NO. COA 10-1077
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

MARTHA B. CAPPS, by and through her Guardian ad Litem, Bruce L. Capps,
Plaintiff

v.

Wake County
No. 07 CVS 16486

HAROLD EARL BLONDEAU; R.J. BLONDEAU; NEAL WILLIAM KNIGHT; ANNE LOUISE KNIGHT; HELEN SOUTHWICK KNIGHT; MORGAN KEEGAN & COMPANY, INC.; MARVIN L. BAKER FAMILY FOUNDATION, INC. and REGIONS BANK, d/b/a REGIONS MORGAN KEEGAN TRUST FSB,
Defendants.

Appeal by defendants, Morgan Keegan and Harold Earl Blondeau, from denial of motion to stay judicial proceedings and compel arbitration and order to resume case management entered 13 April 2010, and amended order resuming case management entered 15 April 2010 by Judge John R. Jolly, Jr. in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 23 March 2011.

Brownlee Law Firm, PLLC, by Gilbert W. File, and Zaytoun Law Firm, PLLC, by Robert E. Zaytoun, for plaintiff-appellee.

Poyner Spruill LLP, by David W. Long and John W. O'Hale, for defendant-appellant, Harold Earl Blondeau.

Penry Riemann PLLC, by Neil A. Riemann and J. Anthony Penry, for defendant-appellant, Morgan Keegan & Company, Inc.

Elaine F. Marshall, Secretary of State and Securities Administrator of the State of North Carolina, by Tasha W. Sheehy and Blackwell M. Brogden, Jr., amicus curiae.

STEELMAN, Judge.

Where no original or duplicate of the document existed and the testimony of witnesses was found to be unreliable, the trial court did not err in ruling that no arbitration agreement existed between the parties. Where Morgan Keegan failed to appeal the trial court's discovery order, those issues were not properly preserved for appellate review.

I. Factual and Procedural History

Martha Capps (Capps) is an elderly woman who suffers from Alzheimer's related dementia. Her memory has been declining since 2001. Since 1988 and until the events complained of, Capps invested substantial assets with broker Harold Earl Blondeau (Blondeau). In 1997, Blondeau became a partner at Morgan Keegan & Company, Inc. (Morgan Keegan), and advised Capps to move her personal and trust accounts to that firm. At the time that her accounts were moved Capps executed certain

documents. Morgan Keegan asserts that several of these documents contained clauses mandating that any disputes between the parties be submitted to arbitration. Morgan Keegan scanned the signature pages of these documents and destroyed the documents, keeping only a specimen form on file.

Blondeau, while working at Morgan Keegan, defrauded Capps of approximately 1.775 million dollars. Blondeau subsequently pled guilty to investment advisory fraud in federal court on 10 June 2009.

On 12 October 2007, Capps, by and through her son and guardian *ad litem*, filed this lawsuit against numerous defendants, including Blondeau and Morgan Keegan. Capps' complaint and amended complaint (served 5 May 2008) asserted the following claims against Morgan Keegan: (1) negligent misrepresentation, based upon the actions of Blondeau as its agent and employee; (2) fraud and breach of fiduciary duty based upon the actions of Blondeau as its agent and employee; (3) negligence of Morgan Keegan based upon its failure to supervise and monitor the fraudulent transactions of Blondeau; (4) unfair and deceptive trade practices based upon the actions of Blondeau as its agent and employee; (5) an accounting of Capps' assets entrusted to defendants; and (6) rescission of alleged

arbitration agreement based upon fraudulent inducement, unconscionability, and breach of fiduciary duty. Capps' complaint and amended complaint asserted the following claims against Blondeau: (1) breach of fiduciary duty; (2) constructive fraud; (3) fraud and deceit; (4) negligent misrepresentation; (5) violation of the North Carolina Racketeer Influenced and Corrupt Organizations Act, North Carolina General Statutes Chapter 75-D; (6) civil conspiracy; (7) unfair and deceptive trade practices; (8) revocation of gifts; (9) constructive trust; (10) an accounting of Capps' assets entrusted to Blondeau; (11) a preliminary injunction preventing Blondeau from selling, transferring, encumbering, or distributing any proceeds, interests, profits, or principal assets that are the subject of this action; and (12) rescission of alleged arbitration agreement based upon fraudulent inducement, unconscionability, and breach of fiduciary duty. On 7 January 2008, Blondeau filed a motion to stay proceedings and compel arbitration (this document was mis-captioned as a Memorandum of Law). On 7 January 2008, Morgan Keegan filed a motion to stay the proceedings and compel arbitration.

At some point in the proceedings this case was designated as a complex business case by the Chief Justice of the North

Carolina Supreme Court, and subsequently assigned to Judge Jolly as a Special Superior Court Judge for Complex Business Cases.

On 2 May 2008, Judge Jolly entered an order allowing limited discovery on the existence of an agreement to arbitrate, and whether any such agreement was unconscionable. On 13 April 2010, the trial court entered an order denying the motions of Morgan Keegan and Blondeau to stay proceedings and compel arbitration. This ruling was based upon the failure of Morgan Keegan and Blondeau to meet their burden of proof to show the existence of an arbitration agreement. On 15 April 2010, the trial court entered an amended order resuming case management stating "that it is appropriate to resume consideration of case management issues relative to the merits of the various claims for relief stated in this civil action."

Morgan Keegan and Blondeau appeal. On 4 November 2010, Blondeau filed notice with this Court that he would not file a brief in this case, and that he adopted the legal arguments made by Morgan Keegan in its brief.

II. Standard of Review

> [S]tate law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements. The [Federal Arbitration Act] only preempts state rules of contract formation which single out arbitration clauses and

> unreasonably burden the ability to form arbitration agreements . . . with conditions on (their) formation and execution . . . which are not part of the generally applicable contract law.

Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003) (citations and quotation omitted). The issue of whether there was a valid agreement to arbitrate will be analyzed under North Carolina law. "[P]ublic policy [favoring arbitration] does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate." *Evangelistic Outreach Ctr. v. General Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) (quotation omitted).

In North Carolina the burden rests upon the party seeking to compel arbitration to prove the existence of an agreement to arbitrate. *Slaughter v. Swicegood*, 162 N.C. App 457, 461, 591 S.E.2d 577, 580 (2004).

> The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. *See Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 272, 423 S.E.2d 791, 794 (1992). Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the

> conclusion that there was no agreement to arbitrate. *See Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

Sciolino v. TD Waterhouse Investor Servs., Inc., 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002).

III. Findings of Fact

In its first argument, Morgan Keegan contends that certain of the trial court's findings of fact were not supported by competent evidence. We disagree.

A. Rule 1002

North Carolina Rule of Evidence 1002, Requirement of Original, states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Morgan Keegan has admitted in its brief that any original of the alleged arbitration agreement was destroyed, stating "[t]he parties agree that the original of Capps' Form 20 and Form 40 [the documents in question] was destroyed years ago as part of Morgan Keegan's imaging program." The trial court's findings of fact that Morgan Keegan destroyed the originals of both the Form 20 and Form 40 are also supported by competent evidence in the record.

B. Rule 1003

North Carolina Rule of Evidence 1003, Admissibility of Duplicates, states "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

The trial court made the following findings of fact with respect to the existence of a duplicate of the alleged arbitration agreement:

> 17. Morgan Keegan says it scanned the Exhibit A Form 40 Signature Page and destroyed the original of the entire document within thirty to ninety days of scanning. . . . However, the form name on the specimen, "FORM #00040 (REV. 9/96)," is located at the bottom of the page while the same name is located at the top of the Exhibit A Form 40 Signature Page. . . . Consequently, a duplicate of the Form 40 arbitration agreement does not exist because the differences between the specimen copy and the signed Form 40 demonstrate the documents are not identical.
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> . . . .
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> 19. Morgan Keegan says it also scanned the Exhibit A Form 20 Signature Page and destroyed the original of the entire document after scanning. . . . However, the spacing and fonts of the Form 20 specimen copy are different from those of the Exhibit A Form 20 Signature Page. Consequently, a

> duplicate of the Form 20 agreement does not exist because the differences between the specimen copy and the signed Form 20 demonstrate the documents are not identical.

An examination of the signature pages of Form 40 and Form 20, allegedly signed by Capps, and the corresponding specimen copies of the agreements reveals that the trial court's findings are supported by competent evidence. The form name on the specimen copy of the Form 40 is located at the bottom of the page, while the form name on the signature page is located at the top. The spacing and fonts of the Form 20 specimen copy are different from those on the Form 20 signature page allegedly signed by Capps.

We reiterate that the trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66 (citation omitted). The trial court's findings of fact are supported by competent evidence and are binding on appeal.

C. Rule 1004

North Carolina Rule of Evidence 1004, admissibility of other evidence of contents, states in part:

> The original is not required, and other

> evidence of the contents of a writing, recording, or photograph is admissible if:
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> (1) Originals Lost or Destroyed. - All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . .

The trial court examined secondary evidence as to the existence and content of the alleged arbitration agreement, and found that evidence not to be credible. The trial court made the following findings of fact relating to secondary evidence as to the existence of an arbitration agreement:

> 24. Since at least September 2001, Martha Capps experienced a progressive decline in her memory. By July 2005, she was experiencing problems in remembering her name. In August 2005, her physician concluded that she had significant cognitive impairment and was not able to make financial or personal decisions. In September 2005, she was diagnosed with dementia, most likely due to Alzheimer's Disease. In an October 2005 visit to her physician, she did not know the date, day of the week, month or year; and did not know the name of the President of the United States or the date of her son's birthday. . . .
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> 30. The court takes judicial notice that on April 28, 2009, a Criminal Information ("Information") was filed against Blondeau in the United States District Court for the Eastern District of North Carolina. Thereafter, in the same court, on June 10, 2009, Blondeau executed a Waiver of

> Indictment and Consent to Prosecution by Information; and a Plea Agreement (collectively, the "Guilty Plea"). By way of the Guilty Plea, Blondeu was convicted of Investment Advisory Fraud.

Each of these findings of fact are supported by competent evidence.

Dr. Todd E. Helton had been Capps' physician since 2001. His affidavit, filed with the court, supports the findings set forth in finding of fact twenty-four. The only discrepancy between Dr. Helton's affidavit and finding of fact twenty-four is that the finding of fact indicates that Capps was diagnosed with dementia in September 2005, and the affidavit indicates that Capps was diagnosed with memory problems as early as 2004. There is no dispute as to Blondeau's conviction for investment advisory fraud.

Each of these contested findings of fact is supported by evidence in the record. We further note that credibility determinations are left to the trial court, and will not be disturbed on appeal if supported by competent evidence. *See Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984) ("It is not for us, as an appellate court, to determine the weight and credibility to be given evidence in the record.").

This argument is without merit.

IV. Conclusions of Law

In its second argument, Morgan Keegan contends that the trial court's findings of fact do not support its conclusion of law that there was no agreement to arbitrate. We disagree.

The trial court carefully weighed and considered all of the evidence presented. Based upon discrepancies in the documents, the inability of plaintiff to testify, and the lack of credibility of Blondeau, the trial court held that Morgan Keegan and Blondeau failed to meet their burden of proof to establish the existence of the arbitration agreement.

Based upon its findings of fact, the trial court made the following conclusions of law:

> 54. It is not necessarily inappropriate for Morgan Keegan to rely upon scanned and electronically stored copies and specimens in proving the existence of an arbitration agreement between it and a client. However, if a party wishes to rely upon such evidence, it must do better than what has been presented here. Morgan Keegan's record keeping with regard to its Exhibit A, the contended client agreement, was sloppy and fragmented at best. Consequently, the documentary evidence submitted by the moving Defendants was so problematic as to be inconclusive. Accordingly, it is not persuasive on the issue of existence of an agreement to arbitrate between Morgan Keegan and Capps.

> 55. With regard to non-documentary evidence, the two witnesses best able to testify now to the factual question of whether Capps actually executed a client agreement containing a binding arbitration provision are Capps and Blondeau. Both of them are highly suspect as witnesses, and the court does not find them credible. Consider:
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> a. Capps has had a progressive decline in her memory since 2001. In 2005, she was diagnosed with dementia, most likely due to Alzheimer's Disease. Her deposition was taken in July, 2008 and is inherently unreliable.
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> b. Blondeau recently was convicted, upon a guilty plea, of the very felonious actions with regard to Capps' asset estate that are being complained of in the Plaintiff's Complaint. His personal interest in this matter is obvious, and his testimony is unreliable.
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> . . . .
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> 57. Accordingly, upon due consideration of all the evidence offered by the moving Defendants, the court is forced to find that Defendants have not carried their burden of proof on the issue of whether there existed a written arbitration agreement between Capps and Morgan Keegan. Consequently, the Defendants' Motion should be denied.

These conclusions of law are supported by the trial court's findings of fact. The original of any arbitration agreement was destroyed. The trial court found that the "duplicate" agreements submitted by defendants and the testimony of Blondeau

and Capps were unreliable. The trial court did not err in concluding that Morgan Keegan failed to meet its burden of proving the existence of a valid arbitration agreement.

V. Discovery

In its third argument, Morgan Keegan contends that the trial court erred in failing to "proceed summarily" to determine its motion to stay judicial proceedings and compel arbitration as required by N.C. Gen. Stat. § 1-567.3[1], instead allowing plaintiff to conduct extensive discovery. We disagree.

Morgan Keegan did not appeal the trial court's order to allow discovery relating to arbitration. "The appellate rules require that the notice of appeal 'designate the judgment or order from which appeal is taken.' N.C.R. App. P. 3(d). Proper notice of appeal is a jurisdictional requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994) (citations omitted). Therefore, we do not address this argument.

V. Conclusion

The originals of the alleged arbitration agreements were destroyed. There were inconsistencies in the original signature

[1] This statute was repealed effective 1 January 2004, applicable to agreements to arbitrate made after that date. It was replaced, along with the remainder of the Uniform Arbitration Act, with the Revised Uniform Arbitration Act.

pages and specimen copies submitted by defendants. The trial court properly concluded that no admissible duplicate of the documents existed. The trial court further found that the testimony of the only two witnesses who could testify to the existence of the agreements was unreliable. The trial court properly concluded that defendants had failed to meet their burden of proof to show the existence of an arbitration agreement. Where Morgan Keegan failed to appeal the trial court's discovery order, those issues were not properly preserved for appellate review.

AFFIRMED.

Judges CALABRIA and BEASLEY concur.

Report per Rule 30(e).