NO. COA10-1339
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

HATTERAS REALTY, INC.,
Plaintiff

v. Dare County
No. 09-CVS-731

TROY DALE PETTY, and PROFESSIONAL ENTERPRISES OF HATTERAS ISLAND, INC. d/b/a SURF OR SOUND REALTY,
Defendants

Appeal by defendants from order entered 1 June 2010 by Judge Milton F. Fitch, Jr., in Dare County Superior Court. Heard in the Court of Appeals 12 May 2011.

Aycock & Butler, by Charlie Aycock, and Olive & Olive, P.A., by Susan Freya Olive, for plaintiff-appellee.

Vandeventer Black LLP, by Norman W. Shearin, for defendants-appellants.

THIGPEN, Judge.

Hatteras Realty, Inc. ("Plaintiff") filed an action against Troy Dale Petty and Professional Enterprises of Hatteras Island, Inc. d/b/a Surf or Sound Realty ("Defendants") alleging Defendants breached the parties' 2008 Settlement Agreement and Consent Judgment. We must decide whether the trial court erred

by (I) granting summary judgment for Plaintiff; (II) making findings of fact regarding issues not before the court and making disputed findings of fact; and (III) awarding attorneys' fees to Plaintiff. Because we conclude the trial court erred by granting summary judgment, we reverse the trial court's order.

In 2005, Plaintiff brought an action against Defendants for activities related to Defendants' advertising practices. In 2008, Plaintiff and Defendants entered into a Settlement Agreement and Consent Judgment. As part of the Settlement Agreement and Consent Judgment, the parties agreed Defendants could not:

> (a) use any data obtained from any Hatteras Realty web site for the purpose of making any comparisons between the performance of Hatteras Realty and the performance of Surf or Sound Realty or any other business owned, operated, or controlled by one or more of Defendants (including any business in which said Defendant acts as a manager or officer); and,
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> (b) use or cause to be used the name of Hatteras Realty, the name or image of any Hatteras Realty employee, or any image of any property owned or managed by Hatteras Realty, in any marketing, advertising, or other promotional material, whether in print, electronic, or other medium, except with the express advance written consent of Hatteras Realty.

The Settlement Agreement also provided that, "in the event it

becomes necessary for either party to enforce this agreement and/or consent order, the prevailing party shall be entitled to reimbursement of all expenses, including costs and attorneys[']fees."

On 31 August 2009, Plaintiff filed an action against Defendants for breach of the Settlement Agreement and Consent Judgment. Defendants filed a counterclaim and a motion to dismiss, and Plaintiff filed a motion for summary judgment. At the hearing on the motions, the trial court ordered a brief recess and suggested the parties discuss attorneys' fees. The attorneys stated the following on the record upon returning to the courtroom:

> Ms. Olive [Attorney for Plaintiff]: It is our understanding, Your Honor, that the defendants agree that summary judgment will be granted in favor of the plaintiff, that their counterclaims will be dismissed, that they will pay attorney's fees in the amount of $10,000.
>
> Mr. Dixon [Attorney for Defendants]: We agree that we will not appeal that.
>
> The Court: So it is said, so it is ordered, so let it be done.

The parties did not agree to any specific findings of fact during the hearing before the trial court. Rather, counsel for Plaintiff agreed to prepare "an order with findings of fact and

conclusions of law that will be enforceable by contempt[,]" and counsel for Defendants requested to see a copy of the proposed order before it was filed. Upon receiving a copy of the proposed order from Plaintiff's counsel, counsel for Defendants wrote a letter to the trial court stating that Defendants did not agree to findings of fact numbers 4 and 6.

Nonetheless, on 4 June 2010 the trial court entered an order granting summary judgment for Plaintiff, dismissing Defendants' counterclaims, denying Defendants' motion to dismiss, and awarding $10,000 in attorneys' fees to Plaintiff. The trial court also made seven findings of fact in its order. Defendants appeal from this order.

Preliminarily, we comment on the trial court's entry of an order containing detailed findings of fact in a case decided upon a summary judgment motion. "[T]he enumeration of findings of fact . . . is technically unnecessary and generally inadvisable in summary judgment cases[.]" *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citation omitted). "Summary judgment should be entered only where there is no genuine issue as to any material fact. If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." *Hyde Ins. Agency, Inc. v. Dixie*

Leasing Corp., 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975). Insofar as a trial court's findings of fact resolve issues as to a material fact, the findings "have no effect on . . . appeal and are irrelevant to our decision." *Id.* at 142, 215 S.E.2d at 165 (citations omitted). When a trial court recites the "uncontested facts" that form the basis of its decision, "any findings should clearly be denominated as 'uncontested facts[.]'" *War Eagle, Inc. v. Belair*, __ N.C. App. __, __, 694 S.E.2d 497, 500 (2010).

In this case, the trial court did not label any of its findings of fact as "uncontested facts." Although it appears from the record that the trial court entered summary judgment in accordance with the parties' statements before the court, it also appears the trial court included in its order findings of fact not contemplated or agreed upon by Defendants. We note that in-court agreements between parties may be more appropriately resolved by the entry of a consent judgment rather than the entry of an order for summary judgment. *See Yurek v. Shaffer*, 198 N.C. App. 67, 79, 678 S.E.2d 738, 746 (2009) (defining a consent judgment as "the contract of the parties entered upon the records of a court of competent jurisdiction

with its sanction and approval") (citation and quotation marks omitted).

I. Summary Judgment

Defendants first contend the trial court erred by granting summary judgment for Plaintiff because there were genuine issues of material fact as to the terms of the Settlement Agreement and Consent Judgment. We agree.[1]

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "[T]he trial judge must

[1]Plaintiff argues Defendants are judicially estopped from pursuing this appeal because of their waiver in open court. Judicial estoppel is an equitable doctrine that may be invoked in a court's discretion to prevent "a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010) (citation omitted), *reh'g denied*, __ N.C. __, 706 S.E.2d 241 (2011). Although Defendants agreed at the hearing before the trial court "that summary judgment will be granted in favor of the plaintiff . . . [and to] pay attorney's fees in the amount of $10,000[,]" Defendants did not agree to the entry of an order containing disputed findings of fact. Thus, we conclude the doctrine of judicial estoppel is not applicable to this case.

view the presented evidence in a light most favorable to the nonmoving party [and] . . . the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted).

Here, Defendants contend the trial court erred by granting summary judgment because Plaintiff and Defendants disagree on whether the following subparagraphs in the Settlement Agreement connected by the word "and" are to be read together, as Defendants contend, or are separately enforceable, as Plaintiff contends:

> The Defendants . . . agree that they shall not hereafter:
>
> (a) use any data obtained from any Hatteras Realty web site for the purpose of making any comparisons between the performance of Hatteras Realty and the performance of Surf or Sound Realty or any other business owned, operated, or controlled by one or more of Defendants (including any business in which said Defendant acts as a manager or officer); and,
>
> (b) use or cause to be used the name of Hatteras Realty, the name or image of any Hatteras Realty employee, or any image of any property owned or managed by Hatteras Realty, in any marketing, advertising, or other promotional material, whether in print, electronic, or other medium, except with the express advance written consent of Hatteras Realty.

Defendants argue that because the subparagraphs are to be read together as one prohibition, even though Defendants used data from Plaintiff's website to compare the companies in an advertisement, the Settlement Agreement is not breached because Defendants did not use Plaintiff's name in that advertisement. Plaintiff, on the other hand, contends the subparagraphs are separately enforceable; thus, even though Defendants did not use Plaintiff's name in their advertisement, Defendants breached the Settlement Agreement by using data from Plaintiff's website to compare the companies in the advertisement.

"A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) (citation and quotation marks omitted); *see also Berkeley Federal Sav. and Loan Ass'n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 705-06, 433 S.E.2d 449, 456 (1993) (stating that "[w]here the agreements between the parties are clear and unambiguous, no genuine issue of fact arises as to the intention of the parties, and summary judgment is appropriate") (citation omitted), *disc. review denied*, 335 N.C. 552, 441 S.E.2d 110 (1994). "Ambiguity exists

where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001) (citation omitted). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *Id.* (citation and quotation marks omitted).

We conclude that the language in subparagraphs (5a) and (5b) creates an ambiguity as to the true intention of the parties. As demonstrated by the parties' dispute, the language of the Settlement Agreement is reasonably susceptible to either of the interpretations asserted by the parties. *See id.* Based upon the contract language alone, we cannot say as a matter of law that subparagraphs (5a) and (5b) are to be read together as one prohibition, or are separately enforceable. Because the interpretation of an ambiguous contract is a matter for the jury, *Metcalf*, 200 N.C. App. at 633, 684 S.E.2d at 719, we hold the trial court erred by granting summary judgment to Plaintiff. Accordingly, we reverse the trial court's order for summary judgment, including, but not limited to, the dismissal of Defendants' counterclaims, the denial of Defendants' motion to

dismiss, and the award of attorneys' fees.

Because we reverse the trial court's order granting summary judgment to Plaintiff, we will not address Defendants' remaining arguments.

REVERSED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).