NO. COA11-191
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

VARIETY WHOLESALERS, INC.,
Plaintiff,

v. Vance County
No. 09-CVS-1249

PRIME APPAREL, LLC; QUICK RESPONSE MARKETING, INC.; CIT GROUP COMMERCIAL SERVICES, INC.; FERNANDO A. FLAQUER; RANDALL C. NEVIL; JOHN DOES 1-50 AND CORPORATIONS A-Z,
Defendants.

Appeal by defendant CIT Group/Commercial Services, Inc. from order entered 10 November 2010 by Judge Ronald L. Stephens in Vance County Superior Court. Heard in the Court of Appeals 29 August 2011.

Kenneth L. Jones for defendant-appellant CIT Group Commercial Services, Inc.

Williams Mullen, by Mark S. Thomas, for defendant-appellee Quick Response Marketing, Inc.

BRYANT, Judge.

Where the trial court's findings of fact support its conclusions of law, we affirm the trial court's order and final judgment.

Facts and Procedural History

On 13 October 2009, Variety Wholesalers, Inc. (Variety) filed a complaint for interpleader against Prime Apparel, LLC (Prime Apparel), Quick Response Marketing, Inc. (QRMI/appellee), CIT Group Commercial Services, Inc. (CIT/appellant), Fernando A. Flaquer (Flaquer), and Randall C. Nevil (Nevil) (collectively defendants). In 2008 and 2009, Prime Apparel sold Variety certain goods bearing the mark "NEWPORT BAY" and sent Variety invoices requesting payment for the goods. QRMI demanded that Variety cease any payment to Prime Apparel for the goods. QRMI claimed that it, not Prime Apparel, owned the "NEWPORT BAY" mark and that Prime Apparel was not authorized to use the mark. Thereafter, Variety filed the 13 October 2009 complaint to determine who was to be paid for the goods Prime Apparel received. The complaint alleged the following, in pertinent part:

> 1. This is an action for interpleader brought by Variety . . . arising out of a trademark dispute between two clothing vendors, Defendants Prime Apparel and Quick Response, and a financing company, CIT, who each claim a right to be paid by Variety for

> certain goods sold to Variety bearing the disputed trademark.
>
> 2. Variety is unable to determine which of the Defendants are entitled to be paid the funds for the goods sold to Variety.
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> 3. Thus, Variety has no adequate remedy at law except to resort to the equitable powers of this Court, and to pay the funds at issue into the Court's registry.
> . . .
>
> 48. Some or all of the Defendants have made, or may have, conflicting claims to the distribution of the Funds.

Variety also filed a motion to deposit funds, $234,747.27 (interpleader funds), into the registry of the court. The motion was granted and the funds deposited with the Clerk of Superior Court of Vance County. Variety thereafter dismissed its claims, with prejudice, against defendants Flaquer and Nevil.

On 4 January 2010, CIT filed an answer and counterclaim against Variety and cross-claim against all defendants. CIT alleged that Prime Apparel and CIT had entered into an agreement in which Prime Apparel assigned to CIT all accounts arising from inventory sales or rendition of services. CIT alleged that it had previously advanced substantial sums to Prime Apparel and sought a determination that CIT recover the interpleader funds with interest.

On 19 January 2010, QRMI filed an answer and cross-claim against Prime Apparel for trademark infringement, violations of the Lanham Act, and violation of the North Carolina Unfair and Deceptive Trade Practices Act. QRMI also filed a cross-claim against CIT and Prime Apparel for a declaratory judgment that QRMI receive the interpleader funds and accrued interest.

Prime Apparel failed to timely answer or file any responsive pleading. The trial court entered default against Prime Apparel on Variety's complaint and QRMI's cross-claims.

After Variety deposited the interpleader funds, the trial court entered a consent order on 13 May 2010 that: (1) discharged and released Variety from any further liability to claims by any defendant arising in this action; (2) dismissed CIT's counterclaim against Variety; and (3) retained jurisdiction to determine all other pending issues, including the cross-claims of defendants and interests of QRMI and CIT in the interpleader funds. On 15 July 2010, CIT filed a motion for summary judgment. On 16 July 2010, QRMI filed a motion for judgment by default on the cross-claims against Prime Apparel.

On 7 October 2010, the trial court entered an order: (1) denying CIT's motion for summary judgment; (2) entering judgment by default against Prime Apparel for QRMI's cross-claims; and

(3) reserving, for a later hearing, a determination of the amount of QRMI's default judgment against Prime Apparel as well as the disbursement of interpleader funds.

On 10 November 2010, the trial court entered its Order and Final Judgment concluding that QRMI was entitled to recover damages from and judgment against Prime Apparel and, therefore was entitled to the interpleader funds. Concurrently, the trial court concluded that "CIT has no right or interest in the fund deposited with the Clerk and is not entitled to an award of any part of said fund." CIT appeals.

On appeal, CIT advances two issues for review: (1) whether the trial court erred by denying CIT's motion for summary judgment; and (2) whether the trial court erred in ordering that CIT had no right or interest in the interpleader funds. Because the same arguments and analyses apply to both issues, we treat them as one.

CIT argues the trial court erred in denying summary judgment and entering a ruling in favor of QRMI. CIT asserts that the trial court erred by concluding that CIT had no right or interest in the interpleader funds and that QRMI was entitled to receive the interpleader funds. Specifically, CIT argues

that this conclusion was tantamount to entry of summary judgment against CIT in favor of QRMI.

CIT maintains that it was the undisputed secured creditor and assignee and owner of all Prime Apparel's accounts receivable including the interpleader funds. CIT also asserts that because it had a prior-perfected security interest, perfected by the recordation of its Uniform Commercial Code Financing Statement on 20 March 2007, its interests are superior to the interests of QRMI. QRMI, on the other hand, argues that it was entitled to receive the interpleader funds because they were generated as a result of Prime Apparel's violation of QRMI's trademark rights. Despite QRMI's argument, CIT asserts that "whether QRMI had an enforceable trademark in the goods, and whether Prime Apparel violated those rights . . . are not material facts for purposes of determining CIT's Motion for Summary Judgment." Instead, CIT contends that even assuming *arguendo* Prime Apparel violated QRMI's rights when selling the goods to Variety, this violation would not give QRMI a security interest in the interpleader funds, but merely allow an unsecured claim for damages which would be subordinate to CIT's prior-perfected security interest. CIT's reasoning is flawed.

Herein, a default judgment was entered against Prime Apparel which, in effect, declared QRMI as the owner of the trademark. Therefore, Prime Apparel's violation of QRMI's trademark by use of the "NEWPORT BAY" mark meant that Prime Apparel had no right to the goods sold to Variety, nor any money generated from the sale of those goods. Prime Apparel had no right and no accounts receivable it could pass on to CIT through their prior agreement. Thus, CIT had no security interest in the interpleader funds and their arguments must fail.

When findings of fact are not challenged, "they are presumed to be supported by competent evidence and are binding on appeal." *Tinkham v. Hall*, 47 N.C. App. 651, 652-53, 267 S.E.2d 588, 590 (1980) (citation omitted). Conclusions of law are reviewable *de novo* on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citation omitted). In the instant case, the trial court made the following unchallenged findings of fact:

> [t]he said fund held by the Clerk of Court represents the gross profit of Prime Apparel from the sale of men's pants to [Variety] as alleged in the Complaint, including $116,225.63 for fabric materials purchased by QRMI and provided by QRMI to Prime Apparel, and used by Prime Apparel to make the said men's pants sold to [Variety]. QRMI has been damaged by Prime Apparel in the amount of $233,128.27.

Variety's complaint had alleged that it withheld payment to Prime Apparel for [g]oods "in part, because of [QRMI's] allegations concerning Prime Apparel's unauthorized use of the NEWPORT BAY mark on the [g]oods, and because of the competing claims to the Funds."

Based on its findings, the trial court concluded the following:

> 2. Pursuant to the Order of this Court entered in this cause on October 4, 2010, granting in part the motion of QRMI for default judgment against Prime Apparel and adjudging Prime Apparel to be liable to QRMI for violation of QRMI's trademark rights under the Lanham Act, 15 U.S. Code § 1125(a), and QRMI's rights under North Carolina General Statutes § 75-1.1, and further adjudging that Prime Apparel has no right or interest in the said fund deposited in the Clerk of Court, this Court now concludes that QRMI is entitled to recover damages from and judgment against Prime Apparel for the full amount of the fund deposited with the Clerk of Court, namely, $233,128.27, and any interest earned thereon while deposited with the Clerk of Court[.]
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> . . .
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> 4. CIT has no right or interest in the fund deposited with the Clerk and is not entitled to an award of any part of said fund.

The Lanham Act provides, in pertinent part, that:

> [a]ny person who, on or in connection with any goods or services, or any container for

> goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which — (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C.S. § 1125(a)(1)(A) (2011). Further, under N.C. Gen. Stat. § 75-1.1 (2009), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Because the findings of fact support the conclusions of law, CIT's argument is overruled, and we affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge Calabria concur.

Report per rule 30(e).