IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-640

Filed 7 May 2024

Brunswick County, No. 19 CVS 1911

ANNE ARNOLD, Plaintiff,

v.

SWEYER & ASSOCIATES, INC. d/b/a CENTURY 21 SWEYER & ASSOCIATES, INC.; and ANNE ARNOLD REAL ESTATE, LLC d/b/a CENTURY 21 ANNE ARNOLD, Defendants.

Appeal by plaintiff from orders entered 9 December 2021 by Judge George F. Jones, 15 March 2022 by Judge Thomas Wilson, and 4 January 2023 by Judge Imelda J. Pate in Brunswick County Superior Court. Heard in the Court of Appeals 6 February 2024.

The Del Ré Law Firm, PLLC, by Benedict J. Del Ré, Jr., for plaintiff-appellant.

Rhine Law Firm, P.C., by Martin A. Ramey, Joel R. Rhine, and Ruth A. Sheehan, for defendants-appellees.

ZACHARY, Judge.

This case arises out of the declaratory judgment action filed by Plaintiff Anne Arnold ("Arnold"). In this action, Arnold sought to have several restrictive covenants implicated by her dissociation from Defendants Sweyer & Associates, Inc. ("Century

21 Sweyer") and Anne Arnold Real Estate, LLC, declared unenforceable. Arnold appeals from the trial court's orders (1) granting Defendants' motion for partial summary judgment and denying Arnold's motion for partial summary judgment; (2) denying Arnold's motion for summary judgment; and (3) denying Arnold's motion for involuntary dismissal and awarding damages to Defendants. After careful review, we affirm.

I. Background

In 2006, Arnold entered into a Real Estate Franchise Agreement ("the Franchise Agreement") with Century 21 Real Estate, LLC ("Century 21") to operate her real estate brokerage firm—Defendant Anne Arnold Real Estate, LLC ("Century 21 Arnold")—as a Century 21 franchise on Clubhouse Drive in Holden Beach, North Carolina. The Franchise Agreement had an effective date of 9 October 2006, and an expiration date of 10 October 2016.

The Franchise Agreement contained several restrictive covenants that were binding not only on Century 21 Arnold but also on Arnold individually, as its sole owner:

> **20.1 In Term.** During the term of this Agreement, neither you nor your Owners, officers or your guarantors, or any of the immediate family members of the Owners, officers, guarantors, or Responsible Broker will, directly or indirectly, through ownership or otherwise, engage in any real estate brokerage business or related business without our advance written consent, unless that business is being conducted under a CENTURY 21 franchise agreement.

20.2 Upon Transfer of the Franchise. Any New Franchise must be protected against the potential for unfair competition by your use of our training, assistance and trade secrets in direct competition with us following a Transfer of the Franchise. Therefore, you, your Owners, officers and your guarantors, and any of the respective spouses of the Owners, officers and guarantors, agree that, following Transfer of the Franchise, neither you nor your Owners and officers, nor your guarantors, nor any of the respective spouses of the Owners, officers or guarantors, will, for the remainder of the original term of this Agreement, directly or indirectly, operate, own, license, franchise, be employed by or consult with any residential real estate brokerage or related business within a two-mile radius of your Office at its location at the time this Agreement is assigned. This provision will not apply if the Agreement expires according to its terms.

20.3 Competing Services or Products. During the term of this Agreement, neither you nor any of your Owners, officers, employees, sales associates or agents, will organize, manage, operate, hold any ownership interest in or receive compensation from any firm, company or other business entity which provides or seeks to provide equipment, supplies, services or other operating materials to our other franchisees, without our advance written consent.

20.4 Post Term. For a period ending the later of one year from the (i) expiration, (ii) termination, or (iii) de-identification of the Office, neither you nor your Owners, officers or your guarantors, or any of the immediate family members of the Owners, officers, guarantors, or Responsible Broker (collectively, the "Restricted Parties") will, directly or indirectly, through ownership or otherwise, engage in any real estate brokerage business or related business that is conducted from the location of the Business at the time of expiration or termination; provided however, that this post-term non-competition provision shall not apply to any Restricted Party if the real estate brokerage business that is subject to the terms and

> conditions of this Agreement was operating as [a] stand-alone licensed real estate business for at least 12 months prior to the Acceptance Date.

(Emphasis omitted).

In 2012, in exchange for other adjustments to the franchise relationship, Arnold and Century 21 agreed to extend the expiration date of the Franchise Agreement to 8 October 2021. Within a few years, however, Arnold desired to relieve herself of the obligations attendant to operating as a Century 21 franchisee.

In 2014, Arnold and Century 21 Arnold entered into a series of contemporaneous agreements with Century 21 Sweyer to transfer Century 21 Arnold to Century 21 Sweyer, with Arnold remaining to serve as a sales associate for Century 21 Sweyer. As relevant to this appeal, among these several agreements were (1) a broker-sales associates contract between Century 21 Sweyer and Century 21 Arnold ("the Broker-Sales Associates Contract"); (2) an assignment, assumption and release agreement ("the Assignment Agreement") between Century 21, Century 21 Arnold, Arnold (as Century 21 Arnold's sole owner), and Century 21 Sweyer; and (3) a location addendum to the extant franchise agreement between Century 21 and Century 21 Sweyer ("the Location Addendum").

The Broker-Sales Associates Contract contained a broad restrictive covenant:

> **TERM.** The term of this Agreement shall be for a minimum term of greater than seven (7) years, ending December 31, 2021 (term of [the Franchise Agreement]). During this term [Century 21 Arnold] will not own, manage, operate, consult or be employed in a business

> substantially similar to, or competitive with, [Century 21 Sweyer] or such other business activity in which [Century 21 Sweyer] may engage. This non-compete agreement shall extend for a radius of 100 miles of [Century 21 Sweyer]'s present locations and shall be in full force and effect during the period, notwithstanding the cause or reason for termination.

In the Assignment Agreement, Century 21 consented to the transfer of Century 21 Arnold from Arnold to Century 21 Sweyer. As part of the Assignment Agreement, Arnold agreed "that nothing herein shall relieve, waive, excuse or discharge any obligation of [Century 21 Arnold] or [Arnold] owing to [Century 21] under the Franchise Agreement(s)." Arnold further agreed not only to "immediately stop operating under the Franchise Agreement(s)" but also that she would "comply with all provisions therein concerning termination, including . . . complying with the other post-termination obligations set out in the Franchise Agreement, which is incorporated herein by this reference." Finally, the Assignment Agreement contained the following restrictive covenant:

> [Century 21 Arnold], its principals, officers and guarantors agree that neither they, nor their respective spouses, will, until after the expiration date of the original term of [the Franchise Agreement], directly or indirectly, operate, own, license, franchise, be employed by or consult with any residential real estate brokerage or related business *within a two mile radius* of the locations (at the Closing Date) of the offices identified in [the Franchise Agreement] and any addenda thereto.

(Emphasis added).

In the Location Addendum, meanwhile, Century 21 and Century 21 Sweyer

agreed to operate Century 21 Arnold's Holden Beach office on Clubhouse Drive and the Century 21 Sweyer branch office in Hampstead under the terms of the original franchise agreement between Century 21 and Century 21 Sweyer governing Century 21 Sweyer's main branch office in Wilmington ("the Surviving Agreement"). As part of the Location Addendum, the Century 21 Sweyer franchise agreement was amended to add a provision stating, *inter alia*, that "each franchise agreement signed by [Century 21 Sweyer], other than the Surviving Agreement, is mutually terminated and will be void and of no further effect." Under the Location Addendum, the the Surviving Agreement's expiration date was set as 2 February 2016.

In April 2019, Century 21 Sweyer informed Arnold and others that it was relocating its Holden Beach office from Clubhouse Drive to Holden Beach Road. In August 2019, Arnold dissociated herself from Century 21 Sweyer.[1] In September 2019, Arnold began to work for Proactive Realty and relocated to another location on Holden Beach Road, less than 300 yards from the location to which Century 21 Sweyer had announced it was relocating.

On 1 October 2019, before Defendants filed suit to enforce any restrictive covenant, Arnold initiated this action by filing a complaint seeking a declaratory judgment that, *inter alia*, she "was not subject individually to the covenant not to

[1] As the trial court found as fact, "although the parties dispute the reasons for the disassociation, it is not a fact that is relevant to whether the non-compete agreements are enforceable and whether Arnold breached those agreements." (Footnote omitted).

compete" in the Assignment Agreement. On 12 December 2019, Century 21 Sweyer filed an answer and counterclaim seeking injunctive relief and alleging breach of contract and breach of the implied covenant of good faith and fair dealing.[2] On 4 February 2020, Arnold filed a reply.

On 6 April 2020, Arnold filed a motion for summary judgment. Defendants obtained new counsel, and on 18 May 2020 filed a motion to amend the answer and counterclaim, which the trial court granted. On 12 July 2020, Century 21 Sweyer filed an amended answer and counterclaim, along with Century 21 Arnold's answer. Defendants alleged additional claims of tortious interference with contract, unfair and deceptive trade practices, and unjust enrichment. Arnold filed a reply on 19 August 2020, which she amended on 1 March 2021. On 12 October 2021, Defendants filed their own motion for summary judgment.

On 8 November 2021, the parties' motions for summary judgment came on for hearing in Brunswick County Superior Court before the Honorable George F. Jones. The parties agreed that the trial court should first consider the enforceability of the several restrictive covenants at issue as a matter of partial summary judgment. On 9 December 2021, the trial court entered an order granting partial summary judgment in favor of each party on different restrictive covenants.[3] The trial court

[2] Unrelated to the present appeal, Century 21 Sweyer also moved to strike an allegation from Arnold's complaint.

[3] The trial court also denied Defendants' oral motion to strike Arnold's amended reply, made in open court on 8 November 2021.

concluded, *inter alia*, that: (1) the restrictive covenants in the Franchise Agreement, as amended in 2012, were reasonable and enforceable; (2) the restrictive covenants in the Assignment Agreement were reasonable and enforceable; and (3) the restrictive covenant in the Broker-Sales Associates Contract was unreasonable and unenforceable.

On 13 December 2021, in light of the trial court's partial summary judgment order, Arnold filed another motion for summary judgment. In this motion, Arnold contended that she had not violated two-mile restrictive covenants contained in the Franchise Agreement and the Assignment Agreement. The second motion for summary judgment came on for hearing before the Honorable Thomas Wilson on 14 February 2022. The trial court entered an order denying this motion on 15 March 2022.

On 14 November 2022, the matter came on for bench trial before the Honorable Imelda J. Pate. In light of the previous rulings on summary judgment, Defendants assumed the position of a plaintiff during the bench trial, as their counterclaims were the only claims remaining. At the close of Defendants' evidence, Arnold moved for involuntary dismissal and filed a written motion for the same. The trial court deferred ruling on the motion until the close of all evidence; Arnold declined to present any evidence and renewed her motion.

On 4 January 2023, the trial court entered its order denying Arnold's motion for involuntary dismissal and entered judgment in favor of Defendants, awarding

damages in the amount of $385,100.26 plus interest. Arnold timely filed notice of appeal from: (1) the 9 December 2021 partial summary judgment order; (2) the 15 March 2022 order denying Arnold's second motion for summary judgment; and (3) the 4 January 2023 order/judgment.

II. Discussion

Arnold argues that the trial court erred by granting partial summary judgment in favor of Defendants and denying her motions for summary judgment,[4] and that the trial court erred by denying her motion for involuntary dismissal and awarding damages to Defendant. We disagree.

A. Summary Judgment

Arnold challenges the trial court's 9 December 2021 order granting partial summary judgment in favor of Defendants and the 15 March 2022 order denying her second motion for summary judgment. We address each order in turn.

1. Standard of Review

It is axiomatic that our standard of review from a trial court's ruling on summary judgment is de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

> [S]uch 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. When considering a motion for summary judgment, the

[4] Arnold does not challenge that portion of the trial court's 9 December 2021 partial summary judgment order granting Arnold's motion for summary judgment in part.

> trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Id. (cleaned up).

2. Partial Summary Judgment

Arnold first argues that the trial court erred by granting partial summary judgment in favor of Defendants regarding the enforceability of the restrictive covenants in the Franchise Agreement and the Assignment Agreement because the Location Addendum voided and terminated those agreements. However, Defendants correctly observe that Arnold was not a party to the Location Addendum; Century 21 and Century 21 Sweyer were the parties to that agreement. Inasmuch as the legal effect of the Location Addendum was to mutually terminate and void "each franchise agreement signed by [Century 21 Sweyer], other than the Surviving Agreement," that agreement has no bearing on the Franchise Agreement in this case.

Instead, Defendants persuasively argue that the Assignment Agreement—which was executed contemporaneously with the Location Addendum—preserves Arnold's noncompetition obligations under the Franchise Agreement. For one, the Assignment Agreement recites that "nothing herein shall relieve, waive, excuse or discharge any obligation of [Century 21 Arnold] or [Arnold] owing to [Century 21] under the Franchise Agreement[.]"

Further, pursuant to the terms of the Assignment Agreement, Arnold is bound to "comply with all provisions [in the Franchise Agreement] concerning termination, including . . . complying with the other post-termination obligations set out in the Franchise Agreement[.]" In addition, under § 20.2 of the Franchise Agreement, Arnold "agree[d] that, following Transfer of the Franchise, . . . for the remainder of the original term of this Agreement," she would not "be employed by or consult with any residential real estate brokerage or related business within a two-mile radius of your Office at its location at the time this Agreement is assigned." It is undisputed that the term of the Franchise Agreement, as modified in 2014, extended until 8 October 2021.

Arnold acknowledges that "there was no genuine issue as to any material fact"; rather, she argues that she was entitled to summary judgment on the basis that "[t]he Location Addendum terms and conditions were dispositive and dispensed with" Defendants' argument that the restrictive covenants in the Franchise Agreement and Assignment Agreement were valid and enforceable. For the foregoing reasons, we agree that there were no genuine issues of material fact, but disagree with Arnold that the trial court's partial summary judgment order was in error. Arnold's argument is overruled.

3. Arnold's Second Summary Judgment Motion

As for the trial court's denial of Arnold's second motion for summary judgment, Arnold argues that when considering "any of the alleged covenants" that the trial

court ruled were enforceable "still carried a distance term of a radius of 2 miles." Arnold contends that it is undisputed that Proactive Realty's Holden Beach Road location is more than two miles from Defendants' Clubhouse Drive location, which she maintains was the location contemplated by the restrictive covenants contained in the Franchise Agreement and Assignment Agreement.

Defendants counter, as they did before the trial court, that a genuine issue of material fact did exist: whether Arnold intended to violate the restrictive covenants when she relocated to a new Holden Beach Road location that she allegedly knew was within two miles of the Holden Beach Road location to which Century 21 Sweyer had announced it was relocating. Arnold asserts that "[i]t is undisputed that [Century 21] Sweyer's new office was not applied for and approved until 18 February 2020[,] five months after [Arnold] relocated." However, Defendants dispute this assertion. Moreover, in their amended counterclaim, Defendants alleged that Century 21 Sweyer informed Arnold in April 2019 that it would be relocating to Holden Beach Road, and in her reply, Arnold admitted this allegation with the reservation that she was "unsure as to the specific time of any notification."

Clearly, a genuine issue of material fact existed as to Arnold's intent to honor the covenants not to compete when she dissociated from Century 21 Sweyer and relocated to a new office within two miles of its new office. Accordingly, the trial court did not err in denying Arnold's second motion for summary judgment.

B. Involuntary Dismissal

Lastly, Arnold argues that the trial court erred in denying her motion for involuntary dismissal at the close of all evidence and awarding damages to Defendants.

1. Standard of Review

"The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *In re Johnson*, 366 N.C. 252, 256, 741 S.E.2d 308, 310 (2012) (citation omitted). "Dismissal under Rule 41(b) is left to the sound discretion of the trial court. Therefore, the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion." *Kerik v. Davidson Cty.*, 145 N.C. App. 222, 227, 551 S.E.2d 186, 190 (2001) (cleaned up).

2. Analysis

On appeal, Arnold again repeats her arguments—which we have already discussed and rejected—that the Location Addendum voided and terminated the Franchise Agreement and the Assignment Agreement. This unpersuasive argument underpins the majority of Arnold's broad argument that "[t]here was no competent evidence to support" the trial court's findings of fact and conclusions of law that Arnold was in breach of the Franchise Agreement or the Assignment Agreement. Therefore, any such challenge to the trial court's order/judgment that hinges upon this argument is overruled.

Additionally, Arnold specifically challenges the trial court's findings of fact 16 and 18. Finding of fact 16 states:

> On or about September 3, 2019, following [Arnold]'s disassociation with [Century 21] Sweyer, [Arnold] began to work for Proactive Realty and relocated her brokerage business, AnneArnold@HoldenBeachNC, LLC, to 3369 Holden Beach Road on the Holden Beach causeway. Between September and the end of the 2019 year, [Arnold] closed a total of eight transactions and earned gross commissions of $58,450. The following two years, through October of 2022, [Arnold] closed an additional 108 transactions and earned gross commissions of $1,867,051.30. Combined, from the time that [Arnold] left [Century 21] Sweyer until the time that transactions closed which were entered into prior to the expiration of the term of [Arnold]'s Century 21 franchise, [Arnold] closed a total of 116 transactions, with gross commissions earned of $1,925,501.30. Had [Arnold] remained associated with the Defendants' franchise rather than go to a competing brokerage, the Defendants would have earned approximately 20% of the gross commissions for sales completed by Arnold during the time that the restrictive covenants were in force, or $385,100.26, plus interest.

Arnold contends that there was no competent evidence to support the "damage calculations and that Defendant would have earned 20% of the gross commissions for sales completed by [Arnold during] the time that the restrictive covenants were in effect[.]" Arnold cites testimony from the trial and argues that "[t]he damage calculation was incorrect and not based upon the evidence." However, we note that Defendants cite testimony—including from Arnold herself—supporting the trial court's finding.

"The trial court, when sitting as trier of fact, is empowered to assign weight to

the evidence presented at trial as it deems appropriate." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987). "Moreover, even in the presence of evidence to the contrary, if there is competent evidence to support the trial court's findings and conclusions, the same are binding on appeal." *Id.* In that there was competent evidence to support this finding of fact, Arnold's challenge fails. *See id.*; *see also Johnson*, 366 N.C. at 256, 741 S.E.2d at 310.

Finding of fact 18 states:

> [Arnold] contended at trial that, despite having obtained approvals to open the Defendants' new office, estimated by . . . [Arnold] herself to be between 200-300 yards from [Arnold]'s current office, that the old location was outside of a two-mile radius. The Court finds [Arnold]'s position untenable. Not only did Arnold admit that the new office was within the two-mile radius, but evidence showed that Defendants had communicated the new location to Arnold and other Century 21 salespersons, and that Arnold had requested changes to a business card containing the new office location's address in advance of leaving the Defendants' franchise and going to work for a competing broker, Proactive Real Estate, LLC.

Arnold challenges the trial court's finding that Century 21 Sweyer had "obtained approval to open the . . . new office" prior to an effective date of 18 February 2020. The basis for Arnold's challenge is an allegation that the trial court erroneously overruled Arnold's objection to certain testimony as hearsay. However, Defendants direct us to other testimony—again, including from Arnold herself—that supports the same finding, the admission of which Plaintiff does not challenge on appeal. In that there is competent evidence to support this finding of fact, Arnold's challenge fails.

See id.

Arnold additionally raises several *de minimis* challenges to factual assertions made within the order/judgment, none of which bear on the overall support for the trial court's conclusions of law.

Finally, Arnold raises one specific challenge to the trial court's conclusion of law that Century 21 Sweyer is a third-party beneficiary of the Franchise Agreement. However, the trial court concluded that Defendants could enforce the Franchise Agreement *either* as a third-party beneficiary *or* "as a party subsequently and expressly incorporated into" the Franchise Agreement. As Arnold raises no challenge to the express-incorporation basis for enforcing the Franchise Agreement beyond the argument invoking the Location Addendum, which we have already addressed and found lacking, we need not address Arnold's third-party beneficiary argument.

The trial court's challenged findings of fact are supported by competent evidence, and the trial court's conclusions of law are supported by its findings of fact. Therefore, Arnold's argument is overruled. *See id.*

III. Conclusion

For the foregoing reasons, the trial court's orders are affirmed.

AFFIRMED.

Chief Judge DILLON and Judge FLOOD concur.

Report per Rule 30(e).