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NO. COA12-1397
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

TANYA DIANNE TEDDER,
Plaintiff

v.

Columbus County
No. 10 CVS 180

JOHN ALAN HIGH and wife, ELIZABETH ELKINS HIGH,
Defendants

Appeal by plaintiff from orders entered 26 June 2012 by Judge Gary E. Trawick in Columbus County Superior Court. Heard in the Court of Appeals 27 March 2013.

Randolph M. James, PC, by Randolph M. James, for Plaintiff.

Patterson Dilthey, LLP, by Ronald C. Dilthey, for Defendant John Alan High.

Williamson, Walton & Scott, LLP, by C. Martin Scott II and Benton H. Walton, III, for Defendant Elizabeth Elkins High.

ERVIN, Judge.

Plaintiff Tanya Dianne Tedder appeals from orders granting summary judgment in favor of Defendants John Alan High and Elizabeth Elkins High.[1] On appeal, Plaintiff contends that the

[1]As a result of the fact that Mrs. High, while having a marital interest in the property at issue in this case, was not

trial court erred by granting summary judgment in favor of Defendants because she forecast sufficient evidence to establish the existence of a genuine issue of material fact concerning the validity of her constructive fraud claim. After careful review of Plaintiff's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

Betty Ann Moore Tedder, a cousin of Defendant's, grew up with Defendant's father. In later life, Ms. Tedder and Defendant lived on separate portions of what had originally been the family's farmland. In 2004, Ms. Tedder died intestate, resulting in the transfer of her property by operation of law to her heirs, who were her two children, William Tedder and Plaintiff. On 1 October 2004, David Tedder, Plaintiff's cousin and a member of the North Carolina State Bar, drafted deeds dividing the property into separate tracts, with William Tedder and Plaintiff receiving 105 and 108 acres, respectively. A provision in these deeds provided that William Tedder and Plaintiff each retained a right of first refusal applicable to the other's property, with that right having to be exercised

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directly involved in any of the events which underlie Plaintiff's claim, we will refer to Mr. High as "Defendant" throughout the remainder of this opinion.

within 30 days after the acceptance of a purchase offer from a third party.

William Barry Freedman effectively owned or controlled several farms through his involvement in various partnerships and corporations. Mr. Freedman began renting the Tedder property from Ms. Tedder in approximately 2002. In 2006, William Tedder informed Mr. Freedman that he was unwilling to rent the Tedder property to Mr. Freedman any longer. However, William Tedder indicated that he would be willing to sell the property to Mr. Freedman due to the fact that he had taken good care of it during the time that he had rented it.

In light of his discussions with William Tedder, Mr. Freedman hired David Tedder to draft an option allowing him to purchase the property from William Tedder. On 15 December 2006, William Tedder executed an agreement giving Mr. Freedman the option to purchase the property for $200,000 on or before 13 February 2007. In the course of negotiating the option agreement with William Tedder, Mr. Freedman mentioned that, while he thought that the property might be worth as much as $300,000, he was not certain of its value given the fact that no appraisal had been prepared. Mr. Freedman never offered to pay William Tedder $300,000 for the property, never discussed the $300,000 value with anyone other than William Tedder prior to the transaction underlying the present case, made an initial

offer to purchase the property for $175,000, and testified that, in his opinion, the property was only worth $200,000. After William Tedder signed the option agreement, David Tedder informed him that the document required him to sell the property to either Mr. Freedman or to his sister, Plaintiff. Although Mr. Freedman requested that David Tedder inform Plaintiff of the execution of the option agreement, he also began looking for other counsel to conduct the closing given the length of time that it took David Tedder to contact Plaintiff.

Defendant, also a member of the North Carolina State Bar, and members of his firm had represented Mr. Freedman on three occasions in the past. On two of these occasions, Defendant performed the necessary legal work himself. Defendant had not, however, ever previously represented Mr. Freedman in connection with a real estate transaction. On 11 January 2007, Mr. Freedman encountered Defendant at the courthouse while attending to other business. At that time, Mr. Freedman told Defendant about the option to purchase the Tedder property, which was set to expire 13 February 2007, and successfully sought Defendant's assistance in completing the purchase of the property. Defendant did not, however, conduct any work on behalf of Mr. Freedman, who simply "assumed" that Defendant was his attorney.

Defendant claimed to have learned that William Tedder and Mr. Freedman had executed an option agreement during the week of

15 January 2007 from his father, who had heard about the transaction on the basis of local gossip. When Defendant's father called William Tedder concerning the rumors that he had heard around town about the sale of the property, William Tedder told Defendant's father that he had not yet sold the property and was willing to meet with Defendant in the hope of keeping the property in the family. According to Defendant, he did not discuss any issue relating to the property with Mr. Freedman until 10 February 2007.

On 17 January 2007, Mr. Freedman made an unannounced visit to Plaintiff's place of employment for the purpose of notifying her that he had acquired an option to purchase the property and that she had thirty days within which to exercise her right of first refusal. However, Plaintiff already knew about the agreement between William Tedder and Mr. Freedman as the result of a conversation that she had had with David Tedder. Plaintiff was glad that Mr. Freedman intended to purchase the property because he took good care of the land, the two of them had a good relationship, and she lacked the resources to purchase the property herself. Although she would have liked to have purchased the property herself for sentimental reasons, Plaintiff took no steps to acquire it in the immediate aftermath of learning of the option to purchase that William Tedder had executed in favor of Mr. Freedman.

After talking with William Tedder, Defendant met with Plaintiff and discussed the idea that Plaintiff would exercise her right of first refusal for Defendant's benefit. At that time, Plaintiff informed Defendant that, while she could obtain the requisite $200,000 purchase price, she did not want to encumber her property in order to complete the transaction. Plaintiff initially agreed to purchase the property from her brother and then sell it to Defendant at the same price. However, the two of them eventually decided that Defendant would fund Plaintiff's purchase using a loan which Defendant would provide to Plaintiff. At that point, Defendant informed Plaintiff that he needed time to gather the necessary funds and would be back in touch with her at a later time.

On 26 January 2007, Defendant spoke to David Tedder for the purpose of inquiring as to when the notice of William Tedder's agreement with Mr. Freedman had been given and informing him that Plaintiff and Defendant intended to exercise the right of first refusal. Defendant told William Tedder that he would be purchasing the property after it had been transferred to Plaintiff. Subsequently, Plaintiff and Defendant met on several occasions to discuss the transaction at either Plaintiff's place of employment or Defendant's office.

Defendant prepared deeds conveying the property from William Tedder to Plaintiff and from Plaintiff to himself

without obtaining the assistance of any of his law partners. The parties planned to close the transaction at Defendant's office at approximately 6:00 p.m. on 8 February 2007. Although the conveyance from William Tedder to Plaintiff took place as planned, Plaintiff never appeared at Defendant's office on the indicated date. Instead, Plaintiff took the closing documents, which she had received two days earlier, to her attorney, Scott Sessions, for his review.

After Plaintiff and Mr. Sessions discussed the proposed transaction, they decided that, even though Plaintiff and Defendant had originally agreed that Defendant would loan the purchase money to Plaintiff and that she would sign a promissory note in favor of Defendant, Plaintiff would not take a loan from Defendant or execute a note in his favor. In addition, Mr. Sessions advised Plaintiff to refrain from signing the detailed conflict of interest waiver documents that Defendant had prepared for her signature. Although Plaintiff was concerned that the property that she had inherited from her mother would pass to her daughter, who would in turn sell it to the highest bidder, she decided not to grant Defendant a right of first refusal with respect to her own property in accordance with another of the proposed closing documents. Defendant learned of the discussions between Plaintiff and Mr. Sessions from William

Tedder, who told Defendant about them after the 8 February 2007 closing of the transaction between William Tedder and Plaintiff.

On 9 February 2007, Defendant stopped by Plaintiff's place of employment to close the transaction between the two of them. Instead of executing the necessary documents, Plaintiff informed Defendant about the changes that she and Mr. Sessions had concluded should be made. After receiving that information, Defendant left to make modifications to the proposed closing documents. However, he returned to Plaintiff's place of employment later that day. Prior to returning to Plaintiff's place of employment, Defendant altered the closing documents to reflect that there would be no loan between the parties. In addition, in lieu of the long-form conflict waiver document which Mr. Sessions had advised Plaintiff to refrain from signing, Defendant returned with a shorter conflict waiver document which stated, among other things, that "[Defendant was] acting as attorney for [Plaintiff]." Defendant abandoned his effort to obtain a right of first refusal relating to the property which Plaintiff had inherited from Ms. Tedder. According to Plaintiff, the only closing document remaining from the first set of documents that she received from Defendant at the time of Defendant's second visit to her place of employment was the deed. During the course of Defendant's second visit to her place of employment, Plaintiff executed the closing

documents, including a deed, with Defendant serving as the "closing attorney," depositing the sales price into Plaintiff's bank account using a check drawn on his law firm's trust account and making the necessary payments to others owed money as a result of this transaction.

The parties provided dramatically different accounts of what occurred at the closing. According to Defendant, Plaintiff did not want to sell the property to Mr. Freedman because he had failed to properly care for it; Plaintiff had requested that the closing take place at her place of employment because she was having difficulty getting off of work; Plaintiff suggested closing the transaction on 9 February 2007; and Plaintiff appeared to be satisfied with the transaction and happy to be involved in keeping the property in the family. On the other hand, Plaintiff asserted that Defendant had appeared at her place of employment on the date of the sale without having been invited to do so, pressured her into rapidly conveying her property to him, answered her question as to whether the transaction was "okay" in the affirmative, deposited funds into her account without her permission, and subsequently withdrew funds from her account without her permission. Although Plaintiff called the bank to prevent the completion of the transaction, Defendant had already consummated the transfer by the time that she did so. Plaintiff denied having understood

the documents which she signed because she failed to read them in their entirety.

On 10 February 2007, Mr. Freedman contacted Defendant and offered him $300,000 for the property. However, Defendant rejected Mr. Freedman's offer because he had purchased the property for sentimental reasons.

B. Procedural History

On 4 February 2010, Plaintiff filed a complaint asserting claims for unfair and deceptive trade practices, fraud, constructive fraud, coercion, undue influence, and violations of the North Carolina Racketeer Influenced and Corrupt Organizations Act. On 9 April 2010, Defendant filed a motion seeking the dismissal of Plaintiff's complaint on the grounds that, among other things, Plaintiff had failed to allege that she intended to purchase the property for her own personal use or that she used funds other than those provided by Defendant to purchase the property. On 12 April 2010, Mrs. High filed a dismissal motion. Plaintiff responded to both dismissal motions on 19 May 2010. On 2 March 2011, the trial court entered an order dismissing Plaintiff's RICO claim and declining to dismiss Plaintiff's remaining claims.

On 4 March 2011 and 14 March 2011, Mrs. High and Defendant, respectively, filed answers in which they denied the material allegations set out in Plaintiff's complaint and asserted an

affirmative defense and a counterclaim seeking reimbursement of the amount that Defendant had expended in purchasing the property in the event that he was held to be holding it subject to a constructive trust. On 21 March 2011, Plaintiff filed a reply to Defendant's counterclaim.

On 15 February 2012, Defendant filed a motion seeking the entry of summary judgment in his favor. On 24 February 2012, Mrs. High filed a similar summary judgment motion. Defendants' summary judgment motions came on for hearing before the trial court on 29 May 2012. On 26 June 2012, the trial court entered orders granting summary judgment in favor of Defendants. Plaintiff noted an appeal to this Court from the trial court's orders.

II. Substantive Legal Analysis

A. Standard of Review

According to well-established North Carolina law:

> Summary judgment is appropriate "if the 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." N.C. Gen. Stat. § 1A-1, Rule 56(c). "A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party." *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662

(2008).

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, 209 N.C. App. 369, 378, 705 S.E.2d 757, 764-65 (quoting *Liptrap v. Coyne*, 196 N.C. App. 739, 741, 675 S.E.2d 693, 694 (2009), *disc. review denied*, 363 N.C. 805, 690 S.E.2d 701 (2010)), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). A party seeking the entry of summary judgment in its favor has the burden of "show[ing] the lack of a triable issue of fact and . . . that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (citing *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 131, 225 S.E.2d 797,806 (1976)). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim . . . would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citing *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992)). We will now evaluate Plaintiff's challenge to the trial court's orders utilizing the applicable standard of review.

B. Constructive Fraud

In her challenge to the trial court's order, Plaintiff argues that the evidentiary materials presented to the trial court demonstrate, at a minimum, that a genuine issue of material fact existed with respect to her constructive fraud

claim. According to Plaintiff, given that Defendant used a confidential relationship with Plaintiff to his own benefit and Plaintiff's detriment, she was entitled to have her constructive fraud claim considered by a jury. Plaintiff's argument lacks merit.

Constructive fraud "'arises where a confidential or fiduciary relationship exists,' which has 'led up to and surrounded the consummation of the transaction in which [the] defendant is alleged to have taken advantage of his position of trust to the hurt of [the] plaintiff.'" *Forbis v. Neal*, 361 N.C. 519, 528, 649 S.E.2d 382, 388 (2007) (quoting *Watts v. Cumberland County Hosp. Sys., Inc.*, 317 N.C. 110, 115, 343 S.E.2d 879, 884 (1986) and *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997)) (citation omitted).

> In order to show constructive fraud, a plaintiff must establish (1) facts and circumstances creating a relation of trust and confidence; (2) which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship; and (3) the defendant sought to benefit himself in the transaction.

Sullivan v. Mebane Packaging Group, Inc., 158 N.C. App. 19, 32, 581 S.E.2d 452, 462, *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003). "[I]ntent to deceive is not an element of constructive fraud." *Forbis*, 361 N.C. at 529, 649 S.E.2d at 388 (citing *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704

(1971)). A "presumption of fraud arises where the superior party obtains a possible benefit," although this presumption may be rebutted through the presentation of evidence establishing that the plaintiff obtained independent advice concerning the transaction in question, at which point the plaintiff is required to prove actual fraud. *Sullivan*, 158 N.C. App. at 32-33, 581 S.E.2d at 462.

Assuming, without deciding, that Plaintiff and Defendant were involved in a "confidential or fiduciary relationship" which "led up to and surrounded the consummation of the transaction in which [D]efendant is alleged to have taken advantage of his position of trust to the hurt of [P]laintiff," *Forbis*, 361 N.C. at 528, 649 S.E.2d at 388, Plaintiff's constructive fraud claim is still defeated by the fact that the undisputed evidentiary forecast presented to the trial court reflects that, on the night prior to the closing, Plaintiff sought the advice of Mr. Sessions, that Mr. Sessions reviewed the closing documents and advised Plaintiff to seek to have certain changes made to those documents before executing them, and that Plaintiff informed Defendant that she had obtained independent legal advice and that she wanted certain changes made to the closing documents before she executed them. Although Plaintiff admitted that she did not read all of the modified closing documents before signing them, the record is

devoid of any evidence contradicting Defendant's claim to have changed the closing documents in accordance with Plaintiff's request. Thus, the record contains undisputed evidence rebutting the presumption of fraud upon which Plaintiff's constructive fraud claim relies.

Although Plaintiff attempts to overcome this obstacle to her challenge to the trial court's order stemming from her decision to seek and obtain independent legal advice prior to executing the closing documents by (1) arguing that Defendant "provided the closing documents without knowing plaintiff would consult another attorney" and (2) advancing assertions concerning which closing documents her attorney did, in fact, review, we conclude that neither of these arguments has merit.[2] As an initial matter, Plaintiff has cited no authority suggesting that the fact that Defendant did not know that she would seek independent legal advice before the original closing date has any bearing on the proper outcome in this case, and we

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[2]Plaintiff also argues that she continued to rely on Defendant for advice even after consulting with Mr. Sessions, with this contention evidenced by her claim to have asked Defendant if the transaction was "okay" at or about the time that she executed the closing documents. However, the fact that Plaintiff may have made such inquiry, while possibly indicating some degree of uncertainty on Plaintiff's part as to the wisdom of entering into the proposed transaction, does not obviate the fact that Plaintiff had sought and received independent legal advice concerning the transaction in question and that she proceeded to close the transaction after receiving this advice.

know of none.[3] Instead, as we have already noted, "evidence that the other party obtained independent advice" serves to rebut the presumption that constructive fraud has occurred arising from the fact that a party in a confidential relationship has acted in such a manner as to benefit himself to the detriment of the other party. *Sullivan*, 158 N.C. App. at 32, 581 S.E.2d at 462. As a result of the fact that Plaintiff clearly sought and obtained independent legal advice prior to consummating the challenged transaction and the fact that no decision of this Court or the Supreme Court suggests that the fact that Defendant did not know that Plaintiff had sought and obtained such advice before the initial closing date has any bearing on the extent to which obtaining such independent advice rebuts the presumption of constructive fraud discussed above, we conclude that this argument has no merit.

Secondly, Plaintiff has not cited any authority indicating that the fact that her independent counsel might not have examined all of the closing documents before the transaction was

[3]The same logic defeats Plaintiff's assertion that she did not consult Mr. Sessions until the night before the transaction closed. Aside from the absence of any authority tending to indicate that the time at which the independent legal advice was sought and obtained has some bearing on the extent to which the presumption of constructive fraud has been successfully rebutted, the record contains no indication that the fact that Plaintiff consulted with Mr. Sessions on the night before the closing had any adverse impact on the quality of the advice which she received or tended to show that she did not, in fact, receive independent legal advice.

closed has any bearing on the extent to which her decision to seek independent legal advice operates to rebut the presumption of constructive fraud upon which Plaintiff relies, and we know of none. Regardless of whether Mr. Sessions did or did not specifically review each and every one of the final set of closing documents, the fact remains that Plaintiff sought independent legal advice from Mr. Sessions, that revised closing documents were prepared based upon Mr. Sessions' recommendations, and that the record is devoid of any evidence tending to show that Plaintiff did not have the ability to seek to obtain additional advice from Mr. Sessions if she had wanted to obtain such advice. Instead, the record clearly shows that Plaintiff understood that she was entering into a contract to sell the property, which she had acquired by exercising her right of first refusal, to Defendant for $200,000, that she received independent legal advice from Mr. Sessions prior to closing on that transaction, and that she never made any attempt to have Mr. Sessions review the revised closing documents, which had been modified in accordance with his earlier recommendations. As a result, given that the undisputed "evidence [tends to show] that the other party obtained independent advice" prior to closing the challenged transaction, the undisputed evidence presented for the trial court's consideration establishes that the presumption of constructive

fraud upon which Plaintiff relies has been successfully rebutted. *Sullivan*, 158 N.C. App. at 32, 581 S.E.2d at 462.

As a result of the fact that the presumption of constructive fraud has been successfully rebutted, Plaintiff was required to demonstrate that actual fraud occurred in order to avoid the entry of summary judgment in favor of Defendants. *Sullivan*, 158 N.C. App. at 32-33, 581 S.E.2d at 462. However, Plaintiff expressly abandoned her actual fraud claim before the trial court and has made no argument to the effect that she was the victim of actual fraud on appeal. For that reason, we are unable to conclude that Plaintiff has forecast evidence which tends to show, despite the fact that the presumption of constructive fraud has been successfully rebutted, that she is entitled to have a jury consider the validity of her claim against Defendants. *See* N.C.R. App. P. 28(a) (providing that "[i]ssues not presented and discussed in a party's brief are deemed abandoned"). Thus, the trial court did not err by granting summary judgment in Defendants' favor.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff's challenge to the trial court's orders lacks merit. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).