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NO. COA07-1360

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

BANANA WIND PROPERTIES, LLC,  
G. SCOTT WADE and EUGENIA N.  
WADE,  
Plaintiffs

v.

Forsyth County  
No. 06 CVS 5505

K&T REAL ESTATE INVESTMENTS  
& LAND DEVELOPMENT, LLC,  
K&T REAL ESTATE INVESTMENTS  
& LAND DEVELOPMENT, INC.,  
KEN HAYES and TIM PENNINGTON,  
Defendants

# Court of Appeals

Appeal by defendants from an order entered 17 May 2007 by Judge R. Stuart Allright in Forsyth County Superior Court. Heard in the Court of Appeals 16 April 2008.

## Slip Opinion

*Wilson & Coffey, LLP, by G. Gray Wilson and Matthew W. Georgitis, for plaintiff-appellees.*

*Parrish, Smith & Ramsey, LLP, by Steven D. Smith, for defendant-appellee Ken Hayes.*

*Harrell Powell, Jr. for defendant-appellant Tim Pennington.*

HUNTER, Judge.

K&T Real Estate Investments & Land Development, LLC, K&T Real Estate Investments & Land Development, Inc., Ken Hayes, and Tim Pennington (collectively, "defendants")<sup>1</sup> appeal from an order

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<sup>1</sup> All of these individuals and entities are defendants in this action, but this appeal concerns only the finding of contempt

holding defendant Pennington in contempt. After careful consideration, we affirm.

I.

Defendant entered into a contract with Banana Wind Properties LLC and G. Scott and Eugenia N. Wade ("plaintiffs"), the principals of the company, to purchase forty-two parcels of real property in Forsyth County. Those closings did not take place on time, and plaintiffs filed suit for specific performance.

In a consent order filed 7 December 2006, defendant agreed to "close on and fully purchase the 42 residential properties owned by plaintiffs pursuant to the June 15, 2006 contracts of sale . . . as amended on August 10, 2006 . . . . [T]he closing for same shall occur on or before December 31, 2006." On 29 December 2006, closings were held as to ten of the lots.

On 7 January 2007, plaintiffs made a motion for specific performance and civil contempt because defendant had not complied with the December order. The superior court ordered that defendants close on the remaining thirty-two properties by 1 February 2007. The court further ordered that defendant appear at a hearing on the contempt motion on 5 March 2007, and if he had not purchased the lots at that time, he must show cause why he should not be held in contempt.

Following the February 2007 order, defendant closed on ten more of the properties on 27 February 2007. On 8 May 2007, a

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against defendant Pennington. As such, the rest of this opinion uses the term "defendant" to refer to Pennington as an individual.

hearing was held regarding defendant's failure to close on the remaining twenty-two properties. On 17 May 2007, the superior court entered an order finding defendant in contempt and gave defendant until 25 May 2007 to purge the contempt by complying with the order to close on the remaining properties. Defendant appeals from this order.

II.

A.

Defendant first argues that no competent evidence exists in the record to support the court's finding that his failure to comply with the court order was willful. This argument is without merit.

Per N.C. Gen. Stat. § 5A-21(a) (2007):

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

(Emphasis added.) As this Court recently noted:

Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of

his or her power. "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply.

*Watson v. Watson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 652 S.E.2d 310, 318 (2007) (citations omitted).

The superior court addressed the issue of willfulness in its findings of fact 3 and 4, which state in relevant part:

3. . . . Defendant Pennington's violation of [the orders] is willful, and this defendant has offered no legitimate or reasonable excuse for his failure to comply with both.

4. Defendant Pennington has the present ability to comply with this court's order or to undertake reasonable measures to enable him to comply. Such measures include this defendant's ability to sell or encumber property he owns in Stokes County, and to enlist the financial support of defendant Ken Hayes. . . . Defendant Pennington could also have been more diligent in his efforts to procure financing through an institutional lender.

Defendant argues that no competent evidence exists in the record to support these findings of fact. Specifically, he argues that the record shows he failed to obtain financing and close on the properties only because of misdeeds by the lending bank, and thus that he did not have the requisite ability to comply. This argument is without merit.

"Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence[.]'" *Watson*, \_\_\_ N.C. App. at \_\_\_, 652 S.E.2d at 317

(citation omitted). From defendant's own testimony, the trial court heard evidence that at various points defendant had letters from one lender in April 2007 stating that he qualified for unlimited financing; that he was in discussions with another lender about bringing in one of two potential partners to co-sign the loans; that he had a potential source of money in Reno; that he had "investors" he would be able to get money from; and that he had three unencumbered pieces of real property in Stokes County. Plaintiffs also presented as evidence letters from the lenders stating their willingness to close on the properties at issue. Defendant offered nothing to refute this evidence except his repeated assertions that he had been "jerked around by the bank." Considering the quantity of this evidence, the fact that it was all presented during defendant's testimony, and defendant's failure to refute it, there seems no question that it constitutes competent evidence on which to base the findings of fact at issue.

In addition to these arguments, defendant argues at length that he did not represent to plaintiffs that he had the funds to purchase the properties; that any statements he made guaranteeing he would complete the purchases were at most "expressions of hope"; and that plaintiffs did not rely on his statements. All of these points are irrelevant. Defendant seems to be arguing that his personal goodwill negates any consideration of whether he had the ability to comply with the order. As noted in the language quoted above, this is a misinterpretation of the law. The issue for the superior court was whether defendant had "the present means to

comply" or "the ability to take reasonable measures to comply" with the order at issue, not the meaning of any promises made by defendant. *Id.* at \_\_\_\_, 652 S.E.2d at 318. As such, this argument is irrelevant.

B.

Defendant also argues that his imprisonment for contempt was essentially a judicial sanction for failure to fulfill a contract to purchase property, in violation of our state constitution. However, as plaintiffs note, defendant did not preserve this issue for appeal -- the assignment of error to which defendant links this argument states only that the court erred in concluding defendant was guilty of contempt -- and as such, we cannot review it. We note, however, that even were we to review this issue, we would find it to be without merit; defendant's signing of the consent judgment on 7 December 2006 put the matter of enforcement before the court, and as such, the court had the authority to enforce it, including finding defendant in contempt when he did not comply.<sup>2</sup> See *Baxley v. Jackson*, 179 N.C. App. 635, 639, 634 S.E.2d 905, 908, *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006).

III.

Because the court's findings of fact were based on competent evidence, we affirm.

Affirmed.

Judges STEELMAN and STEPHENS concur.

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<sup>2</sup> The Court of Appeals of Ohio case to which defendant cites is inapt; there, no consent judgment was entered. See *Bloomberg v. Roach*, 182 N.E. 891 (Ohio, 1930).

Report per Rule 30(e).