NO. COA11-204
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

INTERNATIONAL SON-RY'S ENTERPRISES, INC.,
Plaintiff,

v.

Mecklenburg County
No. 09 CVS 25531

B&T POOLS, INC., BAUSCH PROPERTIES, LLC, ROBERT H. SMITH, and THERESA B. SMITH,
Defendants/Third-Party Plaintiffs,

v.

H. JAMES SCHENCK, III,
Third-Party Defendant.

Appeal by Plaintiff from order entered 28 October 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court.

Heard in the Court of Appeals 31 August 2011.

Vann Law Firm, P.A., by Christopher M. Vann, for Plaintiff-Appellant.

Hamilton Stephens Steele & Martin, PLLC, by Mark R. Kutny, for Defendants/Third-Party Plaintiffs-Appellees.

No brief filed by Third-Party Defendant.

BEASLEY, Judge.

International Son-Ry's Enterprises, Inc. (Plaintiff) appeals from an order granting summary judgment in favor of B&T Pools, Inc., Bausch Properties, LLC, Robert H. Smith, and Theresa B. Smith (Defendants). For the reasons articulated below, we affirm.

On 22 September 2004, Defendant B&T Pools, Inc. (B&T) executed a promissory note (the note), payable to Plaintiff in the amount of $100,000, relating to the purchase of certain assets. The note provided that B&T would repay the debt in fifty-nine successive monthly installments of $1,266.76 each, payable on the 22nd of each month, and a final balloon payment of the full remaining unpaid debt by 22 September 2009. Also on 22 September 2004, Defendants Robert H. Smith (Mr. Smith), Theresa B. Smith (Mrs. Smith), and Bausch Properties LLC (Bausch) signed an endorsement and guaranty for the note. The note contained the following subordination provision:

> 6. Subordination. PAYMENT OF THIS NOTE AND THE SECURITY GIVEN FOR THIS NOTE ARE SUBORDINATED TO ALL DEBTS NOW OR HEREAFTER OWED BY MAKER TO WACHOVIA SBA LENDING, INC., ITS SUCCESSORS AND/OR ASSIGNS (the "WACHOVIA/SBA OBLIGATIONS") AND TO THE SECURITY AGREEMENTS, UCC FINANCING STATEMENTS, DEEDS OF TRUST, AND OTHER SECURITY INTERESTS THAT SECURE THE WACHOVIA/SBA OBLIGATIONS. FURTHER, IT IS UNDERSTOOD THAT PAYMENT ON THIS NOTE MAY BE MADE ONLY IF THE MAKER IS IN COMPLIANCE WITH

> CERTAIN FINANCIAL COVENANTS IT HAS MADE TO WACHOVIA SBA LENDING, INC., ITS SUCCESSORS AND/OR ASSIGNS, AND IN THE EVENT THE UNDERSIGNED IS NOT IN COMPLIANCE WITH SAID FINANCIAL CONVENANTS AND PAYMENT OF THIS NOTE IS PLACED ON HOLD, THE DEFAULT PROVISIONS AND INTEREST RATE SET FORTH BELOW SHALL NOT APPLY UNTIL SUCH TIME AS WACHOVIA SBA LENDINGS, INC., ITS SUCCESSORS AND/OR ASSIGNS, DECLARES ITS NOTE IN DEFAULT.

By letter dated 8 July 2009, Mr. Smith received a copy of a letter addressed to Plaintiff from Debbie Mathis (Mathis Letter), a Small Business Underwriter for Wachovia Small Business Capital, which stated that the payments due to Plaintiff by B&T were suspended until B&T could clearly demonstrate the ability to repay its debt without assistance. The Mathis Letter also provided that Plaintiff was prohibited from accepting payments on the note.

On 23 October 2009, Plaintiff filed a complaint against Defendants seeking a balloon payment of $64,824.14, representing the unpaid principal amount remaining on the note along with 12% interest on that amount from 22 September 2009 until paid. On 11 January 2010, Defendants filed an answer and a counterclaim against Plaintiff and its president, H. James Schenck, III, alleging there were material misstatements, omissions, or inaccuracies in the parties' dealings that inflated the price of the assets purchased by B&T. The parties filed cross-motions

for summary judgment. By order filed 28 October 2010, the trial court granted summary judgment in favor of Defendants. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), the trial court also dismissed Defendants' counterclaims and the third party complaint. From this order, Plaintiff appeals.

Standard of Review

According to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009), summary judgment "shall be rendered forthwith 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." When ruling on a summary judgment motion, a court must consider all evidence "in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). If the movant meets its burden of establishing no genuine issues of material fact, "the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Appellate courts review a trial court's order for summary judgment *de novo*.

Robins v. Town of Hillsborough, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

I.

Plaintiff contends that the only evidence Defendants submitted in support of their motion for summary judgment was the affidavit of Mr. Smith (Smith Affidavit) and the attached Mathis Letter indicating the promissory note was on hold. Plaintiff asserts that the Mathis letter is hearsay and that it was never properly authenticated; therefore it is not competent evidence. It is well settled that "[a] contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990). In order to preserve a question for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired. . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). The record is devoid of any evidence that Plaintiff objected to either the Smith Affidavit or the Mathis Letter at any time before this appeal. Accordingly, this Court is unable to review the admission of the contested evidence.

Considering the Smith Affidavit and the Mathis Letter, along with the rest of the evidence in the record, we conclude that Defendants have established that there is no genuine issue of material fact in this case. The parties do not dispute that Defendants have not paid the remaining balance on the note. However, the Mathis Letter clearly states that payments on the promissory note are held in abeyance. The note itself explicitly provides that Wachovia SBA Lending, Inc. (Wachovia) has the authority to place the payment provisions of the note on hold, and if that authority is exercised, the default provisions of the note do not apply.

Plaintiff notes the language in the note that discusses the repayment of the principal and interest, specifically the final balloon payment. That section provides

> [t]he Balloon Payment will total $62,290.65, provided that all other payments due under this Note have been paid prior to September 22, 2009. The monthly principal and interest payments and the Balloon Payment are referred to herein as the "Payment Installments." In any event, this Note shall be paid in full on or before September 22, 2009.

Plaintiff asserts that the phrase "[i]n any event" indicates that the note *must* be paid in full by 22 September 2009. Thus, Plaintiff argues that this phrase overrides the rest of the

agreement, including the subordination clause that states that if the note is placed on hold the default provisions of the note shall not apply. We disagree.

The modifying phrase "in any event" simply applies to the statements that the balloon payment will total $62,290.65 if all other payments due are paid prior to 22 September 2009. However, if all other payments due are not paid, the balloon payment will exceed $62,290.65. But, *in any event*, the note is due on 22 September 2009. Any other reading of that clause would make the note as a whole internally inconsistent. We must note that "it is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992). We conclude that the phrase "in any event" does not apply to the note as a whole but only to the provision in which it appears. Therefore, Plaintiff has put forth no evidence to contradict the Mathis Letter, and has not met the burden of showing the existence of some genuine issue of material fact.

II.

Plaintiff next argues that Defendants do not have standing to raise subordination as a defense to their failure to pay the balance of the note. In support of this proposition, Plaintiff refers to several federal cases concerning the doctrine of equitable subordination that state a debtor lacks standing to bring an equitable subordination claim. As Plaintiff's brief acknowledges, the doctrine of equitable subordination "does not apply to the facts of this case." Here, the subordination clause is expressly included in the contract. As Plaintiff's entire argument that Defendants lack standing seems to revolve around the doctrine of equitable subordination, this argument is inapplicable to the instant case. The trial court's order of summary judgment is affirmed.

Affirmed.

Judges HUNTER, Robert C. and ERVIN concur.

Report per Rule(e).