NO. COA06-291

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

OSCAR ROJAS VEGA,
Plaintiff,

v.

Martin County
No. 03 CVS 417

SANDER'S FORD, INC.,
GREENVILLE AUTO BROKERS, INC.,
JACK MEWBORN, TOMMY COOKE, AND
EAST CAROLINA AUTO BROKERS, INC.,
D/B/A GREENVILLE MOTOR COMPANY,
Defendants.

Plaintiff appeals from judgment entered 29 June 2005, and from orders entered 3 November 2005, all by Judge William C. Griffin, Jr. in Martin County Superior Court. Defendant East Carolina Auto Brokers, Inc. appeals from order entered 3 November 2005, also by Judge William C. Griffin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 20 September 2006.

Braxton H. Bell, for plaintiff.

Collins & Moore, P.L.L.C., by George L. Collins, for defendant Sander's Ford, Inc.

The Carroll Law Firm, by Heath Carroll, for defendant Jack Mewborn.

Gaylord McNally Strickland Snyder & Holscher, L.L.P., by Brian R. Becker and Danny D. McNally, for defendants East Carolina Auto Brokers, Inc. and Tommy Cooke.

LEVINSON, Judge.

Oscar Rojas Vega (plaintiff) appeals orders granting JNOV in favor of defendants Sanders Ford and Jack Mewborn; an order setting aside entry of default judgment and providing relief from final judgment as to defendant Tommy Cooke; and a judgment denying him, pursuant to N.C. Gen. Stat. § 20-348, treble damages, attorney's fees and costs. East Carolina Auto Brokers (ECAB) appeals an order denying its motion to set aside entry of default judgment and to provide it relief from final judgment. We affirm.

The pertinent facts may be summarized as follows: On 27 March 2000, John Z. Gaby purchased a 1999 Ford pickup truck from Holiday Chrysler in Jacksonville, North Carolina. During the course of Gaby's ownership of the vehicle, it was involved in an accident. The truck "left the road, clipped a 12-inch tree in two on the passenger side . . . [and] jumped a 30-foot embankment into a creek bed." Gaby had the vehicle repaired at a cost of approximately $16,000.00. Despite the repairs, numerous problems with the vehicle remained: faulty wiring of the headlamps, misalignment of the front end of the cab, uneven tire wear, and "overspray" in the door jambs. The misalignment of the vehicle prompted Gaby to trade in the truck to Sanders Ford in April 2001.

At Sanders Ford, the truck was inspected by sales manager Charles Chesser. Gaby was offered $20,400.00 towards the purchase of another vehicle. Chesser thought the vehicle "had paintwork but nothing major[.]" While completing the paperwork, Gaby acknowledged that the vehicle had been in an accident resulting in more than 25% damage. As a result, Gaby received a final trade in

allowance of $18,350.00. In Gaby's damage disclosure statement to Sanders Ford, Gaby marked the "Yes" box, indicating that the pickup truck had "been damaged by the collision or other occurrence to the extent that damages exceed 25 percent of its value at the time of the collision or other occurrence[.]" A CARFAX Vehicle History Report obtained by Sanders Ford on 19 April 2001 showed that the truck did not have an accident history.

On 7 May 2001, Jack Mewborn purchased the vehicle from Sanders Ford. Based upon information provided to him by Sanders Ford employee Todd Martin, Mewborn explained, he had knowledge that the truck had significant damage and was a "salvaged" vehicle. Mewborn further testified that the title he received from Sanders Ford had the "No" block checked in the damage disclosure section. Due to conflicting information regarding the vehicle, Mewborn ordered a CARFAX report, which revealed that the truck had no accident history. Mewborn attempted to phone Sanders Ford for an explanation, but his calls went "unanswered." Sanders Ford General Manager Matt C. Raymond, III, testified that although Sanders Ford received written notice that the truck was damaged and disclosed the same to Mewborn, "when the title clerk was processing the title, she made a mistake and checked the wrong box."

On 10 May 2001, Mewborn sold the vehicle to ECAB. Mewborn dealt with Tommy Cooke, general manager of ECAB. Mewborn testified that he and Cooke looked at the truck and both men observed that the truck had previous paintwork. Cooke test drove the vehicle and purchased it. Mewborn further testified that he marked the "No"

block in the damage disclosure section in the bill of sale to ECAB. While Mewborn acknowledged in his pre-trial answers to interrogatories that "Sanders Ford had indicated at the time of purchase that there was significant damage" to the vehicle, Mewborn testified at trial that he "did not tell Mr. Cooke that." Cooke testified that the truck looked as if it had "some paintwork," but that it did not seem damaged "to the extent of 25 percent." It was, Cooke explained, a "very sharp truck" and "didn't look that bad." Cooke also obtained a CARFAX report that revealed no accident history on the vehicle.

On 22 May 2001, ECAB sold the vehicle to plaintiff for $22,995.00. Plaintiff testified that during his negotiations with ECAB, no one disclosed that the truck was damaged or that it had been in a serious accident. Cooke testified that he "had a clean title and a clean CARFAX to show when we [ECAB] sold [the vehicle] to Mr. Vega in good faith." After purchasing the vehicle, plaintiff noticed that the truck "would pull to the left side"; that the tires would wear easily; and that the paint would "fall off". Plaintiff phoned Cooke, who responded that it was "not his fault" and that he was unable to correct the situation. Plaintiff then phoned Sanders Ford, which offered to buy the truck for $16,000.00. Plaintiff refused this offer. Plaintiff testified that if he had known that the truck had been damaged greater than 25% of its value he would not have made the purchase. Finally, plaintiff testified that before purchasing the truck he had not

spoken with or seen any documents produced by Sanders Ford, and had not spoken with or seen any documents produced by Mewborn.

Plaintiff sued all named defendants for fraud under N.C. Gen. Stat. §§ 20-71.4 and 20-348, and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. ECAB and Cooke did not answer plaintiff's complaint. Therefore, entry of default was entered against ECAB and Cooke on 29 December 2004. In addition, upon motion of Greenville Auto Brokers, the trial court dismissed it from the lawsuit on the basis that it did not exist as a juridical entity at the time of the subject transaction.

After trial, a jury found that plaintiff was injured by defendants in the amount of $6,868.74. The trial court trebled these damages in the amount of $20,606.22 pursuant to N.C. Gen. Stat. § 75-16, and awarded costs of $1,037.06. In the same judgment, the trial court denied plaintiff's motion, made pursuant to G.S. § 20-348, for attorney's fees, costs and treble damages.

Mewborn filed a motion for JNOV on 8 July 2005, and Sanders Ford moved orally for JNOV on 3 October 2005. The trial court granted these JNOV motions on 3 November 2005. Additionally, ECAB and Cooke moved on 4 October 2005 pursuant to (1) N.C. Gen. Stat. § 1A-1, Rule 55(d) to set aside entry of default; and (2) N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) for relief from final judgment. On 3 November 2005, the trial court granted Cooke's motions, reasoning that "(1) Tommy Cooke was not in the chain of title of the vehicle at issue . . . and was not a transferor . . . and (2) Tommy Cooke was not involved in the negotiations with the Plaintiff for the

purchase of the vehicle at issue." The trial court denied the same 4 October 2005 motions by ECAB. Plaintiff and ECAB appeal, and we address only the specific issues and grounds argued by them on appeal.

Plaintiff first contends that the trial court erred by granting JNOV in favor of Sanders Ford and Mewborn because plaintiff presented *prima facie* evidence to support his claims for fraud.[1] We disagree.

A ruling on a motion for JNOV is a question of law for which we provide *de novo* review. *Bahl v. Talford*, 138 N.C. App. 119, 122, 530 S.E.2d 347, 350 (2000). When considering a motion for JNOV:

> all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference . . . from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for . . . judgment notwithstanding the verdict should be denied.

Ace Chemical Corp. v. DSI Transports, Inc., 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994) (citations omitted).

"The essential elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which

---

[1] After the jury found defendants liable for fraud the trial court then trebled the damages in accordance with the Unfair and Deceptive Trade Practices Act codified at N.C. Gen. Stat. § 75-1.1 *et seq.* (2005).

does in fact deceive, (5) resulting in damage to the injured party.'" *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (quoting *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981)) (citations omitted). An essential element of fraud is the false representation or concealment of a material fact. *Id.* "Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices." *Webb v. Triad Appraisal and Adjustment Service, Inc.*, 84 N.C. App. 446, 449, 352 S.E.2d 859, 862 (1987). If plaintiff fails to offer proof of any misrepresentation or reliance on the same, the claim for fraud must be dismissed. *Horack v. Southern Real Estate Co.*, 150 N.C. App. 305, 313, 563 S.E.2d 47, 53 (2002).

In the instant case, as plaintiff concedes, neither Sanders Ford nor Mewborn made a false representation or concealed a material fact to plaintiff. Before purchasing the vehicle, plaintiff had no contact with these parties, and had not seen any documents produced by them. Plaintiff nonetheless argues that, because these parties made false representations to previous persons and entities in the chain-of-title, they are liable to him, a subsequent purchaser, under a theory of fraudulent misrepresentation. Plaintiff relies largely on *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 374 S.E.2d 135 (1988), and *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), in making this argument. However, we need not address the applicability of these authorities or answer whether

they support plaintiff's argument because even assuming *arguendo* that plaintiff's argument has merit, plaintiff cannot show on this record that he relied upon such representations and acted upon them. Indeed, the record is bereft of any evidence that plaintiff even knew that Mewborn made any representations whatsoever until after this litigation began. Plaintiff also had no knowledge of any representations by Sanders Ford at the time he purchased the vehicle. The relevant assignments of error are overruled.

Plaintiff next contends that the trial court erred by denying his motion for treble damages, attorney's fees and costs under G.S. § 20-348. Because plaintiff has not properly preserved this issue for appellate review in accordance with the North Carolina Rules of Appellate Procedure, we do not address it.

N.C.R. App. P. 10(c)(1) provides, in pertinent part, that:

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made. . . .

"One purpose of this rule is to 'identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position.'" *State v. Baggett & Penuel*, 133 N.C. App. 47, 48, 514 S.E.2d 536, 537 (1999) (quoting *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988)). "'[A]ssignments of error [that are] . . . broad, vague,

and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure[.]'" *Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641-42 (2005) (quoting *In Re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002)).

With respect to this argument, plaintiff relies on assignment of error 8: "The trial court's denial of Plaintiff's Motion to impose civil liability on Defendants under N.C.G.[S.] § 20-348 on the grounds that it is an error of law." Like the assignment of error asserted in *Walker*, this amounts to no more than an allegation that "the court erred because its ruling was erroneous." *Walker*, 174 N.C. App. at 783, 624 S.E.2d at 642. The assignment of error fails to adequately state a sufficiently specific legal ground upon which it is based, and plaintiff's argument is therefore not properly preserved for review.

Defendant ECAB also appeals, contending that the trial court erred by denying its motions "to reconsider [its] prior motion to set aside entry of default judgment pursuant to Rule 55(d), and to relieve it of final judgment under Rule 60(b)(6)."[2] We disagree.

N.C. Gen. Stat. § 1A-1, Rule 55(d) (2005) provides that "[f]or good cause shown the court may set aside an entry of default. . . ." A Rule 55 motion to set aside entry of default "is addressed to the sound discretion of the court[,]" *Old Salem Foreign Car Serv., Inc. v. Webb*, 159 N.C. App. 93, 97, 582 S.E.2d 673, 676 (2003),

---

[2] ECAB characterizes its Rule 55(d) motion as one to reconsider an earlier motion. We note that this Court has not been pointed to anything in the record evidencing a prior Rule 55(d) motion by ECAB.

"whose decision will not be disturbed on appeal absent a showing of abuse of that discretion." *Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 528, 537 S.E.2d 227, 232 (2000) (citations omitted). Further, defendant "has the burden of establishing good cause to set aside entry of default." *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 374, 432 S.E.2d 394, 398 (1993) (citation omitted). Our courts use three factors in conducting this analysis: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896-97 (1987). "A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *RC Associates,* 111 N.C. App. at 374, 432 S.E.2d at 398.

Under N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2005), a trial court may grant relief from a judgment where such relief is not available pursuant to the first five subsections of Rule 60(b). *In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985). The test for whether relief may be given under Rule 60(b)(6) "is whether '(1) extraordinary circumstances exist and (2) there is a showing that justice demands it.'" *Id.* (quoting *Baylor v. Brown*, 46 N.C. App. 664, 670, 266 S.E.2d 9, 13

(1980)). In determining whether to grant relief under Rule 60(b)(6), courts should consider:

> (1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities.

Baylor, 46 N.C. App. at 670, 266 S.E.2d at 13 (citation omitted). The decision whether to grant relief from judgment pursuant to Rule 60(b)(6) "is within the sound discretion of the trial court and the trial court's decision will not be disturbed absent an abuse of that discretion[.]" *Oxford Plastics*, 74 N.C. App. at 259, 328 S.E.2d at 9.

ECAB was served with the summons and complaint on 25 August 2004. ECAB did not file an answer, and never sought leave to do so. An entry of default was entered as to Cooke and ECAB on 29 December 2004. After a trial on the merits necessitated by the inclusion of other defendants, Cooke and ECAB hired counsel that filed a Notice of Appearance on 8 August 2005. In support of its Rule 55(d) and Rule 60(b) motions, ECAB argues that "the evidence at trial overwhelmingly confirmed that Tommy Cooke (individually and as the agent of ECAB[]) was not informed orally or in writing that the vehicle at issue had 'salvaged' status or had been damaged in excess of 25% of its fair market value." ECAB argues that it was "duped" because of paperwork "accidents" by Sanders Ford and other evidence that it was not evident to Cooke that the vehicle had been "substantially" damaged. Plaintiff counters, arguing that

it proceeded to trial with the understanding that the allegations against ECAB were deemed admitted, and points to evidence showing that ECAB, through its agent, knew or should have known the vehicle was damaged in excess of 25% of its retail value.

With regard to ECAB's Rule 55(d) and Rule 60(b)(6) motions, we conclude the trial court's rulings did not amount to an abuse of discretion. ECAB was not diligent in defending the subject action and, on these facts, the trial court could properly conclude that ECAB would not suffer a "grave injustice" by not being allowed to defend and that "extraordinary circumstances" are lacking. The trial court's denial of ECAB's motions is not manifestly unsupported by reason, and the relevant assignments of error are overruled.

We have considered and rejected the remaining arguments.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).