NO. COA07-1127

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

CYPRUS GROUP, LLC,
Plaintiff-Appellee,

v.

Wake County
No. 07 CVS 1420

MICHAEL J. TWISS and
ROBERT C. HOLLAND,
Defendants-Appellants.

Appeal by Defendants from judgment entered 29 May 2007 by Judge Michael R. Morgan in Superior Court, Wake County. Heard in the Court of Appeals 5 March 2008.

Harris & Hilton, P.A., by Nelson C. Harris, for Plaintiff-Appellee.

Ragsdale Liggett PLLC, by Walter L. Tippett, Jr. and Amie C. Sivon, for Defendants-Appellants.

McGEE, Judge.

Michael J. Twiss and Robert C. Holland (collectively Defendants) appeal from an award of summary judgment entered in favor of Cyprus Group, LLC (Plaintiff). For the reasons set forth below, we affirm.

Plaintiff initiated the present action by filing a complaint against Defendants on 26 January 2007. In its complaint, Plaintiff alleged the following:

> Plaintiff is the successor in interest to Rodney W. Caudle and Angela Caudle ("the

> Caudles") with respect to a judgment entered in Wake County, North Carolina, on January 31, 1997 ("the Prior Judgment"), in the case identified as *Rodney Caudle and Angela Caudle v. Camelot Homes, Inc.; Michael J. Twiss; Robert C. Holland and Apex Homes, Inc.,* Wake County File No. 96 CVS 5412 ("the Prior Action").

Plaintiff attached a copy of the judgment in the prior action as an exhibit to its complaint in the present case and incorporated the prior judgment by reference. In the prior judgment, the trial court concluded:

> Defendants Michael J. Twiss, Robert C. Holland, Camelot Homes, Inc. and Apex Homes, Inc. breached their contract with [the Caudles] regarding the manufacture and construction of [a] home at 3432 Durham Road, Raleigh, North Carolina. Furthermore, Defendants breached express warranties provided to [the Caudles] and breached the implied warranty of habitability to [the Caudles] in the manufacture and construction of this home. These breaches entitle [the Caudles] to damages as set forth hereinbelow.

In its prior judgment, the trial court also concluded that certain acts of Michael J. Twiss, Robert C. Holland and Camelot Homes, Inc. constituted unfair and deceptive trade practices entitling the Caudles to recover attorney's fees. Consequently, the trial court ordered: (1) that the Caudles were entitled to damages in the amount of $14,000.00 from Michael J. Twiss, Robert C. Holland, Camelot Homes, Inc., and Apex Homes, Inc. based upon breach of contract, breach of express warranty, and breach of the implied warranty of habitability; and (2) that the Caudles were entitled to $2,000.00 in attorney's fees from Michael J. Twiss and Robert C. Holland on the basis of the Caudles' unfair and deceptive trade

practices claim.

In its complaint filed in the present action, Plaintiff alleged that it was entitled, "under the common law and other applicable law, to bring an action to obtain a new Judgment, renewing the Prior Judgment for an additional term of ten (10) years." Therefore, Plaintiff alleged it was entitled "to have and recover of Defendants, in this action on the Prior Judgment, jointly and severally, an amount in excess of $10,000.00, to be shown by proof at trial, with interest thereon at the legal rate until paid in full, plus the costs of this action."

Plaintiff filed a motion for summary judgment on 28 March 2007, attaching a verification of the complaint. Defendants filed a motion to dismiss, affirmative defenses and answer on 2 April 2007. Defendants also filed an affidavit of Michael J. Twiss dated 8 May 2007 in opposition to Plaintiff's motion for summary judgment. At the 10 May 2007 hearing on Plaintiff's motion for summary judgment, Defendants also tendered a certified copy of the Judgment Docket book pages with respect to the prior judgment.

The trial court granted Plaintiff's motion for summary judgment and entered judgment against Defendants on 29 May 2007. Defendants appeal.

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 any party is entitled to a

judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We review the evidence in the light most favorable to the nonmoving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Our review is *de novo* on reviewing a trial court's order allowing summary judgment. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

Defendants argue that the trial court erred in granting Plaintiff's motion for summary judgment because genuine issues of material fact exist regarding: (1) the assignment of the prior judgment from the Caudles to Plaintiff; (2) the amount of damages owed by Defendants to Plaintiff; and (3) the affirmative defenses claimed by Defendants.

I.

Defendants first argue that a genuine issue of material fact exists as to the validity of the assignment of the prior judgment to Plaintiff. In paragraph 4 of its complaint, Plaintiff alleged that it was the successor in interest to the Caudles with respect to the prior judgment. Plaintiff verified its complaint, including this allegation, on 2 February 2007, and attached the verification to its motion for summary judgment. Plaintiff thus met the requirements that allow for an award of summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007) (requiring that the affidavits in support of a motion for summary judgment be made on personal knowledge, that the affidavits set forth such facts as would be admissible in evidence, and that the affidavits show affirmatively

that the affiants are competent to testify regarding the matters stated therein).

Defendants stated in their answer that they "lack the information necessary to admit or deny the substance of the allegations of paragraph 4, and therefore deny the same." In a subsequent sworn affidavit, Michael J. Twiss stated: "I have never received notice from the Caudles or any person that the Judgment had been assigned to Cyprus Group, LLC." These statements, however, do not create a genuine issue of material fact.

"A motion for summary judgment allows one party to force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense." *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 717, 315 S.E.2d 747, 750 (1984). Defendants, by answer and subsequent affidavit, do not deny the assignment to Plaintiff with any material fact nor do they forecast evidence to support such a claim. Rather, Defendants merely state that they had no knowledge of the assignment. This statement is insufficient to bar Plaintiff's motion for summary judgment, as N.C.G.S. § 1A-1, Rule 56(e) states that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Because Defendants did not raise a genuine issue of material fact with regard to the assignment, the trial court did not err by granting summary judgment to Plaintiff.

II.

Defendants next argue that genuine issues of material fact exist as to the amount of damages to which Plaintiff is entitled due to the questionable meaning and accuracy of notations in the Wake County Judgment Docket. Any party seeking damages must show that "the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Defendants raise three issues that they contend create a genuine issue of material fact because, under the *Olivetti* standard, they do not allow for a finding of damages with reasonable certainty.

Defendants argue that damages are uncertain because the Judgment Docket from the prior action indicates that entry of judgment against Apex Homes, Inc. was "docketed in error." However, the fact that the notation does not state the reason for the cancellation of the judgment against Apex Homes, Inc. does not raise a genuine issue of material fact. Whatever the reason, the cancellation of judgment specifically provides that it applies only to the obligations of Apex Homes, Inc. Accordingly, the judgment against Defendants remains intact.

Defendants further argue that damages are uncertain because the Judgment Docket from the prior action indicates that a credit of $3,000.00 was applied against the obligations of Defendants, but does not indicate the source of the credit. However, as demonstrated by an affidavit for the release of real property from

a judgment that is included in the record on appeal, the payment was made by Camelot Homes, Inc. Nevertheless, the source of this credit is not necessary to determine damages in the present action. Defendants were well aware that a $3,000.00 credit was entered on the Judgment Docket. Therefore, the identity of the payor of the $3,000.00 is not a genuine issue of material fact because it did not prevent the trial court from determining remaining damages with reasonable certainty. *See Olivetti*, 319 N.C. at 547-48, 356 S.E.2d at 586.

Defendants argue that damages are uncertain because the Judgment Docket from the prior action and the record on appeal fail to supply any evidence of payments made to the Caudles (or Plaintiff) by Apex Homes, Inc. and/or Camelot Homes, Inc., excluding the $3,000.00 credit discussed above. Once again, this fact does not create any genuine issue of material fact with regard to the damages owed by Defendants to Plaintiff. Defendants make no assertion that any further payments were made by either them or Camelot Homes, Inc. No payments were received by Apex Homes, Inc. because the judgment was cancelled as to it. In other words, the reason no other payments are included in the record on appeal is because no other payments were made. Again, N.C.G.S. § 1A-1, Rule 56(e) provides that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Defendants may not simply state that the lack of other payment

records creates an uncertainty amounting to a genuine issue of material fact. Defendants must bring forth facts evidencing that some other payments have occurred, thus creating the uncertainty required under *Olivetti*. *See* N.C.G.S. § 1A-1, Rule 56(e). Defendants did not do so. Because Defendants failed to raise a genuine issue of material fact as to the amount of damages owed, we hold the trial court did not err by granting summary judgment to Plaintiff.

III.

Defendants also argue that genuine issues of material fact exist with regard to the affirmative defenses raised by Defendants.

Defendants claim that the statute of limitations bars the claim against them. However, an action brought "[u]pon a judgment or decree of any court of the United States, or of any state or territory thereof" may be brought within ten years from the date of its entry. N.C. Gen. Stat. § 1-47(1) (2007). The prior judgment was entered on 31 January 1997, and the complaint commencing the present action was filed on 26 January 2007. Because the present action was brought within ten years of 31 January 1997, Plaintiff's claim was not barred by the applicable statute of limitations.

Defendants also claim that the affirmative defense of laches bars the claim against them. The doctrine of laches applies when "'lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]'" *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 181, 581 S.E.2d 415,

424 (2003) (quoting *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938)). Defendants argue that the Caudles abandoned their efforts to collect on the prior judgment. However, even if the Caudles ceased efforts to collect on the prior judgment for a period of time, the relations of the parties did not change. *See id.* Plaintiff, as successor in interest to the Caudles, is a judgment creditor while Defendants remain judgment debtors.

Defendants also briefly list other affirmative defenses in their brief that they did not include in their answer. These defenses include settlement, accord and satisfaction, payment and release, waiver, estoppel and setoff. Defendants cite authority that may allow these defenses to be brought for the first time at the summary judgment stage. *See Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998). However, there is no indication in the record that Defendants raised these affirmative defenses at the summary judgment stage. Even assuming *arguendo* that these defenses have been preserved, they present no genuine issue of material fact to bar the award of summary judgment. The common factual theme in all of these defenses revolves around paragraph 9 of the affidavit of Michael J. Twiss, claiming that the Caudles agreed to accept $1,500.00 in exchange for a complete release of their claims under the prior judgment. However, in the same paragraph, Michael J. Twiss admits that the "Caudles then refused to accept the payment[.]" Because payment was not accepted, no agreement to release the prior judgment was ever made, and these defenses do not bar the award of summary judgment for Plaintiff.

Defendants also argue that a genuine issue of material fact exists as to their asserted affirmative defenses because "the underlying judgment was never reported to credit-assessing agencies[.]" However, this fact is not material to Defendants' asserted affirmative defenses.

Because Defendants failed to raise any genuine issues of material fact in opposition to Plaintiff's motion for summary judgment, the trial court did not err by granting summary judgment to Plaintiff.

Affirmed.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).