NO. COA01-43

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

CONTINENTAL CASUALTY
COMPANY,
Plaintiff

v.

Cleveland County
No. 98 CVS 2338

THOMAS BOWER, BUCKEYE FIRE
EQUIPMENT COMPANY, ATOMIC
FIRE EQUIPMENT COMPANY, INC.
and GUARDIAN TECHNOLOGY, INC.,
Defendants

Appeal by defendants from judgment entered 4 August 2000 by Judge James E. Lanning in Cleveland County Superior Court. Heard in the Court of Appeals 7 November 2001.

Wyrick Robbins Yates & Ponton, LLP, by Joseph H. Nanney, Jr. and Kathleen A. Naggs, for plaintiff-appellee.

Vann & Sheridan, LLP, by Paul A. Sheridan, Nan E. Hannah, and Paige Chandler, for defendants-appellants.

WALKER, Judge.

Plaintiff initiated this action on 12 November 1998 seeking an order for specific performance or, alternatively, damages for breach of contract. Following defendants' answer, plaintiff moved for summary judgment. The parties agreed on a hearing date of 31 July 2000. However, on 28 July 2000, defendants moved the trial court to continue the summary judgment hearing, for a dismissal, and for a change of venue. On 31 July 2000, the trial court heard

arguments from both parties and, after reviewing the evidence, granted plaintiff's motion for summary judgment.

The relevant facts may be summarized as follows: Plaintiff is an insurance and bonding company involved in the business of writing surety bonds on behalf of building contractors. Defendant Guardian Technology, Inc. (Guardian), is an Ohio corporation owned by defendant, Thomas J. Bower (Bower), which installs fire suppression systems and electric door strike systems. Bower is also the owner of Buckeye Fire Equipment Company and Atomic Fire Equipment Company, Inc., which are named defendants. On 28 September 1992, plaintiff and defendants executed a General Agreement of Indemnity (GAI) by which defendants agreed to indemnify plaintiff for any losses resulting from performance bonds issued by plaintiff on behalf of Guardian.

In December 1993, Guardian contracted with an Ohio governmental agency, the Multi-County Juvenile Attention System (Multi-County), to upgrade the fire and security systems in four juvenile detention facilities. In support of this contract, plaintiff issued a performance bond on behalf of Guardian in favor of Multi-County. Prior to completion of the upgrades, a dispute arose between Guardian and Multi-County concerning Guardian's performance. On 1 April 1996, Multi-County declared Guardian to be in default of their contract citing its failure to "supply an adequate work force, in a timely manner, to complete the contract." Thereafter, Multi-County called upon plaintiff to pay $106,177.80 in accordance with its obligations under the performance bond.

Subsequently, plaintiff undertook an investigation to determine what payments, if any, were owed to Multi-County. On 20 August 1998, plaintiff inquired of Bower as to what his and defendants' position was concerning Multi-County's declaration that Guardian was in default. Bower did not respond to this inquiry and plaintiff proceeded to negotiate a settlement agreement with Multi-County. In a facsimile dated 29 September 1998, plaintiff informed Bower that it had agreed to pay Multi-County $91,686.30 and requested that defendants indemnify it pursuant to the terms of the GAI. Defendants refused to make any indemnity payments.

We summarize defendants' assignments of error as four issues: (1) whether they received sufficient notice of the summary judgment hearing; (2) whether the trial court abused its discretion in failing to continue the summary judgment hearing so that it might first consider defendants' motion for a dismissal and for a change of venue; (3) whether the trial court applied the appropriate State law when it considered plaintiff's motion for summary judgment; and (4) whether the trial court improperly granted plaintiff summary judgment.

I. Sufficiency of Notice

Defendants first allege the trial court abused its discretion when it overruled their objection concerning the notice they received for the 31 July 2000 hearing on plaintiff's motion for summary judgment. Specifically, defendants maintain that because they were served by mail on 18 July 2000, a hearing could not have been held until 1 August 2000. We disagree.

Pursuant to our Rules of Civil Procedure, a motion for summary judgment and any accompanying affidavits "shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c); N.C. Gen. Stat. § 1A-1, Rule 6(d)(1999). However, where the motion is served by mail, "three days shall be added" to the ten-day period. N.C. Gen. Stat. § 1A-1, Rule 6(e). In computing the appropriate period of time, "[t]he last day of the period so computed is to be included . . . ." N.C. Gen. Stat. § 1A-1, Rule 6(a). Accordingly, where a party elects to use the mail as the means to serve notice of a summary judgment hearing, it must generally do so at least thirteen days prior to the hearing date.

Here, defendants concede that on 18 July 2000, plaintiff served them with notice of the 31 July 2000 summary judgment hearing. As defendants were given notice at least thirteen days prior to the hearing date, we find no merit to their claim that they were not timely served.

II. Defendants' Motion to Continue

Defendants next contend the trial court abused its discretion in failing to continue the summary judgment hearing so that it might first consider their motions for a dismissal and for a change in venue.

A party's motion to continue a proceeding is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Jenkins v. Jenkins*, 27 N.C. App. 205, 206, 218 S.E.2d 518, 519 (1975); *Gillis v. Whitley's Discount Auto Sales,* 70 N.C. App. 270, 273, 319 S.E.2d 661, 664 (1984).

Continuances are generally not favored and the party seeking the continuance has the burden of showing sufficient grounds for it. N.C. Gen. Stat. § 1A-1, Rule 40(b); *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976); *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984).

Here, the record shows the action had been pending for approximately nineteen months and lack of jurisdiction was not raised in defendants' answer. Three days before the summary judgment hearing, defendants filed their motions and requested a continuance. Furthermore, defendants present no evidence that they were prejudiced by the trial court's failure to consider their motions for a dismissal and for a change of venue. *See Medford v. Davis*, 62 N.C. App. 308, 311, 302 S.E.2d 838, 840, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 365 (1983)(appellant has the burden of showing not only that error was committed but also that it was prejudicial). Defendants' motion to dismiss was based on a lack of subject matter jurisdiction and improper venue. N.C. Gen. Stat. 1A-1, Rule 12(b)(1),(3). Alternatively, they sought a change of venue under the theory of *forum non conviens.* The trial courts of this State, except in matters where jurisdiction is specifically placed elsewhere, have subject matter jurisdiction over "all justiciable matters of a civil nature." N.C. Gen. Stat. § 7A-240; *see also Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673 675 (1987). Undoubtedly, the parties' dispute as to whether defendants were required to honor the provisions of the GAI was a justiciable matter within the trial court's jurisdiction. *Id.*

Additionally, by waiting almost nineteen months to press their motion, defendants impliedly waived their right to challenge venue. *See Farmers Cooperative Exchange, Inc. v. Trull*, 255 N.C. 202, 204, 120 S.E.2d 438, 440 (1961)(holding questions of venue are not jurisdictional but are only grounds for removal to the proper county upon a timely objection made in the proper manner); *Miller v. Miller*, 38 N.C. App. 95, 97-98, 247 S.E.2d 278, 280 (1978); *Johnson v. Hampton Indus., Inc.*, 83 N.C. App. 157, 158, 349 S.E.2d 332, 333 (1986). Therefore, we conclude the trial court did not abuse its discretion in denying defendants' motion to continue the summary judgment hearing.

III. Appropriate State Law

Defendants next argue that plaintiff was improperly granted summary judgment since the trial court failed to apply Ohio law to the substantive provisions of the GAI.

Our review of the record fails to reveal which state's law the trial court applied in rendering its decision. In the absence of such record evidence, we refuse to speculate as to whether the trial court applied an inappropriate state law to the substantive provisions of the GAI. *See* N.C.R. App. P. Rule 9(a)(1999); *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)(an appellate court cannot assume or speculate there was prejudicial error when none appears on the record before it). In any event, the trial court's grant of summary judgment for plaintiff fully comports with the

laws of Ohio and this State. Therefore, we overrule this assignment of error.

IV. Summary Judgment

Finally, defendants contend that plaintiff was not entitled to summary judgment arguing factual issues exist with respect to: (1) the extent of their liability to plaintiff; (2) whether plaintiff exercised bad faith; and (3) plaintiff's failure to mitigate its damages. Plaintiff responds that each of these issues are fully addressed in the GAI.

The GAI provides in pertinent part:

> [Defendants] will indemnify and save [plaintiff] harmless from and against every claim, demand, liability, cost, charge, suit, judgment and expense which plaintiff may pay or incur in consequence of having executed, or procured the execution of such bonds, or any renewals or continuations thereof or substitutes therefor, including, but not limited to, fees of attorneys, whether on salary, retainer or otherwise, and the expense of procuring or attempting to procure release from liability, or in bringing suit to enforce the obligation of any of the [defendants] under this Agreement in the event plaintiff deems it necessary to make an independent investigation of a claim, demand or suit, [defendants] acknowledge and agree that all expense attendant to such investigation is included as an indemnified expense.
>
> In the event of payments by [plaintiff], [defendants] agree to accept the voucher or other evidence of such payments as prima facie evidence of the propriety thereof, and of the [defendants'] liability therefor to [plaintiff].

> [Plaintiff] shall have the exclusive right to determine for itself and [defendants] whether any claim or suit brought against [plaintiff] or [Guardian] upon any such bond shall be settled or defended and its decision shall be binding and conclusive upon [defendants].

A trial court may enter summary judgment in favor of a party where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c)(1999). Where the movant is also the party asserting the claim, it must establish its claim beyond any genuine dispute with respect to any material fact. *Lambe-Young, Inc. v. Austin*, 75 N.C. App. 569, 571, 331 S.E.2d 293, 295 (1985)

Defendants first contend a factual issue exists as to the extent of their liability to plaintiff. In support of their contention, defendants assert that at the time Multi-County declared Guardian in default, Multi-County's engineers had determined that Guardian had failed to complete only five percent of the upgrades. Applying this figure to the total contract amount of $540,729.42, defendants maintain their liability to plaintiff should be limited to five percent of that amount, or $27,036.47, rather than $91,686.30. However, in arriving at this figure, defendants ignore the unambiguous language of the GAI in which they agreed "to accept the voucher or other evidence of such payments *as prima facie evidence*" of their liability to plaintiff. (emphasis added). Defendants also incorrectly assume that their liability to plaintiff should be calculated based exclusively on the percentage of work Guardian failed to complete. *See Robbins v. C. W. Myers*

Trading Post, Inc., 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960)("where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract"). Defendants presented no evidence to counter plaintiff's evidence that the upgrades could have been completed by another installer for an amount less than $91,686.30. Therefore, we conclude that no factual issue exists concerning the extent of defendants' liability to plaintiff.

Next, defendants argue a factual question is present as to whether plaintiff exhibited good faith in negotiating the settlement agreement with Multi-County.

"Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play." *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974); *see also Nationwide Mutual Ins. Co. v. Public Service Co. of N.C.*, 112 N.C. App. 345, 350, 435 S.E.2d 561, 564 (1993)(applying good faith requirement to indemnity provisions of an insurance contract). Assuming this good faith requirement applies to the GAI, the record is devoid of any evidence that plaintiff acted dishonestly or in an unreasonable manner in its negotiations with Multi-County. Instead, the evidence shows that plaintiff

investigated Multi-County's claim, sought defendants' input, and settled for an amount less than what Multi-County had initially demanded. Thus, we conclude that no factual issue is present with respect to defendants' claim that plaintiff did not act in good faith. *See General Accident Ins. Co. of America v. Merritt-Meridian Const. Corp.*, 975 F.Supp. 511, 518 (S.D.N.Y. 1997)("Conclusory allegations of bad faith are insufficient to defeat a motion for summary judgment in favor of a surety to enforce an indemnification agreement").

Finally, defendants maintain that a factual question exists under Ohio law as to whether plaintiff, in negotiating a settlement with Multi-County, mitigated its damages.

In support of their position, defendants cite *Four Seasons Envtl., Inc. v. Westfield Cos.*, 638 N.E.2d 91 (Ohio Ct. App. 1994), which stands for the proposition that in certain instances a surety must mitigate its damages. In that case, a surety provided a performance bond for a subcontractor's construction project. To protect itself, the surety executed an indemnity agreement with a group of individuals to cover any loss it incurred as a result of having to pay on the performance bond. Within the agreement, the indemnitors "unconditionally agreed" to indemnify and reimburse the surety against "any and all loss" in connection with the subcontractor's performance of the construction project. When the subcontractor defaulted, the surety arranged for a second subcontractor to complete the project at an additional cost of $24,000.00. When this subcontractor completed the project, it sued

the surety for payment, and the surety impleaded the indemnitors as third-party defendants.

On appeal, the indemnitors argued that they were not required to pay the full $24,000.00 because the surety had failed to mitigate damages. The Ohio Court of Appeals recognized that under Ohio's mitigation doctrine, a surety may have a duty to mitigate but disagreed that the surety in the case had failed to mitigate by causing excessive damages to the indemnitors. The Court noted that: (1) the unambiguous language of the indemnity contract did not require the surety to mitigate damages and (2) the surety had not engaged in such overreaching as to render unreasonable any failure on its part to mitigate. *Id.* at 91-93.

Assuming *arguendo* that the *Four Seasons* decision applies to this case, defendants fail to demonstrate that the GAI required plaintiff to mitigate damages or that plaintiff engaged in "overreaching" when it negotiated a settlement with Multi-County. Indeed, the record suggests otherwise. The GAI specifically stated that defendants would indemnify plaintiff "against every claim" made pursuant to a performance bond issued on behalf of Guardian. The GAI also provided plaintiff with the "exclusive right" to settle any such claims and that said settlement would be "binding and conclusive" on defendants. Moreover, the record shows that plaintiff conducted an investigation into Multi-County's initial demand for $106,177.80 and subsequently negotiated a reduced payment of $91,686.30. After initially notifying defendants, plaintiff followed up and specifically inquired as to their

position regarding plaintiff's making this payment. The payment was made only after defendants did not respond. In light of the GAI's unambiguous language and the failure of defendants to provide any evidence of overreaching on the part of plaintiff, we conclude that no factual issue exists concerning whether plaintiff acted in accordance with Ohio's mitigation doctrine. Therefore, the trial court properly concluded that plaintiff was entitled to summary judgment.

Affirmed.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).