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NO. COA12-210
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

MACON M. WHITE,
Plaintiff,

v.

Brunswick County
No. 10 CVS 2426

BALD HEAD ISLAND YACHT CLUB,
BALD HEAD ISLAND LIMITED, LLC,
and BALD HEAD ISLAND CLUB,
Defendants.

Appeal by plaintiff from order entered 28 June 2010 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 6 June 2012.

Shipman & Wright, LLP, by W. Cory Reiss, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi, for defendant-appellee Bald Head Island Yacht Club.

Brown Law LLP, by Joseph B. Chambliss, Jr. and Amy H. Hopkins, for defendant-appellee Bald Head Island Limited, LLC.

Williams Mullen, by Daniel Lee Brawley and Edward James Coyne III, for defendant-appellee Bald Head Island Club.

BRYANT, Judge.

Where the trial court did not err in granting summary judgment in favor of defendants, the order of the trial court is affirmed.

Facts and Procedural History

The Bald Head Island Yacht Club ("the Yacht Club") manages and leases designated portions of the Bald Head Island Marina ("Marina") located on Bald Head Island, North Carolina. The Marina includes various boat slips for use by the Yacht Club and its members. Bald Head Island Club ("BHIC") is a membership club located on Bald Head Island, North Carolina that offers golf, sports, and social memberships. Certain facilities of the Marina, BHIC, and the Yacht Club were developed by Bald Head Island Limited ("BHI Limited"). BHI Limited also holds a limited number of memberships in the Yacht Club.

On 23 March 2004, Duane White ("Duane"), plaintiff's husband, issued a check for \$11,200.00 payable to BHI Limited. While BHIC, the Yacht Club, and BHI Limited (collectively "defendants") contend that this deposit was payment for the purchase of a membership in the Yacht Club, plaintiff argues that the deposit was pursuant to an agreement with BHI Limited to purchase a boat slip within the Yacht Club. On 12 April 2004, Duane paid the remaining balance of \$100,800.00 owed to

BHI Limited, financed by Central Carolina Bank.

On 7 June 2004, the Yacht Club issued plaintiff and Duane a certificate that stated that they, as "the owner[s] of one Non-Restricted Membership Certificate" ("Membership Certificate") in the Yacht Club, were subject to the bylaws of the Yacht Club "as they currently exist or may be amended." On 15 February 2007, Duane sold his interest in the boat slip to plaintiff and plaintiff assumed sole ownership and responsibility for the Membership Certificate.

Plaintiff defaulted in paying her membership dues beginning in the first quarter of January 2009 and the Yacht Club notified her of the default. The Yacht Club's Board of Directors ("the Board") conducted a hearing on 11 November 2009. At this hearing, the Board approved the financial committee's Delinquent Account Collection Procedure. The Delinquent Account Collection Procedure provided that "Members remaining delinquent for six (6) months are subject to forfeiture of their membership. Memberships forfeited by decision of the Board permanently lose all rights and privileges of the membership and will receive no monies upon the resale of the membership, whenever that may occur."

At the 11 November 2009 hearing, the Board also voted to

forfeit plaintiff's membership unless past dues and fees were paid by 4 December 2009. The Yacht Club issued a letter dated 12 November 2009 notifying plaintiff of her impending forfeiture effective 4 December 2009 and that if her membership in the Yacht Club was forfeited, she would permanently lose all rights and privileges of membership and would not receive any money upon resale of the membership. On 8 December 2009, the Yacht Club sent another letter to plaintiff notifying her that her membership had been forfeited on 4 December 2009 and that the forfeiture was final and irreversible.

On 12 October 2010, plaintiff filed a complaint for declaratory judgment against the Yacht Club to determine what interests she had in boat slip F-11. The complaint also alleged breach of contract and contained an action to quiet title. The Yacht Club filed its Answer and Counterclaim on 20 December 2010 and Amended Answer and Counterclaims on 4 January 2011. The Yacht Club's counterclaims included an action to quiet title, a request that Rule 11 sanctions be imposed against plaintiff, a claim for abuse of process and unfair and deceptive trade practices (UDTP), and a request for attorneys' fees.

On 3 March 2011, the Yacht Club filed a motion to dismiss and motion for summary judgment. The trial court then granted a

motion by plaintiff to amend her complaint by adding the following claims: fraud and negligent misrepresentation as to the Yacht Club; and UDTP as to all defendants. Plaintiff then took a voluntary dismissal without prejudice regarding her claim of fraud and negligent misrepresentation as to the Yacht Club.

Following a summary judgment hearing held on 10 June 2011, the trial court entered judgment on 23 June 2011 granting the Yacht Club's Motion for Summary Judgment as to all of plaintiff's claims against all defendants. From this order, plaintiff appeals.

Plaintiff presents the following issues on appeal: whether the trial court erred by granting summary judgment in favor of defendants where there were genuine issues of material fact as to (I) whether plaintiff had a property interest in the boat slip; (II) whether the Yacht Club acted in bad faith by amending its forfeiture policy; (III) whether the Yacht Club's statements to plaintiff constituted an UDTP; and whether the trial court erred (IV) where substantial discovery had not yet been completed.

As a preliminary issue, although plaintiff's appeal is interlocutory in nature, leaving defendants' counterclaims

before the trial court, plaintiff urges our review. Plaintiff argues that a substantial right is affected because the possibility of inconsistent verdicts exists. "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). The general rule is that "there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citation omitted).

However, an appeal from an interlocutory order is permitted . . . when it affects a substantial right which may be lost or prejudiced if not reviewed prior to final judgment. The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims.

Allen v. Sea Gate Ass'n, Inc., 119 N.C. App. 761, 763, 460 S.E.2d 197, 199 (1995) (citations and quotations omitted).

"Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering

inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

Because the Yacht Club's counterclaims remain before the trial court - a quiet title action to boat slip F-11, Rule 11 Sanctions, Abuse of Process, UDTP, and attorneys' fees - and because the Yacht Club's counterclaims have issues in fact common to the claim appealed, thereby creating the possibility of prejudice from inconsistent verdicts, we hear this appeal.

Standard of Review

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted '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 judgment as a matter of law.' . . . A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.

Lowe v. Bradford, 305 N.C. 366, 368-69, 289 S.E.2d 363, 365-66 (1982) (citations omitted).

"[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Huntley v. Howard Lisk Co., Inc.*,

154 N.C. App. 698, 703, 573 S.E.2d 233, 236 (2002) (citation omitted). "Review of summary judgment on appeal is limited to whether the trial court's conclusions are correct as to the questions of whether there is a genuine issue of material fact and whether the movant is entitled to judgment." *Watson Ins. v. Price Mechanical, Inc.*, 106 N.C. App. 629, 631, 417 S.E.2d 811, 812 (1992) (citation omitted). We review an order granting summary judgment *de novo*. *Woods v. Mangum*, 200 N.C. App. 1, 5, 682 S.E.2d 435, 438 (2009).

I

Plaintiff argues that the trial court erred in granting summary judgment in favor of all defendants where genuine issues of material fact existed as to whether plaintiff had purchased a property interest in the boat slip from BHI Limited as opposed to merely a membership in the Yacht Club.

"Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *State v. Philip Morris USA Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009) (citations omitted). "If the language of the contract is 'clear and unambiguous,' the

court must interpret the contract as written." *Martin v. Vance*, 133 N.C. App. 116, 121, 514 S.E.2d 306, 309 (1999) (citation omitted).

Although plaintiff alleged in her amended complaint that on 28 February 2004, she applied for a membership at the Yacht Club with the intent to purchase one of its boat slips, a review of the Yacht Club's Application for Membership, signed by plaintiff, clearly states the following: "I understand that membership at Bald Head Island Yacht Club will be a membership in a private club and that acceptance for membership is subject to my being approved for membership and payment of the required purchase price and dues." Notwithstanding plaintiff's alleged intentions, the record reflects that what she purchased was a membership in the Yacht Club, not a property interest in a boat slip.

On 7 June 2004, plaintiff was issued a Non-Restricted Membership Certificate in the Yacht Club - a document that plaintiff claims gave her a property interest in the boat slip associated with her membership. Despite plaintiff's assertions, the Yacht Club's Bylaws indicate that the Yacht Club offers three types of memberships, "each entitling a Member to the exclusive use of a designated boatslip in the Marina."

(emphasis added). A Non-Restricted Member is said to have "the exclusive right to use a designated boatslip in the Marina." A review of the record also indicates that the Yacht Club's Membership Plan - a summary of the membership opportunities offered by the Yacht Club - explicitly states that the Yacht Club does not own but leases a designated portion of the Marina.

Therefore, plaintiff could not have contracted to gain a property interest in a boat slip since the Yacht Club did not have a property interest to convey, making plaintiff's claim an impossibility. Furthermore, taking the evidence in the light most favorable to plaintiff, the express terms of the membership application and certificate of membership are clear and unambiguous that the conveyance plaintiff received was a membership in the Yacht Club. Plaintiff's argument is overruled.

II

In her second argument, plaintiff asserts the trial court erred in granting summary judgment in favor of defendants where there were genuine issues of material fact as to whether the Yacht Club acted in bad faith by amending their forfeiture policy. In her brief to this Court, plaintiff contends that the Yacht Club breached the implied covenant of good faith by

depriving her of "all right, title, and interest in the boat slip for failure to pay dues[.]"

Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make.

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted). This claim was not included in plaintiff's complaint and was not raised before the trial court. Therefore, because plaintiff's argument is not properly before this Court, it is dismissed.

III

Plaintiff asserts that the trial court erred by granting summary judgment in favor of defendants where there were genuine issues of material fact as to her UDTP claim.

"An unfair and deceptive trade practice claim requires plaintiff[] to show: (1) that defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) plaintiff[was] injured thereby. Plaintiff[] must also establish [she] suffered actual injury as a proximate result of

defendants' misrepresentations." *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (1998) (citations and quotations omitted).

Defendants' acts must have "possessed the tendency or capacity to mislead, or created the likelihood of deception." *Id.* at 575, 495 S.E.2d at 924 (citation omitted). Here, plaintiff is unable to establish genuine issues of material fact regarding this claim. There is no evidence in the record of the existence of the required element of unfairness and deception. The undisputed facts show that plaintiff's membership application to the Yacht Club stated that the fees paid were for membership to a private club; plaintiff's membership certificate stated that it gave her the exclusive right to use, as opposed to ownership of, the boatslip. Plaintiff's argument is overruled.

IV

Lastly, plaintiff argues the trial court erred by granting summary judgment in favor of defendants where discovery was incomplete despite her objection. Plaintiff asserts that the consent Discovery Scheduling Order had not yet expired and that she moved to continue the Yacht Club's motion to dismiss and for summary judgment. Plaintiff contends that further discovery was

necessary to examine the Yacht Club's "policies and intentions regarding the creation of security interests in boat slips," the 2009 decision to define "forfeiture" of a membership, and deliberations regarding the membership policy change.

"A trial court is not barred in every case from granting summary judgment before discovery is completed. Further, the decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." *N.C. Council of Churches v. State*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995) (citation omitted).

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Evans v. Appert*, 91 N.C. App. 362, 367, 372 S.E.2d 94, 97 (1988) (citation omitted). However, "[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 County Bd. Of Educ., 158 N.C. App. 208, 214, 580 S.E.2d 732, 736 (2003) (citation omitted).

Here, on 3 March 2011, the Yacht Club filed its motion for summary judgment and motion to dismiss. Plaintiff moved to continue the motion on 31 March 2011 and filed a Rule 56(f) affidavit in support of her motion. On 4 April 2011, the trial court allowed plaintiff's motion to continue and allowed discovery to proceed. The Yacht Club served plaintiff responses to her first set of interrogatories and requests for production in April 2011. On 2 May 2011, the Yacht Club noticed its summary judgment hearing on 16 May 2011. This hearing was later moved to 10 June 2011, the same hearing date for plaintiff's motion to amend complaint. On 10 June 2011, plaintiff made an oral objection at the hearing, but failed to file a motion to continue or a Rule 56(f) affidavit, stating the general need for further discovery.

Because plaintiff failed to file a motion to continue or a Rule 56(f) affidavit at the 10 June 2011 hearing, we hold that the trial court did not abuse its discretion by granting summary judgment where plaintiff claimed discovery was incomplete. Plaintiff's argument is overruled.

Affirmed.

Judges STEPHENS and THIGPEN concur.

Report per Rule 30(e).