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NO. COA05-1208

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

BETTY SHAW PLAYER,  
Plaintiff,

v.

Mecklenburg County  
No. 03 CVD 7294

WOODROW PLAYER, JR.  
Defendant.

Appeal by plaintiff from judgment entered 18 April 2005 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 15 May 2006.

*Wyrick, Robbins, Yates & Ponton, LLP, by K. Edward Greene and Heidi C. Bloom, for plaintiff-appellant.*

*Casstevens, Hanner, Gunter & Riopel, P.A., by Robert P. Hanner, II, for defendant-appellee.*

LEVINSON, Judge.

Betty Player (plaintiff) appeals from entry of summary judgment in favor of Woodrow Player, Jr. (defendant). We affirm.

The issues raised on appeal pertain to a prenuptial agreement executed by the parties. Relevant facts are summarized as follows: Plaintiff and defendant started dating in January 1996, and became engaged during the summer of 1997. They executed a premarital agreement on 13 November 1997, and were married three weeks later. In June 2002 the parties separated.

In April 2003 plaintiff filed a complaint for post separation support, alimony, and equitable distribution. In his answer and counterclaims, defendant denied the material allegations of plaintiff's complaint and raised several defenses, including his assertion that plaintiff's claims were barred by the terms of the parties' premarital agreement ("the agreement"). Defendant also asserted counterclaims for enforcement of certain provisions of the agreement. Additionally, defendant sought a protective order barring discovery of his financial records, on the grounds that the records would not be relevant if the agreement were upheld. On 27 October 2004 defendant filed a motion for summary judgment on plaintiff's claims and on his counterclaims. A hearing was conducted on defendant's motions in November 2004. In February 2005 the trial court entered a protective order, pending its ruling on the summary judgment motions. On 18 April 2005 the court granted summary judgment in favor of defendant, both on plaintiff's claims and defendant's counterclaims. From this order plaintiff appeals.

#### Standard of Review

Plaintiff appeals from a summary judgment order. "The trial court should grant summary judgment 'if 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.G.S. § 1A-1, Rule 56(c) (2005). The evidence must be considered 'in a light most favorable to the

non-moving party.'" *McCutchen v. McCutchen*, 360 N.C. 280, 285-86, 624 S.E.2d 620, 625 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

"The party moving for summary judgment has the burden of proving that there is no triable issue of material fact. This burden may be met 'by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]'" *Anderson v. Housing Auth. of the City of Raleigh*, 169 N.C. App. 167, 171, 609 S.E.2d 426, 428 (2005) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). "When a motion for summary judgment is properly supported, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue of fact. The nonmoving party cannot simply rely on mere denials in an affidavit, but must at least bring forth facts which forecast that a genuine issue of material fact still exists." *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 288, 616 S.E.2d 349, 354 (2005) (citation omitted).

Affidavits submitted in opposition to a summary judgment motion must meet the requirements of N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005), which provides in relevant part that:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

"A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972). And, in general, on "a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e)[.]" *Howerton*, 358 N.C. at 467, 597 S.E.2d at 692.

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Plaintiff argues first that the trial court erred by conducting a hearing on defendant's summary judgment motion, on the grounds that she was not served with proper notice of the hearing as required by N.C. Gen. Stat. § 1A-1, Rule 56 (2005). Plaintiff concedes that she participated in the hearing without objecting to the lack of notice or requesting a continuance. "A party waives notice of a motion by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence." *Anderson v. Anderson*, 145 N.C. App. 453, 456, 550 S.E.2d 266, 269 (2001) (citations omitted). We conclude that plaintiff waived any defect in notice of the hearing. This assignment of error is overruled.

Plaintiff next argues that the trial court erred by entering summary judgment in favor of defendant on the issue of the validity

of the agreement, on the grounds that there are genuine issues of material fact on the issue of constructive fraud. We disagree.

Plaintiff concedes the absence of fraud, duress, coercion, or undue influence. However, she contends there are genuine issues of material fact on whether defendant engaged in constructive fraud by failing to disclose to plaintiff the extent of his financial assets. Accordingly, we first review the pertinent statutory grounds for invalidating a premarital agreement. N.C. Gen. Stat. § 52B-7 (a) (2) (2005) provides in pertinent part that a premarital agreement is not enforceable "if the party against whom enforcement is sought" proves that the agreement was unconscionable as written and, before execution of the agreement, the party:

- a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
- b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
- c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

In the instant case, it is undisputed that Paragraph 11 of agreement states that:

11. Each of the parties acknowledges that the other has made a full and fair disclosure . . . [of] incomes, assets, debts, liabilities, and responsibilities[,] . . . [is] informed as to, and has adequate knowledge of, all real and personal property owned and possessed by the other party[, and] . . . [is] satisfied with the extent of their disclosure and, therefore, enter into this Agreement with sufficient knowledge of the financial affairs of the other. Each party expressly waives any

right to disclosure of the property or financial obligations of the other party beyond the disclosure provided by the other in the negotiations and execution of this Agreement.

Under this provision of the agreement, plaintiff unequivocally waives the right to any additional disclosure of defendant's financial status. We conclude this paragraph renders untenable plaintiff's argument that defendant engaged in constructive fraud by failing to provide full disclosure of his assets.

Plaintiff, however, argues that there are issues of material fact regarding her execution of the agreement. In support of her assertion, plaintiff cites allegations in her Reply to defendant's Answer and Counterclaims. However, plaintiff's reply is not verified, and thus is not the equivalent of a sworn affidavit. See *Venture Properties I v. Anderson*, 120 N.C. App. 852, 854-55, 463 S.E.2d 795, 796 (1995) (where party "filed only an unverified answer" this Court notes that "[c]ertain verified pleadings may be treated as affidavits for the purposes of a motion for summary judgment" but that an unverified pleading cannot be considered).

Plaintiff also argues that certain facts "call into question" whether her signing of the agreement was voluntary. See N.C. Gen. Stat. § 52B-7 (a) (1) (2005) (premarital agreement not enforceable where agreement not executed voluntarily). We disagree. The evidence was uncontradicted that plaintiff was a college-educated woman with a professional career, that her parents were available for consultation, that the parties discussed the subject of a premarital agreement several months before it was executed, and

that plaintiff was aware of her right to consult an attorney.

We conclude that plaintiff failed to produce any competent evidence raising a genuine issue of material fact regarding her voluntary execution of the agreement, or her waiver of the right to further disclosure of defendant's financial assets. Accordingly, we do not reach the issue of the substantive fairness of the agreement. This assignment of error is overruled.

Plaintiff argues next that the trial court erred by granting summary judgment in favor of defendant on his counterclaims for enforcement of certain provisions of the agreement. We disagree.

In his answer, defendant brought verified counterclaims, supported by a sworn affidavit, seeking the following relief under the agreement: (1) \$30,000 reimbursement for paying plaintiff's separate debts; (2) possession of the parties' federal income tax refund check for tax year 2001, on the grounds that the amount represented overpayment by defendant alone; (3) \$6,000 reimbursement for the value of plaintiff's diamond engagement ring; and (4) \$5,000 reimbursement for money plaintiff made by selling defendant's separate property. Although we find it unnecessary to engage in a detailed analysis of the agreement, we note that defendant's counterclaims are based on the plain language of the agreement.

Plaintiff's response to defendant's counterclaims consisted of an unverified Reply and an affidavit that does not address any of the specific counterclaims. Plaintiff did not produce any competent evidence denying the allegations of defendant's

counterclaims. Further, in her deposition, plaintiff admitted that (1) she had not sold the engagement ring; (2) defendant had paid some of her debts; (3) her federal income tax was withheld from her paycheck; and (4) she had sold furniture belonging to defendant. We conclude that plaintiff did not deny the allegations of defendant's counterclaims, and has failed to present any evidence raising a genuine issue of material fact about their validity.

Plaintiff argues on appeal that she could not defend against defendant's summary judgment motion without access to defendant's financial records, which were the subject of a protective order.

Of course, any party with insufficient access to necessary facts to meet a motion for summary judgment is protected by compliance with Rule 56(f) which provides [in relevant part]. . . [s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or . . . may make such other order as is just.

*Nasco Equipment Co. v. Mason*, 291 N.C. 145, 150, 229 S.E.2d 278, 282 (1976) (emphasis added) (internal quotation marks omitted). In the instant case, plaintiff did not offer an affidavit as required by Rule 56(f). Nor did she argue at the hearing that any particular information was needed to respond to defendant's summary judgment motion.

Moreover, lack of detailed records of defendant's financial situation did not prevent plaintiff from defending against the counterclaims because it was within plaintiff's personal knowledge whether or not she had: (1) sold the diamond engagement ring; (2)



written any checks for federal income tax; (3) incurred debt which was paid by defendant; or (4) sold defendant's furniture. We conclude that plaintiff failed to produce any evidence raising a genuine issue of material fact regarding defendant's motion for summary judgment on his counterclaims. This assignment of error is overruled.

Plaintiff also argues she did not waive the right to equitable distribution. However, the agreement included the following:

4. Separate Estates. . . . Each of the parties hereby agrees that, in the event of a separation or divorce, neither party shall have, nor assert, any interest with respect to any income or property, real or personal, tangible or intangible, of the other party, nor make any claim against the other party for or to an equitable distribution of marital property.

This assignment of error is overruled.

For the reasons discussed above, we conclude that trial court did not err by entering summary judgment for defendant, and that the court's order should be

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).