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NO. COA09-1453

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

LINDA W. DAVID,
Plaintiff,

v.

Macon County
No. 07 CVS 23

CREIGHTON W. SOSSOMAN,
Defendant.

Appeal by defendant from order entered 2 July 2009 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 12 May 2010.

Dungan Law Firm, P.A., by James W. Kilbourne, Jr., for plaintiff-appellee.

Sharpless and Stavola, P.A., by Eugene E. Lester III for defendant-appellant.

HUNTER, Robert C., Judge.

Attorney Creighton W. Sossoman ("defendant") appeals from the trial court's order denying his motion for judgment notwithstanding the verdict ("JNOV") and motion to tax costs against Linda W. David ("plaintiff"). After careful review, we find no error.

Background

Plaintiff owns and resides on a 56-acre parcel of land that has been in her family since 1868. In order to save money for retirement, plaintiff decided to sell an adjoining 19-acre parcel of land; however, "[i]t was extremely important to [her] as to how

it was going to be used." On 2 October 2003, plaintiff entered into an "Offer to Purchase and Contract" ("the contract") with G. Sanders Dupree ("Dupree") for the sale of the 19-acre parcel for \$700,000.00. Plaintiff agreed to sell the land to Dupree, a real estate developer, primarily because he agreed to adhere to a set of restrictive covenants; however, no restrictive covenants were included in the contract, a Standard Form 2-T.

Among the provisions contained in the contract, "[Section] 5. CONDITIONS (b)," states: "There must be no restriction, easement, zoning, or other governmental regulation that would prevent the reasonable use of the Property for SINGLE FAMILY RESIDENTIAL purposes." "[Section] 12. PROPERTY DISCLOSURE AND INSPECTIONS," provides that "CLOSING SHALL CONSTITUTE ACCEPTANCE OF EACH OF THE SYSTEMS, ITEMS AND CONDITIONS LISTED ABOVE IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Section 14, labeled "CLOSING," states: "Closing shall be defined as the date and time of recording of the deed. All parties agree to execute any and all documents and papers necessary in connection with Closing and transfer of title on or before December 23, 2003, at a place designated by Buyer." In Section 16, "OTHER PROVISIONS AND CONDITIONS[,]" the contract provides for two attachments: Standard Form 2A5-T "Seller Financing Addendum" and "Addendum B." Addendum B to the contract provides "Buyer and Seller shall mutually agree on restrictive covenants similar to Highlands Point," which is a single family residential community developed by

Dupree. Addendum B also required Dupree to complete a survey showing individual lots as a pre-condition to closing.

On 8 December 2003, the parties signed a waiver to Addendum B. Additional handwritten changes were made to the waiver on 10 December 2003. The waiver reads: "Buyer hereby acknowledges completion and/or waives contingency items in above referenced attachment of Offer to Purchase and Contract[.]" Condition 5(b) was not referenced in the waiver. Dupree waived the completion of certain preconditions concerning survey work. In exchange, plaintiff acknowledged receiving a copy of the Highlands Point Declarations, agreed to accept these declarations, and agreed to be appointed to the Architectural Review Committee.

Plaintiff retained defendant to represent her at the contract closing. It is undisputed that defendant knew of plaintiff's desire to restrict the 19-acre property so that it could only be used for residential purposes, and, more specifically, that the community built on the land would only contain single-family dwellings. Defendant testified at trial that he was aware that Dupree had agreed to the imposition of restrictive covenants on the property and it was his understanding that Dupree would record the restrictions after the closing and that Dupree's legal obligation to do so "survived the closing." Prior to closing, Dupree assigned all of his rights and obligations under the contract to Old Hemlock Cove Development, LLC ("Old Hemlock Cove"). The record in this matter contains a draft of the "Declaration of Protective Covenants for 'Old Hemlock Cove[,]" but this draft was never signed by the

parties or recorded. A general warranty deed executed 12 January 2004, which was prepared by defendant, conveyed 19.24 acres of plaintiff's property to Old Hemlock Cove. The deed was recorded on 15 January 2004 simultaneously with a \$400,000.00 purchase money deed of trust. A survey of the property, without interior lot lines and showing only the outer perimeter, was also recorded. No restrictive covenants were recorded with these instruments, and the instruments do not specifically mention restrictive covenants pertaining to Old Hemlock Cove. Still, plaintiff believed that the restrictive covenants were part of the agreement between the parties and that Dupree would file them after the closing.

According to plaintiff, "[f]or a long period after the closing," Old Hemlock Cove proceeded to lay the foundations for the new subdivision in accordance with the restrictive covenants plaintiff and Dupree negotiated prior to the contract closing. However, in 2006, Old Hemlock Cove entered into a contract to sell the property to another developer, William Shephard ("Shephard"), without restrictions. Shephard proposed to build a high-rise condominium on the property, which was the type of development plaintiff sought to exclude under the restrictive covenants. Defendant agreed to represent Shephard and Dupree in the transaction without obtaining the consent of plaintiff.

On 12 September 2006, the day of the contract closing for the sale of the property to Shephard, plaintiff filed a summons without a complaint against Old Hemlock Cove and Dupree as well as a *lis pendens* action. On 2 October 2006, plaintiff filed a complaint

against Old Hemlock Cove and Dupree seeking, *inter alia*, specific performance of the contract which would require Old Hemlock Cove to record the restrictive covenants. A jury trial was held, and on 16 October 2008, the jury found that plaintiff and Dupree did not "enter into a contract to place a specific set of written restrictive covenants on the property in question." Consequently, plaintiff's ability to impose any restrictions on the 19-acre tract was lost.

On 24 January 2007, plaintiff filed a civil action against defendant alleging, *inter alia*, legal malpractice. Plaintiff claimed that "Defendant was aware of the Plaintiff's desire to have the property's development restricted by restrictive covenants." Plaintiff alleged that "Defendant owed a duty to the Plaintiff, as her attorney, to competently and zealously represent her, and to advise the Plaintiff of the legal effect and potential for legal challenges that could arise by not having the restrictive covenants executed by the Buyer prior to or at the closing." Plaintiff further alleged that "Defendant breached that duty by not advising the Plaintiff to postpone closing until the restrictive covenants, or some other agreement specifically addressing the requirement for recordation of the restrictive covenants after closing, were executed by the Buyer"; "Defendant further breached that duty by performing the closing with the knowledge that the restrictive covenants were not executed as the Contract called for"; and "Defendant's failure to properly and competently advise and

represent the Plaintiff in this real estate transaction is the actual and proximate cause of the Plaintiff's damages."

A jury trial was held in this matter and on 14 May 2009, the jury returned a verdict in which it determined that plaintiff was injured by the negligence of defendant, but that plaintiff was contributorily negligent. Consequently, plaintiff was unable to recover for defendant's negligence and a judgment was entered in favor of defendant. Defendant filed a motion for JNOV as to the jury's verdict finding him negligent. Defendant also filed a motion to tax costs against plaintiff. On 2 July 2009, the trial court denied defendant's motions. Defendant timely appealed to this Court.

Discussion

I. Motion for JNOV

Plaintiff in this case alleged legal malpractice based primarily on the assertion that defendant failed "to advise the Plaintiff of the legal effect and potential for legal challenges that could arise by not having the restrictive covenants executed by the Buyer prior to or at the closing." Defendant argues on appeal that the trial court erred in denying his motion for JNOV because plaintiff failed to prove at trial that defendant owed a duty to plaintiff or that any breach of a duty was the proximate cause of plaintiff's damages.

A motion for JNOV is governed by Rule 50(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 50(b) (2009).

As a motion for JNOV is simply a motion that judgment be entered in accordance with an earlier directed verdict motion, the same standards are used to review both motions. In ruling upon a motion for JNOV, the evidence must be viewed in the light most favorable to the non-moving party. JNOV should be entered only where the evidence, so considered, is insufficient to support a verdict for the non-moving party.

Smith v. Childs, 112 N.C. App. 672, 682, 437 S.E.2d 500, 507 (1993) (internal citations omitted). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002). "Motions for directed verdict and judgment notwithstanding the verdict should be denied where there is more than a scintilla of evidence to support each element of a plaintiff's case." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 65, 577 S.E.2d 918, 923, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 758 (2003).

Our Supreme Court has aptly stated the duties owed to a client by his or her attorney as follows:

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action [o]n behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

Hodges v. Carter, 239 N.C. 517, 519-20, 80 S.E.2d 144, 145-46 (1954) (internal citations omitted).

In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges* . . . and that this negligence (2) proximately caused (3) damage to the plaintiff.

Rorrer v. Cooke, 313 N.C. 338, 355, 329 S.E.2d 355, 365-66 (1985).

Defendant argues on appeal that he had no legal duty to personally record restrictive covenants on behalf of plaintiff prior to the transfer of the property from plaintiff to Old Hemlock Cove. Upon review of the record, it appears that defendant confuses the allegations against him by plaintiff at trial. Plaintiff did not argue before the trial court that defendant had a legal duty to personally record the restrictive covenants; rather, plaintiff alleged that defendant failed to take reasonable care in advising her of her rights and obligations under the

contract prior to closing. According to plaintiff, defendant was aware of plaintiff's desire to impose restrictive covenants and he failed to advise her that her contract did not explicitly impose restrictive covenants; that she would lose the ability to impose the restrictive covenants after closing where none of the recorded instruments listed restrictions; and, that there was not a separate written agreement that would require Old Hemlock Cove to record the restrictions after closing.

Plaintiff's expert, attorney William Biggers ("Biggers"), testified regarding the standard of care owed to plaintiff:

Q: Mr. Biggers, do you have an opinion as to whether Mr. Sossomon had a duty to point out any concerns he may have with regard to the contract?

A: I think so, yes. . . . [B]ased on what I reviewed . . . I have found nothing that would tell me that Mr. Sossomon had let his clients know at the time of the closing that there were no restrictive covenants recorded concerning this land, and I think there was a duty there to let the clients know that that part of the contract had not been fulfilled at the time the transaction was closed and the deed recorded.

. . . .

Q: [D]o you have an opinion . . . as to whether or not Mr. Sossomon had a duty to discuss the provisions of the contract regarding restrictive covenants?

. . . .

A: Yes.

Q: And what is that opinion?

A: I believe that the standard of care when we are looking at a contract similar to this is that the attorney would need to see to it

that each point of that contract was either dealt with at the closing, or if it was not something that could be dealt with, that the client was informed of that, why it was not dealt with . . . and what options were available to the client at that point.

. . . .

Q: Do you have an opinion if Mr. Sossomon owed a duty of care to Linda David to discuss anything at closing with regard to restrictive covenants?

A: Yes.

Q: And what is that opinion?

A: I think that there should have been some discussion at closing as to the provisions in the contract that addressed restrictive covenants, and there . . . should have been some discussion that they were not being done at that time, and what options the seller would have at that point, whether to insist that this be restricted, whether to add restrictions to the deed, or whether to rely on the survivability clause of the contract .

. . . .

Viewing the evidence in the light most favorable to plaintiff, we hold that there was sufficient evidence to establish that defendant breached the standard of care owed to plaintiff as her attorney in this transaction. Defendant failed to fully advise her of her rights and obligations, knowing that no restrictive covenants had been recorded or set out in the contract, and no agreement existed regarding the recordation of restrictions subsequent to closing.

We further hold that there was sufficient evidence to establish that defendant's actions were negligent, not a mere error of judgment. See *id.* at 341, 329 S.E.2d at 358 ("An attorney who

acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers."). Although defendant contends that at the time of closing he believed Dupree had an "implied" obligation to record the restrictive covenants, defendant admitted at trial that he knew the only way plaintiff could force Dupree or Old Hemlock Cove to record the restrictive covenants, absent a separate written agreement, was to initiate a lawsuit demanding specific performance. Defendant further admitted that he did not discuss that fact with plaintiff and said: "Do I feel that I had a duty to explain to her that she had signed a lousy contract that never should have been written and never should have been signed? No."

Defendant further argues that plaintiff failed to establish at trial that any breach of the standard of care was the proximate cause of plaintiff's injury. Again, viewing the evidence in the light most favorable to plaintiff, we disagree. "To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct." *Id.* at 361, 329 S.E.2d at 369. "Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Williams v. Power & Light Co.,*

296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (citation and quotation marks omitted).

Guy Duvall ("Duvall"), an appraisal expert for plaintiff, testified that the land retained by plaintiff had suffered a loss in value of approximately \$284,000.00 as a direct result of the transfer of the 19-acre tract without restrictions. Defendant claims that when plaintiff signed the contract to sell the property to Dupree without restrictions, a contract that was not drafted by defendant, plaintiff lost all of her rights to impose restrictions and there was nothing he could have done to prevent that from happening. Attorney Ken Fromknecht ("Fromknecht"), who represented Dupree and Old Hemlock Cove with regard to the purchase of the 19 acres, testified that plaintiff lost her right to impose restrictive covenants when she signed the contract for sale without explicit language stating that the property would be subject to restrictive covenants, and further claimed that if plaintiff had refused to close on the contract as written, Dupree and Old Hemlock Cove would have sued her for specific performance. However, plaintiff's expert testified that it was his opinion that plaintiff could have refused to close on the contract and that her right to impose the restrictive covenants was not lost until the closing took place and the restrictive covenants were not filed. "[A]s the finder of fact, the jury is 'entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence.'" *Horne v. Vassey*, 157 N.C. App. 681, 687, 579 S.E.2d 924, 928 (2003) (quoting *Smith v. Price*, 315 N.C. 523, 530-31, 340

S.E.2d 408, 413 (1986)). There was sufficient evidence for the jury to find that all parties were aware of the agreement to impose restrictive covenants, and, had plaintiff known that her right to enforce the restrictive covenants would be lost after closing, her rights could nonetheless have been protected if an agreement had been reached and executed providing that Dupree would record the restrictive covenants after the closing. However, plaintiff was not informed of her right to request that a formal agreement be reached prior to closing concerning recordation, or her right to refuse to close on the property absent such an agreement. In other words, plaintiff believed that Dupree was required to file the restrictive covenants after closing per their agreement and defendant did not advise her that Dupree was not bound to do so given the explicit language of the documents signed at the closing. One such document, the warranty deed itself, states that "[t]his conveyance is expressly made subject to and together with all easements, restrictions, reservations and equitable servitudes, if any, as may be of record."

Defendant points to the jury's verdict in plaintiff's action against Dupree and Old Hemlock Cove to support his contention that any advice he gave plaintiff would not have changed the fact that she did not contract for restrictive covenants. However, defendant's advice may have resulted in a remedy of the situation prior to closing, such as the execution of a separate agreement that the restrictive covenants would be recorded after closing. Again, it is for the jury to determine whether defendant's actions

were the proximate cause of plaintiff's damages based on the evidence. There was more than a scintilla of evidence that defendant's breach of the standard of care resulted in an injury to plaintiff. In sum, we hold that the evidence, viewed in the light most favorable to plaintiff, was sufficient to support the jury's verdict. The trial court, therefore, properly denied defendant's motion for JNOV.

II. Motion for Taxation of Costs

Defendant argues that the trial court erred in denying his motion to tax the costs of trial against plaintiff pursuant to N.C. Gen. Stat. § 6-20 (2009), which states that "costs may be allowed in the discretion of the court." "The trial court's discretion to tax costs pursuant to N.C. Gen. Stat. § 6-20 is not reviewable on appeal absent an abuse of discretion." *Lewis v. Setty*, 140 N.C. App. 536, 538, 537 S.E.2d 505, 507 (2000); *Coffman v. Roberson*, 153 N.C. App. 618, 629, 571 S.E.2d 255, 261 (2002).

Here, the trial court stated in open court: "The [c]ourt has considered arguments of counsel . . . each party will bear their own respective costs. The [c]ourt deems that there was no successful party in this case. Each party lost." The trial court subsequently filed a written order denying defendant's motion.

In *Griffis v. Lazarovich*, 164 N.C. App. 329, 335, 595 S.E.2d 797, 802 (2004), this Court, quoting *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 180, 552 S.E.2d 674, 679 (2001), stated: "'The [trial] court's discretion under N.C.G.S. § 6-20 is not reviewable on appeal,' where the court specifically states the

costs awarded defendants were taxed against plaintiff in the court's discretion." Defendant argues that *Griffis* requires that the trial court specifically state that its determination regarding award of costs is made "in the court's discretion" and the court in this case did not use that terminology. While the Court in *Sterling* acknowledged that the trial court specifically stated that it made its determination "in the court's discretion[,] " neither *Sterling* nor *Griffis* imposes an obligation on the trial court to use those specific words. Clearly, the trial court in the present case utilized its discretion when it determined that, upon hearing arguments of counsel, it was declining to impose costs because "[e]ach party lost." We find no abuse of discretion in the trial court's decision.

No error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).