NO. COA07-240
NO. COA07-417

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

YADKIN VALLEY BANK AND
TRUST COMPANY,

Plaintiff,

v. Surry County
No. 05 CVS 1007

AF FINANCIAL GROUP,

Defendant.

Appeal by Plaintiff from orders entered 23 March 2006 and 8 January 2007 by Judges Richard L. Doughton and L. Todd Burke, respectively, in Surry County Superior Court. Heard in the Court of Appeals 10 October 2007.

Williams Mullen Maupin Taylor, by Michael C. Lord and Heather E. Bridgers, for Plaintiff-Appellant.

Helms Mulliss & Wicker, PLLC, by H. Landis Wade, Jr., for Defendant-Appellee.

STEPHENS, Judge.

Plaintiff Yadkin Valley Bank and Trust Company ("Yadkin") filed one lawsuit against Defendant AF Financial Group ("AF Financial") which has generated two appeals in this Court. The question raised by the appeal in COA07-240 is whether the trial court erred in granting summary judgment in favor of AF Financial on Yadkin's claim of tortious interference with contract. The

question raised by the appeal in COA07-417 is whether the trial court erred in imposing Rule 11 sanctions against Yadkin and its attorneys for filing the lawsuit. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (2007) (requiring court to sanction an attorney or party for signing any pleading, motion, or other paper that is not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or that is interposed for any improper purpose). Because the background of these appeals is identical and the issues presented are completely intertwined, we address both appeals in a single opinion.

BACKGROUND

The following facts are undisputed: On 30 November 1998, High Country Bank ("HCB") hired Robert E. Washburn ("Washburn") as its Chief Lending Officer. On 1 May 2001, HCB hired Joseph E. Eller ("Eller") as its Director of Sales and Marketing. Upon accepting their positions, both men entered into employment agreements with HCB. The employment agreements were identical in all pertinent respects. Paragraph 5(b) of both agreements stated, in part:

> (b) Non-competition. In consideration of employment of the Officer, during the Term and any subsequent Payment Period (as defined below), the Officer agrees that he will not, within the North Carolina counties in which the Bank has banking offices during the Term (the "Market"), directly or indirectly, own, manage, operate, join, control or participate in the management, operation or control of, or be employed by or connected in any manner with, any Person who Competes with the Bank, without the prior written consent of the

> Board; provided, however, that the provisions of this Paragraph 5(b) shall not apply prospectively in the event this Agreement is terminated by the Bank without Cause (as defined below) . . . .

Paragraph 7 set forth seven ways by which the agreements could terminate. The seventh way of terminating the agreements was delineated in Paragraph 7(g):

> (g) Approved Change in Control Termination. Upon ten (10) days prior written notice, the Officer may declare this Agreement to have been terminated without Cause by the Bank, upon the occurrence of any of the following events, which have not been consented to in advance by the Officer in writing, following a Change in Control, approved in advance by a formal resolution of at least two-thirds (2/3) of the Independent Directors: (i) if the Officer is required to move his personal residence or perform his principal executive functions more than twenty (20) miles from the city limits of Boone, North Carolina; (ii) if the Bank should fail to maintain Benefit Plans and Fringe Benefits providing to him at least substantially the same level of benefits afforded the Officer as of the date of the change in Control; or (iii) if in the Officer's sole discretion, his responsibilities or authority in the capacity described in Paragraph 1 have been diminished materially.
>
> Upon such termination, or upon any other termination of this Agreement without Cause by the Bank within one (1) year following an approved Change in Control, the Officer shall be entitled to receive the compensation and benefit continuation when and as provided in Paragraph 7(f) above.

Paragraph 7(f) stated that, in addition to continued participation in benefit plans and receipt of fringe benefits, "the Officer shall be entitled at his election . . . to continue to receive his Base Salary and bonuses as provided in this Agreement for a period of

three and ninety-nine one hundreths [sic] (3.99) years subsequent to the effective date of" termination. Alternatively, Plaintiffs could elect to receive their base pay and bonuses in a lump sum payment within sixty days of their termination.

On 1 January 2004, HCB underwent a "Change in Control" when Yadkin acquired and merged with HCB's parent company, High Country Financial Corporation. As a result of the merger, Plaintiffs became employees of Yadkin, and Yadkin assumed Plaintiffs' employment agreements. On 3 May 2004, both Washburn and Eller notified Yadkin in writing that, in their discretion, their job responsibilities and authority had been diminished as a result of the merger, and Plaintiffs declared their employment terminated without cause pursuant to Paragraph 7(g). Plaintiffs notified Yadkin that they did not consider themselves bound by the employment agreements' noncompetition provisions and sought the compensation provided in Paragraph 7(f). Washburn's termination from Yadkin was effective 24 May 2004, and Eller's termination was effective the following day. Yadkin did not pay Plaintiffs any severance benefits under the agreements. On 3 August 2004, Washburn and Eller filed complaints in Watauga County Superior Court seeking the compensation and benefits to which they claimed entitlement.[1]

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[1]On 6 February 2007, the Watauga County court granted Washburn's and Eller's motions for judgment on the pleadings as to all of their claims. Yadkin appealed those orders to this Court. In a separate opinion, we affirmed the trial court's orders. *Washburn v. Yadkin Valley Bank & Trust Co.*, ___ N.C. App. ___, ___ S.E.2d ___ (May 6, 2008) (Nos. COA07-612, COA07-613).

On 1 November 2004, AF Financial hired Washburn as its President and Chief Executive Officer. In January 2005, AF Financial hired Eller as a senior vice-president of its subsidiary, AF Bank.

Yadkin commenced the present action against AF Financial by filing a complaint on 17 August 2005 advancing four claims: (1) tortious interference with contract; (2) misappropriation of trade secrets; (3) unfair competition; and (4) civil conspiracy. In addition to seeking compensatory, statutory, and punitive damages, Yadkin sought injunctive relief "restraining AF Financial from continuing to employ [] Washburn and Eller . . . ." On 23 March 2006, the trial court entered partial summary judgment in favor of AF Financial, dismissing Yadkin's claim of tortious interference with contract and its other claims to the extent those claims were based on the tortious interference claim. The trial court did not address Yadkin's misappropriation of trade secrets claim or its other claims to the extent those claims were based on the misappropriation claim. Yadkin voluntarily dismissed its remaining claims without prejudice on or about 15 November 2006 and, on 11 December 2006, filed notice of appeal from the partial summary judgment order.

After Yadkin filed its notice of appeal, AF Financial filed a motion for Rule 11 sanctions. AF Financial asserted that Yadkin's claims were not well grounded in fact, were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and were brought for an

improper purpose. The trial court agreed and, on 8 January 2007, awarded $5,000.00 in costs and $25,000.00 in attorney's fees to AF Financial. Yadkin timely noticed appeal from the order imposing sanctions.

SUMMARY JUDGMENT (COA07-240)

First, Yadkin takes the position that the trial court erred in granting summary judgment in favor of AF Financial on Yadkin's claim of tortious interference with contract. In support of this position, Yadkin argues that Washburn and Eller were bound by the agreements not to compete against Yadkin. Alternatively, Yadkin asserts that the trial court *did not err* in granting summary judgment because Washburn and Eller repudiated the agreements, relieving all parties from their duties thereunder. After presenting these arguments, Yadkin "prays that the Court reverse the trial court's entry of summary judgment . . . . In the alternative, Yadkin prays that the Court *affirm* the entry of summary judgment on the express ground that" Yadkin, Washburn, and Eller were not bound by the agreements, and, thus, the parties were relieved of their reciprocal contractual duties. (Emphasis added.) Conspicuously absent from both of these arguments is the role played by AF Financial in this affair.

To establish a claim for tortious interference with contract, a plaintiff must show:

> "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the

> contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff."

Beck v. City of Durham, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). We review a summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 649 S.E.2d 382 (2007).

The bulk of Yadkin's brief is addressed to the issue of whether Yadkin had an obligation to pay Washburn and Eller under the employment agreements, not to the issue of whether AF Financial tortiously interfered with the contracts.[2] In fact, of the twenty-seven cases cited in Yadkin's brief, only one is directly relevant to our analysis of Yadkin's tortious interference claim. This lone case appears on page thirty-four of Yadkin's brief, as the last sentence of Yadkin's argument, and is cited for the proposition that "AF Financial was willing to accept the risk of employing Washburn and Eller based on their incorrect reading of the [agreements]." Moreover, in its briefs in COA07-612 and COA07-613, *supra* n. 1, Yadkin purports to incorporate by reference the entirety of its argument in its brief in this case. Such a tactic, when viewed in combination with the "alternative" sought-after relief, suggests that Yadkin's appeal here is, in actuality, merely an attempt to persuade the Court that Yadkin should prevail in the other matters. The extent of Yadkin's argument that AF Financial

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[2]For a discussion of Washburn's and Eller's alleged breach of their employment agreements, see *Washburn*, *supra* n. 1.

tortiously interfered with the employment agreements is that: (1) the employment agreements were valid contracts and conferred upon Yadkin contractual rights against Washburn and Eller, (2) AF Financial was aware of the employment agreements, and (3) AF Financial hired Washburn and Eller. Completely absent from Yadkin's argument is any discussion of the third, fourth, and fifth elements of the claim. It is not the role of this Court to create an argument for an appellant, *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), and we are not persuaded by the argument presented.[3] Yadkin's argument is overruled.

RULE 11 SANCTIONS (COA07-417)

Next, Yadkin asserts that the trial court erred in imposing Rule 11 sanctions.[4] Rule 11 provides, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney . . . constitutes a certificate by [the attorney] that he [or she] has read the pleading, motion, or other paper; that to the best of his [or her] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

[3]Nor are we persuaded by Yadkin's argument that Washburn and Eller repudiated the agreements, thus relieving Yadkin of its duty to provide severance benefits. *See Washburn*, *supra* n. 1.

[4]"[N]either the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions." *Dodd v. Steele*, 114 N.C. App. 632, 634, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994) (citing *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992), and *Overcash v. Blue Cross & Blue Shield of N.C.*, 94 N.C. App. 602, 617, 381 S.E.2d 330, 340 (1989)).

> extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007). "There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 365 (citations omitted). The trial court imposed sanctions after concluding that Yadkin's complaint was neither factually nor legally sufficient and was filed for an improper purpose.

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

> If this Court determines that (1) the trial court's findings of fact are supported by sufficient evidence; (2) these findings support the court's conclusions of law; and (3) the conclusions of law support the judgment, it "must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions[.]"

Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002) (quoting *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999)). "The trial court's findings of fact are conclusive on appeal if

supported by competent evidence, even when the record includes other evidence that might support contrary findings." *Id.* (citing *Inst. Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992)).

Plaintiff argues its complaint was well grounded in fact. We disagree.

> Analysis of the factual sufficiency of a complaint requires the court to determine "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *Page v. Roscoe, LLC*, 128 N.C. App. 678, 681-82, 497 S.E.2d 422, 425 (1998). An inquiry is reasonable if "given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law[.]" *Bryson v. Sullivan*, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992).

Static Control Components, Inc., 152 N.C. App. at 603-04, 568 S.E.2d at 308.

In the case at bar, the evidence plainly supports the trial court's findings of fact which, in turn, support its conclusions that Yadkin did not undertake a reasonable inquiry into the facts before filing its complaint and that Yadkin did not reasonably believe that its position was well grounded in fact. The evidence which most strongly supports the conclusion that Yadkin's complaint was "not formed after a reasonable inquiry" consists of the deposition testimony of two of Yadkin's top executives, most of which was recounted in the trial court's findings. John Brubaker,

the President of HCB before the merger who became one of Yadkin's regional presidents after the merger, testified:

> Q. Do you know of anything that AF Financial has done improper to cause them to be subjected to a lawsuit by Yadkin?
>
> A. I don't have any knowledge, no.

William A. Long, Yadkin's President and Chief Executive Officer, testified:

> Q. And up to this point, even though you've listed these five categories of information that [Washburn and Eller] may have had access to in terms of confidential or trade secret information, you're not aware of any evidence to suggest that they're using or misappropriating any of those five categories of information, are you?
>
> A. I'm not aware or unaware.
>
> Q. Okay. Well, I'm interested in what you're aware of.
>
> A. I'm not aware of it.
>
> . . . .
>
> Q. As of today are you aware from any source whatsoever of any information that you think Yadkin has that would suggest that Mr. Washburn or Mr. Eller have been misappropriating trade secrets or confidential information?
>
> A. I am not.
>
> Q. Okay. And are you aware of any information from any source whatsoever as of today that AF Financial has aided and abetted them or encouraged them or asked them to misappropriate confidential or trade secret information of Yadkin?
>
> A. I am not.
>
> . . . .

> Q. I asked Mr. Brubaker in his deposition . . . whether he knew of anything that AF Financial had done improper to cause them to be subjected to a lawsuit by Yadkin, and his answer was: I don't have any knowledge, no.
>
> Do you, sir, have any knowledge of anything that AF Financial has done improper to cause it to be subjected to a lawsuit by Yadkin?
>
> A. Not at this time.
>
> Q. And do you know of any wrongful conduct by AF Financial as you sit here today?
>
> A. I do not.

Finally, Mr. Long, whose knowledge is imputed to Yadkin, *see*, *e.g.*, *Static Control Components, Inc.*, 152 N.C. App. at 605, 568 S.E.2d at 309 ("We find unavailing plaintiff's attempts to distinguish between Swartz's knowledge and that of plaintiff, given that [Swartz] is plaintiff's CEO."), testified:

> Q. Do you have any information regarding any damages Yadkin has suffered as a result of the claims made in this lawsuit?
>
> A. No.

The evidence which supports the trial court's conclusion that Yadkin's complaint was "not well grounded in fact" consists of the agreements themselves. Quoting extensively from the transcript of the 23 March 2006 summary judgment hearing before Judge Doughton, Judge Burke's order recited:

> THE COURT: Well, [the employment agreement] says what it says.
>
> MR. LORD: It does.

> THE COURT: And if it doesn't mean what it says, I would like to know what you say it does mean.
>
> MR. LORD: Your Honor, I think that the language is clear. I mean, today we're here on a motion for summary judgment, for purposes of the summary judgment motion, that a contract is presumed to be enforceable. It's presumed that the noncompete is reasonable and effective.
>
> THE COURT: But the noncompete says in it that . . . the provisions of this paragraph 5(b) [the noncompete clause] shall not apply perspectively [sic] in the future in the event this agreement is terminated by the bank without cause as defined below. . . . And then you go on where it is talking about approved change of control. And in the approved change of control it says: Upon 10 days prior written notice the officer may declare this agreement to have been terminated without cause by the bank. And that one of the reasons they can do it is if in the officer's sole discretion -- which, are these two employees[] -- in the sole discretion, his responsibilities or authorities in the capacity described in paragraph 1 have been diminished materially, says he can make that judgment. And in the letters that he sent the bank, they both say that their, in their discretion they have determined that they've changed.
>
> Now, how, how can you get around that language?
>
> MR. LORD: We're not trying to, Your Honor. We're saying that Mr. Washburn and Mr. Eller elected to end their relationship with the bank under those terms.
>
> THE COURT: *And it says they get paid.* And if, if it's done without cause, and in their discretion they've determined that it's without cause, then they get paid. They get this severance pay. *And they're no longer obligated under the noncompete agreement*, because it says without cause.

(Emphasis added.) Judge Burke then found:

> 5. Judge Doughton also did a careful review of the terms of the contract, questioned Yadkin's lawyer at length, made it clear that the argument Yadkin's lawyer was making did not comport with the plain language of the employment agreements, and concluded, consequently, that summary judgment should be granted on the [tortious interference claims].
>
> . . . .
>
> 6. *As demonstrated by Judge Doughton's analysis*, a review of the plain words of the non-compete provisions in the employment agreements of Mr. Washburn and Mr. Eller shows that the [tortious interference claims] were not well grounded in fact . . . . Yadkin filed and pursued the [tortious interference claims] against AF Financial even though *there was no basis whatsoever for the assertion of the claims*.

(Emphasis added.) We agree with AF Financial that an "elementary review" of the employment agreements reveals that Washburn and Eller were not bound by the non-competition provisions. Yadkin's assertion to the contrary was not reasonable. The trial court properly concluded that Yadkin's complaint was not well grounded in fact. Yadkin's argument is overruled.

Because we have concluded that Yadkin's complaint did not meet the test of factual sufficiency, we need not address Yadkin's arguments that its complaint was legally sufficient and was not filed for an improper purpose. *Dodd*, 114 N.C. App. 632, 442 S.E.2d 363. Nevertheless, we have reviewed the evidence in support of the trial court's findings and conclude that the trial court's findings also support its conclusions that Yadkin's claims were not legally sufficient and were brought for an improper purpose. Additionally, although "[t]he appropriateness of a particular sanction is

reviewed for abuse of discretion[,]" *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003) (citing *Turner*, 325 N.C. at 165, 381 S.E.2d at 714), Yadkin does not contest the amount of the trial court's award.

For the reasons stated, both the 23 March 2006 partial summary judgment order and the 8 January 2007 order imposing Rule 11 sanctions are affirmed.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).