NO. COA09-1584

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

JOSEPH KINTZ,

Plaintiff,

v. Nash County
No. 08 CVS 2633

RICHARD SPOOR,

Defendant.

Appeal by plaintiff from order entered 12 March 2009 by Judge Alma L. Hinton in Nash County Superior Court. Heard in the Court of Appeals 7 June 2010.

Barry Nakell for plaintiff.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey and Kathrine E. Fisher, for defendant.

ELMORE, Judge.

On 11 June 2008, Joseph Kintz (plaintiff) entered into a settlement agreement with AmerLink, Ltd., of which Richard Spoor (defendant) was the president and chief operating officer.[1] On 11 and 12 June 2008, plaintiff and AmerLink entered into a Settlement Agreement and General Release of All Claims; pursuant to that agreement, plaintiff filed a voluntary dismissal without prejudice

[1]The facts of the original dispute in this case can be found at *Kintz v. AmerLink, Ltd.*, 174 N.C. App. 365, 620 S.E.2d 735 (2005) (unpublished, No. COA05-164, 1 Nov. 2005).

as to defendant on 11 July 2008 and satisfaction of judgment on 22 July 2008. Per the terms of the settlement agreement:

> II: PAYMENTS:
>
> For and in consideration of the release and dismissal by [plaintiff], the released parties agree to a settlement and a Confession of Judgment in the amount of $1,300,000.00 (One million Three-hundred thousand dollars), however, such settlement amount will be reduced to $950,000.00 (Nine-hundred Fifty-thousand dollars) and the Confession of Judgment satisfied if the payment schedule set forth below is met:
>
> 1. That on the date that this settlement agreement is executed by the released parties AmerLink shall deliver to the Law Office of [plaintiff's attorney] a certified check in the amount of $10,000.00 (Ten thousand dollars);
>
> 2. That on or before July 6th, 2008, AmerLink shall deliver to the Law Office of [plaintiff's attorney] a certified check in the amount of $465,000.00 (Four-hundred Sixty-five thousand dollars);
>
> 3. That on or before July 6th, 2009, AmerLink shall deliver to the Law Office of [plaintiff's attorney] a certified check in the amount of $150,000.00 (One-hundred Fifty-thousand dollars);
>
> 4. That on or before July 6th, 2010, AmerLink shall deliver to the Law Office of [plaintiff's attorney] a certified check in the amount of $150,000.00 (One-hundred Fifty-thousand dollars);
>
> 5. That on or before July 6th, 2011, AmerLink shall deliver to the Law Office of [plaintiff's attorney] a certified check in the amount of $175,000.00 (One-hundred Seventy-five thousand dollars).
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> * * *
>
> V. DISMISSAL OF LITIGATION:

> That in exchange for the consideration set forth above, the parties agree that upon receipt by [defendant's attorney] on or before July 6th, 2009[,] of the certified check of $465,000.00 (Four hundred Sixty-five thousand dollars) and before any of said funds are disbursed from [defendant's attorney's] trust account, by July 10th, 2008[,] the parties will dismiss all pending appeals in the lawsuit identified as Joseph Kintz v. Amerlink, Ltd. and Richard Spoor, 02 CVS 2041. [Plaintiff] further agrees that by July 10th, 2008, his attorney Barry Nakell will mark the Judgment entered in this matter in Nash County Superior Court "Satisfied" by filing a Satisfaction of Judgment with the clerk of superior court. Further, [plaintiff] agrees that by July 10th, 2008[,] his attorney Barry Nakell will file a notice of dismissal without prejudice of the lawsuit against Richard Spoor. *[Plaintiff] further agrees that neither he, nor anyone on his behalf, will re-file the lawsuit or bring any claim against Richard Spoor unless the released parties fail to comply with the payments described in section II*.

(Emphasis supplied.) The parties agree that defendant made the first two payments in a timely manner. On 8 December 2008, plaintiff filed a complaint against defendant and AmerLink, followed by an amended complaint on 13 January 2009; the complaint brought claims of breach of contract, breach of express warranty, breach of implied warranty of merchantability, and others. On 26 January 2009, defendant filed a motion to dismiss and answer, arguing both that the settlement agreement had resolved all the claims named in the complaint and that the complaint failed to state a claim upon which relief can be granted. Because defendant had attached a copy of the settlement agreement to the motion, plaintiff moved for a continuance, arguing that it was in fact a motion for summary judgment; the motion to dismiss hearing was

scheduled for 2 March 2009. On 11 February 2009, AmerLink filed for Chapter 11 bankruptcy. At the hearing on 2 March 2009, the trial court granted defendant's motion, filing a written order on 17 March 2009 stating that "the Motion to Dismiss, alternatively Motion for Summary Judgment, of Defendant Richard Spoor . . . is ALLOWED."

Plaintiff first argues that the trial court erred by not honoring the automatic bankruptcy stay. It is not clear from the record how such an argument is relevant to this matter, nor does plaintiff elucidate the issue for us, and as such this assignment of error is overruled.

Plaintiff next argues that the trial court erred in concluding that plaintiff could not bring this action solely against defendant – that is, that the trial court erred because it dismissed the suit based on its belief that, once AmerLink had been dismissed as a party to the suit, the suit itself could no longer proceed. This argument seems to be based on one comment made by the trial court at the end of the motion hearing that plaintiff understood to mean that, when AmerLink was dismissed as a party to the case, the complaint was no longer valid against defendant alone. However, as the trial court did not state, in either the written order or in its ruling in court, that this was the basis for its ruling, we decline to infer that such was the case. This assignment of error is overruled.

Finally, plaintiff argues that the trial court erred in dismissing his complaint because the documents before the court

were sufficient to establish a *prima facie* case for actual and/or anticipatory breach of the settlement agreement.

Plaintiff argues that the actual breach resulted from defendant's failure to pay a fee owed the Nash County Sheriff's Office for serving the writ of execution on AmerLink. While paragraph VIII ("Costs") of the settlement agreement does mandate that "each party will bear their own costs for dismissing the appeals[,]" the only portion of the agreement that permits plaintiff to reinstate claims against defendant is section II, which, as noted above, states: "[Plaintiff] further agrees that neither he, nor anyone on his behalf, will re-file the lawsuit or bring any claim against [defendant] unless the released parties fail to comply with the payments *described in section II*." (Emphasis supplied.) Thus, nonpayment of the fee to the Sheriff's Office did not form a valid basis for plaintiff to reinstate this claim against defendant.

Plaintiff's final argument is that defendant committed an anticipatory breach of section II of the settlement agreement. As mentioned above, AmerLink had made all the payments required by section II in a timely fashion as of 8 December 2008 when the complaint that initiated this suit was filed.

> When the promisor to an executory agreement for the performance of an act in the future renounces its duty under the agreement and declares its intention not to perform it, the promisee may treat the renunciation as a breach and sue at once for damages. In order to maintain a claim for anticipatory breach, the words or conduct evidencing the renunciation or breach must be a positive, distinct, unequivocal, and absolute refusal to

> perform the contract when the time fixed for it in the contract arrives.

Messer v. Laurel Hill Associates, 93 N.C. App. 439, 443, 378 S.E.2d 220, 223 (1989) (quotations and citations omitted). In addition, the other party must treat it as a breach for it to be considered as such by the Courts. *Gordon v. Howard*, 94 N.C. App. 149, 153, 379 S.E.2d 674, 676 (1989) (citing *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)).

The only circumstances to which plaintiff points to indicate defendant's anticipatory breach of the agreement is its failure to reply to a message and request by plaintiff. In his affidavit dated 11 February 2009, plaintiff's attorney stated that, on 9 December 2008, having heard that AmerLink had "closed its doors," he sent a message to John Barth, president of AmerLink, stating in part:

> I would like to inquire specifically about AmerLink's intentions with regard to the Kintz settlement agreement. I would appreciate it if you would advise me whether AmerLink anticipates that it will be able to make the payment due on July 6, 2009[,] next year. If not, I would appreciate it if you would advise me whether you would consider that circumstance an anticipatory breach of the settlement agreement and would agree that I might file the Confession Judgment at this time.

The affidavit reflects that plaintiff's attorney received no reply to the message, nor any information regarding the Confession Judgment, which AmerLink was obliged to file pursuant to the settlement agreement; AmerLink at some point did file such a judgment, but – per plaintiff – misidentified itself as a New York

(rather than North Carolina) corporation, then failed to refile a corrected version. It also reflects that plaintiff's attorney was aware that AmerLink was not paying other creditors, was a named defendant in a number of other lawsuits for nonpayment of debts, and as of early 2009 was planning to file for bankruptcy.

At best, plaintiff can claim a lack of response to a demand for clarification. Plaintiff can point this Court to no case law suggesting that such a lack of response constitutes the type of "positive, distinct, unequivocal, and absolute refusal to perform" required to constitute anticipatory breach. As such, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge BRYAN concur.

Report per Rule 30(e).