NO. COA11-1420
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

HARRIETT HURST TURNER and
JOHN HENRY HURST,
Plaintiffs,

v. Wake County
No. 06 CVS 18173

THE HAMMOCKS BEACH CORPORATION, NANCY SHARPE CAIRD, SETH DICKMAN SHARPE, SUSAN SPEAR SHARPE, WILLIAM AUGUST SHARPE, NORTH CAROLINA STATE BOARD OF EDUCATION, ROY A. COOPER, III, in his capacity as Attorney General of the State of North Carolina,
Defendants.

Appeal by plaintiffs from orders entered 26 October 2010 and 12 January 2011 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 23 April 2012.

The Francis Law Firm, PLLC, by Charles T. Francis and Alan Woodlief, Jr., and Bailey & Dixon, L.L.P. by Michael L. Weisel and Adam N. Olls, for plaintiffs-appellants.

Hunton & Williams LLP, by Frank E. Emory, Jr., Brent A. Rosser, and Ryan G. Rich, for defendant-appellee, The Hammocks Beach Corporation, Inc.

Attorney General Roy A. Cooper, by Special Deputy Attorney Generals James C. Gulick and Thomas J. Ziko, for defendant-appellee, the North Carolina State Board of Education.

BRYANT, Judge.

Where the North Carolina State Board of Education is judicially bound by admissions made in its answer and motion to dismiss, the trial court erred by appointing the North Carolina State Board of Education as successor trustee of the Trust property.

Facts and Procedural History

On 15 December 2006, plaintiffs Harriett Hurst Turner and John Henry Hurst filed a complaint against defendants The Hammocks Beach Corporation ("Corporation"), Nancy Sharpe Caird, Seth Dickman Sharpe, Susan Spear Sharpe, the North Carolina State Board of Education ("SBE"), and Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina.

The complaint alleged the following: During the 1920's and 1930's, Doctor William Sharpe ("Dr. Sharpe") purchased 810 acres of high land on the mainland adjacent to Queens Creek and Foster's Bay in Onslow County, North Carolina. The highland portion was known as "the Hammocks." He also purchased adjacent property consisting of 2,000 acres of sandy beach outer banks and approximately 7,000 acres of marshland. Dr. Sharpe became closely acquainted with John and Gertrude Hurst ("Hursts"), who

moved onto the Hammocks, serving as managers and caretakers of the highland. Eventually, Dr. Sharpe communicated to the Hursts his desire to devise the Hammocks to them.

On 6 September 1950, Dr. Sharpe and Mrs. Hurst signed an agreement whereby Mrs. Hurst requested that Dr. Sharpe instead make a gift of the property in such a manner that African-American teachers and their then existing organizations could enjoy the Hammocks ("Agreement"). In 1950, by deed of gift ("Deed"), Dr. Sharpe deeded certain real property to the Corporation, as trustee to the Hursts. (The Agreement and Deed are collectively referred to as "the Trust").

The Corporation's charter stated that its purpose was "to administer the property given to it by Dr. Sharpe 'primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth.'" The deed restricted the use of the property "for the use and benefit of the members of The North Carolina Teachers Association, Inc., and such others as are provided for in the Charter of [the Corporation]."

A consent judgment was entered in 1987 stating that the Trust property originally consisted of approximately 10,000

acres. The 2,000 oceanfront acres, now known as Hammocks Beach State Park, were conveyed by the Corporation as trustee, to the State of North Carolina and now comprise Hammocks Beach State Park. The Corporation acquiesced in the claim by the State of North Carolina of title to approximately 7,000 acres of marshland. The deed provided the following:

> if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified . . . the property conveyed herein may be transferred to the [SBE], to be held in trust for the purpose herein set forth, and if the [SBE] shall refuse to accept such property for the purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said [the Corporation] to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; the Hurst family shall have the main land property and the Sharpe family shall have the beach property.

In 1986, the Sharpe and Hurst heirs argued, through an action filed by the Corporation, that fulfillment of the terms of the Trust had become impossible or impracticable, that the Corporation had acted capriciously and contrary to the intent of the settlor of the Trust, that the Trust should be terminated, and that either a conveyance of all the property or an adjudication of title should be made to the Sharpe and Hurst families. Prior to trial, the parties reached a settlement that

was approved by the court in a consent judgment ("Consent judgment").

In the Consent judgment, the Corporation retained title as trustee to a portion of the land, with additional powers of administration given to the Corporation aimed at enabling it to improve the property to the extent reasonably necessary. The Consent judgment also vested in the Sharpe and Hurst families a portion of the real property in exchange for the relinquishment of certain rights, such as raising livestock, fishing, residency, recreation, etc., to be held solely by the Corporation as trustee.

The trial court found that the fulfillment of the terms of the Trust had become impossible or impracticable because

> [t]he integration of the public schools and the virtual disintegration of the organizations for black people which were contemplated by Dr. Sharpe as primary beneficiaries and financial supporters of the trust are circumstances unforeseen by Dr. Sharpe and, in combination with the rights vested in the Sharpe and Hurst families and the prohibition against the mortgage and sale of property, render the fulfillment of the trust terms impossible or impracticable of fulfillment.

The Consent judgment also stated that Dr. Sharpe's alternative plan of having the SBE serve as trustee in the event the terms of the Trust were impossible or impracticable failed for the

same reasons. Therefore, the Consent judgment provided that the Corporation, as trustee, was no longer under a prohibition against the mortgaging or sale of the property, as long as it received court approval, and as long as it furthered the purposes of the Trust.

Based on the foregoing, plaintiffs alleged that the Corporation had taken no steps since entry of the consent judgment in 1987 to improve the Trust property or to fulfill the purposes of the Trust, had failed to account for Trust funds, and had negligently mismanaged said funds. In their 2006 complaint, plaintiffs prayed that the court: enter an order requiring the Corporation to account for its administration of the Trust; enter an order terminating the Trust and vesting fee simple title to the Trust res in the contingent beneficiaries of the trust; award judgment in excess of $10,000.00 as compensatory damages; award judgment in excess of $10,000.00 for punitive damages; award interest on any judgment; and, award attorney's fees.

The Corporation moved to dismiss the action under Rules 12(b)(1) and 12(b)(3) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction and lack of proper venue. The trial court denied the Corporation's motion

in an order entered 15 June 2007. Thereafter, the Corporation filed a motion to dismiss and for a protective order pending resolution of the motion pursuant to Rules 12(b)(6) and 26(c). The SBE and the North Carolina Attorney General also filed a motion to dismiss, arguing that they were not proper defendants to the proceeding because the Consent Judgment had extinguished any interest that the SBE would have had in the trust and because the Attorney General had no intention of maintaining any action to enforce the trust.

On 24 August 2007, the trial court denied the Corporation's motion to dismiss and allowed SBE's motion; the trial court therefore dismissed all claims against SBE and the Attorney General with prejudice. Our Court heard an interlocutory appeal by the Corporation in *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 664 S.E.2d 634 (2008) ("Turner I"). In Turner I, we reversed and remanded with instructions to the trial court to grant the Corporation's motion to dismiss. *Id.* at 61, 664 S.E.2d at 642. The North Carolina Supreme Court then reversed our Court's holding that the trial court erred in denying the Corporation's motion to dismiss and remanded the matter for

further proceedings in the trial court.[1] *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009) ("Turner II").

Following a jury trial and jury verdict in favor of plaintiffs on all issues, the trial court thereafter entered a judgment and order on 26 October 2010. The 26 October 2010 judgment stated that the "Corporation shall be removed as Trustee of the Trust," upon the formal appointment of the SBE as successor trustee. The judgment also provided that in the event that the SBE refused to accept tender of appointment, the trust property would be distributed pursuant to the terms of the 1950 deed. A separate order also entered on 26 October 2010 acknowledged that SBE had previously declined to serve as successor trustee but stated that SBE was now entitled to tender of appointment as successor trustee to administer the Trust for the purposes set forth in the 1950 Deed and Agreement. The trial court then set a hearing date for a formal tender to SBE.

On 6 December 2010, plaintiffs filed a motion for reconsideration of the 26 October 2010 order and objected to the tender of appointment to SBE as successor trustee. Plaintiffs' motion for reconsideration was denied and their objection to the appointment of the SBE as successor trustee was overruled in an

[1] There was no appeal from the trial court's dismissal with prejudice of all claims against SBE and the Attorney General.

order entered 12 January 2011. The trial court made procedural findings regarding deficiencies in plaintiffs' motion and made substantive findings regarding the merits of this case.[2] The 12 January 2011 order also formally appointed the SBE as successor trustee to administer the trust. From the 26 October 2010 and 12 January 2011 orders, plaintiffs gave notice of appeal.

Plaintiffs present the following issues on appeal: whether the trial court erred (I) in appointing the SBE as trustee based on (a) judicial admissions made by the SBE, (b) the doctrines of judicial and equitable estoppel, and/or (c) the principles of res judicata; and (II) in refusing to allow plaintiffs to pursue post-judgment discovery regarding the SBE's representation that

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[2] The 12 January 2011 order, included the following findings and conclusions: 1. The Plaintiffs' Motion does not specify the Rule of Civil Procedure under which Plaintiffs are applying for relief. The Motion seeks to alter or amend the Judgment and companion Order entered in this case to remedy alleged errors of law. Therefore, the Court deems it to be a motion under Rule 59 of the Rules of Civil Procedure. 2. Rule 59(e) requires that a motion to alter or amend a judgment "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(e). The Plaintiffs served their Motion for Reconsideration on or about December 6, 2010, more than 10 days after the entry of judgment on October 26, 2010. 3. Even if Plaintiffs' Motion had been timely filed, motions to alter or amend judgments are limited to the grounds listed in Rule 59(a). Plaintiffs' Motion fails to specify a ground for relief recognized under Rule 59(a).

it would not and could not accept tender of appointment as trustee to the trust.

Standard of Review

Because these determinations each involve the application of legal principles and are properly classified as conclusions of law, we apply a *de novo* review. *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002) ("We review questions of law *de novo*.").

I

Plaintiffs first argue that the trial court erred in appointing the SBE as trustee where the SBE had made judicial admissions disclaiming any interest in the Trust and admitting that it "may not serve as successor trustee." We agree.

This Court has found that

> A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence.

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981) (citation omitted). It is "ordinarily made by a pleading (or lack thereof), or by a response (or failure to respond) to a pretrial demand for admissions, or by

stipulation entered into before or at the trial." Brandis & Broun on North Carolina Evidence Ch. no. 8 § 198 (7th ed. LexisNexis Matthew Bender). "Such an admission 'is binding in every sense, absent a showing of fraud, misrepresentation, undue influence or mutual mistake. Evidence offered in denial of the admitted fact should undoubtedly be rejected.'" *Patrick v. Ronald Williams, Prof'l Ass'n*, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991). Specifically, "[f]acts alleged in the complaint and admitted in the answer are conclusively established by the admission." *Harris v. Pembaur,* 84 N.C. App. 666, 670, 353 S.E.2d 673, 677 (1987) (citation omitted).

In the present case, paragraph 38 of plaintiffs' complaint stated the following:

> Because the trust purposes have become impossible or impracticable because the [SBE] may not serve as successor trustee, and in any event the substitution of the [SBE] would not cure the impossibility or impracticability, the trust and N.C. Gen. Stat. § 36C-4-410 mandate that the trust property be deeded by [the Corporation] to the heirs and descendents [sic] of John Hurst and Gertrude Hurst. This court should enter an order terminating the trust established by Dr. William Sharpe on September 6, 1950 and vesting fee simple title to the trust res in the contingent beneficiaries of the trust, the heirs and descendents [sic] of the late Gertrude Hurst and the late John Hurst, as provided in the Deed and Agreement.

The SBE's Answer admitted the allegations set forth in paragraph 38 of plaintiffs' complaint by stating the following:

> Paragraphs 36 through 38 of the Complaint allege that under the Consent Judgment the parties and the Court found that because of the impossible or impracticable nature of the Trust the State Board of Education could not serve as trustee and the State Board of Education disclaimed any interest as a contingent trustee. The State Board of Education and the Attorney General admit these allegations.

On 9 August 2007, the SBE had filed a motion to dismiss as to their involvement in the case, stating that "[t]he Consent Judgment expunged any interest that the [SBE] may have had in the Trust[.]" Relying on the SBE's admissions and lack of interest in the trust, on 24 August 2007, the trial court granted the SBE's motion to dismiss and they were dismissed as a party to the action.

Defendants now claim that the SBE's statements made in their Answer and Motion to Dismiss were legal conclusions rather than factual admissions and that they should not be bound to those statements. Defendants rely on *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993) ("A stipulation as to the law is not binding on the parties or the court."), and *New Amsterdam Cas. v. Waller*, 323 F.2d 20, 24 (4th

Cir. 1963) ("When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."). We are not persuaded.

The contents of paragraph 38 of plaintiffs' complaint, to which defendants admitted in their Answer, appear to be a concession that is "binding in every sense." *Patrick*, 102 N.C. App. at 362, 402 S.E.2d at 456. There is no allegation or indication of fraud, misrepresentation, undue influence or mutual mistake. On the contrary, defendants clearly and forcefully asserted to the court in their motion to dismiss that they had no more interest in the litigation. The trial court granted their motion and allowed them to be dismissed.

SBE's Answer admitting their lack of interest in the Trust and the impracticability of fulfilling the Trust purposes qualify as judicial admissions, thus, SBE should be bound to their admissions and the facts admitted conclusively established. Based on the foregoing, we reverse the orders of the trial court appointing the SBE as successor trustee of the

Trust property and instruct the trial court to enter an order consistent with this opinion.

Furthermore, based on the disposition of plaintiffs' first argument, we need not reach plaintiffs' remaining arguments.

Reversed and remanded.

Chief Judge MARTIN and Judge MCCULLOUGH concur.

Report per Rule 30(e).