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NO. COA06-269

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

CAPITAL REALTY, INC.,
Plaintiff

v.

Wake County
No. 04 CVS 10226

GEORGIA ALSTON JONES;
MANSON OTIS JONES, JR.;
HERMAN LEVERN JONES, and
CAROLYN WILLIAMS JONES,
Defendants

Appeal by defendant Georgia Alston Jones from judgment entered 28 September 2005 by Judge Donald L. Smith in Wake County Superior Court. Heard in the Court of Appeals 18 October 2006.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellee.

Boxley, Bolton, Garber & Haywood, L.L.P., by Kenneth C. Haywood, for defendant-appellant Georgia Alston Jones.

HUNTER, Judge.

Georgia Alston Jones ("defendant") appeals through her legal guardians from judgment of the trial court granting summary judgment in favor of Capital Realty, Inc. ("plaintiff") and ordering defendant to pay \$110,000.00 as damages for breach of a real estate contract. Defendant argues summary judgment was improperly granted because material issues of fact exist regarding plaintiff's production of a buyer, defendant's competency at the

time she signed the contract, and whether the contract is the result of undue influence. Defendant also contends the trial court erred in awarding attorneys' fees. For the reasons set forth herein, we affirm the judgment of the trial court.

On 21 July 2004, plaintiff filed a complaint against defendant in Wake County Superior Court alleging breach of a real estate listing agreement. The complaint alleged that on 22 May 2004, defendant entered into an exclusive listing agreement for plaintiff to market through its agent, Melanie Osborne ("Osborne"), certain property ("the property") owned by defendant and her son, Manson Jones ("Manson") as tenants in common. Under the terms of the listing agreement, defendant and Manson agreed to pay plaintiff as commission ten percent (10%) of the gross sale of the property. Plaintiff had the exclusive right to sell the property, with a listed sales price of \$950,000.00, until 22 November 2005. The listing agreement further provided that:

In the event [defendant] sells or otherwise disposes of [her] interest in the Property, [defendant] shall remain liable for payment of the commissions provided for in this and any other agreement of which it is a part, including, without limitation, the commission obligations set forth in Paragraph 7.a. or 7.b. unless the purchaser or transferee assumes all of such obligations in writing and [plaintiff] agrees in writing to such assumption.

On 15 June 2004, defendant and Manson entered into an agreement for the sale of the property with Filmore C. Johnson ("Johnson"), a buyer produced by plaintiff. The purchase price was listed as \$1,100,000.00, with a closing date of on or before 21

September 2004. On 2 July 2004, however, defendant changed her mind regarding sale of the property and conveyed as a gift her one-half undivided interest in the property to her son, Herman Jones ("Herman") and his wife, Carolyn. Defendant thereafter sent a letter to Osborne dated 3 July 2004 informing her and plaintiff that defendant "no longer want[ed] to use [their] services."

On 15 July 2004, defendant suffered a heart attack and stroke. Plaintiff filed its complaint against her on 21 July 2004. The complaint alleged that defendant committed an anticipatory breach of the listing agreement by conveying her interest in the property and sought damages. On 30 July 2004, Herman was declared to be the interim guardian of defendant's person and her estate. Defendant was declared incompetent on 13 September 2004 and legal guardians were appointed for her person and her estate.

Plaintiff filed a motion for summary judgment, which was heard by the trial court on 28 September 2005. Upon reviewing the matter, the trial court found there were no genuine issues of material fact and plaintiff was entitled to judgment as a matter of law. The trial court entered judgment in favor of plaintiff in the amount of \$110,000.00, the amount equivalent to the ten percent (10%) commission to which plaintiff was entitled under the listing agreement, and awarded attorneys' fees in the amount of \$16,500.00. Plaintiff voluntarily dismissed defendants Herman and Carolyn and obtained a default judgment against Manson. Thus, present defendant is the only defendant remaining in the case. Defendant appeals.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005); *Cashion v. Texas Gulf, Inc.*, 79 N.C. App. 632, 633, 339 S.E.2d 797, 798 (1986). "An issue is material if the facts alleged would constitute or would irrevocably establish any material element of a claim or defense." *Anderson v. Canipe*, 69 N.C. App. 534, 536, 317 S.E.2d 44, 46 (1984). "An issue is genuine if it may be maintained by substantial evidence." *Id.*

Defendant first argues genuine issues of material fact exist concerning whether plaintiff adequately performed under the terms of the listing agreement and produced a buyer who was ready, able and willing to purchase the property. We find no merit to this argument.

Defendant signed an "exclusive right to sell" listing agreement with plaintiff. Such an agreement "prohibit[s] the owner from selling both personally and through another broker, without incurring liability for a commission to the original broker." *Joel T. Cheatham, Inc. v. Hall*, 64 N.C. App. 678, 681, 308 S.E.2d 457, 459 (1983).

In accordance with cases of other jurisdictions, in the event the owner breaches this type of agreement, he is liable for the commission which would have accrued if the broker had obtained a purchaser during the period of the listing. *The broker need not show that he could have performed by tendering an acceptable buyer, or that he was the procuring cause of the sale. The owner may breach the agreement by arranging a sale in violation of the agreement or by action which renders the broker's performance impossible.*

Id. at 681-82, 308 S.E.2d at 459 (emphasis added) (holding that summary judgment was properly granted in favor of the plaintiff real estate broker where the defendant property owner sold the property in question to a third party in breach of the exclusive listing agreement).

In the instant case, defendant conveyed her one-half interest in the property on 2 July 2004, barely five weeks after entering into the exclusive listing agreement with plaintiff. Defendant's action rendered performance by plaintiff under the agreement impossible. The listing agreement gave plaintiff the exclusive right to sell the property until 22 November 2005. Thus, at the time defendant breached the agreement, plaintiff still had almost seventeen months to perform under the agreement. Because defendant conveyed her half-interest in the property during the time set forth in the exclusive listing agreement, rendering plaintiff's performance impossible, she is in breach of the agreement and plaintiff is entitled to the commission it would have earned but for such breach. See *id.*; *Adaron Group, Inc. v. Industrial Innovators, Inc.*, 90 N.C. App. 758, 760, 370 S.E.2d 66, 67 (1988) (holding that summary judgment was properly granted to the plaintiff real estate broker for commission on the sale of property arising from breach by the defendant of an exclusive listing agreement).

Defendant nevertheless cites the case of *Egan v. Guthrie*, 94 N.C. App. 307, 380 S.E.2d 135 (1989), in support of her argument that issues of material fact exist regarding plaintiff's

performance under the listing agreement. In *Egan*, the defendant property owners privately agreed to sell the property at issue, which was under an exclusive listing agreement with the plaintiff real estate broker, to a third party prior to the expiration of the agreement. *Id.* at 310, 380 S.E.2d at 137. Completion of the sale took place two days after expiration of the listing agreement. The plaintiff did not procure the buyer of the property. After learning of the sale, the plaintiff brought suit for the commission to which it claimed it was entitled, and the trial court granted summary judgment in favor of the plaintiff. Upon review, this Court stated that, "[n]othing else appearing, [the defendants'] actions would have constituted a breach of the exclusive right to sell agreement by [the] defendants and entitled [the] plaintiff to a commission on the sale and summary judgment in this case." *Id.* However, the Court noted that "[u]nder the contract in this case, [the] plaintiff was obligated to make, at a minimum, reasonable efforts to sell the owner's property in order to entitle [the] plaintiff to a commission." *Id.* at 311, 380 S.E.2d at 138. Because the plaintiff had produced *no* evidence that it had made any effort to sell the property in question, the Court held that issues of material fact existed regarding the plaintiff's compliance with the performance required by the listing contract and reversed the trial court.

Unlike the case of *Egan*, plaintiff here had seventeen more months to perform under the listing agreement. Most notably, however, plaintiff produced ample evidence that it substantially

performed in the five weeks before defendant breached the agreement. Plaintiff procured a buyer for the property, Johnson, who entered into an agreement on 15 June 2004 with defendant and Manson for the sale of the property with a purchase price of \$1,100,000.00. Defendant, however, conveyed away her interest in the property before the sale of the property could be completed. Although defendant attempts to cast doubt on Johnson's ability to perform under the purchase agreement, it was defendant's actions which rendered performance by Johnson and plaintiff impossible. Defendant cannot now claim some future possibility of lack of performance by Johnson as grounds for creating issues of material fact. See *Anderson*, 69 N.C. App. at 536, 317 S.E.2d at 46 (in order to be genuine issues of material fact, such issues must be maintained by substantial evidence). As plaintiff produced substantial evidence of its performance under the listing agreement, the present case is unlike the situation in *Egan*, and the trial court properly granted summary judgment in favor of plaintiff.

Defendant further argues genuine issues of material fact exist as to whether she was competent at the time she signed the listing agreement. This argument has no merit. There is no substantial evidence in the record to suggest that defendant was incompetent at the time she signed the listing agreement. Indeed, all evidence is to the contrary. The evidence tended to show that defendant personally managed her business affairs, including the management of multiple properties she owned. Her son Herman testified that

defendant was "very lucid" until her heart attack and stroke, and that any dementia she experienced developed after her stroke. He stated that she had no "significant medical problems prior to the stroke" besides diabetes, and that she was a "strong-willed woman" who "would get up and go everyday, and do everything[.]" According to Herman, defendant "had thought it through" and decided she wanted to keep the property in the family, but wanted to convey her interest in the property for tax purposes. Osborne testified by affidavit that defendant appeared completely competent during the multiple times that Osborne dealt with her. Because defendant presented no substantial evidence to suggest she was not competent at the time she entered into the listing agreement, we overrule this assignment of error.

Defendant next contends there was evidence she was acting under the undue influence of her son Manson at the time she entered into the listing agreement. However, defendant never asserted this defense in her answer to plaintiff's complaint. The defense of undue influence must be affirmatively pled. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005); *Howell v. Landry*, 96 N.C. App. 516, 526, 386 S.E.2d 610, 616 (1989) (noting that where affirmative defenses such as undue influence are neither pled nor litigated, such issues are not properly raised and will not be addressed by this Court). As defendant did not plead undue influence as an affirmative defense, nor is there evidence of record that such was litigated before the trial court, we overrule this assignment of error.

Defendant argues the trial court erred in awarding attorneys' fees, contending there is no statutory authority authorizing the award of attorneys' fees in this case. We do not agree. Section 6-21.2 of the North Carolina General Statutes authorizes the award of attorneys' fees in cases of breach of contract where there is "evidence of indebtedness." N.C. Gen. Stat. § 6-21.2 (2005). The statute also provides that:

If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2005). "Evidence of indebtedness signifies a written agreement or acknowledgment of debt, such as a promissory note or conditional sales contract, which is executed and signed by the party obligated under the terms of the instrument." *Supply, Inc. v. Allen*, 30 N.C. App. 272, 277, 227 S.E.2d 120, 124 (1976).

The exclusive listing agreement in the present case is evidence of indebtedness on defendant's part to pay the ten percent (10%) commission owed to plaintiff. The listing agreement specifies that should plaintiff be forced to institute legal action to enforce the agreement, plaintiff "shall be entitled to reasonable attorney's fees and costs." Pursuant to section 6-21.2(2), plaintiff was entitled to a reasonable attorneys' fee of fifteen percent (15%) of the \$110,000.000 commission, or \$16,500.00, which the trial court awarded. We hold the trial court

properly awarded attorneys' fees, and we overrule this assignment of error.

Finally, defendant argues the trial court improperly failed to consider all of the evidence submitted at the summary judgment hearing. As evidence therefor, defendant cites the language of the judgment of the trial court, wherein the trial court states it is granting summary judgment to plaintiff after "having reviewed the pleadings of record[.]" Assuming *arguendo* that the trial court's statement indicates it failed to review all of the evidence submitted in the case, this Court has conducted a thorough *de novo* review of all of the evidence, and we hold the trial court did not err in granting summary judgment in favor of plaintiff. We therefore affirm the judgment of the trial court.

Affirmed.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).