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NO. COA06-518

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

TWAM, LLC and DANNY G. BOST,
Plaintiffs-Appellants,

v.

Cabarrus County
No. 04 CVS 1005

THE CABARRUS COUNTY BOARD OF
EDUCATION,
Defendant-Appellee.

Appeal by Plaintiffs from order entered 18 January 2006 by Judge Michael E. Beale in Superior Court, Cabarrus County. Heard in the Court of Appeals 6 December 2006.

Wilson & Coffey L.L.P., by G. Gray Wilson and Edward T. Shipley, III, for Plaintiffs-Appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Mark P. Henriques and Sarah A. Motley, for Defendant-Appellee.

McGEE, Judge.

TWAM, LLC and Danny G. Bost (Plaintiffs) filed a complaint against the Cabarrus County Board of Education (Defendant) on 2 April 2004, alleging that Plaintiffs purchased forty-three acres of real property on which they planned to construct a residential subdivision. Defendant agreed to grant Plaintiffs a water and sewer easement on real property known as Mount Pleasant Elementary School for the sum of \$3,750.00. However, Defendant's grant of the easement was contingent upon the approval of the proposed

subdivision by the Mt. Pleasant Planning and Zoning Commission (the Commission). Plaintiffs tendered a check in the amount of \$3,750.00 to Defendant, which Defendant accepted.

Plaintiffs also alleged they filed an application with the Commission seeking approval of a preliminary plat subdividing the real property for the proposed subdivision. The Commission considered Plaintiffs' application on two occasions and each time delayed a decision on the application. However, the Commission's planning staff recommended approval of the application, subject to two conditions. Plaintiffs subsequently filed a petition for writ of certiorari with the trial court, seeking an order requiring the Commission to approve Plaintiffs' subdivision. While the writ of certiorari was pending, the Commission voted to deny Plaintiffs' application for a preliminary plat. Defendant then mailed a check in the amount of \$3,750.00 to Plaintiffs, along with a letter explaining that Defendant was returning the check because the Commission had voted to deny Plaintiffs' application, and that Defendant's grant of an easement had been conditional upon the Commission's approval of Plaintiffs' application.

Plaintiffs alleged they returned Defendant's check. They also sent Defendant a letter stating that no final action had been taken because the Commission's vote to deny Plaintiffs' application had been invalid and the matter was still pending. The trial court found that the Commission's vote denying Plaintiffs' application was invalid and ordered that the Commission approve Plaintiffs' application subject to the conditions recommended by the

Commission's planning staff. The Commission then approved Plaintiffs' application subject to those conditions. Plaintiffs further alleged that Defendant again sent Plaintiffs a check for \$3,750.00 and a letter stating that Defendant had decided to "revoke its conditional approval of the easement." Plaintiffs returned that check to Defendant and wrote a letter stating that "[D]efendant could not unilaterally 'revoke' the decision to grant a sewer easement because [P]laintiffs had paid for the easement, [the Commission] had approved the development, and [P]laintiffs had expended substantial amounts of time and money in reliance on [D]efendant's promise to grant the easement." Plaintiffs alleged they entered into a contract with Defendant for the purchase of the easement and that Defendant breached the contract by failing to grant Plaintiffs the easement. Plaintiffs sought specific performance and damages.

A jury determined that (1) "Plaintiffs and . . . Defendant enter[ed] into a contract for an easement of right of way for purposes of constructing sewer and water lines across the property of Mount Pleasant Elementary School[,]" but (2) "Defendant [did not] breach the contract by repudiation[.]" The trial court entered judgment on 7 February 2005 and ordered that "[P]laintiffs take nothing by this action and that it be dismissed with prejudice." No appeal was filed from the trial court's judgment.

Plaintiffs filed a motion on 3 November 2005 for relief from judgment under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6). Plaintiffs alleged they lost the right to appeal the trial court's

7 February 2005 judgment due to the excusable neglect of their trial counsel. Plaintiffs also alleged that the jury's verdict was inconsistent.

The trial court entered an order on 18 January 2006 denying Plaintiffs' motion for relief from judgment. The trial court found that Plaintiffs' trial counsel erroneously informed Plaintiffs that the trial court's 7 February 2005 judgment was favorable to Plaintiffs. The trial court also found that if Plaintiffs' trial counsel had properly informed Plaintiffs that the jury's verdict was not favorable to them, Plaintiffs would have appealed the 7 February 2005 judgment. The trial court concluded that the conduct and advice of Plaintiffs' trial counsel constituted excusable neglect. However, the trial court also concluded that the jury's verdict and judgment were not inconsistent on their face. Therefore, the trial court concluded that Plaintiffs failed to demonstrate a meritorious defense to the judgment. Plaintiffs appeal.

Plaintiffs argue the trial court abused its discretion by denying Plaintiffs' motion for relief from judgment under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6). Plaintiffs argue the trial court abused its discretion by concluding that Plaintiffs failed to demonstrate a meritorious defense to the judgment. Specifically, Plaintiffs argue they demonstrated a meritorious defense because the jury's verdict was inconsistent.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2005), a

trial court may grant a party relief from a final judgment on grounds of "[m]istake, inadvertence, surprise, or excusable neglect[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2005) allows a trial court to grant relief from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." "The setting aside of a judgment pursuant to [N.C.]G.S. [§] 1A-1, Rule 60(b)(6) should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it." *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987). Additionally, to obtain relief under either Rule 60(b)(1) or 60(b)(6), the moving party must show that it has a meritorious defense. *In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 258, 328 S.E.2d 7, 9 (1985). "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Our Court has recognized that "[i]t is basic contract law that a party is not entitled to specific performance arising under a contract unless the opposing party has breached its agreement pursuant to the contract." *N.C. Med. Soc'y v. N.C. Bd. of Nursing*, 169 N.C. App. 1, 11, 610 S.E.2d 722, 727, *disc. review denied*, 360

N.C. 66, 621 S.E.2d 875 (2005). Although Plaintiffs argue that the jury simply determined Defendant had not yet breached the contract, the plain language of the jury's verdict belies this argument. Moreover, despite Plaintiffs' argument to the contrary, the jury did not determine that the parties continued to have a valid, enforceable contract. The jury only determined that the parties entered a contract, which Defendant did not breach. Therefore, we hold that the jury's verdict in the present case was not inconsistent as a matter of law.

In support of their argument, Plaintiffs cite *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), where the minor plaintiff was struck and injured by a vehicle operated by the defendant. *Id.* at 564, 206 S.E.2d at 192. The minor plaintiff also presented uncontradicted evidence that, as a result of the accident, he had been hospitalized for approximately twenty-six days, had undergone two operations, had a permanent scar on his shoulder, and had suffered pain over an extended period of time. *Id.* at 564, 206 S.E.2d at 192-93. The trial court properly instructed the jury on negligence, contributory negligence, and damages. *Id.* at 564-65, 206 S.E.2d at 193. The jury determined that although the minor plaintiff was injured by the defendant's negligence and was not contributorily negligent, the minor plaintiff was not entitled to recover any amount from the defendant for personal injury. *Id.* at 566, 206 S.E.2d at 193. The jury did determine that the minor plaintiff's father was entitled to recover an amount for medical expenses. *Id.* at 563, 206 S.E.2d at 192.

Our Court recognized in *Robertson* that "[t]he law is well settled in this jurisdiction that in cases of personal injuries resulting from [a] defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [a] defendant's tort." *Id.* at 565, 206 S.E.2d at 193 (quoting *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966)). Our Court held that "[u]nder such circumstances, with the evidence of pain and suffering clear, convincing and uncontradicted, it is quite apparent that the verdict is not only inconsistent but also that it was *not rendered in accordance with the law.*" *Id.* at 566, 206 S.E.2d at 193-94. Therefore, our Court held that the trial court should have set aside the verdict. *Id.* at 568, 206 S.E.2d at 195. Our Court remanded the matter for a new trial on all issues because the issues regarding negligence, contributory negligence, and damages were "inextricably interwoven[.]" *Id.* at 569-70, 206 S.E.2d at 196.

Robertson is distinguishable from the present case. In *Robertson*, the jury's verdict was inconsistent because although there was uncontradicted evidence of pain and suffering, the jury determined that the minor plaintiff, who was not contributorily negligent, could not recover for personal injuries caused by the defendant's negligence. *Id.* at 566, 206 S.E.2d at 193-94. In the present case, unlike in *Robertson*, the jury's verdict was not inconsistent.

Plaintiffs also rely upon *Anuforo v. Dennie*, 119 N.C. App. 359, 458 S.E.2d 523 (1995). In *Anuforo*, our Court held that the

plaintiff sufficiently alleged a meritorious defense "such that it would not be 'a waste of judicial economy to vacate' the order of the trial court denying relief under Rule 60(b)." *Anuforo*, 119 N.C. App. at 363, 458 S.E.2d at 526 (quoting *Oxford Plastics*, 74 N.C. App. at 259, 328 S.E.2d at 9). However, in the present case, we hold that the jury's verdict was not inconsistent as a matter of law. Therefore, in the present case, unlike in *Anuforo*, it would be a waste of judicial economy to vacate the order of the trial court.

We note that Defendant argues the trial court erred by concluding that the conduct and advice of Plaintiffs' trial counsel constituted excusable neglect. However, Defendant did not file a notice of appeal under N.C.R. App. P. 3(a) from the order denying Plaintiffs' motion for relief from judgment, nor did Defendant cross-assign error to the trial court's determination of excusable neglect pursuant to N.C.R. App. P. 10(d). Therefore, this issue is not before us.

In conclusion, we hold that the jury's verdict was not inconsistent as a matter of law, and therefore the trial court properly concluded that Plaintiffs failed to show a meritorious defense. Accordingly, the trial court did not abuse its discretion by denying Plaintiffs' motion for relief from judgment.

Affirmed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).