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NO. COA05-550

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

CONCORD ENGINEERING &
SURVEYING, INC.,
Plaintiff,

v.

Cabarrus County
No. 04 CVD 976

WILLIAM D. FREEMAN,
Defendant.

Appeal by defendant from judgment entered 27 January 2005 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 1 December 2005.

Black, Rogers, Ruth, Grossman & Hastings, P.L.L.C., by William F. Rogers, Jr., for plaintiff-appellee.

Ferguson, Scarbrough & Hayes, P.A., by James E. Scarbrough, for defendant-appellant.

LEVINSON, Judge.

William Freeman (defendant) appeals from a judgment finding him liable for payment to plaintiff for certain work performed by plaintiff and for associated interest and attorneys' fees. We affirm.

The relevant evidence is largely undisputed, and is summarized as follows: Concord Engineering & Surveying, Inc. (plaintiff) is an engineering and surveying company. Defendant is a commercial

developer who does business in Cabarrus County. In 2000 defendant was developing a fourteen acre tract comprised of nine lots, which was known as the "Kings Grant" property. Defendant hired KC & Associates, which employed defendant's brother-in-law, Bill Herndon, to serve as a contractor for the property. On 22 June 2000 plaintiff and defendant executed a contract for plaintiff to perform certain work on the property, including surveying, and staking out the location of roads, sewers, and other features of Kings Grant. The contract also provided for plaintiff to be paid for additional work not specified in the original contract. Defendant instructed plaintiff's employees that they would receive directions from Herndon, and to do as Herndon instructed them. All of plaintiff's work at King's Grant was assigned by Herndon; plaintiff submitted invoices for over \$60,000 for work completed as ordered by Herndon, which defendant paid without protest.

In December 2001 defendant sold one of the Kings Grant lots to the Goodyear Tire Company ("the Goodyear property"). As a result, defendant had no remaining financial interest in the Goodyear property. Goodyear's general contractor subcontracted some of the work to KC & Associates, Herndon's employer. Thus, during part of the time Herndon worked for defendant, he was also working for the Goodyear contractor. Herndon directed plaintiff to perform certain work on the Goodyear property, for which plaintiff later billed defendant approximately \$6700. Defendant refused to pay, on the grounds that plaintiff had been hired by Goodyear's contractor to do the work, rather than by defendant. The parties were unable to

reach an agreement about plaintiff's work on the Goodyear property, and on 31 March 2004 plaintiff filed suit against defendant, seeking payment for the work performed on the Goodyear property.

The case was heard as a bench trial on 15 December 2004. Plaintiff's vice president, Marion Sandlin, testified for plaintiff regarding the June 2000 contract between plaintiff and defendant. Defendant told Sandlin that Herndon would provide specific instructions, and throughout the time that plaintiff worked on the Kings Grant property, all directions came from Herndon. Sandlin assumed that Herndon's directions regarding the Goodyear site were given on behalf of defendant, especially as his instructions for work on the Goodyear property were issued during the same time period that plaintiff was performing other work at Kings Grant pursuant to the contract with defendant. Defendant never modified his original directive that Herndon would give plaintiff directions, or told Sandlin that Herndon's authority to give orders did not include work on the part of Kings Grant that had been sold to Goodyear.

Defendant testified that he hired plaintiff to do engineering work at Kings Grant, and contracted with KC & Associates for work on the property's roads and sewers. He acknowledged that the contract executed with plaintiff referenced the entire fourteen acre site, consisting of nine lots; that one of these lots was the one sold to Goodyear; and that he told plaintiff to take directions from Herndon. Defendant knew that after construction began at the

Goodyear site, KC & Associates were working both for him and for the Goodyear contractor at the same time.

Following the presentation of evidence, the trial court entered judgment in favor of plaintiff. The trial court's order found, in pertinent part, that:

1. The Plaintiff is [a] professional land surveying company[.] . . . Marion Sandlin is the vice president of the company[,] . . . and enters into contracts on its behalf. . . .
2. William Freeman . . . develop[ed] . . . fourteen (14) acres into nine (9) commercial lots . . . at King's Grant[.] . . . One . . . lot[] became known as the Goodyear site.
3. [The parties] entered into a written contract on June 22, 2000 whereby the Plaintiff would perform [surveying and engineering] services for the Defendant at Kings Grant . . . [and also] additional services . . . not specified by the contract[,] . . . to be performed at hourly rates set out in the contract.

. . . .
5. . . . Defendant gave permission for the Plaintiff to perform services at the direction of Mr. Herndon[,and] . . . told Mr. Sandlin that Mr. Herndon was his subcontractor. . . . Herndon was the sole contact person for the Defendant at the King's Grant site.
6. As per the contract, invoices were submitted for work performed by the Plaintiff at the King's Grant including the Goodyear site at the direction of Mr. Herndon through 2001. The invoices totaled approximately \$60,000 and the Defendant paid that amount.
7. However, services totaling [\$6737.50] were performed by the Plaintiff at King's Grant, [at] the Goodyear site at the direction of Mr. Herndon and the Defendant failed to pay. . . .
8. At no time prior to April 2002, while the services were being performed . . . did the

Defendant tell Mr. Sandlin that Mr. Herndon was no longer his subcontractor.

9. At no time while the services were being performed did the Defendant or Mr. Herndon tell the Plaintiff that the Defendant had sold the Goodyear site . . . on December 18, 2001.
10. The Defendant was aware that . . . Mr. Herndon was performing work for [Goodyear's general contractor[.] . . . [Defendant] had a construction trailer [on site] . . . and saw work being done at the Goodyear site.

Based on these and other findings of fact, the trial court concluded in pertinent part that "[t]he Plaintiff performed certain services under said contract for which the Defendant failed to pay." The trial court ordered defendant to pay Plaintiff for the disputed work, as well as interest and attorneys' fees. Defendant now appeals.

Standard of Review

"Since this appeal involves a bench trial, findings of fact made by the trial court have the 'force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them[.]' Appellate review of the trial court's conclusions of law is *de novo*." *Sunbelt Rentals v. Head & Engquist Equip.*, __ N.C. App. __, __, 620 S.E.2d 222, 226 (2005) (quoting *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979)). "Further, under N.C.R. App. P. 10(a), this Court's review is limited to those findings of fact properly assigned as error." *Beneficial Mortgage Co. v. Peterson*, 163 N.C. App. 73, 76, 592 S.E.2d 724, 726 (2004). Accordingly, "findings of fact to which [appellant] has not assigned error and argued in his brief are

conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002).

I.

Defendant argues first that the trial court's conclusions of law are not supported by its findings of fact, on the grounds that "the court did not find that defendant hired plaintiff to do the work on the Goodyear parking lot but, instead, found that a subcontractor, Mr. Herndon, hired plaintiff to do the work for a general contractor named Dooley and Mack Constructors, Inc." We disagree.

First, the undisputed evidence was that Herndon directed plaintiff's job assignments, but was not the one who contracted with or hired plaintiff. Accordingly, the trial court did not find that Herndon "hired plaintiff to do the work" on the Goodyear property, but that the work was performed "at the direction of Mr. Herndon[.]" Defendant does not challenge the evidentiary support for this finding, which is therefore conclusively established on appeal.

Secondly, on the facts of this case, it was not necessary for the trial court to find that defendant hired plaintiff to perform the disputed work. Plaintiff's theory of recovery was not that defendant had hired it to do the Goodyear site work, but that Herndon had the apparent authority to assign the work. Recovery under this theory does not require a finding that defendant hired plaintiff to perform the disputed work.

Defendant also argues that the trial court failed to find specifically that Herndon had apparent authority to assign work on the Goodyear site. However, defendant did not assign error to the trial court's failure to find that Herndon had the apparent authority to assign plaintiff work on the Goodyear site. Nor did defendant challenge the evidentiary support for Herndon's apparent authority. Under N.C.R. App. P. 10(a), "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." Thus, defendant failed to preserve the issue for appellate review.

Moreover, as discussed above, evidence was presented that (1) defendant hired plaintiff to perform work on a fourteen acre tract that included a lot that was later sold to Goodyear; (2) defendant told plaintiff to take directions from Herndon, and for over a year defendant paid plaintiff for work completed at the direction of Herndon; (3) after the Goodyear lot was sold, Herndon worked for both defendant and the Goodyear contractor at the same time; (4) Herndon directed plaintiff to perform work at the Goodyear site, although defendant was not the contractor for that site; (5) the Goodyear work was assigned during the same time period as plaintiff's work on the balance of the fourteen acres; and (6) plaintiff was never informed that Herndon's authority to assign work no longer included the Goodyear lot.

We conclude that the evidence was sufficient to establish Herndon's apparent authority to direct plaintiff to perform the disputed work. Defendant argues that, as a matter of law,

plaintiff had the ongoing duty to reconfirm the scope of Herndon's authority. However, defendant cites no authority for this proposition, and we find none. Indeed:

"as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority."

Warehouse Co. v. Bank, 216 N.C. 246, 253, 4 S.E.2d 863, 868 (1939) (quoting *R. R. v. Smitherman*, 178 N.C. 595, 598-99, 101 S.E. 208, 210 (1919)). This assignment of error is overruled.

We have considered defendant's remaining assignments of error, and conclude they are without merit.

Affirmed.

Judges HUDSON and JACKSON concur.

Report Per Rule 30(e).