

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-560
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

GREER STATE BANK,
Plaintiff-Appellee,

v.

Jackson County
No. 11 CVS 763

DONALD FREDERICK EVANS,
Defendant-Appellant.

Appeal by Defendant from order entered 20 December 2012 by Judge Alan Z. Thornburg in Superior Court, Jackson County. Heard in the Court of Appeals 8 October 2013.

Adams Hendon Carson Crow & Saenger, P.A., by Matthew S. Roberson and Teague, Campbell, Dennis & Gorham, LLP, by Christopher G. Lewis, for Plaintiff-Appellee.

Frank G. Queen, PLLC, by Frank G. Queen and Burton C. Smith, Jr., P.C., by Burton C. Smith, Jr., for Defendant-Appellant.

McGEE, Judge.

Greer State Bank ("Plaintiff") filed a complaint on 16 December 2011 against Donald Frederick Evans ("Defendant"), seeking a deficiency judgment in the amount of \$198,566.56. Plaintiff alleged in its complaint that it loaned Defendant

\$375,125.00 in September 2009, pursuant to a promissory note. The note "was secured by a commercial real estate deed of trust dated September 30, 2009[.]"

Plaintiff alleged that Defendant "failed to make the required balloon payment of the then unpaid principal and accrued and unpaid interest in the amount of \$364,812.59 on the maturity date[.]" Plaintiff instituted a foreclosure proceeding as to the real property described in the deed of trust. Plaintiff was the "last and highest bidder for the land" at \$208,000.00. Following the sale of the land, the balance on the promissory note was \$198,566.56.

Defendant filed an answer to Plaintiff's complaint on 27 February 2012. In response to Plaintiff's allegations as to the amount due on the promissory note, Defendant stated:

As to the allegations of Paragraph 14, they are admitted in that such amounts represent the amounts calculated by [P]laintiff; except as admitted, they are denied.

Defendant asserted in his answer a list of affirmative defenses, including, *inter alia*, (1) that "Defendant is entitled to receive all credits, setoffs or other adjustments to which [D]efendant may be entitled[;]" (2) that the real property Plaintiff purchased at the foreclosure sale "was fairly worth the amount of the debt secured by such real [property;]" and

(3) that the promissory note "was obtained by [P]laintiff from [D]efendant without consideration and is void[.]"

Defendant also asserted three counterclaims in his answer: (1) seeking a declaratory judgment that the promissory note was, *inter alia*, obtained by Plaintiff from Defendant "without consideration as promised[;]" (2) alleging breach of contract; and (3) alleging breach of fiduciary duty.

Plaintiff filed a document titled "Answer to Counterclaims" on 25 April 2012 in response to Defendant's counterclaims, denying Defendant's allegations and requesting that the trial court dismiss Defendant's counterclaims. Plaintiff filed a motion for summary judgment on 21 November 2012, seeking summary judgment on its claims, as well as on Defendant's counterclaims.

The trial court granted Plaintiff's motion for summary judgment as to Plaintiff's claims and entered judgment on 20 December 2012 against Defendant in the amount of \$198,566.56, plus interest and attorney's fees. The trial court also granted Plaintiff's motion for summary judgment as to Defendant's counterclaims, dismissing the counterclaims with prejudice. Defendant appeals.

I. Deficiency Judgment

Defendant argues the trial court erred in granting summary judgment as to Plaintiff's deficiency judgment claim because the

record reveals a genuine issue of material fact as to the amount due on the debt. We agree.

A trial court should grant a motion for summary judgment only "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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011); see also *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 228, 713 S.E.2d 140, 147 (2011).

The purpose of N.C.G.S. § 1A-1, Rule 56 "is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.* "We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *D.G. II*, 213 N.C. App. at 229, 713 S.E.2d at 147 (internal quotation marks omitted).

If there "remains such controversy as to the amount the plaintiff is entitled to recover from" the defendant, then "summary judgment for the amount so in controversy [can]not

properly be entered." *Investments v. Housing, Inc.*, 292 N.C. 93, 99, 232 S.E.2d 667, 671 (1977) (regarding a deficiency judgment). Although Plaintiff contends Defendant failed to challenge the amount due on the promissory note, Defendant's answer shows that he denied Plaintiff's allegations regarding the amount due. In response to Plaintiff's allegation that the amount due on the promissory note was \$198,566.56, Defendant answered, as follows:

As to the allegations of Paragraph 14, they are admitted in that such amounts represent the amounts calculated by [P]laintiff; except as admitted, they are denied.

Defendant's response to Plaintiff's allegation as to the amount due is not a model of clarity. Although Defendant's response to this allegation could be clearer, it appears that Defendant disputes that the amount due is \$198,566.56. Defendant admits only that Plaintiff's calculations yielded a claimed amount of \$198,566.56.

Defendant's response to the above allegation is similar to the rest of the responses in his answer. Plaintiff alleged in Paragraph 16 that,

[a]s a result of the failure of the real property described in the Deed of Trust to bring, at public sale, the amount due on the Note secured by the Deed of Trust, Plaintiff is forced to look to the personal liability of [] Defendant for payment of the Deficiency Amount due under the Note in the

amount of \$198,566.56, with interest[.]

Defendant responded:

As to the allegations of Paragraph 16, they are admitted in that [P]laintiff is pursuing this action as a means of collecting further funds from [D]efendant; except as admitted, they are denied.

From this response, it again appears Defendant disputes that the amount due is \$198,566.56. Defendant admits only the existence of Plaintiff's deficiency judgment claim.

Plaintiff alleges in Paragraph 17 that "[t]here is now due and payable to Plaintiff by Defendant on the Note the Deficiency Amount of \$198,566.56, with interest thereon at the rate of five percent (5%) per annum on the principal balance due." Defendant responded:

As to the allegations of Paragraph 17, they are admitted in that [P]laintiff seeks a deficiency judgment against [D]efendant, the existence and calculation of which is a matter for determination after the trial or other disposition of this matter; except as admitted, they are denied.

This response indicates for a third time that Defendant disputes the amount due on the note. Defendant admits only the existence of the deficiency judgment action filed by Plaintiff.

In sum, it appears from Defendant's responses in his answer that Defendant disputes that the amount due is \$198,566.56. The record shows that a genuine issue of material fact as to the

amount due on the note remains to be determined in the trial court. The trial court therefore erred in granting Plaintiff's motion for summary judgment as to the deficiency judgment claim.

II. Breach of Contract Counterclaim

Defendant argues that the "trial court's dismissal of [the breach of contract counterclaim] was error, requiring reversal." In support of this contention, Defendant contends that his pleadings satisfied the elements of a breach of contract claim. However, the trial court did not dismiss Defendant's counterclaim for failure to state a claim; but rather, the trial court ruled that "summary judgment on Defendant's Counterclaims is granted in favor of Plaintiff and that Defendant's Counterclaims are therefore dismissed, with Prejudice." (emphasis added).

Whether or not the dismissal of Defendant's counterclaim for breach of contract was an error, Defendant fails to challenge the trial court's grant of Plaintiff's motion for summary judgment as to his breach of contract claim. See N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *Helms v. Holland*, 124 N.C. App. 629, 636, 478 S.E.2d 513, 518 (1996) ("[T]he absence of an argument or authority on the question of the propriety of the

summary judgment motion" is a consideration in concluding that the "issue has been abandoned[.]").

"It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); see also N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). In *Viar*, the plaintiff's "assignment of error purports to challenge the Industrial Commission's conclusion of law, but the arguments in [the] plaintiff's brief in the Court of Appeals do not address the issue upon which the Industrial Commission's conclusion of law was based." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Our Supreme Court in *Viar* concluded that, by addressing the issue not raised or argued by the plaintiff, the Court of Appeals created an appeal for the appellant. *Id.* Similarly, Defendant, in his brief, wholly fails to address the issue upon which the trial court's determination of summary judgment was based—the absence of any genuine issue of material fact.

Because Defendant fails to adequately address or challenge the trial court's grant of summary judgment, the trial court's grant of summary judgment as to Defendant's counterclaim for breach of contract is affirmed.

III. Breach of Fiduciary Duty Counterclaim

Defendant next argues that the trial court's dismissal of the breach of fiduciary duty counterclaim was error. In support of this contention, Defendant contends that his pleadings satisfied the elements of a breach of fiduciary duty claim. However, again, the trial court ruled that "summary judgment on Defendant's Counterclaims is granted in favor of Plaintiff and that Defendant's Counterclaims are therefore dismissed, with Prejudice." (emphasis added).

Whether or not the dismissal of Defendant's counterclaim for breach of fiduciary duty was an error, Defendant again fails to adequately challenge the trial court's grant of Plaintiff's motion for summary judgment. For reasons addressed in the previous section of this opinion, Defendant fails to demonstrate an error in the trial court's grant of summary judgment. See *Helms*, 124 N.C. App. at 636, 478 S.E.2d at 518; *Viar*, 359 N.C. at 402, 610 S.E.2d at 361; N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Because Defendant fails to challenge the trial court's grant of summary judgment as to Defendant's counterclaim for breach of fiduciary duty, the trial court's grant of summary judgment is affirmed.

Reversed in part, affirmed in part.

Judges McCULLOUGH and DILLON concur.

Report per Rule 30(e).