NO. COA05-1347

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

JEWEL THAXTON and
CURTIS THAXTON,
Plaintiffs,

v.

Alamance County
No. 04 CVS 1057

TERRY ANTHONY STEVENS,
Defendant.

Appeal by plaintiff from order entered 12 April 2005 by Judge Leon Stanback in Alamance County Superior Court. Heard in the Court of Appeals 12 April 2006.

Egerton & Associates, P.A., by Kurt B. Aktug, for plaintiff-appellant Curtis Thaxton.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendant-appellee.

GEER, Judge.

Plaintiff Curtis Thaxton appeals from an order granting summary judgment to defendant on the grounds that Mr. Thaxton had agreed to settle his claims. Defendant contends that Mr. Thaxton's attorney entered into a settlement in a telephone conversation with an insurance adjuster, while Mr. Thaxton argues that no settlement was reached and, in any event, his attorney had no authority to settle his claims without his consent. This dispute presents a novel scenario in that the two key witnesses — the attorney and the

adjuster — have no recollection of the conversations and instead are relying upon their regular business practices and their construction of computer logs entered two years earlier. While defendant's evidence suggests that a settlement was reached, Mr. Thaxton's evidence would permit a jury to find otherwise. Further, even if a settlement was reached, Mr. Thaxton has offered evidence that is sufficient, if believed, to rebut the presumption that his attorney was authorized to settle his claims without his consent. Under these circumstances, summary judgment is inappropriate and, accordingly, we reverse.

On 11 May 2004, plaintiffs Curtis and Jewel Thaxton sued defendant, alleging he had negligently caused a 31 December 2001 automobile collision. GMAC was defendant's insurance carrier. Defendant's answer included an affirmative defense asserting that "[o]n or about October 24, 2002, the plaintiffs by and through their attorney, settled their claims against the defendant, with the plaintiff Curtis Thaxton settling his claim for the amount of $8,500.00, and the plaintiff Jewel Thaxton settling her claim for $9,000.00. Said settlements are hereby pled in bar of plaintiffs' claims."

On 21 January 2005, Jewel Thaxton agreed to accept $9,000.00 from GMAC in settlement of her claims. As part of that settlement, Ms. Thaxton filed a voluntary dismissal of her claims with prejudice on 15 February 2005.

On 7 February 2005, Curtis Thaxton filed a motion for partial summary judgment as to defendant's affirmative defense of settlement. Defendant subsequently filed a motion for summary judgment as well, seeking dismissal of Mr. Thaxton's claims. On 12 April 2005, the trial court denied Mr. Thaxton's motion for partial summary judgment and granted defendant's motion for summary judgment. Mr. Thaxton has filed a timely appeal.

Discussion

This Court reviews orders granting summary judgment *de novo*. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Summary judgment is appropriate 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.R. Civ. P. 56(c).

In ruling on a motion for summary judgment, a trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, in deciding the motion, "'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.'" *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)).

"A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as

to any material fact and that he or she is entitled to judgment as a matter of law. 'A defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) *showing that the plaintiff cannot surmount an affirmative defense which would bar the claim*.'" *James v. Clark*, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (emphasis added) (quoting *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247, *disc. review denied in part*, 314 N.C. 548, 335 S.E.2d 27 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). Since settlement is an affirmative defense, defendant bore the burden of establishing that Mr. Thaxton could not defeat defendant's evidence that a settlement occurred. *See State Distrib. Corp. v. G.E. Bobbitt & Assocs., Inc.*, 62 N.C. App. 530, 532-33, 303 S.E.2d 349, 350-51 (1983) (noting defendant had burden of proving affirmative defense that settlement had been reached).

Mr. Thaxton claimed in his affidavit in support of his partial motion for summary judgment that he never accepted any settlement offer from GMAC. GMAC does not suggest otherwise, but rather contends that Lawrence Egerton, Jr., Mr. Thaxton's attorney, accepted an $8,500.00 settlement on behalf of Mr. Thaxton. It is undisputed that all the settlement negotiations were conducted through telephone conversations between Charles Hardin, an employee of GMAC, and Mr. Egerton. It is also undisputed that neither Mr.

Hardin nor Mr. Egerton has any independent recollection of those conversations. Both men rely solely on computer logs and their regular business practices.

Mr. Hardin stated in his deposition that no one ever specifically told him that Mr. Thaxton had agreed to the settlement and that he based his belief that the parties had a settlement on his understanding that an attorney has authority to act for his clients. Mr. Hardin stated in both his affidavit and deposition that, on 22 October 2002, he had a conversation with Mr. Egerton in which he made an initial offer to settle Ms. Thaxton's claim for $7,900.00, which was increased to $9,000.00 during the telephone conversation. With respect to Mr. Thaxton's claims, Mr. Hardin initially offered $6,400.00, but increased that figure to $7,500.00. Mr. Hardin's affidavit states: "At that time, Mr. Egerton stated to me that he would present those offers to his clients and call me back." His computer log for that date added only that Mr. Egerton indicated that he would recommend those offers to his clients.

According to Mr. Hardin, he next spoke with Mr. Egerton on 24 October 2002, and they "agreed to settle Jewel Thaxton's claim for $9,000.00 and Curtis Thaxton's claim for $8,500.00." He testified that he told Mr. Egerton he would send the checks and fax the releases. Mr. Hardin's log for that date stated: "Spoke With Clmt Atty And Reached Agreed Settlement At $9k On Jewell And $8500 On Curtis. Raised Offer On Curtis To $8250 Based On New Info. Atty Countered At $8750 And We Split Diff At $8500."

On the other hand, Mr. Egerton testified in his deposition that although he does not recall his conversations with Mr. Hardin, he does not believe he has authority to accept a settlement offer without first advising his client of the offer. He stated: "[N]o case in our office is resolved until the client comes in and accepts it and signs a release." According to his regular practice, he tells the adjuster that although he has no authority to settle the case, he will recommend the specified figure to his client and use his best efforts to persuade his client to accept the offer. Mr. Egerton claimed that he never tells an adjuster he has complete authority to settle for a particular amount. With respect to GMAC's forwarding of the checks and releases in this case, Mr. Egerton explained that it is his practice, when he receives an offer that he would recommend, to ask the adjuster to send the check and the release, and he will present them to his client because "99 times out of 100," his client will then, with the check sitting in front of him or her, accept the settlement.

Mr. Hardin acknowledged that "every couple of months" he is asked to proceed in that manner and send out a check and release even though the client had not agreed to the amount. He claimed, however, that it was his business practice to never agree to do so. According to Mr. Hardin, he asks the attorney whether they have reached a settlement; if the attorney says that they have not, then he tells the attorney to follow up with his or her client and call back to confirm. Although Mr. Hardin testified that this is the

way he always "does business," he could not remember specifically proceeding that way with Mr. Egerton.

The Egerton & Associates, P.A. computer logs dated 22 October 2002 stated as to Ms. Thaxton: "mr. egerton spoke to greg & he initially offered 7900.00, mr. egerton got him to increase his offer to 9k. mr. egerton said he would speak w/ the client & call him back." As for Mr. Thaxton, the 22 October 2002 log stated: "mr. egerton spoke to greg & he initially offered 6400.00, mr. egerton got him to increase his offer to 7500.00. mr. egerton said he would call the client & get back w/ him." For 24 October 2002, the logs state with respect to Ms. Thaxton: "mr. egerton spoke to greg & settled this case for $9k. the check & release is on the way. (client does not know at this time)[.]" With respect to Mr. Thaxton, a 24 October 2002 log stated: "greg called mr. egerton back after considering the additional meds & increased his offer to $8500.00. mr. egerton told him to go ahead & send the check & release. (client does not know at this time)[.]" The 24 October 2002 log for Mr. Thaxton — in contrast to that of Ms. Thaxton — thus contains no express mention of a settlement.

Subsequently, Mr. Thaxton did not sign the release or accept the check. On 19 November 2003, Mr. Hardin spoke again with Mr. Egerton. According to Mr. Hardin's deposition, "We were talking about the checks and releases either being accepted or sent back, and he advised me he was going to send the checks back, as no other claimant accepted the settlement, and he was going to forward additional info on Curtis as well for possible review." When GMAC

received the checks back, it "reopened reserves," a phrase that, according to Mr. Hardin, referred to "a certain amount of money set aside potentially for that claim settlement."

In sum, Mr. Hardin's logs and business practices suggested that he reached a settlement agreement with Mr. Egerton over the telephone on 24 October 2002. Mr. Egerton's logs — stating that a settlement had been reached as to Ms. Thaxton, but omitting similar language as to Mr. Thaxton — and his business practices could be viewed by a reasonable jury as indicating that Mr. Egerton did not agree to a settlement as to Mr. Thaxton on 24 October 2002. The subsequent communications between the two men are ambiguous, but could reasonably be construed as supporting Mr. Thaxton's position that Mr. Hardin did not consider any settlement to have been reached unless the release was signed — the position taken by Mr. Egerton.

We are confronted with a record in which the key witnesses have no independent recollection of the critical conversations and are basing their positions on after-the-fact interpretations of computer log notations regarding conversations occurring two years earlier. While a jury may well reach the conclusion urged by GMAC and Mr. Hardin, this presentation of evidence is not sufficient to justify a conclusion as a matter of law that Mr. Egerton in fact accepted, on behalf of Mr. Thaxton, a settlement of $8,500.00.

Consequently, the evidence before the trial court failed to satisfy defendant's burden of establishing a lack of any triable issues of fact as to the affirmative defense of settlement. *See*

Am. Ripener Co. v. Offerman, 147 N.C. App. 142, 145, 554 S.E.2d 407, 408 (2001) ("'The moving party must still succeed on the strength of its evidence, and when that evidence contains material contradictions or leaves questions of credibility unanswered, the movant has failed to satisfy its burden.'" (quoting *Perry v. Aycock*, 68 N.C. App. 705, 707, 315 S.E.2d 791, 793-94 (1984))), *disc. review denied sub nom. Am. Ripener Co. v. Tolson*, 355 N.C. 210, 559 S.E.2d 796 (2002). *See also Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 598, 79 S.E.2d 185, 192 (1953) ("[E]stoppel, even if pleaded, settlement, accord and satisfaction are affirmative defenses, *and ordinarily a nonsuit will not be allowed in favor of the party on whom rests the burden of proof*." (emphasis added)).

Even if we were to conclude that defendant had conclusively established that Mr. Egerton accepted Mr. Hardin's offer, the evidence gives rise to genuine issues of material fact regarding whether Mr. Egerton had authority to accept that offer without first obtaining Mr. Thaxton's consent. We recognize that the law presumes that attorneys, as agents of their clients, have authority to act for the clients they profess to represent. *See People's Bank of Burnsville v. Penland*, 206 N.C. 323, 324, 173 S.E. 345, 345 (1934) (per curiam) ("There is a presumption in favor of an attorney's authority to act for any client whom he professes to represent."); *Gillikin v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200 ("[T]here is a presumption that an attorney has authority to act for his client and one challenging the attorney's actions as

being unauthorized has the burden of rebutting the presumption."), *disc. review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990).

Our courts have held that "[s]pecial authorization from the client is required before an attorney may enter into an agreement discharging or terminating a cause of action on the client's behalf." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 655 (2000). Nevertheless, even "'[w]here special authorization is necessary . . . it [is also] presumed . . . that the attorney acted under and pursuant to such authorization.'" *Id.* (second alteration original) (quoting *Greenhill v. Crabtree*, 45 N.C. App. 49, 52, 262 S.E.2d 315, 317, *aff'd per curiam without precedential value*, 301 N.C. 520, 271 S.E.2d 908 (1980)). "One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court." *Id.* A trial court's conclusion as to the extent of an attorney's authority must be supported by some evidence in the record. *See Caudle v. Ray*, 50 N.C. App. 641, 645, 274 S.E.2d 880, 883 (1981) (vacating consent judgment signed by attorney because "[t]he presumption of authority [of an attorney to act for his client], standing alone, was not sufficient to sustain the order when countered by plenary evidence in rebuttal").

Here, the Thaxtons submitted two affidavits to the trial court, one by Mr. Thaxton and the other by Ms. Thaxton, each stating that they never explicitly authorized Mr. Egerton's firm to

settle their claims without their permission. In his deposition, Mr. Egerton stated:

> I never tell an adjuster I have spoken to my client and I have authority to accept X number of dollars and the deal is hereby done. *I never tell them that because I never have that authority*.

(Emphasis added.) Later, the following exchange occurred during Mr. Egerton's deposition:

> Q. [Defendant's Attorney] . . . [I]n general terms, do you ever think that you have authority to settle any case without your client's actual consent to do so?
>
> A. [Mr. Egerton] I do not.

Mr. Hardin acknowledged in his deposition that, during the 22 October 2002 telephone conversation, Mr. Egerton said that he would recommend the offers to his clients, and "[h]e didn't say anything about having authority."

This evidence tends to rebut the presumption that Mr. Egerton had the "special authorization" necessary to settle Mr. Thaxton's claims without his permission. *Harris*, 139 N.C. App. at 829, 534 S.E.2d at 655. Both the client and the attorney have denied the existence of the special authorization, and defendant has presented no evidence that Mr. Egerton represented otherwise to the adjuster. Indeed, the 22 October 2002 telephone conversation, in which Mr. Egerton told Mr. Hardin that he needed to call his clients about the settlement offers, also suggests a lack of special authority. Mr. Thaxton has, therefore, made a sufficient forecast of evidence that he will, at trial, be able to rebut the presumption that Mr. Egerton had the special authority required to act for Mr. Thaxton

in settling the case. *Compare Caudle*, 50 N.C. App. at 645, 274 S.E.2d at 883 (concluding plaintiffs rebutted presumption when their affidavits stated attorney lacked authority to settle, and record was "devoid of evidence" indicating attorney had requisite authority), *with Royal v. Hartle*, 145 N.C. App. 181, 183-84, 551 S.E.2d 168, 170-71 (applying presumption to conclude attorney had authority to settle defendants' case when attorney represented he had such authority and no admissible evidence was submitted to the contrary), *disc. review denied*, 354 N.C. 365, 555 S.E.2d 922 (2001).

Mr. Thaxton has presented evidence both that (1) no settlement was reached between Mr. Hardin and Mr. Egerton, and (2) if a settlement was reached, Mr. Egerton lacked the special authorization to enter into the settlement without Mr. Thaxton's consent. A jury must resolve the dispute in the evidence on both issues. The trial court, therefore, erred in granting defendant's motion for summary judgment.

Reversed.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).