and was granted a thirty-day extension of time to answer. On, May 8, 2001, the day his answer was due, Mr. Rogers did not answer but instead, moved to dismiss the action based on Rule 12(b)(4) insufficiency of process and Rule 12(b)(5) insufficiency of service of process. These Motions to dismiss were legally and factually frivolous, insufficient and improper, and, by filing the motion Mr. Rogers violated N.C.R. Civ. 11. In filing the 12(b)(4) and 12(b)(5) motions, Mr. Rogers did not make a reasonable inquiry into the law and, if he had, he would have

> known that his motions were not warranted by law and any belief that they were warranted was an unreasonable one.
>
> 7. Furthermore, Rogers filed his frivolous 12(b)(4) and 12(b)(5) motions for an improper purpose; in particular to further harass the [plaintiffs], to cause unnecessary delay and to cause unnecessary costs. Despite the fact that he began the dispute and antagonized the [plaintiffs], challenging them to take the dispute to court and threatening that he would, Mr. Rogers has wasted the Court's time with baseless motions claiming lack of "personal jurisdiction."
>
> 8. The reasonable amount of attorneys' fees incurred by the [plaintiffs] is $12,000.00 and Mr. Rogers should pay the [plaintiffs] this amount as a sanction under N.C.R. Civ. P. 11.
>
> 9. The frivolous motions should also be stricken and the [plaintiffs] should be allowed to proceed to argue the merits of their case.

"An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.'" *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (citations omitted). "An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose." *Id.*

Here, after a careful review of the record, we conclude that the findings of fact support the trial court's conclusions of law. Specifically, the findings of fact support conclusion of law #7 that Rogers filed his motions to dismiss for an improper purpose. This conclusion supports the award of Rule 11 sanctions. Because a conclusion of improper purpose will support the imposition of

Rule 11 sanctions, we need not address the remaining conclusions. *See Page*, 128 N.C. App. at 681, 497 S.E.2d at 424.

Rogers further argues that the trial court erred in awarding $12,000.00 as a sanction. Rogers argues that sanctions are inappropriate because the plaintiffs initiated this action and that the trial court awarded the attorneys' fees before reviewing the affidavits in support of attorneys' fees. We do not agree.

"If we determine in our *de novo* review that sanctions were properly imposed by the trial court, we then review under an 'abuse of discretion' standard the appropriateness of the particular sanction imposed." *VSD Communications, Inc. v. Lone Wolf Publishing Group*, 124 N.C. App. 642, 644-45, 478 S.E.2d 214, 216 (1996). Here, attorneys for the plaintiffs submitted an affidavit that included the billing rates, years of experience of the attorneys and that $15,000.00 represented the amount of reasonable attorneys' fees incurred and was substantially similar to what other attorneys with like experience would charge. They attached detailed time sheets in support of their affidavit. Based upon the findings of fact, conclusions of law, and the record, we cannot say that the trial court abused its discretion in awarding $12,000.00 in reasonable attorneys' fees as a form of sanction in this matter.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).