NO. COA07-116-2

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

SELWYN VILLAGE HOMEOWNERS ASSOCIATION,
Plaintiff,

v. Mecklenburg County
No. 04 CVS 21480

CLINE & COMPANY, INC.,
Defendant.

Appeal by defendant from order and judgment entered 20 September 2006 by Judge Linwood O. Foust in Mecklenburg County Superior Court. This case was originally heard in the Court of Appeals 10 October 2007. *See Selwyn Village Homeowners Ass'n v. Cline & Co.*, 186 N.C. App. 645, 651 S.E.2d 909 (2007). Upon remand by order from the North Carolina Supreme Court, filed 11 June 2008. *See Selwyn Village Homeowners Ass'n v. Cline & Co.*, 362 N.C. 362, ___ S.E.2d ___ (2008).

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for plaintiff-appellee.

Clontz & Clontz, P.L.L.C., by Ralph C. Clontz, III, for defendant-appellant.

TYSON, Judge.

This Court initially heard Cline & Company, Inc.'s ("defendant") appeal from order entered enforcing a settlement agreement with Selwyn Village Homeowners Association ("plaintiff")

and from judgment entered awarding plaintiff $26,000.00. *See Selwyn Village Homeowners Ass'n*, 186 N.C. App. at 645, 651 S.E.2d at 909–10. A unanimous panel of this Court dismissed defendant's appeal based upon plaintiff's motion to dismiss defendant's appeal, which alleged violations of the North Carolina Rules of Appellate Procedure. *See id.* at 650, 651 S.E.2d at 912.

Defendant petitioned our Supreme Court for discretionary review. *See Selwyn Village Homeowners Ass'n*, 362 N.C. at 362, ___ S.E.2d at ___. Our Supreme Court "remanded for reconsideration in light of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008)[.]" *Id.* Upon remand and after further review, we affirm.

I. Background

This Court previously outlined the background leading to this appeal:

> In June 2003, plaintiff's condominium units were flooded during a rain storm. During this time, defendant was responsible for managing plaintiff's homeowners association. Edwards, Church & Muse, Inc. ("ECM") provided hazard insurance to plaintiff. Plaintiff made a timely claim, together with a proof of loss under the insurance policy obtained by defendant and ECM for the association. Plaintiff subsequently discovered the property was grossly underinsured. Plaintiff brought an action against defendant and ECM alleging breach of contract and negligence.
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> On 26 April 2006, during the third day of trial, the parties settled the case. The settlement agreement provided defendant shall pay $26,000.00 to plaintiff in installments and the terms of the settlement shall include a confidentiality and non-disparagement agreement. The confidentiality and non-disparagement provisions were to be

> "worked out" by the parties in a mutually agreeable consent order.
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> On 25 May 2006, while negotiations were underway concerning the wording of the consent order, plaintiff's counsel was asked by plaintiff's board of directors to explain the settlement terms to members of its homeowners association. Defendant discovered this disclosure and refused to finalize the settlement documents or to make payment to plaintiff. Defendant argued the disclosure by plaintiff's counsel to the members of plaintiff's homeowners association violated the confidentiality and non-disparagement agreement and rendered the settlement void.
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> On 12 July 2006, plaintiff filed a notice of voluntary dismissal with prejudice against ECM regarding this action. On 19 July 2006, plaintiff moved to enforce the settlement agreement. The trial court granted plaintiff's motion. Defendant appeal[ed].

Selwyn Village Homeowners Ass'n, 186 N.C. App. at 645-646, 651 S.E.2d at 910.

On 18 May 2007, plaintiff moved to dismiss defendant's appeal based on violations of Appellate Rule 28 and with the formatting set forth in Appendices B and E of the Rules of Appellate Procedure. The Appellate Rule violations alleged by plaintiff were: (1) failure to "identify the pages of the record for any of the nine questions presented[;]" (2) "the brief does not contain a concise statement of the procedural history of the case[;]" (3) "the index does not have the proper margins[;]" (4) "the issues within the body of the document are not single spaced[;]" and (5) "the index to the appendix is not formatted as found in Appendix E . . . ."

Defendant responded and stated:

> The unintended violation . . . of the Rules of Appellate Procedure does not significantly interfere with the ability of the Court to discern which findings of fact are being challenged by the assignment of error. Such technical violations are not substantial or egregious enough to warrant dismissal of the appeal, and it would be manifestly unjust to [d]efendant . . . for its appeal to be dismissed rather than allowing it to [be] heard on its merits.

Defendant never corrected its admitted violations of the Rules of Appellate Procedure. A unanimous panel of this Court granted plaintiff's motion to dismiss and dismissed defendant's appeal based up the violations enumerated above. *See id.* at 650, 651 S.E.2d at 912. Our Supreme Court "[a]llowed [defendant's petition for discretionary review] and remanded for reconsideration in light of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008)[.]" *See Selwyn Village Homeowners Ass'n*, 362 N.C. at 362, ___ S.E.2d at ___.

II. Defendant's Appellate Rules Violations

In *Dogwood*, our Supreme Court stated "that the occurrence of default under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." 362 N.C. at 194, 657 S.E.2d at 363. Here, defendant's noncompliance falls within the third category.

"Based on the language of [Appellate] Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the

[appellate] rules does not rise to the level of a 'substantial failure' or 'gross violation.'" *Id.* at 199, 657 S.E.2d at 366.

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. *See* [*State v.*] *Hart*, 361 N.C. [309,] 312, 644 S.E.2d [201,] 203 [(2007)] (noting that dismissal may not be appropriate when a party's noncompliance does not "'impede comprehension of the issues on appeal or frustrate the appellate process'" (citation omitted)); *Viar* [*v. N.C. Dep't of Transp.*], 359 N.C. [400,] 402, 610 S.E.2d [360,] 361 [(2005)] (discouraging the appellate courts from reviewing the merits of an appeal when doing so would leave the appellee "without notice of the basis upon which [the] appellate court might rule" (citation omitted)). The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review. *See, e.g.*, N.C. R. App. P. 28(b)(6) ("Assignment of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Id. at 200, 657 S.E.2d at 366–67.

Here, defendant's appellate rules violations, while numerous, do not "rise to the level of a 'substantial failure' or 'gross violation'" to warrant sanctions. *Id.* at 199, 657 S.E.2d at 366. We nonetheless admonish defendant's counsel to review the Rules of Appellate Procedure and be more diligent in any future appeals.

III. Issues

Defendant argues the trial court erred when it granted plaintiff's motion to enforce the settlement agreement and entered judgment against defendant.

IV. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and quotation omitted), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). The trial court's conclusions of law are reviewable *de novo* on appeal. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citations omitted).

V. Motion to Enforce the Settlement Agreement

Defendant argues the trial court's findings of fact numbered 2, 5, 7, and 10 in the Order Enforcing Settlement Agreement are not supported by competent evidence. Defendant further argues that the trial court's conclusions of law are not supported by its findings of fact. We disagree.

Defendant only assigns error to findings of fact numbered 2, 5, 7, and 10 in the trial court's Order Enforcing Settlment Agreement. With regard to the remaining findings of fact, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408

S.E.2d 729, 731 (1991) (citations omitted). The trial court's remaining unchallenged findings of fact are binding on appeal. *Id.*

The trial court's findings of fact numbered 2, 5, 7, and 10 state:

> 2. The members of the Selwyn Village Homeowners Association are the clients of plaintiff's counsel and counsel was asked to represent the association by and through its board of directors.
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> . . . .
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> 5. Unbeknownst to plaintiff's counsel, the daughter-in-law of the principal of the defendant corporation, who as a member of homeowner's association through her ownership interest in a condominium at Selwyn Village, surreptitiously tape recorded the comments of counsel and then supplied the tape to defendant's counsel.
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> . . . .
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> 7. After reviewing the affidavit supplied by Kelly Ann Cline, the association member who secretly recorded the communication between plaintiff's counsel and his clients, it does not appear that the attorney's report to the homeowners association was intended to disclose information other than the information related to the settlement, about which the members were entitled to know.
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> . . . .
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> 10. That the person who intentionally recorded the communications of plaintiff's counsel, was, in all probability, already aware of what had transpired in the court room and in regards to the settlement, and may have been recording the meeting because of her knowledge of the case.

The record on appeal contains competent evidence which supports each of the trial court's findings of fact: (1) "[t]he

plaintiffs in this action are the individual homeowners of condominium units, who, pursuant to their covenants, conditions and restrictions, delegated the duty and responsibility for the repair of exterior units and the acquisition of flood insurance to their board of directors — . . . the named plaintiff in this action[;]" (2) plaintiff's counsel was neither aware of nor made aware of Kelly Ann Cline's relationship with defendant; (3) plaintiff's counsel was not aware that Kelly Ann Cline was tape recording the homeowners' association meeting; and (4) plaintiff's counsel only communicated the terms and rationale of the settlement agreement to his clients.

After thorough review of the record on appeal, we hold that competent evidence in the record supports the trial court's findings of fact numbered 2, 5, 7, and 10. These findings of fact, together with the remaining unchallenged findings of fact, support the trial court's conclusions of law. The trial court properly granted plaintiff's motion to enforce the settlement agreement. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. This assignment of error is overruled.

VI. Trial Court's Judgment

Defendant argues the trial court erred when it entered judgment against defendant based on the grant of plaintiff's motion to enforce the settlement agreement. We disagree.

"It is well-settled in North Carolina that compromises and settlements of controversies between parties are favored by our courts." *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C.

App. 130, 136, 493 S.E.2d 793, 796 (1997) (citation omitted). "[A] party may enforce a settlement agreement by filing a voluntary dismissal of its original claim and then instituting another action on the contract, *or it may simply seek to enforce the settlement agreement by petition or motion in the original action.*" *Id.* at 136, 493 S.E.2d at 797 (citations and quotation omitted) (emphasis supplied).

The terms of the settlement agreement, as found by the trial court in its Order Enforcing Settlement Agreement, included the following clause:

> Should defendant . . . fail and/or refuse to make any timely payment, notice of default shall be provided to Ralph Clontz, Jr. as counsel for defendant . . . . In the event the default is not cured within 5 days, the plaintiff may apply to the Court and obtain a judgment in the amount of $26,000, less any payments made hereunder.

In its judgment entered 20 September 2006, the trial court found that "defendant has not made any payments and has indicated that it does not intend to make payments under the settlement agreement and is now in default of that agreement." This finding was not challenged by defendant on appeal and it is binding. *Koufman*, 330 N.C. at 97, 408 S.E.2d 731. Based on this finding and the trial court's grant of plaintiff's motion to enforce the settlement agreement, the trial court properly entered judgment against defendant. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. This assignment of error is overruled.

VII. Conclusion

Competent evidence in the record on appeal supports the trial court's findings of fact. The trial court's findings of fact support its conclusions of law. The trial court properly granted plaintiff's motion to enforce the settlement agreement and entered judgment in favor of plaintiff. *Id.* The trial court's order and judgment are affirmed.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).