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NO. COA09-1580

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

MCMAHON & ASSOCIATES, LLC,
Plaintiff,

v.

Iredell County
No. 07 CVS 2322

FUTURE SERENITY, INC.,
HENDERSON PROPERTIES &
INVESTMENTS, LLC, LTD OF
LAKE NORMAN, LLC, LAURA C.
CHILCOAT (previously) TOMCZAK,
TERRY EDMUNDSON,
Defendants

&

HENDERSON PROPERTIES &
INVESTMENTS, LLC,
Third-Party Complainant,

v.

CHRISTOPHER CANIPE,
Third-Party Defendant.

Appeal by plaintiff from orders filed 26 March 2009 and 24 August 2009 by Judge Mark Klass in Iredell County Superior Court, and cross-assignment of error by defendants. Heard in the Court of Appeals 27 April 2010.

Blanco Tackabery & Matamoros, P.A., by Peter J. Juran, for plaintiff.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for defendants Future Serenity, Inc., LTD of Lake Norman, L.L.C., Laura Chilcoat, and Terry Edmundson.

Homesley, Goodman & Wingo, PLLC, by Andrew J. Wingo and Michael F. Roessler, for defendant Henderson Properties & Investments, LLC.

STEELMAN, Judge.

One superior court judge may not overrule the rulings of another superior court judge previously made in the same case on the same legal issue. Judge Klass' order granting summary judgment is vacated to the extent that it overruled Judge Beale's order denying summary judgment. The denial of a motion for summary judgment is interlocutory, and this portion of defendants' appeal is dismissed. Judge Klass erred by granting summary judgment in favor of defendants Future Serenity, LTD, Chilcoat, and Terry on plaintiff's claim for tortious interference with a contract. Judge Klass erred by granting defendant Henderson's motion for summary judgment.

I. Factual and Procedural Background

In November 2004, Terry Edmundson (Terry) engaged the services of a commercial real estate broker, McMahon & Associates, LLC (plaintiff), to locate an office rental space for LTD of Lake Norman, LLC (LTD). Terry is 50% owner of LTD, and Laura Chilcoat (Chilcoat), previously Tomczak, owns the other 50% of LTD. Plaintiff located a building, owned by Henderson Properties and Investments, LLC (Henderson). Terry and Chilcoat planned to open a Re/Max Realty office in the office building.

On 6 December 2004, plaintiff and Henderson entered into a contract styled as "Disclosure and Fee Agreement for Non-Listed

Property Lease," (Agreement) which was executed to facilitate the lease of commercial property (the property) located in Mooresville from Henderson to prospective tenants "Terry Edmundson and/or assignees." The Agreement contained a "Sale Protection Provision," under the terms of which Henderson would be obligated to pay plaintiff 3% of the gross sales price on any sale of the property to "Terry Edmundson and/or assignees" within ten years of the date of the Agreement. On 17 December 2004, Terry, as President of LTD, signed a lease agreement for the property with Henderson.

In the spring of 2006, Chris Canipe (Canipe), a realtor and agent of LTD, was approached by Marshall Henderson (Marshall), the principal of Henderson, seeking LTD's assistance in selling the property. Canipe told Marshall that LTD would be interested in purchasing the property, "whereupon [Marshall] stated that he could not sell the [property] to LTD because such transaction could trigger an obligation for Henderson to pay a commission to [plaintiff]." After receiving this information, Chilcoat contacted plaintiff and requested that plaintiff waive the 3% commission, but plaintiff refused.

On 2 August 2006, Chris Edmundson (Chris) filed Articles of Incorporation for Future Serenity, Inc. (Future Serenity) with the office of the North Carolina Secretary of State. Chris is the husband of Terry. In September 2006, Chris, acting for Future Serenity, presented an offer to Henderson to purchase the property for \$1,800,000.00 contingent upon Future Serenity's ability to secure financing within ninety days. The ninety day period lapsed

because Future Serenity was unable to secure financing. Henderson then agreed to an indefinite extension of the right to purchase the property at the same price. The 2006 Tax Return for Future Serenity listed Terry as a shareholder, owning 50% of the stock.

On 15 March 2007, Future Serenity purchased the property from Henderson. At the time of purchase, Chris and Chilcoat each owned 50% of Future Serenity's stock. Upon purchase of the property, Future Serenity became landlord to LTD. The 2007 Tax Return for Future Serenity listed Chris and Chilcoat as shareholders, each owning 50% of Future Serenity's stock.

On 9 August 2007, plaintiff filed a complaint in Iredell County Superior Court against Future Serenity, Henderson, LTD, Chilcoat, Terry and Marshall. Plaintiff asserted four causes of action: (1) breach of contract against Henderson; (2) civil conspiracy against all defendants; (3) unfair and deceptive trade practices against all defendants; and (4) fraud against all defendants. On 15 April 2008, plaintiff filed a voluntary dismissal as to all claims against Marshall, and the claims for civil conspiracy, unfair and deceptive trade practices, and fraud against Henderson. The claim for breach of contract against Henderson was not dismissed.

On 29 August 2008, Future Serenity, LTD, Chilcoat, and Terry filed a motion for summary judgment. On 18 September 2008, plaintiff filed a motion seeking to amend its complaint by adding a claim for tortious interference with a contract against Chilcoat and Terry. On 19 September 2008, Henderson filed a motion seeking

to add Canipe as a third-party defendant and to file a cross-claim against LTD. On 7 November 2008, Judge Michael E. Beale entered an order denying the motion for summary judgment, allowing plaintiff's motion to amend, and allowing Henderson's motion to add Canipe as a third-party defendant and to file a cross-claim against LTD.

On 13 February 2009, Henderson filed a motion for summary judgment. On 26 March 2009, Judge Klass filed an order granting Henderson's motion for summary judgment. On 1 April 2009, Future Serenity, LTD, Chilcoat, and Terry filed a second motion for summary judgment. On 6 April 2009, plaintiff filed a motion seeking to amend its amended complaint by adding a claim for unfair and deceptive trade practices against Henderson. That same day, plaintiff filed a "Motion for Relief from Order Pursuant to Rule 60," seeking to have the order granting summary judgment in favor of Henderson set aside based upon Rules 60(b)(2), (3), and (6). On 24 August 2009, Judge Klass filed three orders: denying plaintiff's motion to amend its amended complaint, granting the motion for summary judgment of Future Serenity, LTD, Chilcoat and Terry, and denying plaintiff's Rule 60 motion.

Plaintiff appeals the orders granting summary judgment as to Henderson, the denial of its Rule 60 motion, the granting of summary judgment as to Future Serenity, LTD, Chilcoat and Terry, and the denial of its motion to amend. Defendants Future Serenity, LTD, Chilcoat, and Terry cross-assign error to Judge Beale's denial of their motion for summary judgment.

II. Future Serenity, LTD, Chilcoat, and Terry's Motions for Summary Judgment

In its second argument, plaintiff contends that Judge Klass erred in granting defendants Future Serenity, LTD, Chilcoat, and Terry's motion for summary judgment because their prior motion for summary judgment had been denied by Judge Beale. We agree.

A. Conflicting Orders on Summary Judgment

The relationship between two trial judges' orders on summary judgment raises a jurisdictional issue. *Cail v. Cerwin*, 185 N.C. App. 176, 181, 648 S.E.2d 510, 514 (2007). "Ordinarily, one superior court judge may not overrule the judgment of another superior court judge previously made in the same case on the same legal issue." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 632-33, 272 S.E.2d 374, 376 (1980) (citations omitted), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981); *see also Adkins v. Stanly Cty. Bd. of Educ.*, ___ N.C. App. ___, ___, 692 S.E.2d 470, 472 (2010). There is an exception for orders that do not resolve an issue but direct some further proceeding prior to a final ruling, but "when the [trial] judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review." *Id.* at 633, 272 S.E.2d at 376.

In the context of summary judgment, this Court has held that in the granting or denial of a motion for summary judgment, the court is ruling as a matter of law. Such a ruling is determinative as to the issue presented. Thus, although there may be more than one motion for summary judgment in a lawsuit, the second motion will be appropriate only if it presents legal issues that are different from those raised in the earlier motion.

Cail, 185 N.C. App. at 181-82, 648 S.E.2d at 514 (internal citations, quotations and alterations omitted).

In the instant case, when defendants Future Serenity, LTD, Chilcoat and Terry filed their first motion for summary judgment, the claims pending against them were for civil conspiracy, unfair and deceptive trade practices, and fraud. These defendants argued that they were entitled to summary judgment because the elements of a civil conspiracy were absent and because Future Serenity was an innocent purchaser for value. In his order denying summary judgment, Judge Beale found that "[b]ased on issues of material fact presented at the hearing, the Court is of the opinion that Summary Judgment is not appropriate"

Approximately six months later, defendants Future Serenity, LTD, Chilcoat, and Terry filed a second motion for summary judgment. The claims pending against them were for civil conspiracy, unfair and deceptive trade practices, fraud, and tortious interference with a contract. These defendants argued that because Judge Klass had granted Henderson's motion for summary judgment, they were entitled to summary judgment. In his order granting summary judgment, Judge Klass found that, "there exists no genuine issue as to any material fact and that the aforesaid Defendants are entitled to judgment as a matter of law."

The only claim pending against Henderson at the time of hearing of Henderson's motion for summary judgment was for breach of contract. Plaintiff never asserted a breach of contract claim against defendants Future Serenity, LTD, Chilcoat and Terry. The

dismissal of plaintiff's claim for breach of contract as to Henderson was immaterial to the claims that Judge Beale had previously ruled upon. As to Future Serenity, LTD, Chilcoat and Terry's motions for summary judgment, the issues before Judge Klass were the identical issues as were heard by Judge Beale, with the exception of the new claim for tortious interference with a contract against Chilcoat and Terry.

Judge Beale denied defendants' motion for summary judgment as to plaintiff's claims for relief of civil conspiracy, unfair and deceptive trade practices and fraud, thereby concluding as a matter of law that there were genuine issues of material fact. Judge Klass was without jurisdiction to grant summary judgment in favor of defendants on those same claims for relief and to conclude that there were no genuine issues of material fact. *See Cail*, 185 N.C. App. at 184, 648 S.E.2d at 516.

The only portion of Judge Klass' order that did not overrule Judge Beale's order is with respect to plaintiff's claim for tortious interference with a contract. We vacate Judge Klass' 24 August 2009 order to the extent that it overrules Judge Beale's 7 November 2008 order. Because we vacate Judge Klass' order granting summary judgment as to the claims of civil conspiracy, unfair and deceptive trade practices and fraud for Future Serenity, LTD, Chilcoat and Terry, that order is null and void, and of no effect. *Adkins*, ___ N.C. App. at ___, 692 S.E.2d at 476.

B. Cross-Assignment of Error by Future Serenity, LTD, Chilcoat, and Terry as to Judge Beale's Denial of Their Motion for Summary Judgment

By vacating Judge Klass' order to the extent it overrules Judge Beale's order, Judge Beale's order of 7 November 2008 is reinstated. Defendants have cross-assigned error as to Judge Beale's order.

The denial of a motion for summary judgment is interlocutory and is generally not immediately appealable unless it affects a substantial right. *Neill Grading & Const. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 41-42, 606 S.E.2d 734, 738, *disc. review improvidently allowed*, 360 N.C. 172, 622 S.E.2d 490 (2005). In their brief, defendants Future Serenity, LTD, Chilcoat, and Terry fail to acknowledge that the denial of summary judgment is interlocutory, much less articulate or argue any substantial right, which would be affected absent immediate review.

It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted). We dismiss Future Serenity, LTD, Chilcoat, and Terry's cross-assignment of error as interlocutory.

C. Dismissal of Tortious Interference Claim

The only portion of Judge Klass' order granting summary judgment in favor of Future Serenity, LTD, Chilcoat, and Terry remaining is plaintiff's claim for tortious interference with a contract asserted against Chilcoat and Terry.

Summary judgment is proper when "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) (2009). The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, "[w]e review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001) (citation omitted), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

The elements of a claim for tortious interference with a contract are: (1) a valid contract between plaintiff and a third party, which confers upon plaintiff a contractual right against a third party; (2) defendant knows of the contract; (3) defendant intentionally induces the third party not to perform the contract; (4) and in doing so acts without justification; and (5) resulting in actual damage to plaintiff. *Holroyd v. Montgomery County*, 167 N.C. App. 539, 546, 606 S.E.2d 353, 358 (2004), *disc. review denied and cert. denied*, 359 N.C. 631, 613 S.E.2d 690 (2005).

"A complainant must show that the defendant acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of the defending party." *Sellers v. Morton*, 191 N.C. App. 75, 82, 661 S.E.2d 915, 921 (2008) (citing *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 158, 520 S.E.2d 570, 581 (1999), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 213 (2000)). "The term 'malice' is used in this connection in its legal sense, and denotes the intentional doing of the harmful act without legal justification." *Childress v. Abeles*, 240 N.C. 667, 675, 84 S.E.2d 176, 182 (1954) (citations omitted). Interference is "without justification" if a defendant's motive is not "reasonably related to the protection of a legitimate business interest." *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989) (citation and quotations omitted).

Our Supreme Court has held that "competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988) (citations omitted). A wrongful purpose exists when the act is done for a purpose other than a reasonable and *bona fide* attempt to protect the interest of defendant. *Id.* at 220, 367 S.E.2d at 650 (citations omitted).

Plaintiff asserts that Terry and Chilcoat knew of the "Disclosure and Fee Agreement for Non-Listed Property Lease" and

intentionally induced Henderson not to perform under the contract. Specifically, plaintiff argues that Terry and Chilcoat "conspired to set up a 'straw man' corporation under which to purchase the property in a way that would avoid paying Plaintiff a commission and that Defendant Henderson participated in the scheme."

In reviewing the record in the light most favorable to plaintiff, we hold that plaintiff has met its burden of forecasting sufficient evidence to withstand defendant's motion for summary judgment on the claim for tortious interference with a contract. The record contains sufficient evidence that Chilcoat or Terry acted with malice, and with motive other than a legitimate business purpose in Future Serenity's purchase of the property. Future Serenity was capitalized by a \$20,000.00 deposit from ETC, a company owned by Terry and Chilcoat. When Future Serenity purchased the property, another \$117,627.13 was paid directly by ETC at the closing. Defendants' attorney stated that Terry intended her contributions to be gifts to her husband.

On 28 February 2007, Chilcoat, in her capacity as president, signed the 2006 Income Tax Return for Future Serenity. The 2006 Income Tax Return further listed Terry and Chilcoat as each owning 50% of Future Serenity's stock. Chris is not listed. On 2 March 2007, a bank account for Future Serenity was opened, and on 15 March 2007, Future Serenity purchased the property. During the month of March 2007, four checks were drawn on Future Serenity's bank account, and were to Chilcoat, Terry, cash, and to the Re/Max Realty office. However, Chris was not added as a signatory on the

bank account until 12 October 2007. On 9 August 2007, plaintiff filed the complaint in this lawsuit. Approximately eight months later, on 1 April 2008, Chilcoat, in her capacity as president, signed the 2007 Income Tax Return for Future Serenity, which listed Chilcoat and Chris as each owning 50% of stock.

Both Chilcoat and Terry knew of the Agreement because Henderson had informed them that he would not sell them the property because of the 3% commission, which would be due to plaintiff. This evidence shows a triable issue of fact on whether Chilcoat or Terry intentionally induced Henderson not to perform the contract by setting up a 'straw man' corporation to purchase the property in order to avoid paying plaintiff a commission.

Judge Klass erred by granting summary judgment in favor of Chilcoat and Terry on the claim of tortious interference with a contract.

III. Henderson's Motion for Summary Judgment

In its fourth argument, plaintiff contends that the trial court erred in granting Henderson's motion for summary judgment. We agree.

The standard of review for summary judgment has already been set forth in Section II(C).

Plaintiff's only remaining claim against Henderson was for breach of contract based upon Henderson's failure to pay plaintiff a commission upon the sale of the property. The elements for the claim of breach of contract are: "(1) existence of a valid contract and (2) breach of the terms of that contract." *Carcano v. JBSS,*

LLC, ___ N.C. App. ___, ___, 684 S.E.2d 41, 47-48 (2009) (citation and quotation omitted). Plaintiff alleged that Henderson breached the "Sale Protection Provision" in the Agreement, which provides:

In the event that the Property is sold to Tenant within 10 year(s) of the date of this Agreement, then it is acknowledged that a commission shall be nonetheless earned upon execution of such sale agreement and payable at closing. The parties agree that the commission payable shall be . . . three percent (3%) of the gross sales price. Gross sales price includes all consideration received or receivable by Landlord/Seller, in whatever form, including the assumption or release of existing liabilities. Seller shall pay the fee upon delivery of the deed or other evidence of transfer of title or interest, provided, however, if the transaction involves an installment contract, then Seller shall pay the fee upon the signing of such installment contract.

The contract defines Tenant as "Terry Edmundson and/or assignee."

In viewing the evidence in the light most favorable to plaintiff, we hold that plaintiff has met its burden by forecasting sufficient evidence to withstand defendant's motion for summary judgment on the claim for breach of contract. As discussed previously in Section II(C), *supra*, genuine issues of material fact exist regarding Terry's ownership interest in Future Serenity, and whether Future Serenity was in fact an assignee of Terry.

Henderson knew that the Agreement was a valid contract. He paid commission on the initial lease and all of the lease amendments, despite the fact that Terry was not the tenant. Henderson testified in his deposition that he knew Future Serenity had "common ties" to the Re/Max Realty office, Terry, and Chilcoat. He further testified that he knew Chris was Terry's husband.

Henderson was aware that the Agreement entitled plaintiff to a 3% commission on a sale of the property to "Terry Edmundson and/or Assignees," and he specifically stated he would not sell the property to LTD because he did not want to pay the 3% commission. Henderson even engaged in discussions with Canipe, an agent of LTD, about how to structure the sale of the property so that Henderson could avoid paying the 3% commission. Henderson knew the contract was valid, and he admittedly did not want to comply with the terms of the Agreement. This evidence shows a triable issue of fact on whether Henderson breached the contract with plaintiff.

Judge Klass erred by granting summary judgment in favor of Henderson on the claim for breach of contract.

IV. Rule 60(b) Motion

In its fifth argument, plaintiff contends that the trial court erred by denying plaintiff's motion for relief pursuant to Rule 60. Plaintiff sought relief from the trial court's order granting Henderson's motion for summary judgment based upon Rule 60(b)(2), (3), and (6).

Because we have reversed Judge Klass' order granting summary judgment in favor of Henderson, we need not address this argument.

V. Plaintiff's Motion to Amend its Amended Complaint

In its sixth argument, plaintiff contends that the trial court erred in denying plaintiff's motion to amend its amended complaint to state an additional claim for unfair and deceptive trade practices against Henderson.

Pursuant to the North Carolina Rules of Civil Procedure, leave to amend pleadings "shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009). Plaintiff's motion to amend was not filed until after an order granting summary judgment was entered in favor of Henderson. After the entry of summary judgment, plaintiff moved to set aside the order pursuant to Rule 60(b). Plaintiff then filed a motion to amend its amended complaint by adding an additional claim for unfair and deceptive trade practices against Henderson. Judge Klass denied the motion to set aside the judgment and denied the motion to amend the amended complaint. "As a general rule, once judgment is entered amendment of the complaint is not allowed unless the judgment is set aside or vacated under Rule 59 or Rule 60." *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 89, 398 S.E.2d 628, 634 (1990), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). However, we have reversed Judge Klass' order granting summary judgment in favor of Henderson. In light of this holding, we remand this issue for reconsideration.

VI. Violation of Appellate Rules of Procedure by Counsel for Plaintiff

In its brief, plaintiff cites the case of *Batts v. Batts*, ___ N.C. App. ___, 673 S.E.2d 169, *disc. review denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). This case was reported pursuant to Rule 30(e) of the Rules of Appellate Procedure. This rule provides that citation of unpublished opinions is disfavored. Such an opinion may be cited if a party believes that it has precedential value to a material issue in the case, and there is no published opinion

that would serve as well. When an unpublished opinion is cited, counsel must do two things: (1) they "must indicate the opinion's unpublished status;" and (2) they must serve a copy of the opinion on all other parties to the case and on the court. N.C.R. App. P. 30(e)(3) (2010). In the instant case, counsel did neither of these things. This conduct was a violation of the Rules of Appellate Procedure. In our discretion, we hold that this conduct was not a gross violation of the Rules of Appellate Procedure meriting the imposition of sanctions. However, counsel is admonished to exercise greater care in the future citation of unpublished opinions.

VACATED IN PART, DISMISSED IN PART, AFFIRMED IN PART,
REVERSED IN PART.

Judges WYNN AND MCGEE concur.

Report per Rule 30(e).