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NO. COA12-1283

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

ROBERT CONSOLI, BRAD DECKER, MIKE
VANEK, and E & E PARTNERS, LLC, a
Delaware Limited Liability
Company,
Plaintiffs,

v.

Mecklenburg County
No. 08 CVS 10480

GLOBAL SUPPLY & LOGISTICS, INC., a
North Carolina Corporation,
STANFORD "RON" BANKS, GREG
KIRCHNER, ROBERT MALZACHER, MARTIN
BANKS, and THE REFRIGERATED
LOGISTICS GROUP, LLC,
Defendants.

Appeal by Defendants Global Supply & Logistics, Inc.,
Stanford "Ron" Banks, Greg Kirchner, and Robert Malzacher from
judgments entered 20 January 2012 and 31 May 2012 by Judge
Richard Boner in Mecklenburg County Superior Court. Heard in
the Court of Appeals 25 March 2013.

*Bray & Long, PLLC, by William P. Bray, for Plaintiff E & E
Partners, LLC.*

*James, McElroy & Diehl, P.A., by Harrison A. Lord, John R.
Buric, and Preston O. Odom III, for Defendants Global*

Supply & Logistics, Inc., Stanford "Ron" Banks, Greg Kirchner, and Robert Malzacher.

STEPHENS, Judge.

Procedural History and Factual Background

This is the second appeal to arise in this shareholder action by Plaintiffs Robert Consoli, Brad Decker, Mike Vanek, and E & E Partners, LLC ("E & E") against Defendants Global Supply & Logistics, Inc. ("GSL"), Stanford "Ron" Banks, Greg Kirchner, Robert Malzacher, Martin Banks, and The Refrigerated Logistics Group, LLC ("RLG").¹ GSL provided distribution and temperature-controlled storage services to clients in the food service industry. Ron Banks was the majority shareholder in and chief executive officer of GSL; Kirchner was a minority shareholder, president, and chief operating officer; and Martin Banks was a minority shareholder and general manager of business

¹Hereinafter, the term "Plaintiffs" refers to all of the plaintiffs listed in the caption, while "Appellees" refers only to Decker and E & E, Consoli and Vanek no longer being parties to the action. Vanek filed a voluntary dismissal without prejudice of his claims on 23 September 2009. Consoli dismissed his claims against Defendants without prejudice on 13 January 2013. Likewise, the term "Defendants" refers to all defendants appearing in the caption, while "Appellants" refers only to GSL, Ron Banks, Kirchner, and Malzacher because Appellees dismissed all claims against Martin Banks in an amended pretrial memorandum filed 11 January 2012, and RLG was not a party to either appeal in this matter.

development. Malzacher was not a shareholder in GSL, but served as corporate controller for the company at all times relevant to this matter.

After reviewing a 2005 business plan developed by Ron Banks and Kirchner, Plaintiffs became minority shareholders in GSL, each investing between \$100,000.00 and \$500,000.00. By March 2008, the GSL directors, to wit, Ron Banks, Kirchner, Consoli, Decker, and E & E, were deadlocked with regard to the operation of the company. The bylaws required an 80% block of the GSL shareholders to break the director deadlock, but the shareholders were unable to reach the required level of agreement. Despite this impasse and the resulting lack of authorization, in April 2008, Defendants shut down all existing operations of GSL. As a result, in May 2008,² Plaintiffs commenced this action against Defendants seeking damages for various alleged acts and omissions in the operation of GSL, including failure to comply with GSL's bylaws and misappropriation of the company's assets.

As this Court noted in the unpublished opinion which

²Plaintiffs' amended complaint was filed 24 October 2008. We note a minor clerical error in the trial court's 20 January 2012 order, which in finding of fact 2 states that the amended complaint was filed 5 May 2008. That was the filing date of Plaintiff's original complaint.

resolved the first appeal in this matter, Plaintiffs sought

(1) reimbursement for funds Plaintiffs paid to Defendants pursuant to a shareholder subscription agreement; (2) compensatory and punitive damages; (3) an accounting and the dissolution of GSL; (4) the entry of an order appointing Plaintiff Consoli to be the receiver of GSL for the purpose of winding up its affairs; (5) the imposition of a constructive trust applicable to RLG's assets in order to ensure the reimbursement of funds provided by Plaintiffs that were wrongfully converted or diverted from GSL; and (6) the costs, including attorney's fees. In seeking relief from Defendants, Plaintiffs relied on claims sounding in fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, breach of duty to minority shareholders, breach of contract, their right to an accounting and inspection of the corporate records of GSL, piercing the corporate veil, judicial dissolution of GSL, the imposition of a constructive trust, unjust enrichment, and punitive damages.

Defendants Ron Banks, Martin Banks, and Kirchner filed separate answers in response to the allegations of Plaintiffs' amended complaint. An entry of default was made against RLG on 22 December 2008 in light of its failure to answer Plaintiffs' amended complaint. On 29 April 2009, counsel representing GSL, Ron Banks, Martin Banks, Malzacher, and Kirchner were allowed to withdraw. GSL and Malzacher never filed an answer to Plaintiffs' amended complaint. However, prior to withdrawing, counsel for GSL filed a motion to dismiss Plaintiffs' amended complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

On 6 August 2009, eleven days before the

case was set for trial, Plaintiffs filed a motion seeking the entry of summary judgment in their favor, a motion for the entry of default judgment against RLG, and a motion for an entry of default against Malzacher. After the trial was continued, Plaintiffs' motions were eventually scheduled for hearing on 28 September 2009. On 18 September 2009, Plaintiffs filed a motion for the entry of default judgment against Kirchner.

At the 28 September 2009 hearing, Plaintiffs' motions were heard by the trial court. Ron Banks, Martin Banks, and Malzacher appeared at the hearing *pro se*; Kirchner failed to appear; and GSL and RLG were not represented by counsel. At the hearing, Plaintiffs urged the trial court to grant all of their motions. Ron Banks, Martin Banks, and Malzacher made statements contradicting Plaintiffs' evidence. However, none of them contested the timeliness of Plaintiffs' motions or raised any issue about the proper measure of damages. At the conclusion of the hearing, the trial court granted Plaintiffs' motions and entered an order to that effect on 29 September 2009.

Consoli v. Global Supply & Logistics, Inc., __ N.C. App. __, 714 S.E.2d 867 (2011) (unpublished), available at 2011 N.C. App. LEXIS 1787, at *2-*4 ("the 2011 opinion"). From the September 2009 order, Ron Banks, Martin Banks, Kirchner, and Malzacher appealed, contending that the trial court erred by (1) granting summary judgment in favor of Plaintiffs, (2) awarding attorney's fees to Plaintiffs, and (3) entering default judgment against

Kirchner and Malzacher. *Id.* at *4. This Court

partially affirm[ed] the trial court's decision to grant summary judgment against GSL, Ron Banks, and Kirchner with respect to the fraudulent inducement and negligent misrepresentation claims and the trial court's decision to enter default judgment on the issue of liability against Malzacher[, but] reverse[ed] the remainder of the trial court's summary judgment determinations and the trial court's decision to enter default judgment against Malzacher on the issue of damages and remand[ed] this case to the Mecklenburg County Superior Court for further proceedings not inconsistent with this opinion.

Id. at *43–*44.

As a result of the 2011 opinion, on 11 January 2012, E & E and Decker filed affidavits on the issue of damages in support of their motions for default judgment against Malzacher. E & E and Decker identified their damages for Malzacher's breach of fiduciary duties as the amounts each had invested in GSL (\$500,000.00 and \$320,000.00, respectively), but requested only nominal damages on their veil-piercing claims because neither E & E nor Decker could allocate specific damages to Malzacher.

On remand, the matter was set to be heard on 17 January 2012. On that date, Appellees filed an amended pretrial memorandum stipulating their intent to proceed only on (1) their claims for fraudulent inducement and negligent misrepresentation

as to GSL, Ron Banks, and Kirchner, "specifically with respect to damages on those liability issues affirmed" by this Court and (2) damages on the default judgment as to Malzacher, "which shall be supported by affidavit and which shall be determined in accordance with the trial court's discretion at the conclusion of the trial." In regard to damages on the fraudulent inducement and negligent misrepresentation claims against GSL, Ron Banks, and Kirchner, the amended pretrial memorandum listed an exhibit in addition to those identified in Appellees' previous pretrial memorandum: a check from Decker to GSL "dated February 29, 2008 in the amount of \$20,000.00, representing the 'March 2008' investment referenced in the [2011] opinion." Thus, at the 17 January 2012 hearing, two issues were before the trial court: (1) compensatory damages against GSL, Ron Banks, and Kirchner and (2) damages against Malzacher on the default judgment.

As to the first issue, the trial court awarded Decker \$20,000.00 in compensatory damages against GSL, Ron Banks, and Kirchner for the investment he made in GSL via the check dated 29 February 2008. Over Appellants' objections, the court then *sua sponte* continued the proceedings as to damages in Malzacher's default judgment. On 30 March 2012, Appellees filed

a supplemental affidavit on damages, reciting opinion testimony as to the value of GSL. Malzacher moved to strike, contending that the supplemental affidavit was wholly speculative and included information upon which only an expert could opine although Plaintiffs had failed to identify any expert witness. Following a hearing on 17 April 2012, the trial court entered a default judgment against Malzacher on 31 May 2012. In the default judgment, the court held the supplemental affidavit was proper, denied Malzacher's motion to strike, and concluded that E & E was damaged in the amount of \$94,839.20 and Decker in the amount of \$56,903.52. This appeal followed.

Discussion

GSL, Ron Banks, and Kirchner appeal from the award of compensatory damages to Decker³ on the fraudulent inducement claim,⁴ contending the award departs from this Court's mandate in the 2011 opinion. Malzacher appeals from the default judgment in favor of Appellees, contending that Appellees' damages

³At the 17 January 2012 trial, E & E admitted that it had made no additional investments in GSL and thus could not prove any damages on the fraudulent inducement and negligent misrepresentation claims against GSL, Ron Banks, and Kirchner.

⁴At the bench trial, Decker elected that any damages award received would be pursuant to the fraudulent inducement claim and dismissed his negligent misrepresentation claim.

presentation was procedurally and substantively deficient. We affirm.

I. Compensatory damages

Appellants first argue that the trial court erred in awarding Decker⁵ compensatory damages against GSL, Ron Banks, and Kirchner, contending the award departs from this Court's mandate in the 2011 opinion. We disagree.

In our judicial system the Superior Court is a court subordinate to the appellate level courts. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the appellate level courts of the state would be shorn of authority over inferior tribunals.

Severance v. Ford Motor Co., 105 N.C. App. 98, 100-01, 411 S.E.2d 618, 620 (citations, quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 331 N.C. 286, 417 S.E.2d 255 (1992). However, where the issue is "the proper interpretation of our decision in [a] previous appeal[,] [e]xpressions contained in an appellate court decision must be interpreted in the context of the factual situation under review, or the framework of the particular case." *Campbell v.*

⁵Decker did not file a brief in this appeal.

First Baptist Church, 51 N.C. App. 393, 394, 276 S.E.2d 712, 713 (1981) (citation omitted); see also *Crocker v. Roethling*, ___ N.C. App. ___, ___, 719 S.E.2d 83, 87 (2011).

Appellants' argument rests entirely upon the month mentioned by this Court in the 2011 opinion when we concluded that "Plaintiffs adequately supported their claim for fraudulent inducement relating to the additional investment that Plaintiffs made in GSL in *March* 2008." *Consoli*, 2011 N.C. App. LEXIS 1787, at *27 (emphasis added). In actuality, all of the evidence showed that the additional investment by Decker was made on 29 *February* 2008 rather than in March of that year.⁶ At the 17 January 2012 bench trial, Appellants raised the issue of this discrepancy, contending that our mandate permitted consideration of damages for a *March* 2008 investment only and, there having been no March 2008 investment, the claim must be dismissed pursuant to Rule 41(b). Appellants argued that the 29 February 2008 investment "was the only investment made by any plaintiff based on those representations for which liability was found [in the 2011 opinion]." The trial court noted that Plaintiffs'

⁶At the hearing on remand, Decker admitted that he issued a check in the amount of \$20,000.00 to GSL on 29 February 2008 and that GSL was credited with that amount on the same day. Decker further testified that he did not make any investment in GSL in March 2008.

amended complaint had used the phrase "in or around March of 2008" in every reference to the additional investment, and that, since 29 February 2008 was Leap Day, in most years Decker's investment would in fact have occurred on 1 March. Likewise, in its written judgment, the trial court found as facts that this Court had "affirmed liability as to [GSL, Ron Banks, and/or Kirchner] for the 'March, 2008' investment" and that Decker invested \$20,000.00 on 29 February 2008. The court then awarded Decker damages in the amount of \$20,000.00 against GSL, Ron Banks, and Kirchner. After careful review of the record, we conclude that, on remand, the trial court proceeded in full accord with this Court's mandate in the 2011 opinion.

In the 2011 opinion, as part of its explanation of the procedural history and factual background of the case, this Court recited, *inter alia*, the following paragraphs from Plaintiffs' amended complaint:

108. *In or around March of 2008*, GSL officers, including Defendants Ron Banks and Malzacher, made various misrepresentations to the shareholders and directors of GSL regarding alleged arrangements that they had made with Carolina Premier Bank to establish a line of credit for GSL.

109. The representations of Defendants Ron Banks and Malzacher were made with the intent to induce the Plaintiffs to infuse yet additional money for the benefit of GSL.

110. These representations were knowingly false when made, as the Defendant Officers and Directors had not secured any such line of credit prior to making representations regarding the same to the Plaintiffs.

111. Defendants['] actions in making such misrepresentations to the Plaintiffs constituted bad faith actions in breach of their fiduciary duties to the Plaintiffs.

112. *In or around this same period of time in March of 2008*, the Plaintiffs presented the Defendants with various alternative proposals for the operation of GSL.

113. However, Defendants Ron Banks, Malzacher and Kirchner, purporting to act on behalf of GSL, unilaterally and without any corporate authority, authorization or resolution from the Board of Directors or otherwise, refused alternatives proposed by the Plaintiffs and, as detailed herein below, shut down GSL instead.

Id. at *20-*21 (emphasis added). In addressing the issues raised on appeal, this Court then concluded:

The amended complaint specifically states that Ron Banks and Kirchner claimed to have secured a line of credit for GSL without having actually made such an arrangement. In reliance on this representation, Plaintiffs made a further investment in GSL which they lost when GSL was shut down. The necessary intent to deceive, along with the required deceptive intent, can reasonably be inferred from the circumstances asserted in the amended complaint. As a result, Plaintiffs adequately supported their claim for fraudulent inducement relating to the

additional investment that Plaintiffs made in GSL in March 2008.

Id. at *27. Any reasonable reading of this language in context makes clear that the Court was referring to the allegations about the fraudulent inducement by Defendants just before GSL was shut down as described in paragraphs 108 to 113 of the amended complaint. Further, as noted *supra*, the check from Decker dated 29 February 2008 was not introduced as an exhibit until the matter was remanded. Thus, in the first appeal, this Court did not have the benefit of that critical detail, but was instead left to rely upon references to an additional investment made "in or around March of 2008." In sum, we conclude that, in understanding that the "additional investment that Plaintiffs made in GSL in March 2008" referenced in the 2011 opinion included the check from Decker dated 29 February 2008, the trial court made an entirely "proper interpretation. . . . in the context of the factual situation . . . [and] framework of the particular case." *Campbell*, 51 N.C. App. at 394, 276 S.E.2d at 713. Accordingly, Appellants' argument is overruled.

II. Award of compensatory damages from Malzacher

Appellants next argue that the trial court erred in awarding Appellees compensatory damages against Malzacher

because Appellees' damages presentation was procedurally and substantively deficient. We disagree.

As stated *supra*, in the 2011 opinion, this Court affirmed the trial court's decision to enter default judgment on the issue of liability against Malzacher, but reversed and remanded on the question of damages. Specifically, we concluded that

since the materials submitted in support of Plaintiffs' request for summary judgment do not include a specific damage amount for which Malzacher is liable in connection with the two claims asserted against him, we must reverse the trial court's decision to enter default judgment against Malzacher on the damages issue and remand this case to the trial court for *further proceedings sufficient to properly resolve that issue.*

Consoli, 2011 N.C. App. LEXIS 1787, at *40 (emphasis added).

On remand, the trial court and counsel for Appellees engaged in a discussion about how to properly value Appellees' damages on the default judgment. Specifically, the trial court wondered whether damages should be based upon the value of Appellees' shares in GSL just before the company was shut down (at a time of national economic recession), rather than at the full value Appellees originally invested in the company as suggested by counsel for Appellees. Counsel for Appellants agreed with the court's position, but neither the trial court nor counsel for any party had case law on hand to provide a

definite answer. Appellants objected to permitting further discovery in the matter, but Appellees observed that, having obtained a default judgment against Malzacher, they had not anticipated the need for extensive discovery. The trial court then continued the proceedings as to damages in Malzacher's default judgment until April 2012.

Appellants first contend that the trial court abused its discretion in ordering a continuance *sua sponte* to permit Appellees the opportunity to present sufficient evidence on the question of damages. Where a party moves for a continuance,

in passing on the motion[,] the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. . . . Since motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Shankle v. Shankle, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976) (citation and quotation marks omitted; alterations in original). We agree that continuances granted by a trial court

sua sponte, as occurred here, should also be reviewed for abuse of discretion.

We decline to conclude that the trial court abused its discretion in continuing the matter to permit the parties to address the very issue which led to our remand. Specifically, Rule 55 of our Rules of Civil Procedure, which covers default judgments, provides in pertinent part:

If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)(a) (2011). Here, the trial was conducted pursuant to Rule 55 in order to comply with this Court's mandate. We see no abuse of discretion therein.

As to Appellants' next contention, that the trial court erred in admitting testimony from an "expert" not so designated by Appellees, we reject this assertion as well.

The evidence in question was an affidavit from Ed Dudley, a corporate officer of E & E. The affidavit, in turn, contained a single exhibit: an economic forecast created by Malzacher and

presented to GSL shareholders in February 2008. The forecast for 2008 showed an operating profit for GSL of \$474,196.00. Dudley then opined that the appropriate multiple to apply to that forecast operating profit to determine the fair market value was six to twenty; that is, that that the fair market value of GSL in 2008 was six to twenty times the operating profit forecast by Malzacher. However, the trial court patently rejected Dudley's opinion in regard to the proper multiplier and awarded damages based solely upon the value of GSL stated in the forecast created by Malzacher himself. This forecast was the clear basis for the court's damages award. The award of damages was thus not based upon expert testimony, but rather upon the statements against interest by a party opponent. See N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2011). Even assuming *arguendo* that any incompetent "expert opinion" testimony was presented, a trial court acting as finder of fact is presumed to disregard all incompetent evidence when rendering a decision. See, e.g., *State v. Allen*, 322 N.C. 176, 185, 367 S.E.2d 626, 631 (1988) ("The presumption in non-jury trials is that the court disregards incompetent evidence in making its decision."). The trial court appears to have done so here. Accordingly, the judgment of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

Report per Rule 30(e).