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NO. COA13-184
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

BRANCH BANKING AND
TRUST COMPANY,
Plaintiff,

v.

Wilson County
No. 12 CVS 643

JOHN D. BING, JR. and
ARVELLA B. BING,
Defendants.

Appeal by defendant from order entered 8 October 2012 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 5 June 2013.

Poyner Spruill LLP, by James S. Livermon, III and Richard A. Prosser, for plaintiff-appellee.

Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellant Arvella B. Bing.

GEER, Judge.

Defendant Arvella B. Bing appeals from the trial court's order granting summary judgment to plaintiff Branch Banking and Trust Company ("BB&T") on BB&T's claim to recover on a promissory note and guarantee agreement. Although Ms. Bing argues that she, rather than BB&T, was entitled to summary

judgment because the admissible evidence showed that BB&T's action was filed outside of the applicable statute of limitations period, we hold that BB&T presented uncontradicted evidence demonstrating that its action was timely filed. Because Ms. Bing makes no further arguments on appeal, we affirm the trial court's order.

Facts

On 14 April 2005, defendant John D. Bing, Jr. executed a promissory note in favor of BB&T in the principal amount of \$803,500.00. The note provided for monthly payments of interest beginning on 14 May 2005 and further provided for a final payment of the principal and of any remaining interest owed on 14 April 2007. The note indicated that it was secured by a single deed of trust on four pieces of property owned by Mr. and Ms. Bing. Only Mr. Bing signed the note as the "[b]orrower."

Ms. Bing signed a "GUARANTY AGREEMENT" dated 14 April 2005, stating that she "unconditionally guarantee[d] to [BB&T] . . . payment of any and all notes, drafts, debts, obligations and liabilities, primary or secondary . . . of [Mr. Bing], at any time, now or hereafter, incurred with or held by [BB&T], together with interest, as and when the same become due and payable, whether by acceleration or otherwise," pursuant to the terms of those notes, "including all renewals, extensions and

modifications thereof." The guaranty further indicated that it was "unlimited and applie[d] to all indebtedness of [Mr. Bing], whether now existing or hereafter arising."

On 13 April 2012, BB&T filed suit against Mr. and Ms. Bing to enforce the promissory note and guaranty agreement. BB&T's verified complaint alleged that Mr. Bing had defaulted on the terms and conditions regarding payment of the note, and BB&T had accelerated the balance due. The complaint further stated: "As of March 21, 2012, the balance due on the Note is \$322,821.51, with interest continuing to accrue at the current rate of \$45.38 per diem from March 21, 2012 until the date of judgment and thereafter at the legal rate until satisfied." The complaint alleged Mr. and Ms. Bing were jointly and severally liable to BB&T in the amount of the balance plus interest. The verified complaint attached the original note executed by Mr. Bing and the guaranty agreement executed by Ms. Bing.

On 13 June 2012, Ms. Bing filed an unverified answer and motion to dismiss substantially denying the allegations of the complaint and asserting that the action was barred by the applicable statute of limitations. BB&T filed a motion for summary judgment on 20 July 2012.

On 28 August 2012, Ms. Bing filed an affidavit in which she admitted signing the guaranty agreement, asserted that the note

attached to BB&T's complaint was payable in full on 14 April 2007, and asserted that "[a]t no time after April 14, 2007 has [Ms. Bing] entered into any agreement with [BB&T] to extend or modify her obligation pursuant to the terms of Exhibit B, the Guaranty Agreement attached to [BB&T's] Complaint." Ms. Bing's affidavit further stated that BB&T's complaint was filed on 13 April 2012, "more than 3 years after [Ms. Bing's] obligation to [BB&T] ended."

On 31 August 2012, BB&T filed the affidavit of Knox B. McMasters, Jr., a vice president. In his affidavit, Mr. McMasters asserted that he had reviewed BB&T's records and that "[BB&T] is the holder of a Promissory Note, BB&T Loan No. xxxxxx1007, Note No. 00002, formerly Note 00001 (the 'Note'), executed on behalf of [Mr. Bing] on or about April 14, 2005 in the original principal amount of \$803,500.00, a copy of which is attached to [BB&T's] Complaint as Exhibit 'A'" He further stated that Ms. Bing had executed a guaranty agreement providing that she "unconditionally guaranteed payment of all present and future indebtedness of [Mr. Bing] to BB&T, including the obligation under the Note." Mr. McMasters' affidavit explained that Mr. Bing "failed to make payment in accordance with the terms and conditions of the Note, constituting an event

of default under the Note[,]” and “[t]he date of default under the Note was 11/26/11.”

On 8 October 2012, the trial court entered an order granting BB&T's motion for summary judgment against Mr. and Ms. Bing and ordering that Mr. and Ms. Bing were "jointly and severally indebted to [BB&T] in the amount of \$322,821.51 on the Note, plus interest continuing to accrue at the rate of \$45.38 per diem from March 21, 2012 until the entry of Judgment and thereafter at the legal rate, plus costs and attorney's fees in the amount of \$48,423.23, which constitutes fifteen percent (15%) of the outstanding indebtedness on the Note." Ms. Bing timely appealed to this Court.¹

Discussion

Ms. Bing argues that the trial court erred in entering summary judgment in favor of BB&T because BB&T's verified complaint, the attached promissory note, and Ms. Bing's affidavit establish that BB&T's action was filed outside of the applicable statute of limitations, and Ms. Bing was, therefore, entitled to entry of summary judgment in her favor. "Our

¹Although Ms. Bing's notice of appeal states that both Mr. and Ms. Bing appealed the summary judgment order, Ms. Bing's brief, filed by the same law firm that represented Mr. and Ms. Bing in the trial court, states that Mr. Bing "has not seen fit to pursue any of the issues arising out of the filing of th[e] Notice Of Appeal; and, therefore, the only issues raised in this Appeal relate to the Defendant, Arvella B. Bing"

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)).

We initially observe that Ms. Bing does not appear to argue that genuine issues of material fact exist precluding summary judgment. Rather, she argues that based on the record, the trial court should have entered summary judgment in her favor, which is permitted under N.C.R. Civ. P. 56(c) (providing that, when appropriate, summary judgment "may be rendered against the moving party").

The parties agree that the guaranty agreement executed by Ms. Bing constituted a suretyship contract and that the applicable statute of limitations required BB&T to bring this action within three years of the alleged default on the underlying note. See N.C. Gen. Stat. § 1-52 (2011). Therefore, for BB&T's action to be timely, the date of default must have been within the three years prior to the filing of BB&T's complaint on 13 April 2012.

Mr. McMasters' affidavit asserted that "[t]he date of default under the Note was 11/26/11." Absent other evidence of a date of default, Mr. McMasters' affidavit established that BB&T's action was filed within the statute of limitations period.

Ms. Bing argues, however, that the date of default provided in Mr. McMasters' affidavit "contradicts the written terms of the Promissory Note which establishes the date of maturity (and thus the date of default) as April 14, 2007." Given this purported contradiction, Ms. Bing contends that the trial court "could not consider [Mr. McMasters'] Affidavit as to the 'date of default'" because doing so would violate the parole evidence rule. However, Ms. Bing did not make her parole evidence argument to the trial court, and, as this Court emphasized in another appeal from a summary judgment order, "'[o]ur 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.'" *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332 (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002)), *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011).

Ms. Bing further argues: "[I]t is clear there could be no 'date of default' on 11/26/11 based on the verified Complaint and the attached exhibits because on the date of maturity (4/15/07) John Bing had either paid his obligation in full (and thus no lawsuit) or he had failed to do so as of the 'date of maturity' (4/15/07) which was the only basis for the filing of" BB&T's lawsuit. However, this argument hinges on Ms. Bing's assertion that "there were no extensions, modifications or renewals by BB&T with regard to John Bing's obligation."

In support of her claim that there were no extensions, modifications, or renewals of the promissory note, Ms. Bing points only to the fact that neither BB&T's verified complaint² nor Mr. McMasters' affidavit expressly asserted that the note was extended, modified, or renewed. Nevertheless, Mr. McMaster's affidavit stated that "[t]he date of default under the Note was 11/26/11." This assertion is not inconsistent with the promissory note.

The promissory note provided: "From time to time the maturity date of this Note may be extended, or this Note may be renewed in whole or in part, or a new note of different form may

²BB&T's verified complaint is properly considered as an affidavit since it was made based upon personal knowledge, set forth facts that would be admissible in evidence, and showed affirmatively that the affiant was competent to testify to the matters stated in the complaint. *Wilson v. Wilson*, 191 N.C. App. 789, 795, 666 S.E.2d 653, 656 (2008).

be substituted for this Note . . .; but no such occurrence shall in any manner affect, limit, modify, or otherwise impair any rights, guaranties or security of the holder not specifically waived, released, or surrendered in writing, nor shall the undersigned [Mr. Bing], or any obligor, either primarily or contingently, be released by reason of the occurrence of any such event." Thus, the promissory note provided that it could be extended, modified, or renewed, and, therefore, Mr. Bing's date of default could occur after the original date of maturity of the original promissory note, 14 April 2007, as Mr. McMasters' affidavit stated.³

In addition, BB&T's verified complaint asserted that Mr. Bing "defaulted on the terms and conditions regarding payment of the Note, and [BB&T] accelerated the balance due." An "acceleration" is "[t]he advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately." *Black's Law Dictionary* 12 (9th ed. 2009). By stating that BB&T accelerated the balance due, the verified complaint necessarily asserted that the loan's maturity date was subsequent to the date of default -- and, therefore, subsequent

³We also note that an extension or renewal was also suggested by the statement in Mr. McMasters' affidavit that the note currently held by BB&T was "BB&T Loan No. xxxxxx1007, Note No. 00002, formerly Note 00001."

to 26 November 2011 -- since otherwise, there would have been no need to accelerate the balance due.

Given Mr. McMaster's affidavit and BB&T's verified complaint, Ms. Bing, in order to avoid entry of summary judgment, was required to present evidence to counter BB&T's affidavit showing that the date of default was 26 November 2011. Apart from Ms. Bing's reliance on the promissory note, which did not preclude a 26 November 2011 default date, Ms. Bing presented no other evidence that Mr. Bing necessarily defaulted on the note prior to 13 April 2009, as required for BB&T's claims to be barred by the statute of limitations.

Alternatively, Ms. Bing points to the statement in her affidavit that she never agreed to extend her obligation under the guaranty agreement. Under the terms of her guaranty agreement, however, she was liable to BB&T for all of Mr. Bing's liabilities to BB&T, whether then existing or thereafter arising. As a result, the fact that she never extended or modified her obligation is immaterial to the question whether Mr. Bing's note was extended, modified, or renewed and whether BB&T's lawsuit was timely filed.

Ms. Bing has, therefore, made no showing that BB&T's action on her guaranty was barred by the statute of limitations. Since Ms. Bing points to no evidence contradicting the affirmative

statement in Mr. McMasters' affidavit that Mr. Bing defaulted on the note on 26 November 2011, Ms. Bing has failed to show the existence of a genuine issue of material fact as to the date of default, much less evidence sufficient to mandate summary judgment in her favor. Consequently, we hold the trial court properly granted summary judgment in favor of BB&T.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).