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NO. COA06-1702

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2007

MARION WATERS, JR. and wife,
TAMELA S. WATERS,
Plaintiffs,

v.

Alamance County
No. 05 CVS 1091

CHARLES WILSON and wife,
DIANA WILSON; CARPENTIER'S
EXTERMINATING SERVICE, and
THE ESTATE OF GEORGE
CARPENTIER,
Defendants.

Court of Appeals

Appeal by Plaintiffs from judgment and order entered 11 August
2006 by Judge J. L. Allen, Jr., in Alamance County Superior Court.
Heard in the Court of Appeals 10 September 2007.

Slip Opinion

*Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr.,
Emma C. Merritt and Rebecca A. Niburg, for Plaintiffs-
Appellants.*

*Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by
Mark A. Jones and Benjamin D. Overby, for Defendant-Appellees.*

ARROWOOD, Judge.

Plaintiffs, Marion and Tamela Waters, appeal from the entry of partial summary judgment for Defendants, and from the trial court's order striking an affidavit from the record. We reverse.

The record establishes, in relevant part, the following: Charles Wilson (Defendant) and his wife Diana Wilson are residents of Alamance County, North Carolina. Defendant previously was a

general contractor, and in the 1990's he designed and built a house located at 104 Westminster Court, Mebane, North Carolina (the house), where the couple lived until the house was sold. On 8 April 2004 Plaintiffs Marion and Tamela Waters signed an Offer to Purchase and Contract (Offer to Purchase), agreeing to buy the house from Defendant. The Offer to Purchase stated, *inter alia*, that Plaintiffs had received a copy of the N.C. Residential Property Disclosure Statement (Disclosure Statement), signed by Defendant and his wife. In the Disclosure Statement, signed in December 2002, Defendant checked "No" in response to the question "Do you know of any problem (malfunction or defect)" with respect to "water seepage, leakage, dampness or standing water in the basement, crawl space, or slab?"

Plaintiff Marion Waters relied on his "background in construction" to conduct a general inspection of the house himself, rather than hiring a home inspector. However, Waters had "medical conditions" that prevented him from performing a thorough inspection beneath the house. During his limited inspection of the crawl space, Waters saw no evidence of water damage.

In April 2004, Plaintiffs hired Carpentier's Exterminating Service to perform an inspection for the presence of wood-destroying insects, such as termites, and on 22 April 2004 Gerald Carpentier (Carpentier) signed a North Carolina Wood-Destroying Insect Information Report stating that he had found evidence of termites under the house and consequently had treated a 30 foot

section of wall in the crawl space. The report did not indicate any problem with excessive moisture under the house.

The parties closed on the sale of the house in early May 2004. In June 2004, Plaintiffs discovered extensive moisture problems under the house, including rotted support beams, standing water, and the presence of mold. Plaintiffs then obtained an inspection by Inspector Jimmy Hall of the Structural Pest Control Division of the North Carolina Department of Agriculture. Hall's report included a letter stating in pertinent part that:

During my inspection I noted and photographed wood rot[.] . . . I found no termite evidence, and no signs of a termite treatment. Review of the Wood Destroying Insect Report revealed a listing of a termite treatment to the wall areas. . . . The report did not list anything in section #5. This section would be used to list any conditions conducive to termites such as excessive moisture, wood debris, or etc.

I later spoke to Gerald Carpentier, and . . . [he] said that he told the seller "Mr. Wilson" that there was a problem with excessive moisture and rot in the crawlspace. He suggested to him that someone needed to look at the problem.

Hall's report also included an Inspection Report assessing Carpentier's report to Plaintiffs, which Hall described as "inaccurate" and containing "discrepancies" in the document.

On 9 May 2005 Plaintiffs filed suit against Charles and Diana Wilson, Carpentier's Exterminating Service, and the estate of George Carpentier, alleging that Defendants intentionally concealed from Plaintiffs the fact that there was a problem with excessive moisture under the house. Plaintiffs brought claims of fraud and unfair or deceptive trade practices from all parties; breach of

contract against Charles and Diana Wilson; negligence and negligent misrepresentation against Carpentier's Exterminating Service and the estate of George Carpentier; and civil conspiracy against Charles Wilson, Carpentier's Exterminating Service, and the estate of George Carpentier.

Charles and Diana Wilson answered, denying the material allegations of the complaint, asserting various defenses, and bringing a cross-claim against the Carpentier defendants for breach of contract. The Carpentier defendants subsequently answered, denying the allegations of Plaintiffs' complaint and the Wilsons' cross-claim.

On 20 February 2006 Charles and Diana Wilson moved for partial summary judgment on the claims brought against them. At a hearing conducted 6 March 2006 Plaintiffs informed the trial court that they had an affidavit from Gerald Carpentier wherein he stated that when he informed Wilson about the moisture problem under the house, Wilson had directed him not to tell Plaintiffs about it. The affidavit was signed, but not sworn or notarized. On Plaintiffs' motion, the court continued the summary judgment hearing to allow Plaintiffs time to obtain a properly sworn and notarized affidavit from Carpentier and to give the parties time to depose Carpentier.

On 9 June 2006 Defendants filed a motion for "suppression" of Carpentier's affidavit on the grounds that Defendants had not been able to depose Carpentier. Defendants' motion stated that Carpentier had retained counsel but that Carpentier's counsel told Defendants he was unable to locate his client. Defendants also

asserted that Plaintiffs had been "unable to produce Gerald Carpentier in accordance with their representations to the Court at the [6 March 2006] hearing." However, we have reviewed the transcript of the 6 March hearing, and find no "representations" by Plaintiffs wherein they promised to "produce" Carpentier, assert that they have the authority or ability to direct Carpentier's actions, or otherwise guarantee Carpentier's appearance in court.

The hearing on Defendants' motion for partial summary judgment and for the exclusion of Carpentier's affidavit was held on 19 June 2006. Plaintiffs' evidence included: (1) a sworn and notarized affidavits from Carpentier averring in pertinent part:

4. In April of 2004, I inspected a residence located at 104 Westminster Court, in Mebane, North Carolina. This home was being sold by its owners, Charles and Diana Wilson, to potential buyers, Marion and Tamela Waters.

5. Prior to the inspection, I spoke with Charles Wilson. Charles Wilson asked me to come see him after the inspection to discuss what was found underneath the house.

6. In connection with this inspection, I went into the crawlspace of the residence. While in the crawlspace, I saw that there was excessive moisture and rot.

7. After the inspection, I told Charles Wilson that there was a problem with excessive moisture and rot in the Residence's crawlspace. In particular, I told Charles Wilson that the center support beam was rotten and dripping wet. I told Charles Wilson that there was extensive rot damage in the crawlspace. I told Charles Wilson that someone needed to investigate these problems.

8. In response, Charles Wilson told me not to inform Marion and Tamela Waters of the excessive moisture and rot in the residence's crawlspace.

9. Mr. Wilson said he would take a look at the situation and correct it.

Plaintiffs also produced an affidavit from Jimmy Hall, averring in pertinent part that he was an inspector for the North Carolina Department of Agriculture & Consumer Services, Structural Pest Control Division, that he had inspected the area under the house, and that:

7. During my inspection, I observed and photographed wood rot to the main center beam, the front porch substructure, and the surrounding area.

. . . .

9. I found no evidence of termites, and no signs of a termite treatment.

10. In connection with my inspection, I reviewed a Wood Destroying Insect Report, dated April 22, 2004, that was prepared by Carpentier's Exterminating Service ('Carpentier's WDIR').

11. Carpentier's WDIR did not list anything in its Section 5. Section 5 is where an inspector, such as Carpentier's Exterminating Service, would list conditions that were conducive to termites.

12. Excessive moisture is a condition that is conducive to termites.

13. I later spoke by telephone with Gerald Carpentier.

14. Gerald Carpentier told me that he performed the inspection of the Home for the issuance of Carpentier's WDIR.

. . . .

16. Gerald Carpentier told me that he had told the seller of the Home - 'Mr. Wilson' - that there was a problem with excessive moisture and rot in the crawlspace.

17. Gerald Carpentier told me that he suggested to 'Mr. Wilson' that someone needed to look at the problem.

Defendants' evidence included Wilson's sworn and notarized affidavit averring in pertinent part that "the allegations of Gerald Carpentier are false. Mr. Carpentier never informed me of a moisture or rot problem in the residence's crawlspace. Further, I never instructed Mr. Carpentier or any individual to withhold any information from the Plaintiffs in connection to the purchase of the residence." Defendants also submitted a copy of a letter from Carpentier's attorney to Plaintiffs' counsel, referencing a photocopy of of Carpentier's affidavit with penciled in changes purportedly made by Carpentier. The revised affidavit was unsigned, and was not sworn or notarized.

At the hearing, the trial court ruled that it would "suppress" the sworn affidavit of Carpentier, on the grounds that it did not "know whether to believe" Carpentier after receiving a photocopy of the affidavit with corrections that Carpentier's counsel contended were those suggested by Carpentier. After excluding the affidavit, the trial court ruled on Defendants' motion for partial summary judgment.

Regarding Diana Wilson, who is not a party to this appeal, the Plaintiffs conceded that she was entitled to summary judgment on all claims against her. The court granted summary judgment for Charles Wilson on Plaintiffs' claims for fraud, conspiracy, and unfair or deceptive trade practices. Plaintiffs subsequently took a voluntary dismissal of their breach of contract claim against

Wilson, and their claims against Carpentier and Carpentier's Exterminating Service. Plaintiffs then appealed from the court's entry of partial summary judgment and its order striking of Carpentier's affidavit.

Standard of Review

Plaintiffs appeal from the trial court's entry of summary judgment for Defendants, and from its exclusion of the sworn and notarized affidavit of Carpentier from consideration in ruling on the summary judgment motion.

"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 [a] party is entitled to a judgment as a matter of law.' N.C.G.S. § 1A-1, Rule 56(c). On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

"In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2005)], and must be viewed in a light most favorable to the non-moving party. Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so

that such disputes may be properly resolved by the jury as the trier of fact. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467-68, 597 S.E.2d 674, 692 (2004) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975); and *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). And, it is axiomatic that "[t]he court should not resolve issues of credibility on a motion for summary judgment." *Hendrix v. Guin*, 42 N.C. App. 36, 39, 255 S.E.2d 604, 606 (1979) (citing *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970)).

Plaintiffs argue that the trial court erred by striking Carpentier's affidavit. We agree.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005) states in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." In the instant case, it is undisputed that Carpentier's signed, sworn affidavit appears to meet these criteria. Accordingly, it should have been considered by the court in its ruling on Defendants' summary judgment motion, absent a valid reason for its exclusion.

During the hearing on Defendants' motions, Plaintiffs' counsel argued to the trial court that "the major part" of Carpentier's affidavit was unchanged in the copy with unsigned corrections. The following dialog ensued:

THE COURT: I don't see how you can stand there and argue to me that. The affidavit

that was tendered to me from, supposed to be an affidavit of Mr. Carpentier said, In response, Charles Wilson told me not to inform Marion and Tamela Waters of the excessive moisture and rot in the residence crawlspace. Then I get another affidavit that's marked up and he said, I never said this. That's a major issue right there.

PLAINTIFFS' COUNSEL: Well, what I would contend is that's a significant issue that my client has to contend with at trial but not at this stage.

THE COURT: I don't know whether to believe this Carpentier or not.

PLAINTIFFS' COUNSEL: I think that's a jury question, Your Honor.

THE COURT: I'm going to suppress the affidavits.

PLAINTIFFS' COUNSEL: Your Honor, I would -

THE COURT: I'd like to hear the other part about the motion for summary judgment. You may proceed.

(emphasis added). The inescapable conclusion to be drawn is that the court "suppressed" the affidavits because it "[did]n't know whether to believe this Carpentier or not." This is clearly an assessment of Carpentier's credibility, and thus not a proper basis for striking the affidavit. As discussed above:

On a motion for summary judgment judges do not resolve inconsistencies and conflicts in evidence, nor do they assess the credibility or weight of the evidence; they only determine whether the evidence, under any view taken of it, raises a material issue of fact.

Tri City Building Components v. Plyler Construction, 70 N.C. App. 605, 607, 320 S.E.2d 418, 419 (1984) (citations omitted).

We have also reviewed the formal written order entered 11 August 2006 and conclude that it fails to state any valid basis for striking Carpentier's affidavit. The order reviews the procedural history of the case, including a finding that:

(10) That at the hearing on the Motion to Suppress Gerald Carpentier's affidavit, another letter was presented to the Court by Carpentier's counsel which stated that the Affidavit presented to the Court at the March 2, 2006 hearing was inaccurate and incorrect. This letter was sent by Mr. Carpentier to the counsel for Plaintiff subsequent to the original hearing date on Defendants' Motion for Partial Summary Judgment. Further an additional affidavit was produced to the Court by counsel for Carpentier which struck substantial portions of the original Affidavit.

The court's finding that Carpentier's affidavit was "inaccurate and incorrect" necessarily rests upon the trial court's assessment of the relative weight and credibility of the documents it considered. This is improper. Based on its findings, including that quoted above, the trial court reached these conclusions of law:

(a) That the Affidavit of Gerald Carpentier filed with the Court on March 6, 2006 is an inaccurate Affidavit of Gerald Carpentier based on statements to the Court and documents produced by Carpentier's own counsel.

(b) That based on the conflict in Affidavits presented to the Court, the Court concludes that the March, 2006 Affidavit of Gerald Carpentier does not appear to be made of Gerald Carpentier's own knowledge and appears to be inherently reliable and is therefore stricken from the Court's consideration pursuant to Rule 56(e) of the North Carolina Rules of Civil Procedure [and] Defendants' Motion for Partial Summary Judgment.

(c) That based on the late service of the Affidavit to counsel for Defendants Wilson

under North Carolina Rule of Civil Procedure 5, and the conflicts in the various Affidavits of Gerald Carpentier, the court in its inherent power in Rule 56(c), hereby concludes that the Affidavit is stricken and that the Court will not consider the Affidavit in regards to Defendants' Motion For Partial Summary Judgment.

Conclusions (a) and (b) represent resolution of a factual issue, the credibility of Plaintiffs' affidavit of Carpentier in the face of later documents proffered by Defendants. Nor does Rule 56(e), cited by the trial court in Conclusion (b) as its authority for exclusion of the affidavit, provide a basis for this ruling, as it does not allow the trial court to go behind the facial language of an affidavit in order to assess the credibility of the affiant.

Conclusion (c) is contradicted by the record evidence, and is premised on a misreading of Rule 56. The trial court cites its "inherent power under Rule 56(c)" as authority to exclude the affidavit. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005) states in relevant part that:

. . . The [summary judgment] motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. . . .

In the instant case, Plaintiffs asked for a continuance of the hearing, in order to replace their unsigned and unsworn affidavit with a properly authenticated affidavit. The trial court granted

their request and on 6 March 2006 it continued the case to allow time for Plaintiffs to obtain a proper affidavit, and to allow both parties time to depose the affiant. Plaintiffs obtained a signed and sworn affidavit within a few days, and served it on Defendants well before the June 2006 hearing. Thus, their affidavit was not served late, and should not have been excluded on this basis. Nor does Rule 56(c) grant the trial court "inherent authority" to rule that a timely filed affidavit was filed late.

Defendants argue that the trial court's decision to exclude or consider evidence at a summary judgment hearing is an exercise of its discretion. However, it is an abuse of discretion for a court to decide a factual issue on a motion for summary judgment. We conclude that, on the facts of this case, the trial court erred by excluding the affidavit of Carpentier because the exclusion was based on determination of its credibility. This in no way diminishes a trial court's authority to exercise discretion in conducting a summary judgment hearing or in the exercise of its gate-keeper functions under Rule 104 of the Rules of Evidence.

We also conclude that exclusion of this affidavit was prejudicial to Plaintiffs and dispositive of the outcome of the hearing. During the arguments of counsel, the trial court and Plaintiffs' counsel again discussed Carpentier's affidavit:

PLAINTIFFS' COUNSEL: . . . On these claims, there are genuine issues of material fact. I would certainly argue that the issues over Mr. Carpentier's affidavit show that there are genuine issues of material fact. But that's not all that we have in this particular case. In regards to the common law fraud, there is an affidavit -

THE COURT: Well, you understand me, now, I suppressed Carpentier's affidavits. So I won't consider that on this issue whether or not they're entitled to partial summary judgment.

PLAINTIFFS' COUNSEL: I understand that, Your Honor.

THE COURT: Certainly, with that affidavit admitted into evidence and considered as evidence, the motion would be denied in a heartbeat.

We conclude that the trial court erred by excluding from its consideration the affidavit of Carpentier, and that this was determinative of the court's ruling on the summary judgment motion.

Plaintiffs also argue that the trial court erred by entering summary judgment for Wilson. In its order the court found that "there is no genuine issue of material fact as to the Plaintiffs' claims of fraud, conspiracy, and Unfair and Deceptive Trade Practices as to Defendant Charles Wilson and that [he] is entitled to partial summary judgment as a matter of law as to Plaintiffs' claims for Fraud, Conspiracy, and Unfair and Deceptive Trade Practices." We conclude, based on the trial court's statement that, had it considered Carpentier's affidavit, it would have denied summary judgment "in a heartbeat," that this conclusion was based on the trial court's improper exclusion of the affidavit.

The parties also present arguments about the propriety of the trial court's consideration of documents that would not be admissible at trial. Plaintiffs argue that the trial court erred by considering the unsworn and unsigned "corrected" affidavit by

Carpentier, while Defendants contend that Plaintiffs waived the right to review of this issue by failing to object to the documents during the hearing. However, regardless of whether the court's analysis of Carpentier's credibility was based on consideration of his affidavit or of his affidavit in conjunction with other documents, it remains an impermissible resolution of a factual issue. Accordingly, we find it unnecessary to reach this issue.

For the reasons discussed above, we conclude that the trial court erred by entering summary judgment for Defendants, and that its order should be

Reversed.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).