NO. COA02-174

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

ROBERT A. ZANDER, an individual
Plaintiff, Pro Se

v.

Wake County
No. 00 CVS 14502

GREATER EMMANUEL PENTACOSTAL TEMPLE OF DURHAM, P.A.W., a corporation; MARION E. WRIGHT, an individual; and Does 1 to 100,
Defendants.

Appeal by plaintiff from order entered 5 December 2001 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 October 2002.

Robert A. Zander for plaintiff-appellant, pro se.

Marsh and Marsh Attorneys, by William A. Marsh III, for defendant-appellees.

EAGLES, Chief Judge.

Robert A. Zander ("plaintiff") appeals from the trial court's order granting a motion to dismiss in favor of the Greater Emmanuel Pentacostal Temple of Durham, and Marion E. Wright ("defendants"). Plaintiff asserts seven assignments of error: (1) that the trial court erred by ordering that defendants were not bound by their failure to respond to a request for admissions for eight months; (2) that the trial court erred by ordering *ex mero motu* that defendants were not bound by their failure to reply to a request

for admissions; (3) that the trial court erred in denying plaintiff's motion for partial summary judgment; (4) that the court erred by denying plaintiff's discovery requests; (5) that the court erred by vacating the order for default judgment; (6) that the court erred by dismissing plaintiff's complaint; and (7) that the trial court denied plaintiff equal protection as a pro se litigant. After careful review of the record and briefs, we hold that the trial court erred in dismissing plaintiff's action. Accordingly, we reverse and remand for further proceedings.

The evidence tends to show the following. On 7 November 2000, plaintiff and defendants entered into a contract. According to the terms of the contract, plaintiff was to arrange refinancing of the defendant Temple's existing mortgage. In addition, plaintiff was required to prepare a financing package that would be presented by the Temple to a commercial lender. Defendant Temple sought to obtain a loan of approximately two million dollars to construct and equip its proposed Family Life Center. In return, defendants agreed to pay plaintiff a one-time fee of $3,500. Upon the attainment of a satisfactory loan commitment from the commercial lender, plaintiff was to be paid an additional fee equal to one percent of the total bank loan.

Plaintiff obtained a loan offer for defendants from Centura Bank in the amount of $1,300,000 in December 2000. Defendants paid plaintiff $3,500 according to their agreement, but did not pay plaintiff's fee of $13,000. Defendants asked plaintiff to reduce his fee or donate his fee to the Temple. Plaintiff declined.

Plaintiff filed a complaint alleging breach of contract on 21 December 2000. The complaint was amended on 2 January 2001. Plaintiff filed a motion for partial summary judgment on 11 January 2001. Plaintiff also submitted his request for admissions and request for production of documents on 27 January 2001. On 9 February 2001, defendants filed a responsive pleading in the form of a motion to strike and a motion to transfer. The motions for summary judgment, motion to strike and motion to transfer were scheduled for hearing on 5 April 2001. At the hearing, the trial court indicated that it would only hear defendants' motion to transfer. Defendants' motion to transfer the case to superior court was granted by order on 9 May 2001. The trial court did not hear or decide upon defendants' motion to strike or plaintiff's motion for summary judgment on 5 April 2001.

Plaintiff obtained an entry of default judgment in his favor on 30 May 2001. Defendants filed a motion to vacate the default judgment based on the pendency of the outstanding motions. Plaintiff served a subpoena on Centura Bank, defendants' commercial lender, seeking the production of financial documents pertaining to the December 2000 loan. Defendants filed an answer to plaintiff's complaint on 28 August 2001.

The default judgment was vacated by order on 10 September 2001. The 10 September order also denied defendants' motion to dismiss and plaintiff's motion for partial summary judgment. The defendants' motion to strike was granted in part. The trial court also quashed plaintiff's subpoena duces tecum to Centura Bank.

Plaintiff and defendants reached a settlement agreement on 14 September 2001. The settlement agreement required plaintiff to release all claims against defendants in exchange for payment of the sum of $7,500. On 14 September 2001, $6,500 of the settlement amount was given to plaintiff. The remaining $1,000 was due on 15 October 2001. On 17 October 2001, plaintiff notified defendants' attorney that he had not received defendants' payment and stated plaintiff's intent to pursue the original breach of contract action. Defendants' attorney instructed defendants to bring a check for the remaining $1,000 settlement payment to his office and made it available for plaintiff on the afternoon of 17 October 2001. Plaintiff refused to accept the payment because he contended defendants had breached the settlement agreement and he would no longer accept settlement. Defendants filed a motion to dismiss with the trial court, which was granted by an order on 5 December 2001. At the hearing upon the motion to dismiss, defendants again attempted to deliver to plaintiff a $1,000 payment. Plaintiff returned defendants' payment the following day, again stating his belief that he was entitled to pursue reimbursement according to the original contract between the parties. Plaintiff appeals from the trial court's order dismissing his action alleging breach of the original contract.

Plaintiff's first three arguments on appeal relate to the 10 September order denying plaintiff's motion for partial summary judgment. Plaintiff contends that defendants' failure to answer his complaint, requests for admissions and documents established

all facts in his favor, leaving no genuine issue of material fact in dispute. Plaintiff argues that the trial court abused its discretion by denying his motion for partial summary judgment. We disagree.

If a party fails to answer a request for admissions within thirty days of service, each matter within the request is deemed to be admitted. G.S. § 1A-1, Rule 36(a) (2001). However, any matter established as a result of a party's failure to respond to a request for admissions can be withdrawn or amended if the court permits. G.S. § 1A-1, Rule 36(b) (2001). Rule 36(b) "gives the trial court the discretion to allow or not allow a party to withdraw admissions." *Interstate Highway Express v. S & S Enterprises, Inc.*, 93 N.C. App. 765, 769, 379 S.E.2d 85, 87 (1989).

Plaintiff's motion for partial summary judgment was based on defendants' failure to respond to his requests for admissions. He argued that without a response from defendants, there were no issues of material fact to preclude summary judgment. However, the trial court, in its discretion, deemed defendants not to have admitted any of the requested admissions pursuant to Rule 36(b). The trial court's decision to deny plaintiff's motion for partial summary judgment was also within its discretion and cannot be reversed without a showing of abuse of discretion. Proving an abuse of discretion has been defined as "a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). The trial court's actions in denying plaintiff's summary judgment

motion and withdrawing defendants' admissions were supported by reason. Therefore, plaintiff's first three assignments of error are dismissed.

Plaintiff further assigns error to the trial court's order quashing his subpoena for documentary evidence. Plaintiff argues that he required the loan documents named in his subpoena to further his lawsuit. We disagree. A subpoena duces tecum compels the production of "records, books, papers, documents, or tangible things." G.S. § 1A-1, Rule 45(c) (2001). "Whether the subpoena should be quashed or modified is a matter within the sound discretion of the trial court." *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 649, 531 S.E.2d 883, 888, *disc. review denied,* 353 N.C. 266, 546 S.E.2d 104 (2000). The quashing of the subpoena here can only be reversed if plaintiff has shown an abuse of discretion or that the trial court's actions were unsupported by reason. Since plaintiff has not made that showing, this assignment of error is denied.

Plaintiff's fifth assignment of error relates to the trial court's vacating of the entry of default judgment against defendants. Plaintiff states that defendants failed to file an answer to his complaint for nearly nine months. Due to defendants' tardiness, plaintiff contends that the default judgment cannot be vacated for good cause. G.S. § 1A-1, Rule 55(d) (2001). We disagree.

The decision to set aside an entry of default judgment can only be disturbed upon a showing that the trial court abused its

discretion in finding good cause. *Byrd v. Mortenson*, 60 N.C. App. 85, 88, 298 S.E.2d 170, 172 (1982), *aff'd and modified in part*, 308 N.C. 536, 302 S.E.2d 809 (1983). The determination of whether good cause exists depends on the facts and circumstances of each particular case. *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970). Here, the trial court found good cause to vacate the entry of default judgment based on the existence of outstanding motions when the default was entered. Accordingly, this assignment of error is denied.

Plaintiff further assigns error to the trial court's granting of defendants' motion to dismiss. A motion to dismiss is converted into a motion for summary judgment when matters outside the pleadings are utilized instead of excluded by the trial court. *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). Since the trial court here considered the settlement agreement between the parties, the motion to dismiss should be treated as a motion for summary judgment by defendants.

Summary judgment is only appropriate when no genuine issue of material fact exists, and one party deserves judgment as a matter of law. G.S. § 1A-1, Rule 56(c) (2001). Here, summary judgment in favor of defendants was not appropriate because defendants are not entitled to judgment as a matter of law.

All parties agree that defendants signed a settlement agreement with plaintiff. That agreement specified that plaintiff would release his previous lawsuit against defendants for the breach of the original contract upon receipt of $7,500. Defendants

agree that they paid plaintiff $6,500 but failed to make the final $1,000 payment before 15 October 2001. The settlement contract plainly states: "The undersigned expressly covenants and agrees that the parties have relied on the representation that this agreement is contingent upon the tender of the additional $1,000.00 by October 15, 2001 and acknowledgment thereof shall be incorporated into this document and fully made a part hereof." All parties agree that on 17 October 2001 plaintiff notified defendants' lawyer of the defendants' failure to pay him. In addition, there is no disagreement that defendants' lawyer notified plaintiff within several hours of the receipt of plaintiff's letter that the final $1,000 payment was available. Both parties concede that defendants attempted on several occasions to pay plaintiff the remaining $1,000 due to him under the contract after the deadline for payment had passed. These facts show that plaintiff had a settlement agreement with defendants, and defendants failed to fulfill their duties according to the contract. Without completing their duties under the contract, defendants had no means of requiring plaintiff to fulfill his duties under the settlement agreement, namely, refraining from pursuit of his lawsuit against defendants. Defendants submitted the settlement agreement to the trial court as evidence that the lawsuit had been settled extra-judicially. The settlement agreement required defendants to pay the final $1,000 to plaintiff on or before 15 October 2001. Plaintiff's release of claims under the agreement was effective only when he was fully paid on the date named in the settlement

contract. Since defendants failed to pay plaintiff by the specified deadline, defendants were not entitled to judgment as a matter of law on the original breach of contract claim. This error requires reversal of the trial court's decision and remand of the cause to the trial court.

Plaintiff finally asserts that the trial court denied him equal protection of the law because he represented himself pro se. We disagree. Both the United States Constitution and the North Carolina Constitution state that the government shall not deny any person the equal protection of the laws. U.S. Const. amend. XIV, § 1; N.C. Const. art. 1, § 19. Here, however, plaintiff does not allege how equal protection of the law was denied to him as a pro se litigant. This assignment of error is overruled.

In conclusion, we hold that the trial court erred in granting defendants' motion to dismiss. Therefore, we reverse and remand to the trial court for further proceedings consistent with this opinion.

Reversed.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).