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NO. COA05-1555

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

PATRICIA B. LOCKE,
Plaintiff,

v.

Randolph County
No. 04 CVS 1483

EDWARD NORRIS GLENN,
Defendant.

Appeal by defendant from judgment and order entered 15 July 2005 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 8 June 2006.

Gavin Cox Pugh and Wilhoit, LLP, by Alan V. Pugh, for plaintiff appellee.

Bunch Robins & Stubblefield, LLP, by W. Edward Bunch, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment and order entered in equity imposing a constructive trust and ordering defendant to convey a one-half undivided interest in certain property owned by defendant located in North Carolina. We affirm.

FACTS

Plaintiff, Patricia Locke ("Ms. Locke") filed suit against defendant, Edward Glenn ("Mr. Glenn") on 22 July 2004, alleging an oral promise to repay money borrowed for the benefit of Mr. Glenn, failure to repay, and resulting unjust enrichment. Ms. Locke

further prayed the court to impose a constructive trust on the property acquired by Mr. Glenn with the money borrowed and a lien to be declared on such property. Mr. Glenn thereafter filed an answer denying the existence of an oral promise to pay money used for his benefit and further stating that the complaint filed by Ms. Locke failed to state a claim upon which relief could be granted. The trial court entered an order denying Mr. Glenn's motion to dismiss on 2 May 2005.

Mr. Glenn then filed a motion for partial summary judgment on the ground that there was no material issue of fact relating to jurisdiction which was subsequently denied by the trial court. The case proceeded to trial on 13 June 2005 before Judge V. Bradford Long. Ms. Locke presented the following evidence at trial:

In 1991 Mr. Glenn and Rose Glenn, his wife at the time, acquired a 10.58-acre tract of property in Randolph County, North Carolina which was held jointly by the married couple. Mr. Glenn and Rose Glenn were separated and eventually entered into a consent order agreeing to a division of property as part of equitable distribution. The consent order provided that the deed to the 10.58-acre tract of land was to be signed over to Mr. Glenn in exchange for certain payments.

During the course of the separation, Ms. Locke and Mr. Glenn began living together sometime around September or October of 1998 in New Jersey. In 2002, the payments required of Mr. Glenn became due under the consent order, but he did not have the money to pay off all the debts owed. Ms. Locke and Mr. Glenn thereafter entered

into an oral agreement that Ms. Locke would obtain a loan for \$50,000.00 which would enable Mr. Glenn to pay the money due under the consent order and in turn, Mr. Glenn promised to repay the money as it came due. Several checks were drawn on the line of credit to pay the amount due under the consent order and the remaining \$15,363.00 was deposited into an account which was used by Mr. Glenn to make improvements to the 10.58-acre tract of property in North Carolina and the structure thereon. After payment to Mr. Glenn's former wife was made, the deed to the 10.58-acre property was signed over to Mr. Glenn, making him the sole owner of the property. Mr. Glenn made all of the payments as they came due on the equity line until April 2004, when he ceased all payments. At the close of Ms. Locke's evidence, Mr. Glenn made a motion to dismiss which was denied by the trial court.

Mr. Glenn contended at trial that Ms. Locke continued to have possession of his tools and further that he was owed \$150,000.00 for improvements he made to her house. However, Mr. Glenn did not file a counterclaim or assert accord and satisfaction in his pleadings. At the close of all the evidence, Mr. Glenn renewed his motion to dismiss which was denied by the trial court.

The trial judge entered a judgment and order in equity on 15 June 2005 finding that there was an oral agreement between the parties to repay the \$50,000.00 loan which was disbursed for the use and benefit of Mr. Glenn. The judge further found that the entire \$50,000.00 loan was used by Mr. Glenn to pay marital debts required under the consent order, to obtain title to the 10.58-acre

tract of land by acquiring his former wife's 1/2 interest in the property, to make improvements to the property, and to acquire fixtures and personalty located on the land. The court found that Mr. Glenn failed to repay the money as promised and that there was no evidence of any agreement that either party expected payment, credit, or remuneration for the improvements made to Ms. Locke's home by Mr. Glenn. The judge then concluded that Mr. Glenn had been unjustly enriched, and therefore Ms. Locke was entitled to the imposition of a constructive trust through the transfer of title as to a 1/2 undivided interest in the 10.58-acre property which was acquired pursuant to funds she provided to Mr. Glenn.

Defendant now appeals.

ANALYSIS

I

Mr. Glenn first contends on appeal that the suit was barred by the statute of frauds and that the trial court further lacked jurisdiction over him as a defendant. We find no merit to these contentions.

Mr. Glenn argues on appeal that the action should have been dismissed based on the defenses of failure to comply with the statute of frauds and lack of personal jurisdiction. However, neither defense was pled in defendant's initial pleading to the trial court. Where a litigant fails to plead the affirmative defense of statute of frauds as required by N.C. Gen. Stat. § 1A-1, Rule 8(c), the benefit of the defense is thereby waived and the litigant is further precluded from asserting such defense on

appeal. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005); *Danjee, Inc. v. Addressograph Multigraph Corp.*, 44 N.C. App. 626, 632, 262 S.E.2d 665, 669, *cert. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

Likewise, to preserve the defenses of insufficiency of service, service of process, and lack of personal jurisdiction, the defendant must assert them in either a motion filed prior to any responsive pleading or include them in his answer or other responsive pleading permitted by the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(h) (1) (2005). Where defendant failed to plead the statute of frauds as an affirmative defense and further failed to raise the defense of lack of personal jurisdiction in his answer as his first responsive pleading to the court, it is thereby waived. Therefore, the corresponding assignments of error are overruled.

II

It appears from the arguments set forth in the brief that Mr. Glenn further contends that the trial court lacked subject matter jurisdiction in the instant action. We find no merit in the contention that the court lacked subject matter jurisdiction.

Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute. Article I, § 18 of the North Carolina Constitution states: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Subject matter jurisdiction is statutorily conferred on the

trial divisions of the General Court of Justice in this state under N.C. Gen. Stat. § 7A-240 which states:

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original 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 as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (2005). It is, therefore, evident that except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over "all justiciable matters of a civil nature[.]" *Id.* The dispute arising in equity between the parties in this case is a justiciable matter which is cognizable in our courts, and therefore the court properly determined that it had subject matter jurisdiction.

Moreover, were this assignment of error to be construed as yet another attempt to assert the defense of lack of personal jurisdiction, as stated, *supra*, where Mr. Glenn failed to raise this defense in his first responsive pleading or a motion prior to the first responsive pleading, this defense is deemed waived. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1).

Therefore, this assignment of error is overruled.

III

It is further contended on appeal that the trial court erred in denying Mr. Glenn's motions to dismiss raised at trial. We disagree.

The gravamen of Mr. Glenn's argument on appeal is that Ms. Locke's claims for the imposition of a constructive trust should have been dismissed where she failed to show any fraud or breach of duty. However, a showing of actual fraud nor a distinct breach of duty is required; rather, a constructive trust may be imposed when equity requires due to actions contrary to conscientious manner. See *Electric Co. v. Construction Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 860 (1966); see also *Speight v. Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936) (Equity impresses a constructive trust where legal title is obtained by violation of fiduciary relationship or "in any other unconscientious manner[.]").

A constructive trust is an equitable remedy "to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (citation omitted). Where the retention of property by the holder of the legal title would result in unjust enrichment, such inequitable conduct, short of actual fraud, will give rise to a constructive trust. *Id.* Where certain facts exist evincing that one has obtained legal title to property against equity and good

conscience, the imposition of a constructive trust is wholly appropriate, and actual fraud need not be established. *Id.*

The facts adduced at trial clearly showed that Ms. Locke obtained a loan for \$50,000.00, which was disbursed for the sole use and benefit of Mr. Glenn; that Mr. Glenn used such money to pay off marital debts, acquire title to the 10.58-acre tract of property from his former wife, and purchase fixtures and personalty for the 10.58-acre property. It was further adduced that there was a distinct agreement between the two parties that Ms. Locke would help Mr. Glenn by obtaining the financing but that he was expected and agreed to repay the money borrowed; that Mr. Glenn paid each installment of the money owed until ceasing all payments in April 2004, and that Ms. Locke was now required to make the payments on the loan for money used for the sole benefit of Mr. Glenn.

Where the facts taken in the light most favorable to Ms. Locke constituted substantial evidence that Mr. Glenn obtained title to the 10.58-acre tract of property, contrary to good conscience and equity, and that retention of such full title would result in inequity, the trial court properly denied the motion to dismiss. Therefore, this assignment of error is overruled.

IV

Lastly, Mr. Glenn objects to the trial court's finding of fact # 5 that he made substantial improvements to Ms. Locke's house but failing to give him any credit or set-off for these improvements in the judgment. We find no merit to this contention.

Because the challenged finding is supported by competent evidence in the record, it must be affirmed. *Shamley v. Shamley*, 117 N.C. App. 175, 180, 455 S.E.2d 435, 438 (1994) ("The trial court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there may be evidence to the contrary."). "The trial judge weighs the evidence, passes upon the credibility of witnesses and the weight to be given their testimony, and draws the reasonable inferences therefrom." *Lyerly v. Malpass*, 82 N.C. App. 224, 225-26, 346 S.E.2d 254, 256 (1986), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 748 (1987). "If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). The trial court sometimes makes findings of fact which resolve conflicts in the evidence; these findings are binding on appellate courts. *Id.*

Mr. Glenn specifically contends that the trial court erred in failing to give him any credit in the judgment for improvements made to Ms. Locke's home. However, there was no evidence adduced at trial showing that there was ever any agreement between Mr. Glenn and Ms. Locke that either party expected payment, credit, or remuneration for the improvements made to Ms. Locke's home by Mr. Glenn. Therefore, this assignment of error is overruled.

Accordingly, the trial court did not err in denying Mr. Glenn's motion to dismiss and properly made findings of fact based on the evidence presented at trial. Further, the record on appeal

contains additional assignments of error which are not properly addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned. Moreover, to the extent that Mr. Glenn attempts to appeal the denial of the pretrial motion to dismiss and denial of the motion for partial summary judgment, where he failed to give any notice of appeal from the denial of such orders pursuant to N.C.R. App. P. 3, any appeal therefrom is improper.

Affirmed.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).