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NO. COA10-1607  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

ROBERT E. OAKES, JR., as TRUSTEE of THE  
TESTAMENTARY TRUST ESTABLISHED UNDER THE  
LAST WILL AND TESTAMENT OF ROBERT E.  
OAKES,  
Plaintiff,

v.

Brunswick County  
No. 09 CVS 2087

ROBERT E. OAKES, JR.; ELIZABETH O.  
LEONARD; MARY KATHRYN OAKES; SUSAN O.  
PINSON; BETTY CLAYTON OAKES and RICHARD  
JAMES KIPKE, III, GUARDIAN AD LITEM FOR  
ALL OTHER PERSONS, FIRMS OR CORPORATIONS,  
IN ESSE OR NOT IN BEING, WHO ARE NOW OR  
MIGHT BY ANY CONTINGENCY BECOME  
BENEFICIARIES OF OR ENTITLED TO ANY RIGHT,  
TITLE OR INTEREST IN OR AUTHORITY IN  
CONNECTION WITH THE TESTAMENTARY TRUST  
ESTABLISHED UNDER THE LAST WILL AND  
TESTAMENT OF ROBERT E. OAKES,  
Defendants.

Appeal by plaintiff and certain defendants from order  
entered 12 October 2010 by Judge Ola Lewis in Brunswick County  
Superior Court. Heard in the Court of Appeals 12 May 2011.

*White & Allen, P.A., by John P. Marshall, for Plaintiff.*

*James Zisa, Attorneys, by James Zisa, for Defendants Robert  
E. Oakes, Jr., Elizabeth O. Leonard, Mary Kathryn Oakes,  
and Susan O. Pinson.*

*The Del Ré Law Firm, PLLC, by Benedict J. Del Ré, Jr., for Defendant Betty Clayton Oakes.*

ERVIN, Judge.

Plaintiff Robert E. Oakes, Jr., in his capacity as trustee of the testamentary trust established under the last will and testament of Robert E. Oakes, and Defendants Robert E. Oakes, Jr.; Elizabeth O. Leonard; Mary Kathryn Oakes; and Susan O. Pinson ("Remainder Beneficiaries"), appeal an order granting summary judgment in favor of Defendant Betty Clayton Oakes ("Betty Oakes"). After careful consideration of Plaintiff's and Remainder Beneficiaries' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court erred by entering summary judgment in favor of Betty Oakes and that this case should be remanded to the Brunswick County Superior Court for further proceedings not inconsistent with this opinion.

#### I. Factual Background

Robert E. Oakes died testate on 28 May 2001, with his will having subsequently been admitted to probate. Decedent's will established a trust for the benefit of his wife, Betty Oakes, and his four children, the Remainder Beneficiaries. The initial corpus of the trust consisted of a residence located at 412 Cobia Street in Sunset Beach and liquid assets valued at \$250,000.00. According to the terms of Decedent's will, Betty

Oakes had the right to use the Cobia Street residence "until such time as she enters a nursing home and stays in such for a continuous period of thirty (30) days, and until such time as my Trustee receives confirmation in writing from a competent physician that her physical and mental condition will preclude her from ever returning to such home[.]" In addition, the trust was to pay "all taxes and insurance premiums" associated with the Cobia Street residence as long as Betty Oakes continued to occupy the residence and to pay \$1,000.00 per month to Betty Oakes during her lifetime. Upon Betty Oakes' death, the trust was to be terminated and the corpus of the trust was to be distributed to the Remainder Beneficiaries. Decedent appointed Plaintiff to serve as the trustee of the trust.

Betty Oakes has resided in the Cobia Street residence since the creation of the trust. As required by Decedent's will, Plaintiff has paid \$1,000.00 to Betty Oakes each month and, although not expressly required to do so under the trust, provided for the maintenance and repair of the Cobia Street property as well.

On 30 July 2009, Plaintiff filed a verified complaint<sup>1</sup> seeking the entry of an order requiring Betty Oakes to vacate

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<sup>1</sup> Plaintiff filed an amended complaint on 16 September 2009. The only difference between Plaintiff's initial and

the Cobia Street residence as soon as reasonably possible so that the property could be listed for sale on the open market. In support of this request, Plaintiff alleged that, "as a result of the duration of the Trust and the proper expenditures and distributions made from the Trust, the liquid assets of the Trust [had] decreased to the sum of approximately [\$54,000.00, so that] the Trust [could] no longer be administered in accordance with its specific terms . . . [, insofar] as the liquid assets of the Trust [would] soon be exhausted and the Trustee [would] be able to neither fund the monthly stipend specified in the Trust, nor be able to maintain the [Cobia Street property] and pay the taxes and insurance premiums thereon." As a result, Plaintiff sought a declaration permitting him to sell the Cobia Street property for the purpose of generating funds for the continued payment of the monthly stipend due to Betty Oakes under the terms of the trust.

On 8 September 2009, Betty Oakes filed an answer and counterclaim seeking a declaration "of her rights and benefits under the Trust agreement and any subsequent agreements" "to the extent that there is any justifiable issue raised in the Pleadings." In addition, Betty Oakes requested a "full

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amended pleadings was that two exhibits that had been omitted from the initial complaint were attached to the amended complaint.

accounting" of the financial affairs of the trust since its inception. On 18 September 2009, Plaintiff filed a response to Betty Oakes' counterclaim in which he joined her request for a declaration of the parties' rights under the trust.<sup>2</sup>

On 27 July 2010, Betty Oakes filed a motion seeking an entry of default against the Remainder Beneficiaries on the grounds that they had failed to file a timely response to the Plaintiff's complaint; a motion for judgment on the pleadings; and a motion for summary judgment. In the motion for judgment on the pleadings and the motion for summary judgment, Betty Oakes simply alleged that "there is no genuine issue for court disposition based upon the Pleadings and that the Moving party is entitled to a judgment as a matter of law" and that "there is no genuine issue of material fact and that the Moving party is entitled to a judgment or partial summary Judgment as a matter of law."

The following day, the Remainder Beneficiaries filed an answer and moved to dismiss the requests for a declaratory judgment submitted by Plaintiff and Betty Oakes on mootness grounds. According to the Remainder Beneficiaries, the "forced

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<sup>2</sup> In addition, Betty Oakes had requested that Plaintiff be removed as trustee. Subsequently, Plaintiff successfully moved to have Betty Oakes' motion seeking to have him removed as trustee dismissed on subject matter jurisdiction grounds.

sale of the [Cobia Street property would be] contrary to [Decedent's] clear testamentary intent" to provide Betty Oakes with "a monthly stipend and a life tenancy in the [Cobia Street residence]" while ensuring that the property in question remained in the Oakes family. According to the Remainder Beneficiaries, a \$100,000.00 loan secured by the Cobia Street property had been procured for the purpose of recapitalizing the trust and allowing for the uninterrupted continuation of Betty Oakes' life estate without the necessity for the destruction of any future interests in the trust corpus. As a result, the Remainder Beneficiaries alleged that "[Plaintiff and Betty Oakes'] claims for trust modification by declaratory judgment" were moot and should be dismissed since there were "no other issues which require modification of the [trust.]"

This case came on for hearing before the trial court at the 10 September 2010 session of Brunswick County Superior Court.<sup>3</sup> On 12 October 2010, the trial court entered an order for the purpose of addressing "the Trustee's and Remainder

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<sup>3</sup> On 28 July 2010, Plaintiff filed a "Consent to Dismissal of Amended Declaratory Judgment" in which he consented to the dismissal of his original request for a declaration authorizing him to sell the Cobia Street residence in light of the Remainder Beneficiaries' decision to procure a loan secured by the Cobia Street residence which could be used to make the required payments to Betty Oakes pursuant to the terms of Decedent's will.

Beneficiaries' Motion to Dismiss the Counterclaim of [Betty Oakes] for Declaratory Judgment and [Betty Oakes'] Motion for Summary Judgment" in which the trial court found as a fact that:

10. That the initial funding of the Trust consisted of a certain beach cottage located at 412 Cobia Street, Sunset Beach, Brunswick County, North Carolina, (the "Cottage") and liquid assets in the approximate amount of [\$250,000.00].

. . . .

12. That since the inception of the Trust, the Defendant, [Betty Oakes], has resided in the Cottage, in accordance with the terms of the Trust.

13. That shortly after the inception of the Trust, the Plaintiff, as Trustee of the Trust, began paying to the Defendant, [Betty Oakes], on a monthly basis, the sum of [\$1,000.00], and in addition paid for maintenance and repairs in connection with the Cottage, all in accordance with the terms of the Trust.

14. That as a result of the expenditures and distributions made from the Trust, the liquid assets of the Trust have decreased to the sum of approximately [\$15,000.00].

. . . .

20. That following significant litigation concerning the Trust modification, the Trustee and the Defendant Remainder Beneficiaries, unilaterally and without prior knowledge of [Betty Oakes] secured a loan for \$100,000.00 and pledged trust assets as collateral for the said loan, in the form of a Deed of Trust of record in Brunswick County.

. . . .

23. That the trustee has charged the trust for inspections of the residence at Sunset Beach, the trust property, in years 2003, 2004, 2005, 2006, 2007 and 2008 and has charged to the trust for repairs made in year 2002, 2003, 2007 and 2008.

24. That the trust property is in need of immediate repairs to the Heating and Air Conditioning systems, and that the failure to repair that system and make other reasonable and necessary repairs, will impair the intent of the trust and make the property otherwise uninhabitable.

25. That the beneficiary has on multiple occasions requested that the monthly stipend [] be paid to her on or before the 1<sup>st</sup> of each month for the purposes of her paying her bills timely, but the Trustee refuses to honor that request.

Based upon these findings of fact, the trial court concluded as a matter of law that:

3. That pursuant to N.C. [Gen. Stat.] § 36C-4-412, this Court has the authority to modify the Trust consistent with the terms of the trust and [the] intent of Robert Oakes, Sr.

4. That pursuant to N.C. [Gen. Stat.] § 36-10-1004 and N.C. [Gen. Stat.] § 6-21 this court has discretion to award attorney[’s] fees, and counsel for [Betty Oakes] has requested same.

5. That Defendant [Betty Oakes] is entitled to a declaratory judgment from this Court as to the appropriate course of action and as to a modification of the administrative and dispositive terms of the



Trust, which said modification will further the purposes of the Trust and will be in accordance with the Decedent's probable intention, all in accordance with N.C. [Gen. Stat.] § 36C-4-412(a).

6. That [p]ursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure, there are no genuine issues of material fact and [Betty Oakes] is entitled to Judgment as a matter of law.

Based upon these findings of fact and conclusions of law, the trial court ordered that:

1. That Defendant Remainder Beneficiaries['] (and Trustees[']) Motion to Dismiss Defendant [Betty Oakes'] actions for Declaratory Judgment is DENIED.

2. Plaintiff Trustee's (and [Betty Oakes']) action for the sale of the trust corpus and the termination of the Oakes Testamentary Trust by Declaratory Judgment is DENIED.

3. [Betty Oakes'] Counterclaim for Declaratory Judgment and Motion for Summary Judgment are GRANTED.

4. [Betty Oakes'] Motion For Attorney's Fees and costs is GRANTED.

5. That the Robert Oakes Testamentary Trust is modified as follows:

A. That the Trustee is ORDERED to continue to pay the monthly stipend under the trust of \$1000.00 and that said sum is due to [Betty Oakes] on or before the 1<sup>st</sup> day of each month commencing October 1, 2010.

B. The Trust shall be responsible for reasonable repairs to the property for the benefit of the Remaindermen and the Life

Tenant.

C. The Heating and Air unit shall be repaired or replaced by the Trustee within two weeks of the signing of the order.

D. The Trustee shall not pay himself more than reasonable travel to inspect the property and all monies spent on behalf of the property shall be duly documented by receipt presented to the trust.

E. The Trustee shall make all loan payments pursuant to the terms and conditions of the loan agreement and shall not become delinquent in any payments as to put the Life Tenant in jeopardy of losing the use and enjoyment of the property.

F. The Life Tenant is entitled to reasonable attorney's fees. That the Counsel for [Betty Oakes] has submitted an Affidavit for the amount of time expended in this matter eliminating time spent in connection with the filing and hearing of a motion to remove the trustee which are not allowed. That the court adopts the Affidavit of Counsel herein as to the reasonableness of the fees as if fully reprinted herein. That [the C]ourt [O]rders the trustee to pay to Counsel for [Betty Oakes] the Sum of \$14,465.00 for reasonable attorney fees based upon 57 hours @\$250.00 per hour and the costs of Mediation in the sum of \$215 due and payable within 15 days of the entry of this [O]rder.

G. That a yearly accounting be provided to [Betty Oakes] after the same has been done by the Trust.

Plaintiff and Remainder Beneficiaries noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial." *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161-62 (1976) (citations omitted). "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.'" *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84, *disc. review denied*, 363 N.C. 655, 686 S.E.2d 518 (2009) (citation omitted). "Information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under [N.C. Gen. Stat. § 1A-1,] Rule 56(c)." *Huss*, 31

N.C. App. at 466, 230 S.E.2d at 161. "The party who moves for summary judgment has the initial burden to prove that there are no disputed factual issues[;]" however, "[o]nce the moving party has met this initial burden, the nonmoving party must produce a forecast of evidence demonstrating that he or she will be able to make out a *prima facie* case at trial." *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 207, 400 S.E.2d 38, 41 (1991) (citations omitted).

In reviewing an order granting a motion for summary judgment, our task is to "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). A trial court's decision to grant a summary judgment motion is reviewed on a *de novo* basis. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). We will now utilize this standard of review in

analyzing the appropriateness of the trial court's decision to enter summary judgment in favor of Betty Oakes.<sup>4</sup>

B. Substantive Legal Issues

The trial court's decision to modify the terms of the trust in Betty Oakes' favor was clearly inappropriate given the procedural posture of this case. After a thorough review of the record, we are unable to locate any evidence upon which the trial court could have based a number of the factual decisions upon which its order apparently rests. The record presented to this Court for review on appeal is devoid of any verified pleading or other evidence, as compared to unsupported assertions by counsel, raising an issue concerning or establishing the appropriateness of granting specific relief relating to the amount of liquid assets remaining in the trust, the extent to which Betty Oakes did or did not have advance

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<sup>4</sup> Although the parties have debated the exact nature of the trial court's ruling in their briefs, it is clear to us that, having expressly stated that it was granting Betty Oakes' summary judgment motion and having apparently considered various materials that were not contained in the pleadings in the course of its analysis, *Presbyterian Hospital v. McCartha*, 66 N.C. App. 177, 310 S.E.2d 409, 410 (stating that, "since [the order being appealed from] also recites that matters other than the pleadings were considered, it must be treated as an order of summary judgment"), *disc. review improvidently allowed*, 312 N.C. 485, 322 S.E.2d 761 (1984), *overruled on other grounds in N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987), the trial court's order, correctly understood, constituted a ruling on a summary judgment motion.

knowledge of the loan procured by Plaintiff and the Remainder Beneficiaries, the date upon which the trust should be required to pay Betty Oakes' monthly stipend, the extent to which the trust was obligated to pay repair and maintenance expenses associated with the Cobia Street residence, the extent to which Plaintiff had charged the trust unreasonable amounts associated with trips made for the purpose of inspecting the Cobia Street residence, the necessity for an express requirement that Plaintiff make the payments under the agreements pursuant to which he and the Remainder Beneficiaries had borrowed the money needed to make the monthly payments to which Betty Oakes was entitled under the trust, the necessity for an immediate repair of the HVAC system or any other component of the Cobia Street residence in order to ensure that Betty Oakes could continue to reside at that location, or the necessity for a change in the explicit terms of the trust relating to the necessity for Plaintiff to provide an accounting to Betty Oakes. None of the modifications that the trial court made to the trust, except for the requirement of an accounting, was requested in Betty Oakes' counterclaim for a declaratory judgment. Instead, counsel for Betty Oakes appears to have broached these issues for the first time during the 10 September 2010 hearing, arguing that his client felt "entitled to some sort of reformation of the trust"

and asking that the trust be modified to "provide for payments on the first, [and require the trustee to] make reasonable and necessary repairs[.]" In response, counsel for the Remainder Beneficiaries pointed out that "there are no claims in any pleadings for declaratory judgment asking that the Court modify the trust to make repairs[; t]here's nothing." In addition, the transcript of the 10 September 2010 hearing reveals the existence of a sharp disagreement between the parties concerning the merits of these new issues.

Wholly aside from the well-established legal principle that, in cases where "findings of fact are necessary to resolve an issue, summary judgment is improper," *White v. Town of Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179 (quotation omitted), *disc. review denied*, 318 N.C. 511, 349 S.E.2d 874-75 (1986), and the fact that Betty Oakes never requested that the trust be modified in a manner consistent with the trial court's order in any of her pleadings or other filings prior to the hearing, we conclude that the trial court's decision to enter summary judgment in favor of Betty Oakes was fatally flawed given the fact that the materials that Betty Oakes submitted in support of her request for summary judgment and delivered to this Court for subsequent review failed to establish either the absence of a genuine issue of material fact

or that Betty Oakes was entitled to the entry of a judgment modifying the trust in the manner she deemed appropriate as a matter of law.

According to N.C. Gen. Stat. § 36C-4-412:

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

*See also Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 708-09, 153 S.E.2d 449, 455 (1967) (stating that, "[i]f the settlor or a trustee or beneficiary can prove to the court that such a situation exists, the court has power to allow the trustee to deviate from the administrative provisions laid down by the settlor, to ignore them, and to employ other methods in carrying out the trust" and that, while "[t]he clauses of the instrument relating to the benefits to be conferred on the beneficiaries are primary and fundamental and are the principal concern of the court," "[t]he terms regarding methods and means of achieving these results are of secondary importance and



equity will not permit them to interfere with the efforts of the trustee to bring to the beneficiaries the intended benefits'") (quoting *Bogert on Trusts* § 146 at 375 (4th ed. 1963)). Although Betty Oakes clearly had the right to request a modification of the existing trust instrument pursuant to N.C. Gen. Stat. § 36C-4-412, she was not entitled to receive that relief through the use of the procedures employed in this case. The record developed before the trial court is simply devoid of any evidence (as compared to the assertions of counsel) establishing the appropriateness of the specific award by the trial court or tending to show that, in the absence of the requested relief, "continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." N.C. Gen. Stat. § 36C-4-412(b). As a result, we have no choice except to reverse the trial court's order, including that part awarding attorney's fees to Betty Oakes, and remand this matter to the Brunswick County Superior Court for further proceedings not inconsistent with this opinion.

### III. Conclusion

Thus, for the reasons discussed above, we conclude that the trial court erred by granting summary judgment in favor of Betty Oakes. As a result, this case must be remanded to the Brunswick

County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and THIGPEN concur.

Report per Rule 30(e).