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NO. COA12-1438
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

Pugh Oil Company, Inc.,
Plaintiff,

v.

Randolph County
No. 10 CVS 2485

Ace Transport, Ltd., and Ace
Transport 1, LLC, as Successor by
Merger to Ace Transport, Ltd.,
Defendants.

Appeal by defendant from judgment entered 19 March 2012 by
Judge John O. Craig in Randolph County Superior Court. Heard in
the Court of Appeals 5 June 2013.

*Ryan McKaig and Stewart and Schmidlin, PLLC, by Walter A.
Schmidlin, III, for defendant-appellant.*

*Carruthers & Roth, P.A., by Jack B. Bayliss, Jr. and Michal
E. Yarborough, for plaintiff-appellee.*

HUNTER, Robert C., Judge.

Ace Transport, Ltd. ("defendant") successor by merger with
Ace Transport 1, LLC appeals from a jury verdict finding that:
(1) defendant breached its contract with Pugh Oil Company, Inc.
("plaintiff"); (2) plaintiff did not waive its right to bring a
claim for defendant's breach of contract; and (3) plaintiff

should be entitled to recover \$230,000 from defendant. Defendant contends that the trial court erred by denying its motion to amend its counterclaims and third-party complaint, in awarding partial summary judgment to plaintiff, and in denying defendant's motion for directed verdict. After careful review, we affirm.

Background

Plaintiff owns and operates gas stations and convenience stores in the area of Randolph County. Defendant had an inventory control agreement ("the agreement") with plaintiff for delivering gasoline to plaintiff's gas stations between 2005 and 2009. As part of the agreement, plaintiff required different brands of gasoline for its stations: eight stations sold BP-branded fuel, four stations sold Exxon-branded fuel, and one station sold unbranded fuel. The agreement required defendant to supply BP-branded fuel to the BP-branded stations unless such fuel was unavailable, and then unbranded fuel was to be delivered. The parties understood that defendant would obtain authorization from plaintiff before delivering any non-BP branded fuel to a BP station. Plaintiff's president, Mr. Ronald Pugh ("Mr. Pugh"), testified that no one at Pugh Oil monitored what defendant was delivering to the stations. As a result,

Pugh Oil never complained about incorrect deliveries. Mr. Pugh admitted on cross-examination that there were at least 40 instances where defendant delivered unbranded fuel to branded stations in 2008. In addition, trial exhibits showed that defendant delivered Exxon gas to BP stations 93 times in 2005 and delivered unbranded gas to branded gas stations 150 times between 5 January 2008 and 17 August 2009.

From April through the third week of June 2009, defendant's delivery of BP-branded fuel to plaintiff's stations decreased 33 percent from the same time period in 2008, causing a decrease in plaintiff's monthly consumption of fuel from BP. Defendant did not notify plaintiff of this change until 16 June 2009. BP, however, noticed the drop in deliveries and began investigating. On 24 July 2009, defendant mistakenly delivered unbranded fuel to a BP station, and BP fuel to an unbranded station; a BP investigator checked the fuel at that particular BP station that day and found non-BP product in the tank. On 5 August 2009, defendant delivered Exxon fuel to one of plaintiff's Exxon stations but had an extra 1,000 gallons that would not fit in the Exxon tank; the driver delivered those 1,000 gallons to one of plaintiff's BP stations. A BP investigator checked the fuel at that BP station the following day and again found non-BP

product in the tank. These investigations, combined with the drop in deliveries of BP-branded fuel by defendant, caused BP to terminate its contract with plaintiff. Plaintiff wrote a letter to BP ("the BP letter"), dated 11 September 2009, concerning the loss of the BP contract, in which it discussed the possible causes of the mistakes, acknowledged its own lack of internal control procedures, and attempted to ameliorate the issues with BP.

As a result of BP's termination of the contract, plaintiff filed the underlying action against defendant alleging breach of contract, breach of express and implied warranties, unfair and deceptive practices, and indemnity. Defendant filed a motion to dismiss as well as its own counterclaim and third-party complaint, alleging fraud, libel per se, other libel, slander per se, disregarding the corporate entity, and unfair and deceptive practices. Plaintiff then moved for partial summary judgment, which defendant moved to strike. Defendant also moved to amend its counterclaim and third-party complaint. The trial court denied defendant's motion to amend and granted plaintiff's motion for partial summary judgment. The jury found defendant had breached its contract with plaintiff and awarded plaintiff damages of \$230,000. Judgment was entered on 28 February 2012,

and an amended judgment was entered 19 March 2012. Defendant appeals.

Discussion

I. Denial of Defendant's Motion to Amend

Defendant argues that the trial court erred in denying its motion to amend its counterclaim and third-party complaint because the proposed amendments properly alleged causes of action and relied upon evidence that was not available to defendant at the time of its original filings. We disagree.

"A motion to amend is left to the sound discretion of the trial court, and a denial of such motion is reviewable only upon a clear showing of abuse of discretion." *Brown v. N.C. Div. of Motor Vehicles*, 155 N.C. App. 436, 438, 573 S.E.2d 246, 248 (2002) (citation omitted). "The trial court's ruling is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 438-39, 573 S.E.2d at 248 (citation and quotation marks omitted). Under N.C. Gen. Stat. § 1A-1, Rule 15(b), "the [trial] court [is authorized] to allow amendments to pleadings 'as may be necessary to cause them to conform to the evidence' and . . . amendments may be allowed at any time, even after judgment. The rule also contemplates

liberality on the part of the court in allowing amendments to the pleadings." *Performance Motors, Inc. v. Allen*, 20 N.C. App. 445, 447, 201 S.E.2d 513, 515 (1974). "[L]eave to amend should be 'freely given when justice so requires' and . . . the burden is on the party objecting to the amendment to show that he would be prejudiced thereby." *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977) (citing N.C. Gen. Stat. § 1A-1, Rule 15(a) and (b)). "One of the stated justifications for a trial court's denial of a plaintiff's motion to amend its complaint is futility of amendment." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., Inc.*, 192 N.C. App. 74, 84, 665 S.E.2d 478, 487 (2008).

Defendant contends that the trial court erred in dismissing its motion to amend dated 19 September 2011 because at the time it filed its original complaint it had not received plaintiff's allegedly libelous letter written to BP, dated 11 September 2009. Defendant is correct in its contention that the BP letter was not in evidence at the time it filed its original answer, counterclaim, and third-party complaint. However, as plaintiff contends, the letter was already in the record when the trial court ruled on defendant's motion. The letter was included with the affidavit of Mr. Pugh submitted by plaintiff in support of

its motion for partial summary judgment dated 2 September 2011. Despite the fact that the affidavit is dated ten days after plaintiff's motion for partial summary judgment, it was properly admitted by the trial court. *See Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184, 609 S.E.2d 456, 458 (2005) ("Pursuant to Rule 6(d) [of the North Carolina Rules of Civil Procedure], the trial court is empowered with discretion as whether to allow affidavits to be filed subsequent to the filing of a motion."). In its order on plaintiff's motion for partial summary judgment, the trial court stated that it considered the affidavits and materials submitted when denying defendant's motion to amend and concluded that defendant's proposed amendment would be futile because it would not raise an issue of fact that would have prevented the trial court's grant of partial summary judgment.

As the trial court's denial of defendant's motion to amend was based upon all relevant evidence, the decision was within its discretion, and we find no error.

II. Grant of Partial Summary Judgment to Plaintiff

Defendant alleges that the trial court erred in two ways in granting plaintiff's motion for partial summary judgment. First, defendant contends that the trial court's refusal to

continue the case to allow defendant more time for discovery was erroneous, and second, defendant argues that the trial court erred in granting plaintiff's motion for partial summary judgment. We find no error in the refusal to allow a continuance and deem the alleged error regarding partial summary judgment to be abandoned.

A. Denial of Motion to Continue

"A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion." *O'Brien v. O'Brien*, 266 N.C. 502, 506, 146 S.E.2d 500, 504 (1966). "A trial court does not abuse its discretion when it denies motions to continue a hearing on a motion for summary judgment if a party fails to file and give notice of a motion to continue and submit an affidavit pursuant to Rule 56(f)." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 214, 580 S.E.2d 732, 736 (2003), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004).

After plaintiff filed its motion for partial summary judgment, the trial court granted continuances on 19 September and 10 October 2011 to allow for further discovery. When plaintiff's motion for summary judgment came on for hearing on 8

November 2011, defendant argued that plaintiff had not answered two interrogatories and that defendant could not move forward without more time for discovery. The trial court denied the motion and noted defendant's failure to file any motions to compel or motions for sanctions in the months since defendant had been granted two continuances. We conclude the trial court's decision to deny defendant's oral motion to continue was not an abuse of discretion. Defendant did not file another motion to continue or supporting affidavits and did not file a motion to compel discovery or to sanction plaintiff for its alleged failure to comply with defendant's discovery requests. *See id.* (concluding that a trial court did not abuse its discretion in denying the plaintiff's motion to continue where the plaintiff did not give notice of its motion to continue or submit an affidavit pursuant to North Carolina Rule of Civil Procedure 56(f)). Defendant's argument is overruled.

B. Grant of Partial Summary Judgment

Defendant also contends that the trial court erred by awarding partial summary judgment because there existed genuine issues of material fact as to the alleged defamation in the BP letter and plaintiff had not complied with all of defendant's

discovery requests, thus precluding defendant from fully supporting its claims.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "[A]n appellant's brief must contain: [a]n argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." *Belk v. Belk*, ___ N.C. App. ___, ___, 728 S.E.2d 356, 359 (2012) (citing N.C. R. App. P. 28(b)(6)).

Defendant in the instant case has provided no substantive argument or reasoning in support of its contention that the trial court erred in granting partial summary judgment. Defendant simply contends that there was a genuine issue of material fact as to the alleged defamation in the BP letter from plaintiff that would have been more obvious had plaintiff complied with defendant's discovery requests. Defendant also

contends the same is true regarding its slander and fraud claims. However, no supporting arguments for either contention are provided for this Court to review and thus the argument is deemed abandoned. See *id.* (deeming defendant's argument abandoned where defendant failed to present an argument in support of his contention that the trial court erred).

III. Denial of Defendant's Motions for Directed Verdict

Defendant's final contention is that the trial court erred in denying its motion for directed verdict because, it argues, plaintiff waived its right to bring a claim against defendant for breach of contract. We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions,

conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"Waiver is an affirmative defense which defendant must plead. Having pled waiver, defendant has the burden of proving it." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 664, 194 S.E.2d 521, 535 (1973) (citation omitted). "It is well settled in North Carolina that a party may waive a contractual right by any intentional and voluntary relinquishment." *Demeritt v. Springstead*, 204 N.C. App. 325, 328, 693 S.E.2d 719, 721 (2010) (citation and quotation marks omitted). "[Waiver] is a question of intent, which may be inferred from a party's conduct." *Harris & Harris Const. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962). "[I]ntent is an operation of the mind [and] it should be proven and found as a fact and is rarely to be inferred as a matter of law." *H.M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 454, 168 S.E. 517, 519 (1933).

It is unclear from the transcript if defendant made a motion for directed verdict on plaintiff's breach of contract claim. The relevant portion of the transcript reads:

[THE COURT:] I know that you would like, probably, to make your motions at this point for a directed verdict.

[DEFENDANT'S COUNSEL:] I would, in fact, Your Honor, and *I don't expect you to grant it as to the breach of contract claim.* However, I would like to be heard about the unfair and deceptive trade practices claim. (Emphasis added.)

It is possible to interpret defendant's response to the trial court as a motion for directed verdict on plaintiff's breach of contract claim, which was denied. Defendant's motion for directed verdict on plaintiff's unfair and deceptive practices claim was granted at the close of evidence.

Assuming that defendant made a proper motion for directed verdict on breach of contract, defendant's sole argument on appeal is that the trial court erred in denying defendant's motion for directed verdict because plaintiff waived its right to bring a breach of contract claim. Defendant contends that plaintiff's pattern of receiving invoices, bills of lading, and driver's sheets constituted waiver in that plaintiff had notice of the times that the fuel deliveries differed from what was expected and did not object to the deliveries for the duration of the agreement, until BP's investigations. In turn, plaintiff argues that the discrepancies to be found in the invoices, bills of lading, and driver's sheets could only be found by careful examination and correlation of the documents, and neither the

accounting software or reconciliation process at Pugh Oil, nor any industry standard, requires such cross references. Plaintiff contends that it relied on defendant to control its inventory per their agreement.

In its brief, defendant does not cite to any invoice in the record to demonstrate that Pugh Oil was on notice of the nonconforming deliveries. Based on this Court's review of the invoices provided by plaintiff, we cannot discern whether the documents show unbranded or branded fuel at incorrect stations. The invoices do not compel the conclusion that plaintiff intentionally relinquished its right to bring a claim of breach of contract against defendant.

In addition, the record establishes a clear factual dispute concerning plaintiff's intent, which was proper for the jury to resolve. "Where more than one conclusion can reasonably be drawn from the evidence, such a determination should be left for the jury." *Williams v. Davis*, 157 N.C. App. 696, 700, 580 S.E.2d 85, 88 (2003). Plaintiff possessed the invoices and bills of lading provided by defendant, as evidenced by Mr. Pugh's testimony, and did not take action regarding any discrepancies in fuel deliveries. According to testimony by defendant's employee, Mark Idol, defendant was not to deliver

unbranded fuel to a BP station without the authorization of plaintiff, per the parties' agreement. Defendant also admitted in its Answer, which was read into evidence, that, "Ace would deliver motor fuel to designated locations, per branded allocation, *unless otherwise directed* by Ronald Pugh or Pugh Oil's dispatch." (Emphasis added.) Considering the evidence in the light most favorable to plaintiff as the non-movant, we conclude that the trial court did not err in denying defendant's motion for directed verdict. See *H.M. Wade Mfg. Co.*, 204 N.C. at 454, 168 S.E. at 519 (requiring that the jury decide the issue of waiver, while noting that intent is primarily an issue of fact).

Conclusion

We conclude that the trial court did not abuse its discretion in denying defendant's motion to amend and motion to continue. Defendant's contention as to whether the trial court erred in granting partial summary judgment for plaintiff is deemed abandoned. In addition, the trial court did not err in denying defendant's motion for directed verdict.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).