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NO. COA05-143

NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2006

T-WOL ACQUISITION COMPANY,  
INC.,

Plaintiff,

v.

Durham County  
No. 03 CVS 01894

HOUSING AUTHORITY OF THE  
CITY OF DURHAM and FAIR  
CITY-PINES CORPORATION,  
Defendants.

Appeal by plaintiff from order entered 28 May 2003 by Judge Ripley E. Rand in Superior Court, Durham County, and appeal by plaintiff and defendant Housing Authority of the City of Durham from order and judgment entered 27 July 2004 by Judge A. Leon Stanback, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 28 November 2005.

*Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiff.*

*The Banks Law Firm, P.A., by John Roseboro, for Housing Authority of the City of Durham, defendant.*

McGEE, Judge.

T-WOL Acquisition Company, Inc. (plaintiff) filed a complaint on 1 April 2003 against the Housing Authority of the City of Durham (defendant) and Fair City-Pines Corporation (FCP), which is not a party to this appeal. FCP was administratively dissolved by the

North Carolina Secretary of State on 10 September 1993 and has not been reinstated. In its complaint, plaintiff sought, *inter alia*, a declaratory judgment concerning ownership of real property in Durham County (the real property) and damages from defendant for an alleged trespass upon the real property. Plaintiff alleged it was the owner of the real property by virtue of a deed from FCP to plaintiff dated 20 March 2001. Plaintiff also alleged that defendant trespassed upon the real property by constructing a sewer line upon the real property.

In its answer and counterclaim, defendant sought to quiet title to the real property and alleged unfair and deceptive trade practices by plaintiff. Defendant claimed title to the real property through a 12 April 1996 deed from FCP. Defendant filed a motion to dismiss plaintiff's claims for "lack of subject matter jurisdiction, lack of real party in interest, and failure to state claims."

In an order filed 28 May 2003, the trial court granted in part defendant's Rule 12(b)(6) motion to dismiss as to the declaratory judgment. The trial court determined as follows:

With respect to Plaintiff's request for a declaratory judgment as it pertains to the determination whether the 1996 and 2001 [FCP] deeds are valid, the Court finds and concludes that Plaintiff's allegations do state a legal claim upon which relief may be granted. In this regard, Defendant['s] . . . Motion to Dismiss this claim is DENIED. To the extent that Plaintiff seeks in its declaratory judgment to void the 1996 [FCP] deed, the Court finds and concludes that Plaintiff's allegations do not state a legal claim for declaratory relief. . . . In this regard, the Motion of Defendant . . . to dismiss this

claim is ALLOWED.

The trial court also granted defendant's Rule 12(b)(6) motion to dismiss as to plaintiff's trespass claim. Plaintiff filed a notice of appeal from the 28 May 2003 order on 26 June 2003. However, plaintiff subsequently moved to dismiss its appeal as interlocutory and this Court allowed plaintiff's motion on 29 January 2004.

Defendant moved for partial summary judgment on 1 June 2004. The trial court granted defendant's motion in an order and judgment entered 27 July 2004. The order and judgment: (1) quieted title to the real property in favor of defendant, (2) declared that the 20 March 2001 deed from FCP to plaintiff conveyed no title to the real property, (3) denied plaintiff's request to set aside the 12 April 1996 deed from FCP to defendant, (4) denied plaintiff's request to be declared the owner of the real property, and (5) denied plaintiff's requests for declarations of a lien on the real property. The trial court also dismissed defendant's claim for unfair and deceptive trade practices. Both plaintiff and defendant filed notices of appeal from the 27 July 2004 order and judgment.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Our Court views the evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiff argues the trial court erred by granting summary judgment for defendant. Specifically, plaintiff argues the trial

court improperly made a finding that FCP was "winding up" FCP's business affairs at the time of its 12 April 1996 deed to defendant, when there was a genuine issue as to this material fact. Plaintiff asserts that FCP was not "winding up" its business affairs at the time of the 12 April 1996 conveyance, and as a result, the conveyance from FCP to defendant was *ultra vires* and therefore void. The essence of plaintiff's argument is that because the 1996 deed from FCP to defendant was void, there was a material issue of fact as to whether the 23 March 2001 deed conveyed valid title to the real property to plaintiff. In fact, plaintiff concedes that "[i]f [FCP] was disposing of its property to 'wind up' its affairs, the conveyance between [FCP] and [defendant] was valid in all respects and summary judgment was properly granted for [defendant]."

However, in actions involving establishment of title to real property, a plaintiff asserting ownership "must rely upon the strength of his own title." *State v. Johnson*, 278 N.C. 126, 151, 179 S.E.2d 371, 387 (1971). In this case, plaintiff attempts to rely upon the alleged invalidity of defendant's deed to establish title to the real property in itself. We also note the trial court previously made the following determination, which plaintiff does not challenge: "To the extent that Plaintiff seeks in its declaratory judgment to void the 1996 [FCP] deed, the Court finds and concludes that Plaintiff's allegations do not state a legal claim for declaratory relief." Therefore, whether or not defendant was "winding up" its business affairs at the time of the 12 April

1996 deed from FCP to defendant was immaterial. As a matter of law, plaintiff cannot establish title to the real property by seeking to void the 1996 deed from FCP to defendant. Accordingly, defendant was entitled to judgment as a matter of law and the trial court did not err in entering summary judgment for defendant.

Plaintiff also argues the trial court erred in dismissing its trespass action by improperly relying upon *Central Carolina Developers, Inc. v. Moore Water & Sewer Auth.*, 148 N.C. App. 564, 559 S.E.2d 230 (2002). In *Central Carolina Developers, Inc.*, our Court held that a landowner has no common-law right to bring a trespass action against an entity possessing the power of eminent domain. *Id.* at 567-68, 559 S.E.2d at 232. Rather, the exclusive remedy for the landowner seeking compensation for a "taking" is an action for inverse condemnation. *Id.* at 567, 559 S.E.2d at 232.

A housing authority, such as defendant, has the power of eminent domain pursuant to N.C. Gen. Stat. § 157-11 (2005), which provides:

The [housing] authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this Article after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The [housing] authority may exercise the power of eminent domain pursuant to the provisions of Chapter 40A.

N.C. Gen. Stat. § 40A-3(c) (5) (2005) states:

For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated

purposes.

. . .

- (5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

N.C. Gen. Stat. § 157-28 (2005) directs that "the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina[.]"

Plaintiff argues that pursuant to N.C.G.S. § 157-28, a housing authority does not possess the right of eminent domain unless and until it is granted a certificate of public convenience, and that until the issuance of such a certificate, a housing authority is subject to a trespass action. Plaintiff's argument is inconsistent with the plain language of the enabling statutes quoted above which clearly vest a housing authority with the power of eminent domain. The requirement that a housing authority acquire a certificate of public convenience and necessity is merely a procedural prerequisite to the exercise of its eminent domain power, rather than an enabling provision. *See, In re Housing Authority*, 233 N.C. 649, 657-58, 65 S.E.2d 761, 767 (1951) (recognizing that a certificate of public convenience and necessity "does not give a local housing authority any right, title or interest in real estate, even though the property may be described in the petition for the certificate of public convenience and necessity."). Because plaintiff's exclusive remedy against defendant was an

action for inverse condemnation, the trial court did not err in dismissing plaintiff's trespass action.

Defendant moved to voluntarily dismiss its appeal and our Court allowed defendant's motion on 13 July 2005. Therefore, the trial court's 27 July 2004 order and judgment allowing plaintiff's motion for summary judgment on defendant's unfair and deceptive trade practices claim is not before us for review.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).