IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-21

Filed: 5 July 2017

Union County, No. 13-CVS-1611

ESTATE OF VAUGHN E. RUSSELL, By and through its administrator, NANCY E. RUSSELL, and NANCY E. RUSSELL, individually, Plaintiffs

v.

SONDRA LYNN RUSSELL and JANICE M. RUSSELL, Defendants.

Appeal by plaintiffs from order entered 19 February 2016 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 16 May 2017.

Steven D. Starnes, P.A., by Steven D. Starnes, for plaintiff-appellants.

Law Offices of Sanjay R. Gohil, PLLC, by Sanjay R. Gohil, for defendant-appellees.

BRYANT, Judge.

Where a power of attorney expressly provides for the type of gift transfer executed by the attorney-in-fact, the trial court properly granted defendants' motion for summary judgment, and we affirm. Where plaintiffs cannot demonstrate prejudice from the trial court's denial of their motion to continue, there was no abuse of discretion and we affirm the trial court's ruling.

On 29 December 2007, Vaughn E. Russell ("decedent") died intestate. His wife of many years predeceased him in January 2005. Plaintiff Nancy E. Russell and her siblings, Hubert L., Ella M., Georgia, and James H. Russell (collectively, the "Russell heirs") were the heirs and surviving lineal descendants of decedent. Defendants Sondra and Janice Russell (respectively, "Sondra" and "Janice") are sisters and the granddaughters of decedent and were raised by decedent and his late wife.

In 1999, decedent designated Sondra as his first choice to serve as his attorney-in-fact in his duly executed Durable Power of Attorney, which was recorded in the Union County Registry in May 2001. Thereafter, Sondra executed a gift deed conveying approximately 10.48 acres of real property on behalf of decedent to Janice. The gift deed was executed on 28 December 2007 and recorded on 31 December 2007. In the interim, decedent passed away.

Plaintiff Nancy Russell, in her individual capacity and in her capacity as administrator of decedent's estate,[1] applied and was granted Letters of Administration in the Estate of decedent in order to file the instant action against her nieces, defendants Sondra and Janice, to try and recover the real property for the estate.

On 30 November 2010, plaintiffs filed a verified complaint in Union County Superior Court against defendants seeking to set aside the deed. After mediation, on

[1] Hereinafter, plaintiff Nancy Russell and plaintiff-administrator Nancy Russell will be referred to as "plaintiffs."

21 June 2012, plaintiffs took a voluntary dismissal of the action and refiled the action within a year on 17 June 2013. After attempts at discovery by plaintiffs, defendants moved for summary judgment.

Despite plaintiffs' written motion to continue, defendants' motion for summary judgment was heard on 25 January 2016, the Honorable Christopher W. Bragg, Judge presiding. The trial court granted defendants' motion for summary judgment by order entered 19 February 2016, and plaintiffs timely filed written notice of appeal.

On appeal, plaintiffs contend the trial court erred by (I) granting defendants' motion for summary judgment, and (II) denying plaintiffs' motion to continue the summary judgment hearing.

I

Plaintiffs first argue the trial court erred by granting defendants' motion for summary judgment. Specifically, plaintiffs contend the trial court erred in determining that Sondra's power of attorney granted her the unfettered authority to make a gift of her principal's home and real property.[2] We disagree.

[2] The trial court's summary judgment order also determined that there was no genuine issue of material fact that the gift deed was actually executed and delivered to the grantee on 28 December 2007 and therefore granted summary judgment in favor of defendants, dismissing plaintiffs' claim for "failure to Deed for Want of Delivery." Plaintiffs have not challenged this ruling on appeal and therefore have waived any argument as to this issue.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

Before we address the order specifically, we note that the summary judgment order includes several "findings of fact" and "conclusions of law." Since findings of fact are normally intended to resolve disputed factual issues, and summary judgment is not proper if the affidavits and other information submitted by the parties show any genuine issue of material fact, findings of fact are disfavored in summary judgment orders.

> "A motion for summary judgment is not an action tried upon the facts since this motion can only lie where there is no necessity for trying the action upon the facts." *Garrison v. Blakeney*, 37 N.C. App. 73, 76, 246 S.E.2d 144, 146, *cert. denied*, 295 N.C. 646, 248 S.E.2d 251 (1978).
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> This rule does not require the trial court to make findings of fact when requested by a party in deciding a motion for summary judgment. *Id.* "The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented." *Id.* at 77, 246 S.E.2d at 146–47 (quoting *General Teamsters, Chauffeurs and Helpers Union, Local No. 782 of Maywood and Vicinity, of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Blue Cab Co.*, 353 F.2d 687, 689 (7th Cir. 1965)).

Oglesby v. S.E. Nichols, Inc., by Noecker, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (1991).

For similar reasons, a summary judgment order should not include conclusions of law, and we disregard the trial court's conclusions of law on appellate review of a summary judgment order: "[W]e note that either on a motion to dismiss or a motion for summary judgment, it is not necessary or required for the trial court to enter conclusions of law, and that if such are entered, they are disregarded on appeal." *City of Charlotte v. Little-McMahan Props., Inc.*, 52 N.C. App. 464, 469, 279 S.E.2d 104, 108 (1981) (citing *Mosley v. Fin. Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978)). Yet, upon close examination, some of the "findings of fact" actually set forth several facts that are truly undisputed, including the identities of the parties and relevant dates. Several findings address the plaintiffs' claim of failure of deed for want of delivery, and, as noted above, plaintiffs have not challenged the trial court's ruling on this claim on appeal. Finding of Fact No. 11 notes that "the questions presented by Defendants' Motion for Summary Judgment as to whether Sondra Russell's gift deed was violative of the terms of the power of attorney and whether this transaction breached her fiduciary duties are questions of law for this Court to consider rather than questions of fact." This "finding of fact" is therefore not a finding at all, but a determination that the issue presented is a question of law. The remaining "findings" are not actually findings of fact either, but instead include

partial recitations of the terms of the power of attorney and the trial court's legal conclusions regarding those terms.

On appeal, plaintiffs argue that the question of interpretation of the power of attorney is a question of fact. We disagree. The meaning of unambiguous terms of the power of attorney is a question of law for the court, so we review the trial court's conclusions of law *de novo*. *See Hutchins v. Dowell*, 138 N.C. App. 673, 676–77, 531 S.E.2d. 900, 902–03 (2000) (interpreting whether a power of attorney met the requirements of N.C. Gen. Stat. § 32A-14.1 to determine if an attorney-in-fact had authority to deed real property to herself under the power of attorney).

"[T]he Attorney-In-Fact[] . . . [may] make gifts of any of the principal's property to any individual other than the attorney-in-fact . . . in accordance with the principal's personal history of making or joining in the making of lifetime gifts." N.C. Gen. Stat. § 32A-2(14)a. (2015).

However, "[s]ince the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney." *Whitford v. Gaskill*, 345 N.C. 475, 478, 480 S.E.2d 690, 692 (citation omitted), *opinion amended on reh'g*, 344 N.C. 762, 489 S.E.2d 177 (1997). Therefore,

> an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. Accordingly, the power of attorney set forth in

> N.C.G.S. § 32A-1 and the powers granted attorneys-in-fact by N.C.G.S. § 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property.

Id. Thus, where the power of attorney goes "beyond the short form" and expressly provides that an attorney-in-fact's powers include the power to transfer or gift real property, the attorney-in-fact has the authority to make such gifts. *See id.* at 478–79, 480 S.E.2d at 692 (holding that because the power of attorney at issue expressly provided the attorney-in-fact with " 'the power to [convey by sale or by gift] the real estate known as the homeplace [the decedent] inherited from [his] mother[,]' " the attorney-in-fact had the authority to gift the property in dispute (first alteration in original)).

In the instant case, the durable power of attorney invested the attorney-in-fact, Sondra, with the following powers as related to making gifts:

> *To make such gifts of my real and personal property to my relatives*, descendants, and others, and to charities to which I heretofore have contributed or hereafter designate to be my beneficiaries, *as my attorney-in-fact deems appropriate and desirable*.
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> The specific beneficiaries of gifts or other fully or partially gratuitous transfers made by my attorney-in-fact shall be determined in the discretion of my attorney-in-fact, and my attorney-in-fact shall not be required to make gifts or transfers so as to benefit all of my relatives and descendants or so as to benefit the selected beneficiaries equally, it being my desire that all such decisions be made in the discretion of my attorney-in-fact. In making such gifts, my attorney-in-fact shall consider, among other things, (1) the extent to which I have been, am being, or

> will be cared for by such specific beneficiaries; (2) the tax effects of gifts to those beneficiaries; (3) my personal history of making gifts to those beneficiaries; (4) any exceptional need of a beneficiary, such as because of poor health, learning disability, mental or physical handicap, or other adversity that might justify my providing for that beneficiary more liberally than for those in good health and with normal capabilities; and (5) any special loyalty, affection, interest, or gratitude that I heretofore have expressed, or hereafter might express in any charity.

(Emphasis added).

In granting defendants' motion for summary judgment, the trial court stated as follows:

> 12. The thirteen (13) page Durable Power of Attorney executed by [decedent] explicitly gave Sondra Russell the discretion, power, and authority to make transfers and gifts, including gift transfers of real property. Furthermore, the Durable Power of Attorney did not limit this discretion to just relatives or descendants.
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> 13. [Decedent], in the Durable Power of Attorney, also provided guidance as to how Sondra Russell should make transfers and gifts. "Among other things" Sondra Russell was to consider five (5) specific factors. However, these five (5) factors were not exclusive or determinative of gifts or transfers to be made and were simply some factors "among other things" that Sondra Russell could consider in using her discretion to make transfers or gifts.
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> . . . .
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> 5. The gift transfer to Sondra Russell's sister was not violative of the terms of the Durable Power of Attorney, nor did this gift transfer breach the attorney-in-fact's fiduciary duties.

Plaintiffs highlight the word "shall" in the gift-giving provision of the power of attorney in which the attorney-in-fact is directed to consider certain factors in making gifts, specifically factor number 3, "[decedent's] personal history of making gifts to those beneficiaries." Plaintiffs allege that "upon information and belief, Defendant Janice provided no care for [decedent] and no prior history of gifts to her are known," thereby implying that Sondra did not consider the aforementioned gift-giving factors. However, plaintiffs have offered no forecast of evidence that Sondra ignored these considerations in making the gift to Janice in her capacity as attorney-in-fact. *See* N.C. Gen. Stat. § 1A-1, Rule 56 ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."). To the contrary, affidavits executed by both Sondra and Janice corroborate defendants' position that Sondra did consider these gift-giving factors. Sondra averred as follows:

> 8. In making this deed of gift transfer to Janice, I considered [decedent's] personal history of making gifts to Janice. [Decedent] raised Janice from the time she was 11 months old until she was an adult and provided for all of her financial support. My grandparents continued to assist Janice whenever they could, even babysitting Janice's daughter so that Janice could work, and also by providing Janice with food from their farm.

> 9. In making this deed of gift transfer to Janice, I considered the extent to which my grandfather, [decedent], had been cared for by Janice. After my grandmother passed away in 2005, Janice drove [decedent] wherever he needed to go for grocery shopping, doctor appointments, barber appointments, etc. In 2005, [decedent] was admitted to Saturn Nursing Home facility in Charlotte, NC for a period of 30 days. Janice traveled to the nursing home every day on her lunch break to visit with [decedent] and would take him items he needed or requested. None of [decedent's] other children visited him during his stay at the nursing home or volunteered to help with his care.

Even when we consider plaintiffs' evidence as true, as we must for purposes of summary judgment, it shows only that plaintiffs disagree with how Sondra evaluated and weighed the gift-giving factors, but they have not presented any evidence to rebut Sondra's evidence that she considered these factors. Furthermore, the gift-giving provision of the durable power of attorney specifically provides for gifts to be given in the attorney-in-fact's discretion, specifically noting that "attorney-in-fact *shall not* be required to make gifts or transfers so as to benefit all of my relatives and descendants or so as to benefit the selected beneficiaries equally . . . ."

Accordingly, where the power of attorney expressly provides for the type of gift transfer as the one executed by Sondra as the attorney-in-fact, there are no genuine issues of material fact and the trial court did not err in granting defendants' motion for summary judgment. Plaintiffs' argument is overruled.

II

Plaintiffs next argue the trial court abused its discretion in denying plaintiffs' motion to continue the hearing on defendants' motion for summary judgment on 25 January 2016. Because plaintiffs failed to include in the record any evidence (either a transcript of the hearing or a narration) that they obtained an explicit ruling on their motion (other than the trial court's clear denial of the same as evidenced by the trial court's order issued following the summary judgment hearing), we need not consider this issue on appeal.[3] *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 430, 651 S.E.2d 386, 390 (2007) ("The record before us does not indicate that plaintiff obtained a ruling from the trial court on plaintiff's Motion for Continuance. Therefore this question was not properly preserved for appellate review, and this assignment of error is therefore dismissed.").

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure "requires that the complaining party 'obtain a ruling upon the . . . motion' in order to preserve the issue for appeal." *State v. Davis*, 198 N.C. App. 146, 149, 678 S.E.2d 709, 712 (2009) (alteration in original) (quoting N.C. R. App. P. 10(b)(1) (2008)). "Rule 10(b) 'is not simply a technical rule of procedure' and 'a party's failure to properly preserve an

[3] We note that both parties in brief acknowledge that the trial court made an *oral* ruling denying plaintiffs' motion to continue. Plaintiffs argue their "written motion was denied without hearing such that the trial court could not consider all the circumstances," while defendants state the court "acknowledged receiving and having read Plaintiffs' written motion and Defendants' written objection to the continuance and made a ruling to deny Plaintiffs' motion and proceed with oral arguments on Defendants' motion for summary judgment." The aforementioned further indicates the need for the appealing party to obtain a clear ruling and include evidence of such in the record on appeal. But, given these circumstances—where both parties agree that a ruling was made and plaintiffs' motion was denied—we succinctly review the trial court's ruling.

issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal.' " *Id.* (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.,* 362 N.C. 191, 195–96, 657 S.E.2d 361, 363–64 (2008)).

However, assuming arguendo that plaintiffs obtained a ruling on their motion which would preserve their right to appeal this issue, *see supra* note 2, plaintiffs cannot show an abuse of discretion, *see Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001) ("The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." (citation omitted)), nor can they demonstrate how they were materially prejudiced by the trial court's denial of their motion. Plaintiffs argue that Sondra's seventy-page affidavit served on plaintiffs on 19 January 2016 did not allow plaintiffs time to "determine if responding was necessary and if so, to so respond." However, by the 25 January 2016 hearing date, plaintiffs had had sufficient notice and ample time to assert any facts they deemed necessary to overcome defendants' motion for summary judgment, especially considering that plaintiffs' claims had been lingering for more than six years and had been continued at plaintiffs' request multiple times. Plaintiffs are unable to show the existence of a response so material to summary judgment as to justify a continuance of the hearing. Accordingly, plaintiffs' argument is overruled and the order of the trial court granting defendants' motion for summary judgment is

AFFIRMED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).