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NO. COA05-1543

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

HERBERT W. VIRGIN, as  
general guardian on behalf  
of JEAN ELDER ANLYAN,  
Plaintiff,

v.

Durham County  
No. 05 CVS 563

KAREN LEIGH VIRGIN, EDRYA  
RUTH, and DONALD RUTH,  
Defendants.

Appeal by plaintiff from an order entered 30 August 2005 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 16 August 2006.

*Moore & Van Allen PLLC, by Edward L. Embree and Catherine Crowell Pavur, for plaintiff-appellant.*

*Hedrick Murray & Cheek PLLC, by Josiah S. Murray, III, for defendant-appellee Karen Leigh Virgin.*

*Lewis, Anderson, Phillips, Greene & Hinkle, PLLC, by J. Dickson Phillips, III, for defendant-appellees Edrya Ruth and Donald Ruth.*

BRYANT, Judge.

Herbert W. Virgin (Dr. Virgin), acting as guardian of the estate of Jean Elder Anlyan (Ms. Anlyan), appeals from an order entered 30 August 2005, granting the motions to dismiss of both Karen Leigh Virgin (Ms. Virgin) and Edrya and Donald Ruth (the Ruths) pursuant to Rule 12(b)(1) of the North Carolina Rules of

Civil Procedure and additionally holding plaintiff's motion to amend his complaint as moot. After review of the record before this Court, the order of the trial court is affirmed in part and reversed in part.

*Facts*

Jean Elder Anlyan is over seventy years old, having been born on 21 September 1935; plaintiff Herbert Virgin and defendant Karen Virgin are her son and daughter. Until approximately August 2004, Ms. Anlyan lived in a house that she owned in Durham, North Carolina. Her only residence away from Durham was her vacation home in Beech Mountain, North Carolina, which she owned. Since 27 May 1998, Ms. Anlyan also owned a house and lot located at 3638 St. Gauden's Road, Miami, Florida (the Florida Property). Ms. Virgin has resided with her mother for extended periods in her life, including the spring and summer of 2004. Ms. Virgin has also lived on the Florida Property at various times since its purchase. Ms. Anlyan furnished substantial funds to Ms. Virgin to remodel the Florida Property, and has refinanced the mortgage on the property four times between 1998 and 2003 in order to obtain additional remodeling funds.

In 2002, Ms. Anlyan was diagnosed as suffering from a mild form of dementia resulting in cognitive impairment which was progressive and irreversible. Dr. Virgin initiated an incompetency proceeding involving Ms. Anlyan in Durham County on 12 July 2004, and a guardian ad litem was appointed to represent her interests. An initial hearing on Ms. Anlyan's incompetency was held on 26

August 2004 before the Durham County Clerk of Court, at which Ms. Virgin, and the Ruths were present.

On 31 August 2004, the Durham County Clerk of Court entered an order finding that Ms. Anlyan was likely incompetent and in need of guardianship. The Clerk appointed Dr. Virgin and Ms. Anlyan's brother as interim guardians of her person and appointed Dr. Virgin as interim guardian of her estate. Dr. Virgin had previously been appointed Ms. Anlyan's attorney in fact in a power of attorney dated 24 June 1998, and recorded with the Durham County Register of Deeds on 7 July 1998.

The final incompetency hearing was held on 12 January 2005. Ms. Virgin appeared at that hearing and testified. Following the close of the evidence, the Clerk stated his finding that Ms. Anlyan had been incompetent as of 12 July 2004 and at all times since then, and subsequently entered an order containing these terms.

Immediately following the 12 January 2005 hearing, Dr. Virgin learned for the first time of a deed that Ms. Anlyan had signed on 25 August 2004 (the Deed). The Deed transferred an interest in the Florida Property to Ms. Virgin "for and in consideration of the sum of TEN DOLLARS and other good and valuable considerations [sic] to the grantor . . . ." The Deed was prepared by Ms. Ruth, witnessed by the Ruths and signed by Ms. Anlyan before a Durham County notary. The Deed was subsequently recorded in Miami-Dade County, Florida on 30 September 2004. When Ms. Virgin took Ms. Anlyan to have the Deed notarized, Ms. Virgin told the notary that they

needed the deed signed urgently because Ms. Anlyan was scheduled to enter the hospital the next day for possible surgery.

*Procedural History*

Plaintiff filed his Complaint in this action on 3 February 2005, seeking the following relief: (1) an order to set aside the challenged deed; (2) damages equal to the value of the transferred property; (3) damages for fraud; (4) reimbursement for expenses and attorney fees; (5) interest on the value of the transferred property; (6) a restraining order preventing contact between defendants and Ms. Anlyan and preventing defendants from interfering with the actions of Ms. Anlyan's general guardian; (7) an accounting for the use of the funds entrusted to defendant-Virgin; (8) damages for unfair and deceptive trade practices; and (9) a temporary restraining order and preliminary injunction limiting further unsupervised contact between defendants and Ms. Anlyan. On 19 April 2005, defendant-Virgin filed an Answer incorporating motions to dismiss pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 19 April 2005, the Ruths filed a Motion to Dismiss pursuant to Rules 9(b), 12(b)(1), 12(b)(2), 12(b)(6), and for failure to allege justiciable claims. On 3 August 2005, plaintiff filed a motion to amend his complaint to modify the claims raised in the original complaint, to add additional claims based on the same conduct, and to modify the relief sought.

Defendants' motions to dismiss and plaintiff's motion to amend his complaint were heard on 11 August 2005, in Durham County

Superior Court before the Honorable Henry W. Hight, Jr. The trial court subsequently entered an order on 30 August 2005, granting defendants' motions to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and holding plaintiff's motion to amend his complaint as moot. Plaintiff appeals.

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Plaintiff raises the issues of whether the trial court erred in: (I) granting defendants' motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1); (II) granting defendants' motions to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2); (III) granting defendants' motions pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted; (IV) granting the Ruths' motion to dismiss pursuant to Rule 9(b) for failure to allege fraud with particularity; (V) granting the Ruths' motion to dismiss for failure to allege justiciable claims; and (VI) denying plaintiff's motion to amend complaint pursuant to Rule 15. For the reasons below, we affirm in part and reverse and remand in part the order of the trial court.

I

Plaintiff first argues the trial court erred in granting defendants' motions to dismiss for lack of subject matter jurisdiction. "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666,

667, 353 S.E.2d 673, 675 (1987) (citation omitted). Unless our Legislature has specifically placed jurisdiction elsewhere, subject matter jurisdiction over civil actions generally rests in the trial courts of this state. N.C. Const. art. IV, § 12(3) ("Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."); N.C. Gen. Stat. § 7A-240 (2005) ("[O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division . . . ."). "The appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction, but the trial court's findings of fact are binding on appeal if supported by competent evidence." *Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513-14 (2000) (citation omitted). We review whether the trial court has subject matter jurisdiction to hear each of plaintiff's claims in turn below.

#### Setting Aside the Deed Due to Undue Influence

Plaintiff first claims Ms. Anlyan is entitled to an order to set aside the challenged deed granting Ms. Virgin a one-half interest in the Florida Property as tenants in common with Ms. Anlyan. Our Supreme Court has held that where the jurisdiction acquired over the parties is only *in personam*, the judgment of a trial court cannot have any extraterritorial force *in rem*. *McRary v. McRary*, 228 N.C. 714, 718, 47 S.E.2d 27, 30 (1948). See also *Noble v. Pittman*, 241 N.C. 601, 605, 86 S.E.2d 89, 91 (1955)

(holding a Michigan trial court "was without power to enter any decree affecting title to land in North Carolina and to the extent the decree attempted to do so, it is void"); *Green v. Wilson*, 163 N.C. App. 186, 189, 592 S.E.2d 579, 581, (holding North Carolina courts alone have *in rem* jurisdiction to determine title disputes over property situated within North Carolina) *disc. review improvidently allowed*, 359 N.C. 186, 606 S.E.2d 117 (2004). Here, plaintiff is asking the trial court to enter an order affecting title to real property located in Florida, which the trial court is without power to do. Thus the trial court properly found it did not have subject matter jurisdiction over this claim.

Monetary Damages Arising from the Challenged Transfer

Plaintiff next argues that, due to the invalidity of the disputed deed, Ms. Anlyan is entitled to: damages equal to the value of the transferred property; damages for fraud; reimbursement for expenses and attorney fees; and interest on the value of the transferred property. Each of these civil claims does not operate directly on the property or affect its title, but are for monetary damages allegedly arising out of the actions of defendants. Our Supreme Court has held that "[t]he superior courts have 'general jurisdiction of all justiciable matters of a civil nature' whose jurisdiction is not specifically placed elsewhere." *Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994) (quoting N.C. Gen. Stat. § 7A-240 (1989)). Thus the trial court erred in finding it lacked subject matter jurisdiction over plaintiff's claims for monetary damages arising out of the allegedly invalid deed.

Restraining Orders

Plaintiff also claims the trial court should enter a restraining order preventing contact between defendants and Ms. Anlyan and preventing defendants from interfering with the actions of Ms. Anlyan's general guardian, and a temporary restraining order and preliminary injunction limiting further unsupervised contact between defendants and Ms. Anlyan. Defendants argue the terms and provisions of N.C. Gen. Stat. § 1-301.2(g)(1) and N.C. Gen. Stat. § 35A-1207(a) vest the exclusive jurisdiction to hear these claims in the Office of Durham County Clerk of Superior Court. However, "[a]ll judges of the superior court . . . have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings pending in their respective divisions." N.C. Gen. Stat. § 1-493 (2005). Here, plaintiff has a pending civil action seeking, *inter alia*, damages resulting from contact between defendants and Ms. Anlyan. Thus the trial court erred in finding it lacked subject matter jurisdiction over plaintiff's requests for injunctions and restraining orders against defendants.

Accounting of Funds

Plaintiff next claims the trial court should order an accounting for the use of the funds entrusted to Ms. Virgin for the remodeling of the Florida Property and award damages for any loss of those funds. This Court has previously held that the Superior Courts of this state have subject matter jurisdiction over civil actions in the nature of an account. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165-66 (1978). Thus the trial

court erred in finding it lacked subject matter jurisdiction over plaintiff's claim for an accounting of funds given to Ms. Virgin purportedly for the remodeling of the Florida Property.

Unfair and Deceptive Trade Practices

Plaintiff lastly claims the trial court should award Ms. Anlyan damages for defendants' unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. Article I of Chapter 75 of the North Carolina General Statutes provides that it is unlawful to engage in unfair or deceptive acts or practices in or affecting commerce and grants a person injured by such acts or practices a right of action. N.C. Gen. Stat. §§ 75-1.1, 16 (2005). As this statute focuses on the acts of the parties involved and provides money damages for any injuries sustained, this claim is within the subject matter jurisdiction of the trial court. Thus the trial court erred in finding it lacked subject matter jurisdiction over plaintiff's claim for damages resulting from defendants' unfair and deceptive trade practices.

Conclusion - Issue I

The trial court did not err in concluding it could not exercise subject matter jurisdiction over plaintiff's claim that Ms. Anlyan is entitled to an order to set aside the challenged deed. However, as the remainder of plaintiff's claims do not require the trial court to enter a decree affecting title to the Florida Property, they cannot be dismissed on the same grounds. As discussed above, the trial court does have subject matter

jurisdiction over plaintiff's remaining claims and it erred in dismissing plaintiff's entire civil action.

II - V

Plaintiff also raises the issues of whether the trial court erred in: granting defendants' motions to dismiss for lack of personal jurisdiction over defendants pursuant to Rule 12(b)(2); granting defendants' motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6); granting defendant Edrya and Donald Ruths' motion to dismiss pursuant to Rule 9(b); and for failure to allege justiciable claims. However, the Order and Judgment of the trial court did not grant defendants' motions to dismiss on any of these grounds, but rather only pursuant to Rule 12(b)(1) after finding it lacked subject matter jurisdiction over plaintiff's claims.

In order to preserve a question for appellate review, the complaining party must obtain a ruling upon the "request, objection or motion" at issue. N.C. R. App. P. 10(b)(1). As plaintiff has not obtained a ruling from the trial court on defendants' motions to dismiss pursuant to Rule 9(b), 12(b)(2), 12(b)(6), or for a failure to allege justiciable claims, these arguments are not properly before this Court. *Childs v. Johnson*, 155 N.C. App. 381, 390, 573 S.E.2d 662, 668 (2002) ("If a party desires for this Court to review a decision by a trial court, it is the responsibility of that party to obtain a ruling from the trial court for this court to review."); see also *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, \_\_ N.C. App. \_\_, \_\_, 624 S.E.2d 380, 386-87 (2006) (where

this Court refused to address the merits of the plaintiffs' substitution motion because the trial court entered no ruling on that motion). These assignments of error are overruled.

VI

Plaintiff lastly argues the trial court erred in holding plaintiff's motion to amend his complaint as moot once it granted defendant's motions to dismiss. We have held it was error for the trial court to dismiss plaintiff's entire civil action pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, see *Issue I, supra*. Thus it was error for the trial court to hold plaintiff's motion to amend his complaint as moot based on the trial court's finding it lacked subject matter jurisdiction over all of plaintiff's claims. Upon remand for the trial court's reconsideration of plaintiff's remaining claims, the trial court shall also rehear plaintiff's motion to amend his complaint.

Affirmed in part, reversed and remanded in part.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).