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NO. COA01-897

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

FINOVA CAPITAL CORPORATION,
Plaintiff-Appellee

v.

Wake County
No. 99 CVD 6511

JODY BRIAN VITALE,
Defendant-Appellant

Appeal by defendant from order entered 8 February 2001 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 27 March 2002.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by Byron L. Saintsing and Connie E. Carrigan, for plaintiff-appellee.

Newitt & Bruny, by Roger H. Bruny, for defendant-appellant.

WALKER, Judge.

Plaintiff is a Delaware corporation with an office and place of business in Phoenix, Arizona and conducts business in Wake County, North Carolina. On 16 November 1995, Trendline Home Fashions, Inc. (Trendline) leased equipment from plaintiff. On the same day, defendant, a resident of Mecklenburg County, North Carolina, guaranteed the lease. On 1 October 1997, Trendline defaulted on its lease and defendant defaulted on the guaranty.

On 15 June 1999, plaintiff filed suit for breach of personal guaranty in Wake County District Court. On 6 October 1999, defendant filed a motion to transfer the case to superior court and a motion to change venue to Mecklenburg County. However, defendant did not calendar the motions until the day of trial on 18 October 2000. On 16 May 2000, plaintiff filed a motion for summary judgment. In support of the motion, plaintiff submitted O'Neil Petrone's affidavit, which included a statement that plaintiff was not able to repossess any of the leased equipment from the Perry, Georgia site. On 30 August 2000, the trial court granted summary judgment in favor of plaintiff on the issue of liability but denied summary judgment on the issue of damages.

On 22 August 2000, plaintiff served its response to defendant's first set of interrogatories. Defendant's first interrogatory was as follows:

Identify each person known or believed by you to have knowledge of the subject matter of this action or the matters alleged in the complaint herein, and with respect to each such person set forth a summary of the important facts known or observed by such person and identify any written or recorded statement taken from such person concerning any feature of the subject matter of this action.

In response, plaintiff objected to the interrogatory as being "overly broad in its scope and unreasonably burdensome." Without waiving its objections, plaintiff identified eight individuals plus counsel. In a proposed pretrial order, plaintiff listed John Ferrell and defendant as potential witnesses at trial; however, no pretrial order was ever executed.

On 16 October 2000, plaintiff filed a supplemental affidavit, which corrected the 16 May 2000 affidavit of Mr. Petrone. The supplemental affidavit revealed that the leased equipment, which plaintiff wanted to repossess, had already been returned to plaintiff and sold to Madison Financial Corporation for \$1,100.00. On 17 October 2000, the day before trial was to begin, defendant filed a motion to set aside the summary judgment order because the affidavit, upon which summary judgment was based, was false. On that date, defendant also filed an answer which included a demand for a jury trial.

The trial court found that, because defendant had delayed the calendaring of his motions for over one year until the day of trial, defendant waived his right to transfer the case or to change the venue. Further, the trial court found there was no adequate notice of the hearing on the motion to change venue because notification was the same day as the trial was scheduled to take place.

The trial court also denied the motion to set aside the summary judgment order. The trial court found that "[o]ther than a policy argument, the Defendant proffered no responsive pleadings or evidence to contradict the Plaintiff's entitlement to partial Summary Judgment as to Defendant's liability." In addition, the trial court determined that plaintiff's assertion that the original affidavit was false dealt solely with the issue of damages which was not determined by summary judgment.

The trial court further concluded the following:

8. Defendant's Answer filed the day before the trial contained a Demand for a Trial by Jury. All parties were noticed of the trial at least six weeks in advance of the trial date and were on notice that it was set on the non-jury calendar. Defendant could have filed his Answer at any time demanding a jury trial. The Defendant's demand for a jury trial was untimely, would have necessitated a continuance of the trial, constituted undue hardship and delay, and added expense to the parties. The timing of the jury demand also calls into question as to whether it was raised in good faith or for an improper purpose. The parties were before the Court and ready for trial. Therefore, the Court deems the Defendant's right to a jury trial to have been WAIVED and the jury trial demand is therefore stricken from the Answer.

At the bench trial, plaintiff called Mr. Ferrell and Timothy Nagy. Mr. Nagy was qualified without objection as an expert in the field of commercial computer equipment valuations. He testified as to the value of the computer equipment and lack of value of the software. Defendant testified, contrary to Mr. Nagy, that the software had value because it was transferable. However, defendant offered no evidence of the potential market value of the software if it were transferable.

After considering the evidence, the exhibits entered into the record, and the arguments of counsel, the trial court ordered that plaintiff recover the accelerated payments under the lease less credit given for the sale of the equipment. The trial court also ordered late fees, reasonable attorney's fees, and costs to be taxed to the defendant. Defendant's motion for a new trial was denied.

On appeal, defendant first contends the trial court erred in denying his Rule 60(b) motion to set aside the summary judgment order based on fraud in the affidavit upon which summary judgment was based. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

. . .

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

The granting or denying of a motion for relief from a judgment under Rule 60(b) is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Here, defendant alleges that plaintiff committed a fraud by submitting a false affidavit in support of its motion for summary judgment. The original affidavit stated that plaintiff was not able to repossess the leased equipment when, in fact, it had already taken possession and sold the equipment to a third party. This error in the affidavit was corrected through the submission of a supplemental affidavit after summary judgment had been granted. The location and disposition of the leased equipment applied only to the issue of damages. Because the summary judgment order was limited to the issue of liability and preserved for trial the issue of damages, we find the trial court did not abuse its discretion in denying defendant's motion to set aside the summary judgment order.

Defendant next contends the trial court erred in refusing to grant his request for a jury trial. Our Courts have held that a party may waive the right to a jury trial through its own actions, such as failure to appear, written consent filed with the court, oral consent reflected in the minutes of the court, or failure to timely demand a jury trial as required by Rule 38(b). *Sykes v. Belk*, 278 N.C. 106, 123, 179 S.E.2d 439, 449 (1971). Defendant contends that because his answer was not required to be filed until after his motion to transfer and his motion to change venue had been decided, his demand for a jury trial in his answer was timely under N.C. Gen. Stat. § 1A-1, Rule 38(b) and thus was not waived.

Defendant filed his motion to transfer and motion to change venue on 6 October 1999; however, he did not calendar them until 18 October 2000, the day the case was scheduled for trial. Defendant's actions alone delayed the hearing and judgment on the motions. Further, six weeks prior to 18 October 2000, defendant received notice of the non-jury trial date; however, he failed to demand a jury trial until the day before the trial was scheduled to begin. The trial court noted that all witnesses were present and ready for trial. It also found that the timing of the demand called into question whether it was filed in good faith and for a proper purpose. Based on all of the circumstances and application of the guidelines set forth in *Sykes*, we find the trial court did not abuse its discretion in denying defendant's demand for a jury trial.

Defendant finally contends the trial court erred in allowing Mr. Farrell and Mr. Nagy to testify for plaintiff. The admissibility of the testimony of a witness, whose identity was not disclosed to the opposite party in discovery requesting such disclosure, is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 98 N.C. App. 13, 19, 389 S.E.2d 840, 844 (1990).

Here, in response to defendant's interrogatory to "[i]dentify each person known or believed by you to have knowledge of the subject matter of this action," plaintiff objected to the interrogatory as being overly broad. However, without waiving the objection, plaintiff identified eight persons "known by the Plaintiff to have knowledge regarding the subject matter of this action." Defendant did not file a motion to compel discovery nor did he request the identity of expert witnesses by way of further discovery. Approximately one week before trial, plaintiff notified defendant of its intention to call Mr. Ferrell as a witness when it submitted a draft of a proposed pre-trial order to defendant.

Although Mr. Nagy was not listed as a witness until trial, he was cross-examined by defendant who elected not to present any evidence of the value of the leased equipment. On appeal, defendant does not challenge the value of the leased equipment as found by the trial court. Thus, we find that the trial court did not abuse its discretion in allowing plaintiff's witnesses to testify at trial.

In conclusion, the trial court did not abuse its discretion in denying defendant's motion to set aside the summary judgment order. Further, it did not abuse its discretion in denying defendant's demand for a jury trial. Finally, there was no abuse of discretion in allowing plaintiff's witnesses to testify at trial. The order of the trial court is

Affirmed.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).