NO. COA01-194

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STANTON JOSE MOSS, and wife REBECCA PERRY MOSS; VERNON G. FOSTER; HAROLD CRAVEN McCLELLAN, JR., and wife SANDRA FRALEY McCLELLAN; GLENN EDWARD INGRAM, and wife MARIE DILLON INGRAM; LARRY GRAY ATHAN, and wife KRISTA DYSON ATHAN; MARK IRVIN STAFFORD, and wife DEANNA GILBERT STAFFORD; TODD CHRISTOPHER ZIMMERMAN, and wife ELIZABETH LINDSEY ZIMMERMAN, successors in interest to RICHARD SAMUEL LEHMAN, and wife BARBARA STONER LEHMAN; and RONALD EUGENE RICHARDSON, and wife YVONNE CASTILLO RICHARDSON,
Plaintiffs-appellees,

v.

THE TOWN OF KERNERSVILLE,
Defendant-appellant.

Forsyth County
No. 00 CVS 3235

Appeal by defendant from order entered 16 October 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 2001.

Bell, Davis & Pitt, PA, by Walter W. Pitt, Jr. and Alan M. Ruley, for plaintiffs-appellees.

John G. Wolfe, III & Associates, PLLC, by John G. Wolfe, III; Womble Carlyle Sandridge & Rice, PLLC, by Roddey M. Ligon, Jr., for defendant-appellant.

BRYANT, Judge.

Plaintiffs are citizens of Kernersville, North Carolina who own property surrounding a lake and adjoining area known as Century Park Lake. Adjoining and beneath Century Park Boulevard exists a dam, which for many years impounded water, thus creating the Century Park Lake. In 1997, the North Carolina Department of Environment and Natural Resources (DENR) inspected the dam and found several deficiencies that would require repair and reconstruction. On 3 August 1997, DENR issued dam safety orders to people and entities, including defendant Town of Kernersville, requiring remedial action to repair and reconstruct the dam.

Petitions contesting DENR's orders were filed in the Office of Administrative Hearings (OAH), and an administrative proceeding involving plaintiffs, defendant, and others commenced. Ultimately a negotiated resolution was reached, wherein defendant agreed to repair, reconstruct and maintain the dam. In accordance with the negotiated resolution, the plaintiffs, defendant, and others entered into an agreement and consent judgment. The consent judgment was filed with OAH on or about 14 July 1998, and was signed by Administrative Law Judge Brenda B. Becton, Mayor of the Town of Kernersville Larry R. Brown, and plaintiffs.

On 10 March 1999, pursuant to the consent judgment, defendant submitted to DENR proposed plans, construction specifications and engineering design data for repairs which would allow the dam to impound water. Defendant also submitted erosion control plans and additional construction specifications to DENR on or about 19 April 1999. By letter dated 12 May 1999, defendant received approval

from DENR to repair and reconstruct the dam consistent with defendant's 10 March 1999 proposal.

Following receipt of DENR's approval of defendant's proposal, defendant had approximately six and one-half months to complete repairs by the 30 November 1999 deadline stated in the consent judgment. It is undisputed that defendant did not complete the repairs and reconstruction by the deadline. Plaintiffs commenced this action on 24 May 2000 seeking specific performance and damages for defendant's alleged breach of the consent judgment. In its answer, defendant denied any allegations of breach.

Defendant filed a motion for judgment on the pleadings, which was denied following a hearing at the 17 July 2000 civil session of the Forsyth County Superior Court with the Honorable Richard L. Doughton presiding. In addition, defendant filed a motion for summary judgment which was heard at the 9 October 2000 civil session of the Forsyth County Superior Court with the Honorable L. Todd Burke presiding. An order denying defendant's motion for summary judgment but granting summary judgment in favor of the plaintiffs "on plaintiffs' claim for specific performance" was entered on 16 October 2000. Defendant filed notice of appeal from the 16 October 2000 order on 8 November 2000.

I.

On appeal, defendant first argues that the trial court erred in denying its motion for summary judgment and granting summary judgment for plaintiffs. We disagree.

A motion for summary judgment may be properly granted when

there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 159, 284 S.E.2d 697, 699 (1981). For summary judgment to be granted, the moving party must produce evidence, which he has available for presentation at trial, sufficient to compel a verdict in his favor as a matter of law. *See Cockerham v. Ward*, 44 N.C. App. 615, 618, 262 S.E.2d 651, 654 (1980). If the non-moving party fails to counter the effect of the moving party's evidence by presenting his own evidence sufficient to create a genuine issue of material fact, this failure will result in a judgment against the non-moving party. *See id.*

Defendant acknowledges that pursuant to the consent judgment, defendant is required to repair the dam and that these repairs are to be in compliance with DENR requirements. Defendant, however, argues that breaching the dam (i.e., creating a hole in the dam which will result in draining of the lake) is a permissible repair; and defendant is not required to repair the dam so that the dam will impound water. Whereas plaintiffs contend defendant is required to repair the dam as would permit water to be impounded. Defendant contends that by planning to breach the dam, it was acting pursuant to the consent judgment and in compliance with DENR requirements. Therefore, defendant argues it was entitled to a granting of summary judgment in its favor. We disagree.

A consent judgment is essentially a contract between parties, entered with the approval and sanction of the court, which creates a final determination of their rights and duties. *See King v.*

King, 146 N.C. App. 442, 444, 552 S.E.2d 262, 264 (2001); *Harborgate Prop. Owners Ass'n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297, 551 S.E.2d 207, 212 (2001). In interpreting a consent judgment, where the document language is unambiguous, our courts must follow the express language in the document in accordance with the parties' intentions. *See, e.g., Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 552, 478 S.E.2d 518, 521 (1996); *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). When the language of the consent judgment is ambiguous, however, our courts are required to interpret the language consistent with the intentions of the parties to the consent judgment. *See, e.g.*, *Bicket*, 124 N.C. App. at 552-53, 478 S.E.2d at 521. The intention of the parties may be derived by reading the document language as a whole, attempting to give each word meaning.

The consent judgment in our case reads in relevant portions:

> 2. The parties to this document adjoining the "lake property" and known as the adjoining property owners, agree that they shall accept the deeds of conveyance containing a deed Restriction which will prohibit fencing of the lake shore in a manner which would prohibit the adjoining property owners and/or the Town of Kernersville from having access to the lake shore or the lake itself. The property owners also agree that they shall grant an easement unto the Town of Kernersville which will permit the Town to control the level of the lake situated upon this property as provided in Paragraph 5 herein.
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> . . .
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> 4. The Town agrees to bear all costs and responsibility to repair and reconstruct

> the dam in accordance with the requirements of the State of North Carolina Department of Environment and Natural Resources by the 30th day of November, 1999, and shall indemnify the remaining parties from any claims which may arise from the reconstruction, maintenance and control of the dam. The Town agrees that there shall be no impoundment of water until such time as engineering plans for the reconstruction of the dam have been approved by DENR and said dam has been built in accordance therewith and is approved for impoundment by DENR.
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> 5. The Town shall have sole control over the dam, said control to include the control of the height/depth of the waters contained by the dam, by any manner or means seen proper by the Town so long as the dam is maintained by the Town. Adjoining property owners further agree to provide a permanent construction Easement to the Town of Kernersville over each property in order to maintain the proper level of height/depth of the lake, including any dredging or construction of the lake bank.
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> . . .
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> 9. Adjoining property owners agree that they shall not fill the lake, by any means whatsoever, without the express written permission of the Town of Kernersville. The adjoining property owners further agree not to construct any improvement or structure on the individual property owned by each, save and except a pier, which shall be the sole responsibility of the property owner . . . . The Town of Kernersville shall not be liable to any property owner for any damages to any pier due to elevation of water in the lake.

Although there is no express provision that states defendant must repair the dam in a manner in which the dam will impound water, this intention is clear based on a reading of the consent judgment as a whole. Pursuant to the consent judgment, defendant was under an obligation to repair the dam in a manner that would

impound water. This obligation remained in spite of the fact that DENR would have otherwise approved defendant's proposal to breach the dam. Therefore, this assignment of error is overruled.

II.

Next, defendant argues that the trial court erred in denying its motion for summary judgment and instead granting plaintiffs' motion for summary judgment because repairing the dam in a manner that would impound water would violate the public purpose provisions of the State Constitution and provisions of N.C.G.S. § 159-28(a). We disagree.

a. Public Policy

Two principles are applied to determine whether an undertaking by a municipality is for a public purpose as referenced pursuant to N.C. Const. art. V, § 2: 1) whether the undertaking has a reasonable connection with the convenience and necessity of the municipality, and 2) whether the undertaking benefits the public as opposed to particular individuals. *See Madison Cablevision v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). The term public purpose is not to be narrowly construed when making the determination whether an undertaking is for a public purpose. *See id.*

Defendant argues that requiring it to repair the dam in a manner that would allow for the impoundment of water, would only serve the purpose of creating a private lake for the plaintiffs. Spending to impound water for the purpose of creating a private lake would violate the public purpose provisions of the State

Constitution, defendant argues.

In reviewing the evidence, however, this Court is of the opinion that repair and reconstruction of the dam was in furtherance of a public purpose. Specifically, the evidence shows that the dam is located beneath Century Park Boulevard, a street maintained by the Town of Kernersville (defendant). Defendant agreed to bear all the costs and responsibility for repair and reconstruction of the dam. The parties agreed that defendant would have sole control over the dam so long as the dam is maintained by defendant. Moreover, in its answer to plaintiffs' complaint, defendant responded that it "actively and timely pursued the repair and reconstruction of that property upon, under, and surrounding Century [Park] Boulevard in order to provide a safe means of travel for the citizens of the Town of Kernersville."

The evidence shows that in violation of the Dam Safety Law of 1967, there were several deficiencies in the dam that required repair and reconstruction. DENR issued dam safety orders requiring defendant to take remedial actions to ensure the dam structure was in compliance with DENR requirements. DENR would have approved defendant either breaching or repairing the dam so that it would impound water. By consent judgment, however, defendant town obligated itself to remedying defects by the latter method.

Moreover, after the consent judgment was entered, minutes from the 6 October 1998 Board of Alderman meeting reflects the following: "John G. Wolfe, III, Town Attorney has rendered an opinion that the proposed undertaking is authorized by law and is

a purpose for which public funds may be expended pursuant to the Constitution and laws of North Carolina." In addition, the record reflects that if the dam were breached, essentially a mud patch would be left in place of the lake which could become "very odorous and unsightly."

We find that repair and reconstruction of the dam so that it would impound water was not in violation of the public purpose provision of the State Constitution. Therefore, defendant's assignment of error correlating to this argument is overruled.

b. Section 159-28(a)

Defendant lastly argues that the consent judgment was entered in violation of N.C.G.S. § 159-28(a); therefore, the consent judgment was invalid. We disagree.

N.C.G.S. § 159-28(a) (2001) provides in pertinent part:

> (a) Incurring Obligations. — No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. . . . *If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection*. . . . An obligation incurred in violation of this subsection is invalid and may not be enforced.

(emphasis added).

Defendant argues that its obligation pursuant to the consent

judgment is not evidenced by a certificate stating the judgment had been preaudited to assure compliance with N.C.G.S. § 159-28(a). Without evidence of the required certificate, defendant argues that the consent judgment is not a valid agreement. Therefore, defendant argues its motion for summary judgment was improperly denied in light of the alleged violation of N.C.G.S. § 159-28(a). We disagree and hold that this contract is one for specific performance which does not require the payment of money and is therefore not subject to N.C.G.S. § 159-28(a).

N.C.G.S. § 159-28(a) requires a preaudit certification when an obligation is evidenced by a contract or agreement requiring the payment of money. The consent judgment in the instant case, does not require the payment of money, but rather, defendant's obligation is for specific performance. The consent judgment is not "an obligation []evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials" such that a preaudit certificate is required pursuant to N.C.G.S. § 159-28(a). The cases cited by defendant for this proposition are not applicable to the consent judgment. In asserting that N.C.G.S. § 159-28(a) controls, defendant attempts to distinguish *Myers*. *See Myers v. Town of Plymouth*, 135 N.C. App. 707, 522 S.E.2d 122 (1999) (holding lack of preaudit certificate did not invalidate contract when financial obligation was not due in year contract signed). Defendant argues that it incurred obligations for design and related work during the same fiscal year in which the consent agreement was signed, and refers to a project

chronology in the record. However, the referenced project chronology dated 13 January 2000 is not a part of the consent agreement. We find nothing in the record to indicate that there were any financial obligations due and payable pursuant to this consent judgment during the current fiscal year — 14 July 1998 to 14 July 1999 — or at any other time.

Moreover, in a resolution dated 6 October 1998 the Board of Aldermen agreed to request approval for an installment purchase contract for the renovation of the culvert and Century Boulevard, with financing to take place over a period of seven years. The resolution acknowledged the need for pre-approval by the Local Government Commission pursuant to Article 8 of N.C.G.S. § 159. The proposed installment purchase contract was clearly one which required the payment of money, a fact acknowledged by the Board in noting the need for Local Government Commission approval. From this and other evidence in the record, it appears defendant recognized the difference between this contract for specific performance to make repairs to the dam and other contracts for payment of money subject to pre-approval, whether by audit or otherwise. Therefore, we conclude that a violation of N.C.G.S. § 159-28(a), as alleged by defendant, has not occurred in the instant case. The correlating assignment of error is therefore overruled.

Conclusion

The trial court did not err in denying defendant's motion for summary judgment and granting summary judgment in favor of plaintiffs.

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).