NO. COA10-266

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

BAXTER R. HUGHES,
Plaintiff,

v. Randolph County
No. 09 CVS 1812

BONNIE LEE CRADDOCK (unmarried), LOIS J. LEVINE, and husband, ALLEN LEVINE,
Defendants.

Appeal by Plaintiff from order entered 6 January 2010 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 15 September 2010.

Wilhoit, Pugh & Allen, LLP, by Alan V. Pugh, for Plaintiff-Appellant.

Smith, Alexander & Morgan, LLP, by Ben C. Morgan and Barron L. Thompson, for Defendant-Appellees.

BEASLEY, Judge.

Baxter R. Hughes (Plaintiff) appeals from an order granting summary judgment in favor of Bonnie Lee Craddock, Lois J. Levine, and Allen Levine (Defendants). We affirm as to Defendants Lois and Allen Levine and reverse as to Defendant Craddock.

Plaintiff filed a verified complaint dated 30 June 2009, seeking a constructive or resulting trust upon certain real property (the Property) in Asheboro, North Carolina. Prior to

November 2002, the Property was owned by decedent Mary Elizabeth Hughes Lambeth (Mary Lambeth), who was the mother of Plaintiff, Defendants Bonnie Craddock and Lois Levine, and their two other siblings, Jay Lambeth and Louise Todd, before her death in August 2006. Mary Lambeth made a will in 1998, which intentionally excluded Plaintiff and divided the Property between her four other children. On 7 November 2002, however, she conveyed a remainder interest therein to Defendants Bonnie Craddock and Lois Levine. Only days earlier on 1 November 2002, Mary Lambeth had executed a deed conveying a remainder 1% undivided interest in the Property to the same Defendants. Both conveyances were made subject to the life estate of Jack W. Griffith; thus, the later deed conveyed the remaining 99% future interest to Defendants while retaining Griffith's present possessory estate.

Plaintiff contends the purpose of the property transfer was to qualify Mary Lambeth for Medicaid and shield the Property from claims or liens for nursing home care expenses, but "was never intended by the grantor to be a gift to two of her children to the exclusion of her other three." Plaintiff also alleges that the Property was Mary Lambeth's "sole asset of any substantial value . . . at the time of conveyance or at her death." While Plaintiff acknowledges that he was intentionally excluded from his mother's 1998 will, he alleges that she subsequently executed a hand-written codicil dividing the Property equally among all five of her children, specifically including Plaintiff. He contends that this codicil was not offered for probate because Defendant

Bonnie Craddock, as administrator of the estate, knew of its existence but "deliberately, fraudulently, and unlawfully withheld [the codicil]."

The complaint proposes that when the remainder interest vested upon Griffith's death in April 2008, Defendants Bonnie Craddock and Lois Levine began to and continue to "hold legal title in trust for the heirs and devisees of [Mary Lambeth]." Plaintiff's belief that Defendants marketed the Property for sale with the intention of converting the proceeds therefrom to their own use prompted this action. In his complaint, Plaintiff requested, *inter alia*, that the trial court impose a constructive or resulting trust upon the Property; equitably convey title thereto to Mary Lambeth's heirs at law or devisees and administer the same under her estate; and order the estate reopened if the clerk of superior court did not do so.[1]

On 10 August 2009, Defendants filed an unverified answer, which included a Rule 12(b)(6) motion to dismiss, and a separate motion for summary judgment. Defendants prepared a memorandum of law and also submitted affidavits of non-party siblings, Jay Lambeth and Louise Todd. Plaintiff responded with a memorandum and an affidavit to which he himself attested. Defendants' motions came on for hearing on 14 December 2009, when a hand-written letter, advocated by Plaintiff as a holographic codicil to Mary Lambert's will, was introduced and accepted by the trial court as an exhibit. After reserving ruling in open court, the trial court

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[1] Plaintiff also petitioned the clerk of superior court to reopen the estate, submit the above-referenced codicil, and continue to administer the estate in light of this action.

entered an order on 6 January 2010 concluding that Plaintiff's complaint does state a claim for relief, but there is no genuine issue as to any material fact. Accordingly, the trial court denied Defendants' motion to dismiss but granted their summary judgment motion. From the order of summary judgment and consequent dismissal of the action, Plaintiff appeals.

We review a summary judgment order *de novo* to determine whether there is a genuine issue of material fact and whether any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009) (requiring judgment when "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"). While the evidence is always viewed in a light most favorable to the nonmoving party, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), the nonmovant must establish a genuine factual dispute for trial if the movant demonstrates an absence thereof. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576. A defendant movant may shift the burden in this manner by "proving that an essential element of the plaintiff's case is nonexistent," *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995), requiring the plaintiff to "'produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie*

case at trial,'" *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation omitted).

Plaintiff first argues that the trial court erred in granting summary judgment where Defendants' answer was unverified and their supporting affidavits lacked a clear jurat and notarial seal, thereby rendering the documents inappropriate for consideration. Plaintiff objected to the admission of Defendants' affidavits on these bases at the summary judgment hearing.

The identical affidavits of the non-party siblings state that they had full knowledge of the conveyance without any expectation of receiving ownership interest in the Property and that Defendants are entitled to full ownership. Plaintiff argues that "[t]he only statement of consequence" therein was the conclusion that "Mary Lambeth was competent when she executed the deed conveying said interest." While we agree that this statement is not based on any specific facts of personal knowledge and impermissibly provides a legal conclusion, there is no indication that the trial court relied on this or any other portion of the challenged affidavits in granting summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e) (providing that affidavits supporting or opposing summary judgment must be made on personal knowledge and set forth specific facts that would be admissible as evidence). For,

> "[w]here both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." When sitting without a jury, the trial court is able to eliminate

> incompetent testimony, and the presumption arises that it did so.

In re Foreclosure of Brown, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003) (internal citation omitted). Moreover, as we conclude below, summary judgment was proper, in part, not because of anything contained in these affidavits but because Plaintiff's own materials failed to establish an essential element of his case. Where we do not believe that the trial court based its ruling on the contested portion of the affidavits and Plaintiff presents no argument that it did, we fail to perceive any prejudice from the introduction of the affidavits, even if they were faulty, and dismiss this argument.

Plaintiff argues summary judgment was improper also because the record reveals genuine issues of material fact as to the judicial creation of a constructive trust. "Trusts created by operation of law are classified into resulting trusts and constructive trusts." *Carcano v. JBSS, LLC*, __ N.C. App. __, __, 684 S.E.2d 41, 49 (2009). Particularly, "a resulting trust involves a presumption or supposition of law of an intention to create a trust; whereas a constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee." *Id.* (quoting *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954)). We note that although Plaintiff raised the resulting trust issue below, he does not address this equitable remedy in his brief. Thus, we are precluded from reviewing the issue and examine only the constructive trust claim. *See* N.C.R. App. P. 28(a).

"[A] constructive trust 'arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship.'" *Patterson v. Strickland*, 133 N.C. App. 510, 521, 515 S.E.2d 915, 921 (1999) (citation omitted). Our Supreme Court has further described the nature of a constructive trust as

> a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through *fraud, breach of duty* or some other circumstance making it inequitable for him to retain [title] against the claim of the beneficiary of the constructive trust. . . . [The] common, indispensable element . . . is some *fraud, breach of duty* or other wrongdoing by the holder of the property.

Guy v. Guy, 104 N.C. App. 753, 757, 411 S.E.2d 403, 405 (1991) (quoting *Wilson v. Development Co.*, 276 N.C. 198, 211-12, 171 S.E.2d 873, 882 (1970)). This trust "arises purely by construction of equity independently of any contract or of any actual or presumed intention of the parties to create a trust." *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83 (1938); *see also Carcano*, __ N.C. App. at __, 684 S.E.2d at 49 (stating constructive trusts remedy fraud, "in view of which equity transfers the beneficial title to some person other than the holder of the legal title").

Still, neither actual fraud nor distinct breach of duty are required. Indeed, "'[i]nequitable conduct short of actual fraud will give rise to a constructive trust" where the holder of legal title would be unjustly enriched through retention of the property.

Roper v. Edwards, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (1988) (citation omitted); *see also Cury v. Mitchell*, __ N.C. App. __, __, 688 S.E.2d 825, 827 (2010) ("Although most constructive trusts arise from fraud, . . . the absence of fraud alone is not necessarily fatal to a claim of constructive trust[.]"). Moreover, a specific breach of duty need not be shown when other actions were unscrupulously performed. *See Speight v. Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936) (stating legal title obtained by violating fiduciary relationship "or in any other unconscientious manner" may be remedied by equity's impressing a constructive trust for one in good conscience entitled to the property). This trust may also arise from constructive fraud, which is not based on specific misrepresentation like actual fraud. Rather, we presume constructive fraud if a confidential relationship has "'led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'" *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation omitted).

Included among the fiduciary relations in which the law presumes fraud are those of principal/agent and attorney/client. *Atkins v. Withers*, 94 N.C. 581, 590 (1886). Due to the "special facilities" that "the party in the superior position has of committing a fraud upon him in the inferior situation," the law "requires the party in the superior situation, to show that his action has been fair, honest and honorable." *Id.* If "the superior party obtains a possible benefit through the alleged abuse of the

confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred." *Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007). "This presumption arises 'not so much because [the fiduciary] has committed a fraud, but [because] he may have done so.'" *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (quoting *Atkins*, 94 N.C. at 590). Accordingly, "[o]nce the presumption arises, the alleged fiduciary 'may rebut the presumption by showing, for example, that the confidence reposed in him was not abused.'" *Forbis*, 361 N.C. at 529, 649 S.E.2d at 388 (citation omitted).

Here, nothing in Plaintiff's verified complaint or affidavit tends to show fraud, breach of duty, or any other inequitable conduct short of such wrongdoing on the part of Defendants Lois and Allen Levine.[2] Defendant Allen Levine is referenced only fleetingly as the husband of Lois Levine and goes completely unmentioned thereafter. The allegations pertaining to Defendant Lois Levine address her familial relationship to Mary Lambeth and indicate that she, along with Defendant Craddock, received a remainder interest in the Property via two conveyances. *See Guy*, 104 N.C. App. at 757, 411 S.E.2d at 405-06 (stating fraud is not automatically presumed in parent-child relationships but explaining

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[2] It is presumed that Plaintiff's inclusion of Defendants Levine was purported to pertain to the resulting trust claim, which involves intent as opposed to wrongdoing. However, where Plaintiff's appeal of the summary judgment order addresses only the applicability of a constructive trust, we are constrained to limit our review to that remedy, and the trial court's dismissal as to the resulting trust issue is left undisturbed.

that "'it is fraudulent for a child, as grantee, to make a promise which deceives a parent, as grantor, and induce(s) the parent to act when the child making the promise knows at the time [the promise] is made that [the child] does not intend to keep the promise'"). While the complaint does raise the suspicion that the conveyances were intended to qualify his mother for Medicaid and never to preclude the Property from being devised as directed in her will, there is no claim that Defendant Lois Levine prompted Mary Lambeth in *any* manner, whether unconscientious or honest, to "circumvent Medicaid rules." *See id.* at 758, 411 S.E.2d at 406 (noting, where there was no presumption of fraud arising from any confidential relationship, "that the plaintiff must allege a false promise by the grantee made prior to the legal conveyance which caused the plaintiff-grantor to convey the land"). Thus, we reject Plaintiff's argument that the mere fact of Defendant Lois Levine's receipt of the Property allegedly conveyed as a contrivance for Medicaid purposes or as a vehicle to achieve estate planning goals is sufficient conduct, without more, to support an inference that she wrongfully convinced their mother to transfer the lot.

The only other reference to Defendant Lois Levine is the allegation that her remainder interest had vested, giving her legal title to the Property, and that she and Defendant Craddock had listed the Property for sale. There is no allegation, however, of impropriety in Defendant Lois Levine's *acquisition* of the Property that she may now be attempting to sell, rendering inappropriate the imposition of a constructive trust to prevent her enjoying the

proceeds thereof. *See Graham v. Martin*, 149 N.C. App. 831, 836, 561 S.E.2d 583, 586 (2002) (finding no North Carolina cases "in which a constructive trust has been imposed absent some fraudulent or improper *acquisition* of property"). We conclude that, as to these Defendants, Plaintiff failed to rebut the argument that, lacking any allegation of fraud, inequitable conduct, or breach of fiduciary duty, an essential element of the claim for constructive trust is non-existent. Accordingly, Plaintiff did not establish that there was a genuine issue of material fact that could trigger the imposition of a constructive trust over any portion of the Property held by Defendants Allen and Lois Levine. Therefore, the trial court did not err in granting summary judgement as to said Defendants and thereby dismissing the action as it relates to them.

To the contrary, it is undisputed that a confidential relationship existed between Defendant Craddock and Mary Lambeth at the time the second deed was made on 7 November 2002, if not at the time of both conveyances. While the allegations in the complaint regarding the two deeds contend only that the conveyances were made unbeknownst to the other siblings — which clearly would not suffice to show inequitable conduct — Plaintiff attested by affidavit that after filing his complaint, he discovered that Defendant Craddock

> was made [his] mother's attorney-in-fact at the time of the execution of the first deed, and was acting as [his] mother's fiduciary at the time of the execution of the second deed. The power of attorney is dated 1 November 2002 and is recorded at book 1788 page 3748 Randolph County Registry.

We recognize "that where the evidence presented at a hearing upon a motion for summary judgment would justify an amendment to the pleadings, such amendment should not be precluded by entry of summary judgment." *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977) (treating complaint as amended despite its failure to specifically allege adoption of a contract because the evidence presented at the hearing supported the theory). "Furthermore, where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties." *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 74, 394 S.E.2d 263, 265 (1990).

Here, the complaint did not refer to any power of attorney or Defendant Craddock's attorney-in-fact status. However, Plaintiff's affidavit was admitted by the trial court without objection and raised the existence of a fiduciary relationship that would entitle Plaintiff to certain presumptions on summary judgment. While oral arguments are not considered as evidence when ruling upon summary judgment motions, Plaintiff's counsel articulated this point before the trial court at the hearing. He clarified that Defendant Craddock did not physically sign either deed via power of attorney but only that she was a fiduciary when she received this remainder interest, and Defendants' counsel responded, "That's correct. . . . There was a Power of Attorney that had been . . . executed." Thus, the issue of a confidential relationship created by the power of

attorney vested in Defendant Craddock was clearly before the trial court with the consent of both parties. Under these facts, it is proper and desirable to treat the complaint as though it were amended to conform to the evidence presented at the hearing.

While the power of attorney was executed contemporaneously with the first deed, it is unclear whether a fiduciary relationship existed at that time because it is not stated when the grant was made known to Defendant Craddock. *Cf. In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 799 (1999) (rejecting argument that fiduciary relationship existed when power of attorney was made contemporaneously with will, as evidence showed testator delivered power of attorney to named attorney-in-fact 18 months after executing her will and there was no proof that grantee served as attorney-in-fact at time testator executed will). The relevant paragraph in Plaintiff's affidavit, however, provides that the power of attorney was executed six days prior to the making of the second deed and avers that Defendant Craddock was indeed serving as Mary Lambeth's attorney-in-fact when the 99% remainder interest was transferred. Plaintiff thereby forecasted evidence that Mary Lambeth's only asset of substantial value passed to Defendant Craddock outside the will, damaging the estate by depleting the same, at a time when Defendant Craddock was her mother's fiduciary. Plaintiff's allegations tend to show not only a confidential or fiduciary relationship, but also that Defendant Craddock, the superior party, obtained a benefit, which raises a presumption that constructive fraud occurred. *See Forbis*, 361 N.C. at 530, 649

S.E.2d at 389 (holding allegation that fiduciary benefitted as result of abusing the confidential relationship entitled plaintiff to the legal presumption). As such, the specific facts in Plaintiff's affidavit produce a forecast of evidence demonstrating that he can at least establish a *prima facie* case for a constructive trust at trial. *Cf. McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943) (presuming fraud in two deeds making defendant grantee and will making him sole executor and primary beneficiary, where power of attorney was in effect and defendant was general agent and manager of principal's affairs); *Sorrell v. Sorrell*, 198 N.C. 460, 152 S.E. 157 (1930) (presuming fraud in conveyance from grantor to attorney-in-fact); *Seagraves v. Seagraves*, __ N.C. App. __, __, 698 S.E.2d 155, 163-64 (2010) (reversing grant of partial summary judgment for defendant who was his mother's attorney-in-fact pursuant to power of attorney at time she granted him tract of land that was devised to different child in her will).

Where Defendant Craddock presented no evidence to rebut the presumption, she failed to prove the absence of a genuine issue of fact; thus, the trial court erred in ruling she was entitled to summary judgment. Our holding, however, does not preclude Defendant Craddock from attempting to rebut the presumption of constructive fraud. For example, she may be able to show that the confidence reposed in her was not abused by presenting evidence of the circumstances surrounding the execution of the deeds. Alternatively, or in combination therewith, the power of attorney document itself might detail Defendant Craddock's scope of

authority or even define the extent to which she may receive gifts as Mary Lambeth's attorney-in-fact, evidencing that her acquisition of the Property was not contrary to the duties she owed her mother. Without limiting the rebuttal evidence Defendant Craddock may offer, we hold only that the weight of the presumption, in light of whatever proof she may present on remand, is a jury issue.

We briefly address Defendants' argument that even if there was a sufficient forecast of evidence to show a genuine issue of wrongdoing, summary judgment must be granted because Plaintiff could not be the beneficiary of a constructive trust anyway. For, we acknowledge that justification for a constructive trust would be irrelevant if the party bringing the action could not benefit therefrom, essentially lacking standing. *See Scott v. United Carolina Bank*, 130 N.C. App. 426, 432-33, 503 S.E.2d 149, 153-54 (1998) ("'No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust[;] . . . only beneficiaries have standing to sue to enforce a trust.'").

Here, while Plaintiff admitted that he was intentionally excluded from Mary Lambeth's 1998 will, he introduced a paper writing dated 17 August 2001 and sought resolution thereof as a codicil to his mother's will. Accepted as an exhibit, the document is hand-written in letter form and begins, "I in my right mind w[a]nt to make a little change in my last will and testimony. . . . I left my son Baxter out of it." The letter then provides that any funds remaining from the sale of the Property

shall be divided "between the five," naming "Baxter[,] Louise[,] Lois[,] Bonnie[,] Jay B." The document is signed, "Love to you all. From Mom." Defendants argue that this document could not be a valid holographic codicil because it "is not subscribed, nor does the name of the purported testator appear in the document" such that "the statutory requirements of a valid holographic codicil are not met as a matter of law. *See* N.C. Gen. Stat. § 31-3.4(a)(2) (2009) (requiring a holographic will or codicil to be "[s]ubscribed by the testator, or with his name written in or on the will in his own handwriting"). However, there is direct precedent — which has not been overruled — indicating that the signature on the letter is not fatal to Plaintiff's ability to meet this requirement. *See In re Southerland*, 188 N.C. 325, 328, 124 S.E. 632, 633 (1924) (holding signature of the word "Mother" to a paper writing offered as a holographic will "is sufficient if the maker adopted it as her own for the purpose of executing the instrument"). Where Defendants' only challenge to treating the document as a codicil — and thereby negating Plaintiff's standing as a real party in interest — rested on the words used in the signature, we merely conclude that the closing "From Mom" is insufficient to show there is no genuine issue of material fact as to whether Mary Lambeth amended her will to include Plaintiff. We render no opinion as to whether Mary Lambeth "adopted it as her own for the purpose of executing the instrument" or whether the remaining requirements of § 31-3.4 have been satisfied.

In light of the foregoing, we hold that summary judgment is affirmed as to Defendants Lois and Allen Levine. We reverse the grant as to Defendant Craddock, however, and remand the case for further proceedings.

Affirmed in part; Reversed in part.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).