

NO. COA12-1454

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

BOST CONSTRUCTION COMPANY,
Plaintiff

vs.

Chatham County
No. 09-CvS-79

MARY LYNN BAUMUNK BLONDY,
Defendant

WILLIS COATING & FINISHES, INC.,
Plaintiff

vs.

BOST CONSTRUCTION COMPANY d/b/a
BOST CUSTOM HOMES f/k/a BOST
BUILDERS, INC [sic] f/k/a BOST,
INC., MARY LYNN BAUMUNK BLONDY and
STEVEN M. BLONDY,
Defendants

BOST CONSTRUCTION COMPANY,
Third-Party Plaintiff,

vs.

SUMMERHOUR AND ASSOCIATES
ARCHITECTS INC., FLUE SENTINEL,
LLC, FLUE SENTINEL, INC., *et al.*,
Third-Party Defendants

Appeal by Third-Party Plaintiff from orders entered 15
April 2010 and 14 May 2010 by Judge R. Allen Baddour, Jr., in

Chatham County Superior Court. Heard in the Court of Appeals 25 April 2013.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Stacey E. Tally and Steven C. Lawrence, for Third-Party Plaintiff Bost Construction Company.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, for Third-Party Defendants Flue Sentinel, LLC and Flue Sentinel, Inc.

DILLON, Judge.

Bost Construction Company (Bost) appeals from the trial court's 15 April 2010 order granting summary judgment in favor of Flue Sentinel, LLC and Flue Sentinel, Inc. (together, Flue), and from the trial court's 14 May 2010 order awarding Flue attorneys' fees. This is Bost's second appeal to this Court from these orders. We dismissed Bost's first appeal as interlocutory in an unpublished decision filed 19 July 2011. See *Bost Const. Co. v. Blondy*, __ N.C. App. __, 714 S.E.2d 274 (2011) (unpublished). For the following reasons, we reverse the summary judgment order, vacate the attorneys' fees order, and remand for further proceedings consistent with this opinion.¹

¹ Bost also appealed from the trial court's 15 April 2010 order denying its motion to continue the summary judgment hearing. However, this issue is moot in light of our resolution of this appeal.

I. Factual & Procedural Background

In August 2004, Mary Lynn Baumunk Blondy contracted with Bost to construct a single-family residence. Bost subcontracted with various entities, including Flue, which supplied a gas fireplace in the residence.

On 15 March 2006, Ms. Blondy and her family moved into the residence. Sometime thereafter, Ms. Blondy contacted Bost, complaining about a number of issues pertaining to the construction of her residence, including issues with the fireplace. Bost contacted Flue regarding the fireplace, and, in response, Flue sent representatives to the residence to perform repairs and/or make adjustments to the fireplace.

On 30 January 2009, Bost filed suit against Ms. Blondy for breach of contract, contending that she had failed to pay the entire amount due under their agreement. On 11 March 2009, Ms. Blondy filed counterclaims against Bost alleging, *inter alia*, that there were defects concerning the fireplace. On 11 May 2009, Bost filed a third-party complaint pursuant to Rule 14 of the North Carolina Rules of Civil Procedure, impleading many of its subcontractors, including Flue, and alleging that they were liable to Bost to the extent that Bost was found liable to Ms. Blondy for work that they had each performed.

Though Flue and Ms. Blondy never asserted any direct claims against each other in this action, Flue did serve Ms. Blondy with Requests for Admissions and Interrogatories. On 28 December 2009, Ms. Blondy responded to Flue's discovery requests, stating that she *did not contend* that her damages were attributable - one way or another - to "any act or omission, contract breach, [or] negligence [or] faulty workmanship" by Flue or that Flue was otherwise responsible for any of the damages alleged in her counterclaims against Bost.

Citing Ms. Blondy's discovery responses, Flue contacted Bost and requested that Bost voluntarily dismiss its third-party claims against Flue with prejudice. However, Bost neither responded to Flue's request nor dismissed its claims against Flue. Consequently, on 1 April 2010, Flue filed a motion for summary judgment seeking dismissal of Bost's third-party claims. Flue also filed a motion seeking attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, contending that Bost had improperly pursued its claims against Flue after receiving notice of Ms. Blondy's admissions. Bost filed an affidavit from Rex Bost, the company's President, in opposition to Flue's motion for summary judgment, wherein Mr. Bost averred that Flue bore responsibility

for some of the alleged damages that served as the basis for Ms. Blondy's counterclaims against Bost.

Flue's motions for summary judgment and attorneys' fees came on for hearing in Chatham County Superior Court on 13 April 2010 and 10 May 2010, respectively. The trial court granted both Flue's motion for summary judgment and Flue's motion for attorneys' fees, concluding, with respect to attorneys' fees, that Bost had "persisted in litigating the case after the point where Bost reasonably should have become aware that the claims it filed against Flue Sentinel no longer contained a justiciable issue." Bost filed notices of appeal from both orders; however, as previously stated, this Court dismissed Bost's initial appeal from these orders as interlocutory.

Subsequently, Bost and Ms. Blondy reached a settlement agreement in resolution of their claims and counterclaims against one another. Ms. Blondy filed a stipulation of dismissal with prejudice as to all of her claims against Bost on 4 May 2012, and Bost, in turn, voluntarily dismissed with prejudice its claims against Ms. Blondy on 20 August 2012. On 19 September 2012, Bost filed a second notice of appeal from the 2010 orders granting Flue's motions for summary judgment and attorneys' fees.

II. Jurisdiction

Preliminarily, we address Flue's contention that this Court lacks jurisdiction over the instant appeal. Specifically, Flue contends that Bost has not appealed from a final judgment, as Bost's 19 September 2012 notice of appeal references only the orders for summary judgment and attorneys' fees, both of which were interlocutory at the time they were entered. We disagree.

Appeal from a "final judgment" of the superior court lies as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). This Court has previously held that where a trial court enters an interlocutory order granting partial summary judgment, a "voluntary dismissal of the 'remaining claim[s] . . . ha[d] the effect of making the trial court's grant of partial summary judgment a final order.'" *Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 247, 608 S.E.2d 80, 83 (2005), *rev'd on other grounds*, 360 N.C. 321, 626 S.E.2d 263 (2006) (quoting *Combs & Assocs., Inc. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (alterations in original)). Further, in *Stein*, we held that "with the filing of the voluntary dismissal, [the aggrieved party] would have [] 30 days in which to appeal the trial court's [prior interlocutory] order." *Id.*

Here, Bost filed its notice of appeal on 19 September 2012, within 30 days of Bost's 20 August 2012 voluntary dismissal of the remaining claims in this action. Thus, we conclude that Bost has appealed from a final judgment of the superior court and, accordingly, that jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b). We now proceed to address the merits of Bost's appeal.

III. Analysis

A. Summary Judgment

Bost contends that the trial court erred in granting Flue's motion for summary judgment. More specifically, Bost contends that the trial court erred in concluding that no genuine issue of material fact existed concerning Flue's liability in light of Ms. Blondy's judicial admissions. We agree.

A motion for summary judgment is appropriately granted where "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) (2011). In the instant case, Flue submitted Ms. Blondy's responses to its request for admissions and interrogatories in support of its motion for

summary judgment, and Bost presented Rex Bost's affidavit in opposition to the motion. The trial court found Ms. Blondy's discovery responses dispositive with respect to Bost's claims against Flue, stating that the admissions "precluded any possibility of liability for any work on, or materials supplied to, the Blondy residence by Flue Sentinel." We conclude that the trial court's reliance on Ms. Blondy's discovery responses was misplaced.

Rule 36(b) of the North Carolina Rules of Civil Procedure governs the effect of admissions and provides that "[a]ny matter admitted under this rule is *conclusively established* unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b) (2011) (emphasis added). Our Supreme Court has described a judicial admission as "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." *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981). While such "[s]tipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation, as well as save costs to litigants[,] . . . the effect or operation of a stipulation will not be extended by the courts beyond the limits

set by the parties or by the law.” *Id.* (citations omitted). “In determining the extent of the stipulation, it is appropriate to look to the circumstances under which it was entered[.]” *Id.* at 604, 276 S.E.2d at 380.

Here, in her discovery responses, Ms. Blondy did not state that she was no longer seeking damages for the fireplace; nor is there any indication in the record that she dismissed her counterclaim for damages relating to the fireplace prior to the summary judgment hearing. Rather, Ms. Blondy merely “[a]dmitted” that she did “not contend” that any of her counterclaims against Bost - which would include her counterclaim regarding the fireplace - were the result of “any act or omission, contract breach, negligence or faulty workmanship on the part of” Flue. Similarly, in responding to Flue’s interrogatories, Ms. Blondy stated that she did “not contend that any act, omission or conduct by Flue [was] attributable to any damage” and that she did “not contend that any damage [was] attributable to Flue Sentinel.” Ms. Blondy’s “admissions” can, therefore, be characterized as statements that she did not contend that her alleged damages regarding the fireplace were caused by any act or omission, contract breach, negligence or faulty workmanship on the part of Flue.

Furthermore, Ms. Blondy's statement that Flue did not perform any of the work that served as the basis for her claims against Bost - including her claim for damages relating to work performed on the fireplace - was contradicted by Rex Bost's affidavit, which Bost introduced in opposition to Flue's motion for summary judgment. In the affidavit, Mr. Bost averred that "all issues regarding the fireplace in the Blondy residence as alleged by Mary Blondy are the result of either improper installation by Airmakers of the Flue Sentinel products, a defective product from Flue Sentinel, or improper adjustments/repairs by Flue Sentinel."²

Ms. Blondy's remaining "admissions" consist essentially of her own legal conclusions that Flue was neither negligent for any of the work performed on the fireplace nor in breach of an agreement pertaining thereto. As such, these statements did not constitute judicial admissions, as they did not serve to

² We note the affidavit further asserts that an expert witness retained by Ms. Blondy "possessed additional information regarding the allegations of Mary Blondy relating to the allegedly malfunctioning fireplace" which would be procured through deposition testimony. Bost was ultimately unable to rely upon the expert's testimony in opposing Flue's motion for summary judgment, however, as the deposition was scheduled for 21 April 2010 - eight days after the summary judgment hearing - and the trial court denied Bost's motion for a continuance.

"withdraw[] a particular *fact* from the realm of dispute." *Id.* at 604, 276 S.E.2d at 379. More importantly, Ms. Blondy was not a party to the agreement between Flue and Bost concerning the work at issue and was not an agent of either Flue or Bost. Her discovery responses as a third party in this context cannot establish conclusively whether Flue breached any such agreement with Bost.

In sum, Ms. Blondy asserted a counterclaim against Bost for damages concerning work performed in connection with the fireplace installed in her residence, and Bost produced evidence at the summary judgment hearing indicating that Flue had provided the fireplace product and had performed various repairs on the fireplace. Thus, the evidence presented before the trial court raised a question of material fact concerning the nature of the work performed by Flue, as Flue's liability to Bost hinged upon resolution of this factual issue. Accordingly, we conclude that the trial court erred in granting summary judgment in Flue's favor, and we reverse the trial court's summary judgment order.

B. Attorneys' Fees

Bost further contends that the trial court erred in awarding attorneys' fees in favor of Flue. We agree.

The court below granted Flue's motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, which provides for a "reasonable attorney's fee to the *prevailing party* if the court finds that there was a *complete absence of a justiciable issue* of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2011) (emphasis added). As we have held, *supra*, there existed a genuine issue of material fact concerning the work performed by Flue and, thus, an issue of law concerning Flue's liability, if any, stemming from Ms. Blondy's counterclaims. Thus, notwithstanding the significant deference accorded to the lower court's decision to award attorney's fees, *see Runnels v. Robinson*, 212 N.C. App. 198, 203, 711 S.E.2d 486, 490-91 (2011) (providing that the trial court's decision to award attorney's fees "will not be overturned absent an abuse of discretion"), we hold that the trial court erred both in concluding that there was a "complete absence of a justiciable issue" and in concluding that Flue was the prevailing party at the summary judgment phase of these proceedings. Accordingly, we vacate the trial court's 14 May 2010 order for attorneys' fees.

C. Mootness

Finally, we address Flue's contention that this appeal should be dismissed because Bost's third-party claim against Flue became moot when Ms. Blondy dismissed her counterclaims against Bost. We disagree.

Rule 14 of the North Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

N.C. Gen. Stat. § 1A-1, Rule 14(a) (2011). "Under this rule, an original defendant may implead a party for the purposes of indemnification and contribution 'for all or part of the plaintiff's claim against him.'" *Spearman v. Pender County Bd. of Educ.*, 175 N.C. App. 410, 412, 623 S.E.2d 331, 333 (2006) (citing N.C. Gen. Stat. § 1A-1, Rule 14(a)). "If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant." *Jones v. Collins*, 58 N.C. App. 753, 756, 294 S.E.2d 384, 385 (1982). "A claim which is independent of the defendant's possible liability to the plaintiff cannot be the basis of impleader under Rule 14.'" *Spearman*, 175 N.C. App. at 412, 623 S.E.2d at 333 (citations omitted).

Flue argues that Bost's third-party claims were derivative in nature in that they there were contingent upon Bost's liability to Ms. Blondy; and, therefore, Ms. Blondy's dismissal of her claims against Bost with prejudice extinguished any potential derivative liability of Flue. Flue primarily relies upon this Court's ruling in *Spearman*, 175 N.C. App. 410, 623 S.E.2d 331, in support of this contention. In *Spearman*, the plaintiffs filed a complaint against Pender County alleging injury stemming from exposure to mold at the local elementary school. *Id.* at 411, 623 S.E.2d at 332. Pender County filed a third-party complaint against the architectural firm that had supervised the construction of the school, requesting that "in the event the defendant is found liable to the plaintiff, it have complete indemnity and/or contribution from the third party defendants[.]" *Id.* The original plaintiff's subsequently filed a voluntary dismissal of their claims against Pender County, prompting the architectural firm's motion to dismiss Pender County's third-party claims, which the trial court granted. *Id.* On appeal, this Court held that Pender County's third-party claims had been extinguished by virtue of the plaintiff's voluntary dismissal of its claims, and, accordingly, that Pender County's appeal was moot. *Id.* at 413, 623 S.E.2d at 333.

We recognize that the instant case bears contextual similarities to *Spearman*. Here, Bost asserted third-party claims against Flue alleging that Flue was liable “[t]o the extent that Blondy recovers of Bost on her counterclaims for any portion of the Work on the Project performed by [Flue,]” and Ms. Blondy subsequently dismissed her claims against Bost. There is, however, at least one key distinction between this case and *Spearman*. In this case, Ms. Blondy dismissed her claims *with prejudice as a result of a settlement* that she had reached with Bost. In contrast, the defendant in *Spearman* never assumed liability for or paid any damages potentially caused by the third-party defendant, as there was no settlement in that case and the plaintiffs filed a voluntary dismissal of their claims *without prejudice*. Bost is entitled to its day in court to prove what portion, if any, of its settlement with Ms. Blondy stemmed from the damages allegedly incurred in connection with the fireplace or any other work performed by Flue. Flue’s contention that this appeal is moot is, accordingly, overruled.

IV. Conclusion

For the foregoing reasons, we reverse the trial court’s summary judgment order, vacate the attorneys’ fees order, and remand for further proceedings consistent with this opinion.

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REVERSED and REMANDED IN PART; VACATED IN PART.

Judges ELMORE and GEER concur.