NO. COA13-222
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

FSI, INC.,
Plaintiff,

v. Mecklenburg County
No. 11 CVS 11635

ANDY NEWSON and BENTON &
PARKER COMPANY, INC.,
Defendants/Third-Party
Plaintiffs,

v.

DEEP SOUTH SURPLUS, INC.,
FORMERLY KNOWN AS DEEP SOUTH
SURPLUS OF GEORGIA, INC.,
Third-Party Defendant.

Appeal by defendants/third-party plaintiffs from orders entered 23 July 2012 and 23 September 2012 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2013.

Martineau King, PLLC, by L. Kristin King, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence, Joseph S. Murray, IV, and M. Duane Jones, for defendants/third-party plaintiffs-appellants.

No brief filed on behalf of third-party defendant-appellee.

GEER, Judge.

Defendants/third-party plaintiffs Andy Newson and Benton & Parker Company, Inc. (collectively "Benton & Parker") appeal from (1) the trial court's order granting plaintiff FSI, Inc.'s motion for partial summary judgment on FSI's unfair and deceptive practices claim and (2) the court's order denying Benton & Parker's motion, pursuant to Rule 60(b) of the Rules of Civil Procedure, to reconsider the summary judgment order. On appeal, Benton & Parker argues that the trial court erred in entering summary judgment in favor of FSI because genuine issues of material fact existed as to whether Benton & Parker committed unfair or deceptive acts and whether any unfair or deceptive acts by Benton & Parker proximately caused FSI's injury.

The specific arguments Benton & Parker makes on appeal were not, however, first presented to the trial court and, therefore, may not be argued on appeal as a basis for reversing the trial court. Because we may not consider those arguments for the first time on appeal, we affirm the trial court's summary judgment order.

With respect to the trial court's order denying Benton & Parker's Rule 60(b) motion, Benton & Parker filed notice of appeal from the summary judgment order prior to the date the trial court entered the Rule 60(b) order. Consequently, we hold

the trial court was without jurisdiction to enter any order deciding the Rule 60(b) motion, and we vacate that order.

Facts

FSI is a business located in Mecklenburg County, North Carolina that operates an intermodal storage facility for loaded shipping containers. Containers are transported to FSI's premises where they are stored until the owner and consignor arranges to have them picked up. Benton & Parker is an insurance brokerage business, specializing in trucking insurance services, that offers insurance products in North Carolina through its employee Andy Newson. In 2008, FSI met with Mr. Newson to discuss the possibility of Mr. Newson's procuring insurance for FSI. Mr. Newson was aware that FSI sought a policy that provided coverage for the property of others stored inside sealed shipping containers in its yard.

Mr. Newson contacted underwriter Ms. Thayer Corker of Deep South Surplus, Inc., formerly known as Deep South Surplus of Georgia, Inc., to procure an insurance policy for FSI. Deep South served as an agent for QBE Insurance Company. On 22 August 2008, Ms. Corker sent Mr. Newson an email regarding insurance for FSI, in which she stated her understanding that FSI's business model did not involve hauling containers and, therefore, FSI would not need "cargo" coverage. "Cargo"

coverage has a specific meaning in the insurance industry. She further stated her intent was to write FSI's coverage on a "property legal liability form." Mr. Newson responded to Ms. Corker that he agreed with her.

On 25 August 2008, Ms. Corker sent Mr. Newson two written quotations for insurance packages for FSI. Each quotation stated that the coverage offered was, in relevant part, "PERSONAL PROPERTY OF OTHERS IN THE OPEN LIMIT OF 200,000 . . . WRITTEN ON A LEGAL LIABILITY FORM." Each quotation stated, "This quote should be carefully reviewed to ensure it meets your client's needs, as it may have been modified in terms or conditions or pricing from the way it was submitted." The coverage offered in the quotations did not describe the type of coverage Mr. Newson sought to procure for FSI or the type of coverage Mr. Newson later represented to FSI that he had procured.

On 27 August 2008, Mr. Newson submitted to FSI an insurance proposal that offered to procure insurance for "Cargo/Property of Others" at a $200,000.00 limit from "QBE Specialty Insurance." Unlike the quotations from Deep South that Mr. Newson had reviewed, Mr. Newson's written proposal to FSI did not state that the offered insurance only covered personal property of others "in the open." In addition, Mr. Newson never

orally informed FSI that the insurance he was procuring only provided coverage for property of others "in the open." The written proposal further stated that Mr. Newson had procured "Cargo/Property of Others" coverage even though Mr. Newson had not procured "cargo" coverage for FSI.

Benton & Parker recommended that FSI accept the policy offered by QBE. FSI, relying on Mr. Newson's recommendation and representations regarding the coverage, then authorized Benton & Parker, as FSI's broker, to accept the QBE policy on behalf of FSI. On or about 10 September 2008, QBE, through its agent Deep South, issued FSI a commercial insurance policy.

Mr. Newson never personally reviewed the policy. He believed it was the responsibility of someone else at Benton & Parker to review the policy to ensure it provided the coverage sought. Had Mr. Newson reviewed the policy and seen that the relevant coverage was written on a legal liability form, as it was, he would have known that the policy did not provide the coverage he sought to procure for FSI. Further, the policy only provided coverage for property of others that was "in the open." Mr. Newson did not send FSI a copy of the issued policy until 6 February 2009.

On 7 May 2009, Mr. Newson emailed FSI's president, Tim Frye, regarding the possibility of increasing FSI's property of

others coverage. In the email, Mr. Newson stated, "You have a $200,000 Limit for Property of Others." Mr. Newson did not note that the coverage only extended to property of others "in the open."

On 12 July 2009, thieves broke into FSI's premises and stole a shipping container containing cargo (computer monitors) for which FSI was liable to a customer. FSI paid its customer for the loss of the cargo and filed a claim with QBE for the loss. QBE denied the claim on the grounds that the stolen cargo was not "in the open" as required by the policy.

On or about 9 October 2009, QBE filed an action against FSI in the United States District Court for the Western District of North Carolina seeking a declaratory judgment that FSI's policy did not provide coverage for the 12 July 2009 loss. The district court issued a memorandum of decision concluding that FSI's loss was not covered because "the cargo or contents of a locked and sealed intermodal containers are [sic] not 'in the open.'"

On 17 June 2011, FSI filed this action against Benton & Parker, alleging claims for negligence, breach of contract, breach of fiduciary duty, unfair and deceptive practices ("UDP"), and punitive damages. On 8 August 2011, Benton & Parker filed an answer denying many of the material allegations

of FSI's complaint. Also on 8 August 2011, Benton & Parker filed a third-party complaint against Deep South, alleging claims for contribution, indemnification, and breach of contract.

During discovery, Benton & Parker admitted pursuant to Rule 36 of the Rules of Civil Procedure that "[t]he policy of insurance procured by Defendant Andy Newson did not provide coverage for the stolen computer monitors." Benton & Parker further admitted that it could have obtained the coverage needed by FSI for cargo stored inside of sealed shipping containers both in the insurance marketplace generally and also through QBE.

FSI filed a motion for partial summary judgment on 23 February 2012 and an amended motion for partial summary judgment on 31 May 2012, seeking summary judgment on its claims for negligence and UDP. On 24 February 2012, Benton & Parker filed a motion for partial summary judgment seeking summary judgment on FSI's claims for negligence, breach of fiduciary duty, UDP, and punitive damages. Neither party moved for summary judgment on FSI's breach of contract claim.

On 23 July 2012, the trial court entered an order denying Benton & Parker's motion for partial summary judgment, granting FSI's motion for summary judgment as to the UDP claim only, and

denying FSI's motion for summary judgment as to all other claims. After noting that the parties had stipulated that FSI suffered actual damages in the amount of $211,277.06, the trial court entered judgment against Benton & Parker in the amount of $633,831.18 "[p]ursuant to N.C.G.S. Chap. 75-1." The trial court also found that there was no just reason to delay entry of final judgment on the UDP claim and certified its order for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

On 27 July 2012, Benton & Parker filed a motion to reconsider the summary judgment order pursuant to Rule 60 of the Rules of Civil Procedure. Benton & Parker timely appealed the order partially granting FSI's motion for summary judgment and denying Benton & Parker's motion for partial summary judgment on 21 August 2012. The trial court entered an order denying Benton & Parker's Rule 60 motion on 23 September 2012, and Benton & Parker appealed that order as well.

Discussion

As an initial matter, we address FSI's motion to dismiss this appeal based upon several alleged violations by Benton & Parker of the Rules of Appellate Procedure. Those violations are, however, nonjurisidictional and have not impeded our task of review. We, accordingly, deny FSI's motion and undertake our

"core function of reviewing the merits of the appeal to the extent possible." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).[1]

"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)).

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing Inc. of N.C. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). Benton & Parker argues that genuine issues of material fact exist as to whether it committed an unfair or deceptive act

[1]We further note that although the trial court had already entered summary judgment in favor of Deep South on the third-party claims (the subject of the appeal in COA13-219), Benton & Parker's appeal in this case is interlocutory since the summary judgment order did not dispose of all of FSI's pending claims against Benton & Parker. However, this Court has jurisdiction over the appeal because the summary judgment order finally resolved FSI's UDP claim, and the trial court properly certified the order for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

and as to whether any unfair or deceptive act it committed proximately caused FSI's injury. Benton & Parker does not dispute that there is no genuine issue of material fact as to the element that its alleged unfair or deceptive acts were in or affecting commerce.

Our Supreme Court has held that, as matter of law, "a violation of N.C.G.S. § 58-63-15(1) is an unfair and deceptive practice under N.C.G.S. § 75-1.1," establishing the first element of a UDP claim. *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 53, 442 S.E.2d 316, 318 (1994). N.C. Gen. Stat. § 58-63-15(1) (2011) provides:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and False Advertising of Policy Contracts. -- Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby . . ., or using any name or title of any policy or class of policies misrepresenting the true nature thereof . . . .

In this case, FSI contends that there is no genuine issue of material fact whether Benton & Parker, within the meaning of

N.C. Gen. Stat. § 58-63-15(1), engaged in the conduct of (1) "making, issuing, and circulating a statement misrepresenting the terms and benefits of the policy" and (2) "using a name or title of coverage that misrepresented the true nature of the Policy." FSI points to undisputed evidence (1) that Mr. Newson represented to FSI that he was procuring coverage for "Cargo/Property of Others" when, in fact, the procured coverage was not "cargo" coverage; (2) that Mr. Newson never disclosed to FSI that the coverage procured was limited to personal property of others "in the open"; and (3) that FSI's claim was denied by QBE on the grounds that the stolen property was not "in the open."

In arguing that a genuine issue of material fact existed as to whether it committed an unfair or deceptive act by misrepresenting to FSI that it would have coverage for a loss due to theft of the contents of the shipping containers, Benton & Parker asserts on appeal that a reasonable jury could determine that the policy in fact provided coverage for the loss. In connection with this argument, Benton & Parker contends that this Court is not bound by the federal district court's decision that the policy did not provide coverage.

However, Benton & Parker did not argue to the trial court that the policy in fact provided coverage for the loss. Indeed,

rather than arguing to the trial court that the policy in fact provided coverage, Benton & Parker stated, in a memorandum of law in support of its own motion for summary judgment: "At the time of the theft, FSI believed that it was covered by a policy of insurance issued by QBE Specialty Insurance Company on September 9, 2008. . . . *Unfortunately, this policy did not provide coverage for the theft.*" (Emphasis added.)

As this Court has held in another summary judgment case, "'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). This principle is incorporated within Rule 10(a)(1) of the Rules of Appellate Procedure, which provides that in order to preserve an issue for appeal, a party must present the trial court with a "timely request, objection, or motion, stating *the specific grounds* for the ruling the party desire[s] the court to make." (Emphasis added.)

Since defendants did not argue to the trial court that the policy in fact provided coverage, they cannot now make that

argument for the first time to this Court. Moreover, even if that argument had been preserved for appeal, we note that Benton & Parker made a binding admission, pursuant to Rule 36 of the Rules of Civil Procedure, that "[t]he policy of insurance procured by Defendant Andy Newson did not provide coverage for the stolen computer monitors." Given Benton & Parker's admission, there was no genuine issue of material fact as to whether the policy provided coverage. *See Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) ("Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment.").

Benton & Parker further argues that a genuine issue of material fact exists as to whether Mr. Newson committed an unfair or deceptive act by (1) failing to discuss the legal liability form on which the policy was written or (2) by calling the policy a special form policy. However, as Benton & Parker concedes in its brief, FSI alleged several specific unfair or deceptive acts by Benton & Parker in support of its UDP claim, including not only that the policy provided coverage for the cargo contained in the containers, but also (1) Mr. Newson's representation of the coverage as "'cargo/property of others'" and (2) Mr. Newson's omission of the property description of

"'in the open.'" Benton & Parker does not dispute the existence of the latter two misrepresentations and omissions.

Thus, even if there was a genuine issue of material fact as to two of several alleged misrepresentations by Mr. Newson, undisputed evidence established the existence of other material misrepresentations or omissions by Mr. Newson that, under N.C. Gen. Stat. § 58-63-15(1), constitute unfair or deceptive acts for a UDP claim as a matter of law. *See Jefferson-Pilot Life Ins.*, 336 N.C. at 53, 442 S.E.2d at 318. There was, therefore, no genuine issue of material fact as to whether Benton & Parker committed an unfair or deceptive act.

Benton & Parker also argues that there is a genuine issue of material fact as to whether any unfair or deceptive act by Benton & Parker proximately caused FSI's injury. After repeating its contention that a reasonable jury could conclude that the policy in fact provided coverage for the loss, Benton & Parker argues that FSI's loss was, therefore, caused not by Benton & Parker's acts, but by Deep South's wrongful denial, as QBE's agent, of FSI's claim when the policy in fact provided coverage.

FSI contends that this causation argument, which hinges on whether the policy in fact provided coverage, was not raised in the summary judgment proceedings before the trial court.

Although Benton & Parker tries to conflate two different arguments made to the trial court at the summary judgment stage in order to assert in response to FSI's motion to dismiss the appeal that its causation argument was preserved, after reviewing the record, we do not believe that Benton & Parker's causation argument was fairly presented to the trial court at the summary judgment hearing.

Further, although Benton & Parker did make the causation argument in its Rule 60(b) motion to reconsider the summary judgment order, an argument made for the first time in a Rule 60(b) motion does not preserve that argument for purposes of an appeal of the summary judgment ruling. *Cf. Ward v. Beaton*, 141 N.C. App. 44, 49, 539 S.E.2d 30, 34 (2000) (holding party did not preserve for appeal fraud argument for purposes of challenging ruling denying directed verdict since defendant asserted fraud for first time in post-trial Rule 60(b) motion).

In any event, Benton & Parker's causation argument fails because of its binding admission that "[t]he policy of insurance procured by Defendant Andy Newson did not provide coverage for the stolen computer monitors." Since Benton & Parker makes no other argument regarding the summary judgment order, we hold that the trial court did not err in granting summary judgment to FSI on its UDP claim.

Benton & Parker has also appealed the trial court's denial of its Rule 60(b) motion to reconsider the court's summary judgment order based upon newly discovered evidence. Benton & Parker based its motion on the deposition of Ms. Corker, the employee of Deep South from whom Mr. Newson obtained FSI's insurance policy. Benton & Parker alleged in its motion that the evidence was unavailable earlier because Ms. Corker is a resident of Georgia, and Benton & Parker, therefore, had to obtain a commission from the trial court and an order from the appropriate Georgia court in order to take her deposition.

However, the trial court entered its summary judgment order on 23 July 2012, Benton & Parker filed its Rule 60(b) motion on 27 July 2012, Benton & Parker filed notice of appeal from the summary judgment order on 21 August 2012, and the trial court entered its order denying Benton & Parker's Rule 60(b) motion on 23 September 2012. N.C. Gen. Stat. § 1-294 (2011) provides: "When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

Pursuant to N.C. Gen. Stat. § 1-294, Benton & Parker's appeal from the summary judgment order divested the trial court

of jurisdiction over any matter "embraced therein," including the Rule 60(b) motion to reconsider the appealed order. *See Lovallo v. Sabato*, ___ N.C. App. ___, ___, 715 S.E.2d 909, 910-11, 12 (2011) (explaining, when defendant filed Rule 60 motion seeking relief from custody order and defendant filed notice of appeal while Rule 60 motion still pending, that filing notice of appeal divested trial court of jurisdiction to hear and rule on Rule 60 motion); *Curry v. First Fed. Sav. & Loan Ass'n of Charlotte*, 125 N.C. App. 108, 109-10, 479 S.E.2d 286, 287 (1997) (holding trial court was divested of jurisdiction to rule on motion to reconsider when plaintiffs filed motion to reconsider trial court's order, but appealed from underlying order prior to trial court ruling on motion to reconsider). *See also Wiggins v. Bunch*, 280 N.C. 106, 111, 184 S.E.2d 879, 881 (1971) (quoting favorably James W. Moore, *Moore's Federal Practice*, ¶ 60:30(2) (2d ed. 1970), for following proposition: "But the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court. Hence during the pendency of an appeal it is generally held that the district court is without power to grant relief under Rule 59; or to vacate, alter or amend the judgment under Rule 60(b), whether the 60(b) motion is made prior to or

after the appeal is taken, except with permission of the appellate court."). Since the trial court was without jurisdiction to rule on the motion, we must vacate the court's Rule 60(b) order.

Even if we were to deem the trial court's order denying the Rule 60(b) motion as an order pursuant to *Bell v. Martin*, 43 N.C. App. 134, 143, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980), "for the limited purpose of indicating how [the trial court] would have been inclined to rule on the motion," we would hold that denial of the Rule 60(b) motion would be proper.

Rule 60(b)(2) provides that a court may relieve a party from a final judgment or order based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." To be considered newly discovered evidence for the purposes of Rule 60(b)(2), evidence must have been in existence at the time of the original proceeding but not obtainable through the exercise of due diligence in time for that proceeding. *Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to

determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

The trial court's order denying Benton & Parker's Rule 60 motion provided that the deposition of Ms. Corker was not newly discovered evidence in that "all parties were aware of Ms. Corker's address at least as early as January 24th, 2012 when said information was produced in discovery and Defendants did not issue a notice of her deposition until June 15th, 2012 and did not obtain said deposition until June 29th, 2012." Benton & Parker does not dispute that it was aware of Ms. Corker's address as early as 24 January 2012 and provides no explanation as to why it waited until mid-June 2012 to begin the process of deposing an out-of-state witness in preparation for the 26 June 2012 summary judgment hearing.

Accordingly, even if this issue were properly before us, we would hold that the trial court did not abuse its discretion in denying Benton & Parker's Rule 60(b)(2) motion. *See Parks*, 153 N.C. App. at 413, 571 S.E.2d at 19 (holding defendant did not exercise due diligence with respect to obtaining evidence of his own affidavit in time for relevant proceedings since defendant "d[id] not explain why he was unable to obtain his own affidavit prior to" relevant proceedings).

Affirmed in part; vacated in part.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).