NO. COA09-1665

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

BROWN & BROWN ENTERPRISES, LLC,

Plaintiff

v.

Martin County
No. 08 CVS 62

IRVING BROWN and wife, JOANNE BROWN,

Defendants

Appeal by defendants from judgment entered 17 July 2009 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 11 May 2010.

Irvine Law Firm, PC, by David J. Irvine, Jr., for plaintiff-appellee.

Irving Brown and wife, Joanne Brown, pro se.

CALABRIA, Judge.

Irving Brown ("Mr. Brown") and wife, Joanne Brown ("Mrs. Brown") (collectively "defendants"), appeal the trial court's judgment concluding that defendants breached a contract with Brown & Brown Enterprises, LLC ("plaintiff") and ordering defendants to pay plaintiff the amount of $59,668.36 plus interest, costs and attorneys' fees. We affirm.

I. BACKGROUND

Plaintiff is a general contractor in the business of building construction and restoration. On 2 February 2007, defendants entered into a contract ("the contract") with plaintiff for the cleaning, repair, restoration and improvement of defendants' property located at 23832 N.C. Highway 125 North, Williamston, North Carolina, following a fire at defendants' home. Defendants agreed to pay plaintiff the normal and customary charges for the work based upon the regional price list for such services compiled and published regularly by Xactware, Inc. As part of the contract, defendants authorized their mortgage company and/or insurer to include plaintiff as a named payee on any checks sent to defendants as reimbursement for the work performed on defendants' home.

Plaintiff began the cleaning, repair, restoration, and improvement of defendants' home on 12 February 2007 and completed the work on 12 October 2007. During this time period, defendants' insurance carrier, Kemper Insurance Company ("Kemper"), paid certain periodic progress payments through defendants' bank to plaintiff for the work that was performed. On 7 June 2007, the Martin County Building Inspector ("the building inspector") issued a Certificate of Occupancy for the home, and on 15 June 2007, the building inspector issued a Certificate of Completion. On 11 October 2007, defendants signed a Certificate of Satisfaction indicating that plaintiff's work had been completed to defendants' satisfaction. After giving defendants credit for the periodic progress payments received by plaintiff, the total balance due for the work plaintiff completed was $82,693.36 plus interest at 1.5%

per month from 12 October 2007. Kemper then paid what was characterized as "hold-back money" or retainage in the amount of $23,025.00 to plaintiff, leaving a balance due in the amount of $59,668.36. Kemper paid additional sums relative to the work performed by plaintiff to defendants' mortgage company, which additional sums were then disbursed to defendants. Defendants did not pay these additional sums to plaintiff and have not paid plaintiff $59,668.36, the balance on the contract.

On 30 January 2008, plaintiff filed an action in Martin County Superior Court, claiming, *inter alia*, that defendants breached the contract. Defendants filed an answer on 8 April 2008. Plaintiff moved to file an amended complaint, and the trial court granted the motion on 27 August 2008. Plaintiff filed its amended complaint on 5 September 2008 and did not request a jury trial. Defendants did not file an answer to the amended complaint. The matter was heard on 20 April 2009 in Martin County Superior Court. On 17 July 2009, the trial court entered judgment against defendants, jointly and severally, in the amount of $59,668.36 plus interest at the rate of 1.5% per month from 12 October 2007 until paid. The trial court also ordered defendants to pay plaintiff's costs and attorneys' fees, and that plaintiff was entitled to enforce its lien against defendants' property. Defendants appeal.

II. NORTH CAROLINA RULES OF APPELLATE PROCEDURE

As an initial matter, we address defendants' numerous violations of the North Carolina Rules of Appellate Procedure ("the Rules") to determine whether defendants' appeal should be dismissed

under our Supreme Court's holding in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008) ("*Dogwood I*").

Since defendants' appeal was filed before 1 October 2009, the 2009 version of the Rules applies. North Carolina Rules of Appellate Procedure 2010 Ann. R. N.C. 197. "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.'" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). "Furthermore, these rules apply to everyone - whether acting *pro se* or being represented by all of the five largest law firms in the state." *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999).

According to N.C.R. App. P. 9(a)(1)(k) (2009), the record on appeal must contain "assignments of error set out in the manner provided in Rule 10[.]" N.C.R. App. P. 9(a)(1)(k) (2009). Rule 10 states that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(a). Furthermore, "[a] listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal . . . ." N.C.R. App. P. 10(c)(1) (2009).

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the

> attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

Id. According to N.C.R. App. P. 28(b)(6) (2009), defendants' brief must contain an argument for each question presented, and each question must be separately stated. N.C.R. App. P. 28(b)(6). Furthermore, the argument must contain "a concise statement of the applicable standard(s) of review for each question presented . . . ." *Id.*

"[T]he occurrence of default under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 119, 665 S.E.2d 493, 498 (2008) ("*Dogwood II*") (quoting *Dogwood I*, 362 N.C. at 194, 657 S.E.2d at 363). In the instant case, defendants' noncompliance falls into the third category. *Id.* Since defendants have failed to comply with one or more nonjurisdictional appellate rules, we must (1) determine if the noncompliance is substantial or gross under Appellate Rules 25 and 34 and, if it is, then (2) determine which, if any, sanction under Appellate Rule 34(b) should be imposed. *Dogwood I*, 362 N.C. at 201, 657 S.E.2d at 367.

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would

> frustrate the adversarial process. ... The court may also consider the number of rules violated . . . . []

Id. at 200, 657 S.E.2d at 366-67 (internal citations omitted).

In the instant case, defendants' assignments of error do not contain specific references to the record. For assignments of error I through V, defendants contend that certain findings of fact are "deficient under North Carolina law . . . ." For assignments of error VI and VII, defendants contend that certain conclusions of law are "not correct under North Carolina law." Nowhere in these assignments of error do defendants "state plainly, concisely and without argumentation the legal basis upon which [the] error[s] [are] assigned." N.C.R. App. P. 10(c)(1) (2009).

In defendants' brief to this Court, each question presented is not separately stated, in violation of N.C.R. App. P. 28(b)(6). Further, while defendants state a standard of review under a separate heading placed before the beginning of the discussion of all the questions presented, the standard of review is incorrect. Moreover, defendants fail to cite any authority to support their argument that the standard of review they state is correct. For their assignments of error, the only "authority" defendants cite is "Matthew Bender Civil Procedure." Defendants fail to cite any North Carolina constitutional provisions, statutes, or cases from our courts to support their contention that the trial court erred in entering judgment against them.

Defendants' assignments of error, "like a hoopskirt - cover[] everything and touch[] nothing. [They are] based on numerous

exceptions and attempt[] to present several separate questions of law - none of which are set out in the assignment[s] [themselves] - thus leaving [them] broadside and ineffective." *Dogwood II*, 192 N.C. App. at 121, 665 S.E.2d at 499 (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)). In the instant case, defendants' appellate rules violations "rise to the level of a 'substantial failure' or 'gross violation.'" *Dogwood I*, 362 N.C. at 199, 657 S.E.2d at 366.

Under Appellate Rule 34(b),

> A court of the appellate division may impose one or more of the following sanctions: (1) dismissal of the appeal; (2) monetary damages including, but not limited to, a. single or double costs, b. damages occasioned by delay, c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding; (3) any other sanction deemed just and proper.

N.C.R. App. P. 34(b) (2009). "[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood I*, 362 N.C. at 198, 657 S.E.2d at 365.

"Given . . . the nature and number of uncorrected nonjurisdictional appellate rules violations in this case, we hold [defendants'] noncompliance to be substantial, but not so egregious as to warrant dismissal of [their] appeal . . . ." *Dogwood II*, 192 N.C. App. at 122, 665 S.E.2d at 500. In the exercise of our discretion, defendants are ordered to pay double the printing costs of this appeal. *See id.*; N.C.R. App. P. 34(b). The Clerk of this Court is to enter an order accordingly.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants essentially argue that the trial court's findings of fact were not supported by competent evidence, and that its conclusions of law were unsupported by its findings. We disagree.

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (internal citations omitted). "If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001). "Further, findings of fact to which [defendants] ha[ve] not assigned error and argued in [their] brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). "A trial court's conclusions of law, however, are reviewable *de novo*." *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845. In a bench trial,

> [t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines

> which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (internal citations omitted).

Defendants take exception to the following findings of fact and conclusions of law:

> 14. The Defendants are justly indebted to the Plaintiff in the amount of Fifty-Nine Thousand, Six Hundred Sixty-Eight and 36/100 Dollars ($59,668.36) plus interest at the rate of 1.5% per month from October 12, 2007 until paid.
>
> . . .
>
> 17. Defendants have breached their Contract with Plaintiff by failing to pay for Plaintiff's services.
>
> 18. The Plaintiff has performed all conditions precedent to recovery of the balance owed under its contract with the Defendants.
>
> 19. The Plaintiff is entitled to a judgment against the Defendants in the amount of Fifty-Nine Thousand, Six Hundred Sixty-Eight and 36/100 Dollars ($59,668.36) plus interest at the rate of 1.5% per month from October 12, 2007 until paid.
>
> . . .
>
> 21. The reasonable value of the materials, supplies, labor and services provided by Plaintiff to the improvement of the property which remains unpaid is Fifty-Nine Thousand, Six Hundred Sixty-Eight and 36/100 Dollars ($59,668.36).
>
> . . .
>
> 2. The Defendants have breached their contract with Plaintiff by failing to pay for Plaintiff's service pursuant to said contract.
>
> . . .
>
> 5. The Plaintiff is entitled to a judgment against the Defendants in the amount of Fifty-Nine Thousand, Six Hundred Sixty-Eight and 36/100 Dollars ($59,668.36) plus interest at the rate of 1.5% per month from October 12, 2007 until paid.

Defendants argue that plaintiff's work was substandard, that additional work needed to be done, that the home smelled like smoke, and that there were numerous violations of the Building Code. However, in their answer dated 8 April 2008, defendants admitted authorizing their mortgage company and/or insurer to include plaintiff as a named payee on any checks sent to defendants as reimbursement for the work performed on defendants' home. Defendants also admitted that certain amounts relative to plaintiff's work were paid directly to them. Defendants admitted not having paid the entire amount owed under the contract.

At trial, Mr. Brown testified that on 11 October 2007, he and Mrs. Brown signed a Certificate of Satisfaction indicating that plaintiff's work had been completed to their satisfaction. In addition, Steven Buckner ("Buckner"), plaintiff's employee, testified for plaintiff. Buckner, who accompanied the building inspector for every inspection, stated that Mr. Brown "had no complaints" regarding plaintiff's work. Specifically, Buckner stated that in June 2007, during the completion of plaintiff's work, the house did not smell like smoke.

Also at trial, the following items were admitted into evidence: (1) defendants' contract with plaintiff; (2) the building inspector's file, including all satisfactory inspections and the 7 June 2007 Certificate of Occupancy; and (3) the 15 June 2007 Certificate of Completion issued by the building inspector. The pleadings, combined with the evidence and testimony at trial, provided competent evidence to support the trial court's findings

of fact. Those findings, in addition to the unchallenged findings, support the trial court's conclusions of law. Defendants' assignments of error are overruled.

IV. CONCLUSION

We affirm the trial court's judgment for plaintiff against defendants, in the amount of $59,668.36 plus interest, costs and attorneys' fees. According to the judgment, plaintiff is entitled to enforce a lien against defendants' property by selling the property and applying the sale proceeds to the debt owed to plaintiff.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN concurs in the result by separate opinion.

Report per Rule 30(e).

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WYNN, Judge, concurring in result only.

I concur in the result of this opinion but specially do not join in the part of the opinion that orders Defendants "to pay double the printing costs of this appeal."

Regarding the merits of the appeal, the analysis for the result reached is relatively simple. Defendants argue essentially that they did not pay because the Plaintiff did not render satisfactory performance of the contract. However, one of the uncontested findings of the trial court indicated that "[o]n October 11, 2007, the Defendants signed a Certificate of Satisfaction indicating that the work performed by Plaintiff had been completed to their satisfaction." On that basis, I join in the result reached by the majority.