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NO. COA09-877

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

SECURITY CREDIT CORPORATION,
INC.,
Plaintiff,

v.

Johnston County
No. 08 CVS 142

MICHAEL S. BAREFOOT, FRANKIE
W. BAREFOOT, EDDIE W. SNEAD,
SECURITY AUTO SALES, GSW
INCORPORATED, and MB-0001, INC.,
Defendants.

Appeal by defendants from order entered 20 February 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 27 January 2010.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and LedoLaw, by Michele A. Ledo, for plaintiff-appellee.

Hairston Lane Brannon, P.A., by Anthony M. Brannon, (deceased), and James E. Hairston, Jr., for defendant-appellants.

STEELMAN, Judge.

The trial court did not abuse its discretion in disqualifying defendants' counsel from further representation in this matter. The trial court did not abuse its discretion in its advisory ruling upon defendants' Rule 60(b) motion.

I. Factual and Procedural Background

Security Auto Sales was a used car sales operation owned and operated by Michael S. Barefoot ("Barefoot"). In November of 2006,

this operation was incorporated as Security Auto, Inc. (Security Auto Sales and Security Auto, Inc. are hereinafter collectively referred to as "SAS"). Security Credit Corporation, Inc. ("SCC") provided financing for the purchase of used cars to customers of SAS. On 16 October 2007, Barefoot and Eddie Snead ("Snead") retained James E. Hairston Jr., Robert J. Lane, III, and Anthony M. Brannon (collectively referred to as "HLB") to represent them in connection with "one Superior Court trial." Barefoot and Snead, along with Frankie Barefoot, were general partners in SAS. The retainer agreement entered into between Barefoot, Snead, and HLB did not specify the matter(s) of representation. On 17 October 2007, HLB sent a letter to SCC announcing that they represented SAS, Barefoot, and Snead, and requested a conference to attempt to resolve disputes prior to the initiation of litigation.

On or about 24 October 2007, Snead approached counsel for SCC to prepare an affidavit on his behalf. Counsel for SCC "felt it was best to allow an independent attorney" to prepare the affidavit. Snead retained attorney George Mast ("Mast") to prepare the affidavit, although the cost of preparation of the affidavit was paid by SCC. On 8 November 2007, Mast wrote to HLB announcing his representation of Snead, and requesting that HLB turn over to Mast certain "tapes" that had been previously delivered by Snead.

On 14 January 2008, SCC filed this action against Barefoot, SAS, GSW Incorporated, and MB-0001, Inc. seeking monetary damages based upon fraud, conversion, forgery, breach of fiduciary duty, and unfair and deceptive trade practices. The complaint also

sought appointment of a receiver, a temporary restraining order, and a preliminary injunction. On 25 March 2008, SCC filed an amended complaint adding Frankie Barefoot and Snead as parties-defendant. On 25 April 2008, HLB filed an answer and counterclaims on behalf of all defendants, except Snead. Counterclaims were asserted for abuse of process, unfair and deceptive trade practices, tortious interference with contract, and breach of the duty of good faith and fair dealing. Snead never filed answer, and default was entered against him.

Also on 14 January 2008, Barefoot and SAS filed a complaint in the United States District Court for the Eastern District of North Carolina (case 5:08cv00018) against SCC and its principals. The amended complaint, filed 9 May 2008, asserted claims under 18 U.S.C. § 1961 *et seq.* (Racketeer Influenced Corrupt Organization Act, ("RICO")), N.C. Gen. Stat. 75D-1 *et seq.* (North Carolina RICO Act), N.C. Gen. Stat. § 75.1-1 *et. seq.* (Unfair and Deceptive Trade Practices), and for common law abuse of process, tortious interference with contract, and breach of the duty of good faith and fair dealing. SCC and its principals filed answer in the federal action.

On 6 February 2009, SCC filed a motion requesting that the trial court make an inquiry as to whether HLB had a conflict of interest based upon its prior representation of Snead. On 9 February 2009, Barefoot and SAS filed a response in opposition to the motion, seeking the imposition of Rule 11 sanctions against SCC. On that same date, Barefoot and SAS filed a motion requesting

that Judge Lock recuse himself from hearing all proceedings in this matter. On 20 February 2009, Judge Lock entered an order denying the motion for recusal. Also on 20 February 2009, Judge Lock entered an order disqualifying and removing defendants' counsel based upon a conflict arising out of their prior representation of Snead.

On 20 March 2009, defendants filed notice of appeal from the disqualification and removal order. Defendants sought a temporary stay and a writ of supersedeas from both the North Carolina Court of Appeals and the North Carolina Supreme Court as to the disqualification and removal order. The Court of Appeals denied the stay and the petition for writ of supersedeas. The Supreme Court granted the temporary stay, later dissolved the stay, and denied the writ of supersedeas.

On 22 June 2009, defendants filed a motion pursuant to Rule 60, with the trial court, seeking relief from the disqualification and removal order. Attached to this motion were two affidavits of Snead. One, captioned the federal action, stated: "I did not have, and do not have, any problems with Michael Barefoot being represented by the law firm of Hairston Lane Brannon in his lawsuit against Security Credit Corporation." The second affidavit stated that persons connected with SCC had promised material benefits to Snead if he sided with SCC in the pending litigation. The motion alleged that a similar disqualification motion was filed by SCC in the federal action but was denied by Judge Boyle. In accordance with *Bell v. Martin*, Judge Lock ruled that he was not inclined to

grant the Rule 60 motion, and to the extent jurisdictionally permitted denied the motion. 43 N.C. App. 134, 258 S.E.2d 403 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

II. Interlocutory Nature of the Disqualification Order

The trial court's order did not dispose of any of the claims pending between the parties, and is therefore interlocutory. *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). However, an order granting a motion to disqualify counsel, where the counsel has worked extensively and for an appreciable period of time on the case, does affect a substantial right, and is immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990).

III. Appeal of Disqualification Order

In their only argument on appeal, defendants contend that the trial court erred in disqualifying and removing their counsel in this case. We disagree.

A. Standard of Review

The decision of a trial judge to disqualify counsel is reviewed for abuse of discretion. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Dockery v. Hocutt*, 357 N.C. 210, 215, 581 S.E.2d 431, 435 (2003) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Our review of the trial court's findings of fact in an order is a deferential one. If there is competent evidence in the record to support the findings, they are binding on appeal. *Knight v. Higgs*, 189 N.C. App. 696, 699-700, 659 S.E.2d 742, 746 (2008) (citations omitted). Conclusions of law by the trial court are reviewed *de novo*. *Id.*

B. Findings of Fact

Defendants have assigned error to and attacked in their brief a number of the trial court's findings of fact. We have reviewed each of these findings to determine whether they are supported by competent evidence in the record. While there are certain findings that are not fully supported by the record, we hold that the findings that are material to the trial court's conclusions of law are supported by competent evidence in the record, or are reasonable inferences from evidence in the record.

C. Conclusions of Law and Order of Disqualification

In their brief, defendants acknowledge that the trial court's findings of fact support its conclusions of law, and focus their argument upon the findings of fact. We hold that the trial court's findings of fact support its conclusions of law. We further hold that the trial court's decision to disqualify defendants' counsel was not manifestly unsupported by reason, and was not an abuse of discretion.

IV. Defendants' Rule 60(b) Motion

A. Standard of Review

"A motion under Rule 60(b) is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983) (citing *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975)).

B. Judge Lock's Advisory Ruling on Defendants' Motion Pursuant to Rule 60(b)(1), (2), (3), & (5)

The issues presented in defendants' Rule 60(b) motion, not already dealt with above, pertain to the subsequent denial of the disqualification motion in federal court by Judge Boyle, and the two affidavits of Snead attached to the motion. We note that our review of Judge Lock's disqualification order is based upon what was before Judge Lock, and not what was before Judge Boyle. Further, Snead's affidavit in the federal action pertains solely to the federal action, and not to the instant case. Defendants categorize the two Snead affidavits as "newly discovered evidence," but offer no explanation as to why this was not available at the time of the hearing before Judge Lock. "[T]o constitute 'newly discovered evidence' within the meaning of Rule 60(b)(2), the evidence must be such that it could not have been obtained in time for the original proceeding through the exercise of due diligence." *Waldrop v. Young*, 104 N.C. App. 294, 297, 408 S.E.2d 883, 884 (1991) (citation omitted). No such showing has been made by defendants.

We discern no abuse of discretion by the trial judge in his advisory ruling on defendants' Rule 60(b) motion.

V. Conclusion

Based upon the applicable standard of review, the trial court did not abuse its discretion in disqualifying defendants' counsel.

AFFIRMED.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).