NO. COA03-970

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

THOMAS W. HILL,
Plaintiff

v. Henderson County
No. 97 CVS 725

GARFORD TONY HILL and wife,
JEWEL ANNE HILL, and the
ESTATE OF SADIE C. HILL,
Defendants

Appeal by plaintiff from judgment entered 15 January 2003 by Judge Richard L. Doughton in Henderson County Superior Court and from order entered 5 March 2003 by Judge E. Penn Dameron, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 20 April 2004.

Thomas W. Hill, pro se, plaintiff-appellant.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for Garford Tony Hill and Jewel Anne Hill, defendants-appellees.

CALABRIA, Judge.

This appeal arises from a trial court grant of summary judgment to defendants in a suit by plaintiff seeking the return of certain real property to the estate of his deceased mother. We affirm.

Thomas W. Hill ("plaintiff") brought suit seeking the return of certain real property to the Estate of Sadie Clark Hill

("estate"), which Sadie Clark Hill ("Sadie Hill" or "Sadie") had transferred in her lifetime to Garford Tony Hill ("Tony Hill" or "Tony") and his wife, Jewel Anne Hill ("Jewel Hill" or "Jewel") (collectively "defendants"). Plaintiff alleged defendants used undue influence, fraud, and misrepresentation of material facts in their business dealings with Sadie and further alleged the administrator of the estate, Ervin W. Bazzle ("administrator"), breached his duty by failing to bring suit against defendants.

Sadie Hill was the mother of five children, including plaintiff and defendant Tony Hill. Sadie was also the principal owner of Appalachian Apple Packers Co. ("AAP"), an apple packing corporation located in Henderson County. In addition to her interest in AAP, Sadie owned some real property, which she conveyed to AAP in 1969 ("AAP property"), as well as the family home and apple orchard ("orchard property").

From 1977 onward, Sadie, Tony, and Jewel Hill were the only shareholders in AAP. Sadie actively participated in the business by working daily at the corporate office and supervising the records and bookkeeping. In addition, Sadie maintained apple production on the orchard property and, with help from Tony, managed the orchard property. By contract dated 16 July 1980 ("1980 contract"), Sadie sold the orchard property to defendants in exchange for a rental property and a promissory note, secured by a deed of trust, for the balance of the purchase price. Sadie, nevertheless, continued to live in the family home on the orchard property.

A decline in the apple market allowed Tony, in 1981 and 1983, to receive disaster loans from the Farmers Home Administration ("FmHA"), which he secured with both the orchard property and the AAP property. Despite these loans and other efforts to preserve the business, AAP ceased regular operations in 1984. In November 1987, the FmHA liens against the AAP property accounted for a debt of approximately $844,000, and the assets of AAP totaled approximately $360,000.

After Tony obtained a release of the orchard property from the FmHA lien, Sadie and the defendants entered into another contract dated 16 November 1987 ("1987 contract") allowing: (1) Sadie to repurchase the orchard property from defendants and (2) the defendants to purchase Sadie's remaining stock in AAP. To accomplish these objectives, the 1987 contract treated payments made by defendants under the 1980 contract as payment for Sadie's AAP stock. As a result, defendants were allowed to purchase Sadie's AAP stock for a single additional payment of $21,300. However, the application of the payments made by defendants after execution of the 1980 contract to the stock purchase meant that defendants had paid Sadie nothing on the loan for the purchase of the orchard property under the 1980 contract. The balance on the note and deed of trust executed by defendants pursuant to the 1980 contract was deemed to be $211,000, and was credited towards Sadie's repurchase.

In May 1987, FmHA instituted a debt restructuring process ("buyout") of FmHA disaster relief liens, which was implemented at

its Henderson County office in September 1988. In December of 1989, after notification in August of eligibility under the buyout, Tony obtained a release of the AAP property from the FmHA liens for $129,232. During this time, defendants dissolved the AAP corporation.

Sadie Hill died in March 1997. Although Sadie's will divided her assets equally among her children, plaintiff was dissatisfied when he reviewed the 1987 contract and unsuccessfully tried to convince the administrator to bring suit against defendants. On 21 May 1997, plaintiff filed the instant suit against defendants, alleging undue influence, fraud, and misrepresentation of material facts in their business dealings with Sadie. The suit survived dismissal when this Court held that plaintiff could properly bring suit on behalf of the estate as a real party in interest, since the administrator of the estate had declined to do so. *Hill v. Hill*, 130 N.C. App. 484, 506 S.E.2d 299 (1998) ("*Hill I*").[1] On remand, the trial court, by order dated 19 November 1998, allowed plaintiff to add the estate as a necessary party and a claim against the administrator alleging breach of duty for refusal to bring suit against defendants. On 18 December 1998, defendants filed a counterclaim and moved for sanctions under Rule 11. Plaintiff responded with his own Rule 11 motion.

On 15 January 1999, while the instant case was proceeding, plaintiff filed a separate suit on these facts, 99 CVS 67, in

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[1] *Hill I* was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

Henderson County Superior Court against, *inter alia*, defendants and the administrator. The complaint alleged undue influence, fraud, and misappropriation of AAP corporate funds by defendants and breach of duty by the administrator. In orders filed 21 July 2000 and 2 August 2000, the trial court granted all defendants' motions for summary judgment. In an unpublished opinion, this Court affirmed summary judgment. *Hill v. Hill*, 147 N.C. App. 313, 556 S.E.2d 355 (2001) ("*Hill II*").[2]

On 15 January 2003, in the instant case, the trial court granted summary judgment to defendants and the administrator, finding there was no genuine issue as to any material fact. On 5 March 2003, the trial court denied plaintiff's motion to set aside defendants' voluntary dismissal of their counterclaim and Rule 11 motion as well as his motion for a jury trial on the issue of his good faith.

I. Summary Judgment

A grant of summary judgment is reviewed *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Summary judgment is properly granted where, taking the evidence in the light most favorable to the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." N.C. Gen.

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[2] *Hill II* was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

Stat. § 1A-1, Rule 56(c) (2003); *see also Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). A defendant is entitled to summary judgment "when (1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; or (3) the other party cannot overcome an affirmative defense which would bar the claim." *Caswell Realty Assocs. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998).

A. Undue Influence, Constructive Fraud, and Breach of Duty

Plaintiff asserts the trial court erred in granting summary judgment on the basis of defendants' affirmative defenses of *res judicata* and collateral estoppel. We disagree with respect to plaintiff's claims of undue influence and constructive fraud against defendants and his claim of breach of duty against the administrator.

"The doctrine of *res judicata* treats a final judgment [on the merits] as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 692, 370 S.E.2d 567, 569 (1988). "[W]here defendant prevails, the judgment 'bars' the plaintiff from further litigation [on those claims or causes of action]." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

> In order to successfully assert the doctrine of res judicata, a defendant must prove the following essential elements: (1) a [prior] final judgment on the merits . . ., (2) an

> identity of the causes of action in both . . . suit[s], and (3) an identity of the parties or their privies in the two suits.

Caswell Realty Assoc., 128 N.C. App. at 720, 496 S.E.2d at 611.

Based on the same facts as the instant case, this Court, in *Hill II*, affirmed the grant of summary judgment to defendants and the estate. In *Hill II*, this Court held: (1) plaintiff's claim of undue influence against defendants failed for lack of evidence as to several relevant factors indicating the presence of undue influence in defendants' dealings with Sadie; (2) plaintiff's claim of constructive fraud against defendants failed as a matter of law for lack of evidence as to the necessary element of a confidential relationship; and (3) plaintiff's claim of breach of duty against the administrator failed for lack of any evidence of maladministration. *Hill II* constituted a final judgment on the merits with respect to plaintiff's claims of undue influence, constructive fraud, and breach of duty regarding these parties. Accordingly, with respect to these three claims, the trial court properly granted summary judgment on the basis of *res judicata*.

Nonetheless, plaintiff argues that under N.C. R. App. P. 30(e)(3) "[a]n unpublished decision . . . does not constitute controlling legal authority" and thus may not be cited on issues of *res judicata* or collateral estoppel. However, N.C. R. App. P. 30(e)(3) also establishes that "citation of unpublished opinions . . . is disfavored, *except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case*." (Emphasis

added). Here, citation to *Hill II* is appropriately made to establish claim preclusion and the law of the case.

In the alternative, plaintiff argues *res judicata* is not proper because the instant case was filed earlier than 99 CVS 67, the case decided in *Hill II*. However, application of *res judicata* is not dependent on which suit is filed first but rather on whether a final judgment as to a plaintiff's claims has accorded "the full measure of relief" to which he is entitled. *State ex rel. Utilities Comm.*, 322 N.C. at 692, 370 S.E.2d at 569. Since *Hill II* constituted a final judgment as to plaintiff's claims, he is now barred from "further litigation" of those claims. *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556.

Plaintiff further argues this Court's holding in *Hill I*, allowing him to institute an action, established that his claims were meritorious and thus foreclosed any *res judicata* argument based on *Hill II*. Plaintiff misapprehends this Court's holding. The holding in *Hill I* did not address the merits of plaintiff's claim but merely allowed plaintiff, as an heir, to bring an action when the administrator refused to do so and to join the estate as a defendant. Upon remand, the trial court was then to determine the merits of plaintiff's claims.

B. Actual Fraud

Plaintiff asserts that neither *res judicata* nor collateral estoppel apply to his claim of actual fraud and that summary judgment was improper. Although plaintiff's argument concerning

res judicata and collateral estoppel has some merit, we find summary judgment was proper.

We look to the essential elements of actual fraud. These are: "'(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974)).

With regard to the 1980 contract, plaintiff asserts defendants persuaded Sadie to deed them the orchard property by falsely representing to Sadie that they would take care of the orchard property and pay interest on the note executed pursuant to the 1980 contract. No evidence in the record indicates that any such representation was material to the transaction. Moreover, no evidence in the record contradicts that defendants made payments under the note to Sadie in November 1981, December 1983, and November 1984. Plaintiff argues the 1987 contract recites that no payments were made under the note. The record shows, however, the intent of Sadie and the defendants under the 1987 contract was to redefine the three payments for tax purposes as payments for Sadie's AAP stock. Sadie received, under the 1987 contract, $211,000 in principal and *interest* due under the note as a credit toward her repurchase of the orchard property. Thus, defendants paid the interest due under the note, and no false representation as to a material fact with regard to the 1980 contract was made.

Plaintiff's claim of actual fraud under the 1980 contract fails as a matter of law.

With regard to the 1987 contract, plaintiff asserts Tony persuaded Sadie to sell her AAP stock to him by falsely representing that, as of November 1987, the legitimate debts of AAP exceeded the corporate assets. Plaintiff concedes that in 1987 the assets of AAP totaled $360,000 and the FmHA lien was $844,000. Nonetheless, plaintiff contends Tony knew the amount of the FmHA lien was not collectible in full because of the FmHA buyout rules, and he then falsely represented to Sadie that the FmHA lien was collectible in full. Assuming *arguendo* that Tony knew the 1987 FmHA rules would, in 1989, affect the amount owed under the lien, no evidence in the record indicates that the passage of the 1987 FmHA rules affected the FmHA lien on the AAP property as of November 1987. Thus, Tony made no false representation regarding AAP's debt to asset ratio as it stood in November 1987. Plaintiff's claim of actual fraud under the 1987 contract fails as a matter of law.

II. Refusal to Set Aside Dismissal of Defendants' Counterclaim

Appellant asserts the trial court erred by denying his motion to set aside defendants' voluntary dismissal of their counterclaim. We disagree.

Under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2003), "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a

stipulation of dismissal signed by all parties who have appeared in the action." "The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim." N.C. Gen. Stat. § 1A-1, Rule 41(c).

Plaintiff first argues that "affirmative defenses" contained in his answer to defendants' counterclaim foreclosed defendants' ability to voluntarily dismiss their counterclaim. This Court has held that, although a plaintiff's right to voluntarily dismiss his claim prior to resting his case is virtually absolute, *Massey v. Massey*, 121 N.C. App. 263, 268, 465 S.E.2d 313, 316 (1996), "'[w]here defendant sets up a claim for *affirmative relief* against plaintiff[] arising out of the same transactions alleged by plaintiff[], plaintiff[] cannot take a voluntary dismissal under Rule 41 without the consent of defendant.'" *Lafferty v. Lafferty*, 125 N.C. App. 611, 613, 481 S.E.2d 401, 402 (1997) (quoting *Maurice v. Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978)) (emphasis added). Our Supreme Court has defined affirmative relief as "'that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action. . . .'" *McCarley v. McCarley*, 289 N.C. 109, 113-14, 221 S.E.2d 490, 493-94 (1976) (quoting *Rhein v. Rhein*, 244 Minn. 260, 262, 69 N.W.2d 657, 659 (1955)). By way of contrast, an affirmative defense is defined as "[a] response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of claim." *Black's Law*

Dictionary 60 (6th ed. 1990). In reviewing plaintiff's answer we find no affirmative defenses that are also claims for affirmative relief.

Plaintiff also argues his motion for Rule 11 sanctions was an action for affirmative relief, which required the trial court to set aside defendants' voluntary dismissal of their counterclaim. After voluntary dismissal of a claim, the trial court retains jurisdiction to rule on collateral issues such as Rule 11 sanctions, and a party's motion for Rule 11 sanctions may still be heard. *Renner v. Hawk*, 125 N.C. App. 483, 489, 481 S.E.2d 370, 373 (1997). Thus, plaintiff's motion for Rule 11 sanctions did not require the trial court to grant plaintiff's motion to set aside defendants' voluntary dismissal.

III. Denial of Jury Trial on Defendants' Rule 11 Motion

Plaintiff asserts the trial court violated his constitutional right to a jury trial by denying his motion for a jury trial regarding his good faith, which was at issue in defendants' motion for Rule 11 sanctions. Under the mootness doctrine, "[w]henever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). Defendants' voluntary dismissal of their Rule 11 motion made the issue of plaintiff's good faith moot.

Plaintiff also asserts: (1) the trial court erred in not granting him a hearing on his Rule 11 motion after the voluntary dismissal, and (2) under N.C. Gen. Stat. § 1A-1, Rule 41(d), defendants must be taxed with the costs of plaintiff's counterclaim defense. Under N.C. R. App. P. 10(a), "the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991). Plaintiff failed to assign these issues as error. Thus, his assertions are not properly before this Court, and we decline to address them.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).