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NO. COA12-732
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

BRYANT & ASSOCIATES, LLC and
KENNETH L. BRYANT,
Plaintiffs,

v.

Clay County
No. 11-CVS-31

CHARLES E. EVANS and wife,
TERESA G. EVANS,
Defendants.

Appeal by plaintiffs from order entered 15 February 2012 by Judge Zoro J. Guice in Clay County Superior Court. Heard in the Court of Appeals 22 October 2012.

Law Offices of John M. Kirby, by John M. Kirby, for plaintiffs-appellants.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones and R.S. Jones, Jr., for defendants-appellees.

MARTIN, Chief Judge.

Plaintiffs Bryant & Associates, LLC and Kenneth L. Bryant appeal from an order granting summary judgment in favor of defendants Charles and Teresa Evans. We reverse in part and remand.

Plaintiffs and defendants own adjacent property on Lake Chatuge in Clay County, North Carolina. On 9 June 2010, a consent judgment was entered resolving a prior dispute between plaintiffs and defendants. The consent judgment required, among other things, that:

[Evans] will maintain all vegetation in the area of [Evans]' property, in the shape of a triangle, bounded as follows: Beginning at the 1933 MLS at the common West corner of [Evans] and Bryant, runs Westerly with [Evans] South line to the 1926 MLS; then in an Easterly direction to the West side of the large oak tree; then South to the Beginning.

1. All existing river birch in excess of 10 feet in height will remain but will be trimmed by [Evans] in the higher area and no limbs will be allowed to extend lower than 10 feet above the ground.
2. The existing plum tree shall remain.
3. All Leland cypress shall be removed.
4. All other vegetation shall be kept below 5 feet in height.

A consent order filed 27 September 2010 resolved a subsequent dispute over the deadline for compliance with the terms of the 9 June 2010 consent order. In pertinent part, it provided that compliance with the above provisions "shall be completed by December 1, 2010."

Plaintiffs alleged that defendants failed to comply with the terms of the consent judgments and filed the present action

on 7 February 2011. Specifically, plaintiffs alleged that defendants "have failed to remove river birch trees of less than 10 feet in height and to trim the remaining trees so that no limbs extend lower than 10 feet above the ground; and . . . all other vegetation has not been trimmed to a size below 5 feet in height." Plaintiffs further alleged that "defendants have located their boat dock at a location which encroaches upon the land owned by plaintiffs" Plaintiffs alleged the noncompliance was willful and sought punitive damages in addition to compensatory damages. Defendants answered, denying the allegations.

Defendants moved for summary judgment pursuant to N.C.G.S. § 1A-1 Rule 56 on 3 February 2012. In support of their motion, defendants filed the affidavit of defendant Teresa G. Evans, in which she averred that she "and her spouse have complied with the requirements" of the consent judgment "on or before December 1, 2010." The affidavit further noted that "if any vegetation had grown so as to be in violation of the height requirements" of the consent judgment, her husband "Charles E. Evans took action immediately to remove the offending vegetation as soon as it was brought to his attention." Finally, the affidavit specified that the Evans "have at all times intended to comply with the letter and intent of" the consent judgment "and have

done so to the best of their ability, in a timely manner." The defendants also relied upon the deposition testimony of plaintiffs' expert, surveyor Donald Bruce Black.

In opposition to the motion, plaintiffs relied upon the affidavit of Kenneth L. Bryant and the deposition testimony of Mr. Black. Mr. Bryant's affidavit indicated that on 7 February 2011 "the river birch tree that is located with [sic] the triangular area defined in the consent judgment was not removed, nor was it trimmed up to a height of at least ten feet" and that "the 'other vegetation' within the triangular area, including the shrubs along the fence, was not trimmed to a height of less than five feet." The affidavit specified that on 11 May 2011, certain shrubs within the triangular area were "greater than 5 feet in height." The affidavit also asserted several areas of noncompliance on the date required by the second consent judgment, "December 1, 2010, including the failure to remove the river birch tree, or to trim it to a height of 10 feet, and to trim the other shrubs to a height of less than 5 feet."

Mr. Black's deposition indicated that he surveyed the property in question on 8 July 2011. Mr. Black testified that there was a clump of river birch trees nineteen feet in height with limbs extending down to eight feet above the ground. However, on that date Mr. Black found no vegetation in the

triangular area that exceeded five feet and determined that the defendants' boat dock did not encroach upon the plaintiffs' property.

On 15 February 2012, the trial court allowed defendants' motion for summary judgment and entered a judgment in defendants' favor. The court also awarded costs to defendants in the amount of \$660 for "surveying costs," \$500 for "deposition costs," and \$30 for "sheriff's department costs." Plaintiffs appeal.

Plaintiffs first argue the trial court erred when it granted defendants' motion for summary judgment as to plaintiffs' 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, 523-24, 649 S.E.2d 382, 385 (2007)). Summary judgment motions test a claim's legal sufficiency for submission to the jury. *Kennedy v. Polumbo*, ___ N.C. App. ___, ___, 704 S.E.2d 916, 920, *appeal dismissed and disc. review denied*, 365 N.C. 331, 718 S.E.2d 368 (2011). If the pleadings, depositions,

interrogatories, admissions on file, and affidavits establish that there is no genuine issue of material fact, leaving only questions of law, then summary judgment is appropriate. *Id.* When a motion for summary judgment is properly supported by affidavits, depositions, and answers to interrogatories, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party.'" *Marso v. United Parcel Service, Inc.*, ___ N.C. App. ___, ___, 715 S.E.2d 871, 873 (2011) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

Plaintiffs assert there is a genuine issue of material fact regarding defendants' compliance with both the original 9 June 2010 consent judgment and the later 27 September 2010 consent judgment which required compliance with the original consent judgment by 1 December 2010. Defendants' affidavit asserts that they "have complied with the requirements imposed upon them by the Consent Judgment All action required to be taken was completed on or before December 1, 2010." Defendants further assert that they "have at all times . . . compl[ie]d

with the letter and intent" of the consent judgment "to the best of their ability." In contrast, plaintiffs' verified complaint and affidavit raise specific issues of fact concerning whether defendants had complied by 1 December 2010 with the maintenance of vegetation requirements contained in the consent order specifying that no river birch limbs be allowed to extend lower than ten feet above the ground and that all other vegetation be kept below five feet in height. Plaintiffs' affidavit raises the same specific factual issues concerning defendants' compliance with the consent order as of 7 February 2011 and 11 May 2011. The deposition of Donald Bruce Black raises the factual issue of defendants' compliance with the requirement that no river birch limbs be allowed to extend lower than ten feet above the ground as of 8 July 2011. Therefore, the record, when viewed in the light most favorable to plaintiffs, evinces the existence of a genuine issue of material fact as to whether defendants have complied with the consent order's requirements, both on 10 December 2010 and in the months that followed. It was erroneous to grant summary judgment as to this claim.

Defendants argue on appeal that "[t]his case is a breach of contract action; as such the issue becomes whether or not the Defendants have substantially complied with the terms of the agreement." It is true that "a consent judgment is the contract

of the parties entered upon the record with the sanction of the court." *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994) (citing *Armstrong v. Aetna Ins. Co.*, 249 N.C. 352, 356, 106 S.E.2d 515, 518 (1959)). However, whether there has been substantial performance of a contract is an issue of fact for the jury. *Spivey & Self, Inc. v. Highview Farms, Inc.*, 110 N.C. App. 719, 727, 431 S.E.2d 535, 539 (quoting John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11-18(b) (3d ed. 1987), *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993); *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 578, 329 S.E.2d 417, 418 (1985); *Black v. Clark*, 36 N.C. App. 191, 196, 243 S.E.2d 808, 812 (1978)). Therefore, whether defendants have substantially complied with the consent judgment is not an appropriate consideration during summary judgment and an unavailing argument on appeal.

Plaintiffs next argue the trial court erred in granting summary judgment with respect to their claim that defendants' boat dock encroached upon land owned by plaintiffs. We agree.

Plaintiffs alleged the defendants' boat dock encroached on their property in their original complaint. Defendants moved for summary judgment relying in part upon the deposition of plaintiffs' expert, surveyor Donald Bruce Black. Mr. Black indicated in his deposition that no portion of the dock

encroached upon the plaintiffs' property. In opposition to defendants' motion, plaintiffs offered the affidavit of Kenneth L. Bryant. Nowhere in Mr. Bryant's affidavit was the boat dock mentioned. Thus, plaintiffs' only support for their claim that the boat dock encroached upon their property was the allegation contained in their original complaint. However, plaintiffs' original complaint was a verified complaint.

While "the trial court may not consider an unverified pleading when ruling on a motion for summary judgment," verified complaints may be treated as affidavits for that purpose. *Rankin v. Food Lion*, __ N.C. App. __, __, 706 S.E.2d 310, 315-16 (2011) (quoting *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000)). To be treated as an affidavit, a verified complaint must be (1) made on personal knowledge, (2) set forth facts that would be admissible evidence, and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. *Id.* at __, 706 S.E.2d at 315. In *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 698 S.E.2d 757 (2010), this Court treated a verified complaint as an affidavit where the verification of the complaint indicated that the complaint was made with personal knowledge and the affiant was "clearly a party to the contract

and [was] competent to attest to the discussions that transpired during negotiations and execution of the agreement." *Id.* at 69-70, 698 S.E.2d at 761-62.

In this case, the verification of the complaint uses the same language as the verification in *Bauer* concerning personal knowledge. Additionally, the issue at hand pertains to the boundaries of Mr. Bryant's own property, a subject about which he asserts he has personal knowledge and is competent to testify. Thus, the verified complaint may be treated as an affidavit. See *Rankin*, ___ N.C. App at ___, 706 S.E.2d at 315; *Bauer*, 207 N.C. App. at 69-70, 698 S.E.2d at 761-62. As the plaintiffs' verified complaint asserted specific facts that raise a question of whether defendants' boat dock encroached upon plaintiffs' land, there is a genuine issue of material fact precluding summary judgment. Therefore, the trial court erred when it granted summary judgment of plaintiffs' claim related to the alleged encroachment by defendants' boat dock.

Plaintiffs further argue the trial court erred when it granted summary judgment as to plaintiffs' claims for punitive damages. We disagree.

Generally punitive damages are available if a claimant proves that the defendant is liable for compensatory damages and then proves, by clear and convincing evidence, that the

defendant engaged in fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2011); *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 179-80, 684 S.E.2d 41, 54 (2009). Breach of contract alone is not enough to support punitive damages. N.C. Gen. Stat. § 1D-15(d).

A careful review of the entire record on appeal—even when viewed in the light most favorable to plaintiffs—reveals there is no evidence of fraud, malice, or willful or wanton conduct on the part of defendants. Therefore, the trial court did not err when it granted summary judgment in favor of defendants as to plaintiffs' punitive damages claim.

Finally, plaintiffs contend the costs awarded by the trial court were improper. As we reverse in part the trial court's order for summary judgment and remand for additional proceedings, we decline to address these arguments, and instead vacate the award of costs in its entirety.

Affirmed in part, reversed in part and remanded.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).