NO. COA14-557
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

GREGORY SCOTT KEYES,
Plaintiff,

v. Caldwell County
No. 13 CVS 610

JOSEPH C. DELK, III,
Defendant.

Appeal by plaintiff from order entered 10 March 2014 by Judge James W. Morgan in Caldwell County Superior Court. Heard in the Court of Appeals 8 October 2014.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for plaintiff-appellant.

Poyner Spruill LLP, by T. Richard Kane, for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff Gregory Scott Keyes appeals from an order granting summary judgment in favor of defendant Joseph C. Delk, III. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Prior to 18 February 2009, plaintiff was the owner of certain land and commercial buildings ("the Property") located in Caldwell County, North Carolina, described in North Carolina General Warranty Deed recorded in Book 1703, pages 474-477, Deed Records of Caldwell County. Also prior to 18 February 2009, plaintiff had leased the Property to C&R Plumbing, Heating & A/C, LLC ("C&R"). Plaintiff negotiated a business plan with C&R whereby C&R would purchase the Property for the sum of $175,000.00.

On 18 February 2009, defendant prepared a deed in which plaintiff transferred the Property to C&R. This deed was recorded in book 1703, pp. 474-477, Deed Records of Caldwell County. C&R paid $10,000.00 in cash to plaintiff as partial payment upon the gross purchase price of $175,000.00. Also on 18 February 2009, defendant prepared a promissory note in the amount of $165,000.00, payable to plaintiff on an installment basis, representing the balance of the purchase price.

On 11 September 2009, C&R executed and conveyed, for the benefit of Parkway Bank, a deed of trust to secure a loan for $35,000.00. Defendant informed plaintiff that C&R was borrowing $35,000.00 from Parkway Bank and asked plaintiff to sign a subordination agreement. Plaintiff signed the subordination

agreement, which provided that Parkway Bank's security interest "shall unconditionally be and remain at all times a lien or charge upon the land hereinbefore described, prior and superior to" plaintiff's security interest in the Property.

Over time, C&R made some of the payments due under the promissory note, but failed to make all payments when and in the amount due. Plaintiff approached defendant to request assistance in obtaining additional payments from C&R.

In the spring of 2010, defendant presented plaintiff with a notice of satisfaction. Plaintiff signed the notice of satisfaction on 10 July 2010, which provided as follows:

> I, [defendant], TRUSTEE, certify that the debt . . . in the amount of $165,000.00 secured by the Deed of Trust executed by [C&R] to [defendant], Trustee for [plaintiff] as beneficiary and recorded in the Caldwell County registry on the 18th day of February 2009 in Book 1703, Page 478 was satisfied on the 20th day of July, 2010.

On 27 July 2010, C&R was indebted to Murray Supply Company ("Murray") in the amount of $252,928.27. Murray's attorney was working on a proposal with defendant, attorney for C&R, by which C&R would convey the Property to Murray in cancellation of the debt owed by C&R to Murray. However, no such conveyance occurred. Instead, on 27 July 2010, C&R executed a promissory note to Murray for $252,928.27. Also on 27 July 2010, C&R

executed a deed of trust to defendant as Trustee for Murray, to secure the $252,928.27 note. The Property was given as security under the deed of trust.

On 13 May 2013, plaintiff filed a complaint against defendant alleging claims of legal malpractice. The complaint alleged that defendant was acting as plaintiff's attorney when defendant prepared: the 18 February 2009 General Warranty Deed to transfer the Property from plaintiff to C&R; the promissory note in the amount of $165,000.00; the settlement statement; and, the deed of trust securing $165,000.00 of the purchase price. Plaintiff also alleged that defendant failed to explain the effect of the subordination agreement, leaving plaintiff without knowledge that the filing of such agreement would render plaintiff's deed of trust junior to the interest of Parkway Bank. In regards to the notice of satisfaction, plaintiff alleged that defendant told him that signing it would "expedite the payments due to Plaintiff from C&R." Plaintiff argued that defendant failed to explain to plaintiff the consequences of the notice of satisfaction and it was not until after 27 July 2010 that plaintiff learned of its legal ramifications. As such, plaintiff argued as follows:

> 31. Defendant as the attorney for Plaintiff had both the express and implied duty to

conduct Plaintiff's business affairs, to fully advise Plaintiff, and to represent Plaintiff in all matters with C&R to the extent and in the manner as was the custom of attorneys in the area of Caldwell County at the times hereinabove described.

32. Defendant defaulted in his duties to Plaintiff in at least the following respects:

a. He failed to advise Plaintiff as to the reason for and the legal effect of a Subordination Agreement by which Plaintiff's first mortgage became second to the mortgage of C&R to Parkway Bank;

b. He failed to advise Plaintiff as to any nee[]d for or the legal effect of the Notice of Cancellation by which the Deed of Trust from C&R to Plaintiff to secure a Note for $165,000 was cancelled upon the public record;

c. He caused language to be inserted in the Notice of Cancellation that the obligation of $165,000 evidenced by C&R's Note to Plaintiff dated February 18, 2009, had been satisfied in full;

d. He prepared documents and secured their execution by Plaintiff when he knew or should have known that (1) Plaintiff did not understand the legal effect of the documents that were prepared by Defendant, and (2) with knowledge that the execution of said documents was not in the best interest of his client;

e. He knowingly put himself in a conflict of interest status between Plaintiff and C&R, when he knew or should have known that he could not

> fairly represent both the parties in matter[s] that involved the potential for conflict between them;
>
> f. He promoted his interest as attorney for C&R at the expense of Plaintiff by encouraging and obtaining Plaintiff's execution of the Subordination Agreement and the Notice of Cancellation;
>
> g. He placed the interest of his new client, C&R, over and above the interests of Plaintiff.

On 24 June 2013, defendant filed an answer and raised the following affirmative defenses: failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; expiration of the statute of limitations; absence of an attorney-client relationship with plaintiff; absence of duty; contributory negligence; absence of damages; assertion of indefinite damages; *in pari delicto*; and set-off.

On 25 October 2013, defendant filed a motion for summary judgment pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure. The summary judgment motion provided that the action centered around three related real estate transactions: 18 February 2009 purchase-money loan by plaintiff; 11 September 2009 subordination of plaintiff's secured interest in the Property; and a 20 July 2010 notice of satisfaction and cancellation of his secured interest. Defendant argued that

plaintiff could not seek any damages arising from the first two transactions based on a lapse of the three year statute of limitations. Defendant also argued that he was not an attorney for plaintiff in any of the three transactions. Furthermore, defendant asserted that plaintiff was contributorily negligent as a matter of law with respect to any loss suffered because plaintiff admitted he signed the critical documents, that he did so without understanding the documents, and that he did so without misrepresentation, fraud, or duress by defendant. As such, defendant argued that because there were no genuine issues of material fact, he was entitled to summary judgment.

Following a hearing, the trial court granted summary judgment in favor of defendant on all claims by an order entered 10 March 2014.

On 8 April 2014, plaintiff filed notice of appeal.

II. Standard of Review

"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) (citation and quotation marks omitted).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Folmar v. Kesiah, __ N.C. App. __, __, 760 S.E.2d 365, 367 (2014) (citation omitted).

III. Discussion

Plaintiff's sole issue on appeal is that the trial court erred by granting defendant's motion for summary judgment. Specifically, plaintiff argues that there was sufficient evidence for a jury to find that defendant was plaintiff's attorney; that defendant's statute of limitations argument fails because defendant's "last act" pursuant to N.C. Gen. Stat. § 1-15(c)[1] was on 27 July 2010, the filing date of the notice of satisfaction, and the complaint was filed on 13 May 2013; and, that defendant's contributory negligence argument fails based on the holding in *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951).

[1]Malpractice actions "shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2013).

In the present case, even assuming *arguendo* that defendant was acting as plaintiff's attorney, we find the affirmative defense of contributory negligence dispositive.

"Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Piraino Brothers v. Atlantic Financial Group*, 211 N.C. App. 343, 351-52, 712 S.E.2d 328, 334 (2011) (citation and quotation marks omitted).

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Id. at 351, 712 S.E.2d at 334. "Contributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action." *Id.*

We find our holdings in *Hahne v. Hanzel*, 161 N.C. App. 494, 588 S.E.2d 915 (2003), and *Marion Partners, LLC v. Weatherspoon*, 215 N.C. App. 357, 716 S.E.2d 29 (2011), to be instructive. In *Hahne*, the plaintiffs Lutz Hahne, William M. Easterwood, and

Raymond Monroe filed an action against the defendant attorney in connection with the purchase of certain stock. *Hahne*, 161 N.C. App. at 495, 588 S.E.2d at 916. The defendant filed a motion for summary judgment. At the summary judgment hearing, the only remaining claims against the defendant were for negligence arising out of the plaintiffs' purchases of stock. *Id.* The trial court granted summary judgment in favor of the defendant and plaintiffs appealed. The plaintiff Monroe testified that defendant encouraged him to invest in Invinca-Shield, Inc. but that the plaintiff Monroe did not ask to see any financial statements prior to making his investment. *Id.* at 496, 588 S.E.2d at 916. The plaintiff Easterwood also testified that he never saw any financial statements of Invinca-Shield, Inc. prior to making his investment and decided to invest in Invinca-Shield, Inc. based solely on the representations made by the plaintiff Monroe. The plaintiff Easterwood testified that he never spoke to the defendant about Invinca-Shield, Inc. prior to his investment. *Id.* at 496-97, 588 S.E.2d at 917. The plaintiff Hahne testified that he bought stock in Invinca-Shield, Inc. solely based on the defendant's representations without having seen any financials. *Id.* at 497, 588 S.E.2d at 917. Our Court noted that all three plaintiffs were experienced

investors who were seeking investment opportunities. "None of the three plaintiffs reviewed, or even requested, financial data for [the stocks they purchased] before purchasing at least tens of thousands of dollars of stock in one or both corporations." *Id.* at 498, 588 S.E.2d at 918. In addition, each plaintiff signed an investment letter "stating, in effect, that his decision to purchase the stock was not made based upon any representation as to the stock's likely performance, but rather upon his independent examination and judgment of the company's prospects, with the understanding that there was an inherent economic risk involved." *Id.* at 498-99, 588 S.E.2d at 918. There was no evidence that the defendant attempted to keep the plaintiffs from reading the contents of the investment letter nor did the plaintiffs communicate to the defendant that they disagreed with any of the investment letters' terms. *Id.* at 496-99, 588 S.E.2d at 917-18. Our Court concluded that because "the contributory negligence of all three plaintiffs has been so clearly established that no other reasonable conclusion may be reached," the trial court's order of summary judgment in favor of the defendant was affirmed. *Id.* at 499, 588 S.E.2d at 918.

In *Marion Partners*, the plaintiffs, several limited liability companies, hired the defendant attorney to review

leases between their company and CVS Corporation. *Marion Partners*, 215 N.C. App. at 357, 716 S.E.2d at 30. The plaintiffs constructed and leased the buildings in which CVS drugstores operated. *Id.* In January/February of 2006, the plaintiffs executed leases with CVS after having the defendant review the leases. *Id.* at 358, 716 S.E.2d at 30. The new leases included a new tax provision that shifted certain tax burdens to the landlord from the tenants. *Id.* at 358, 716 S.E.2d at 31. In the spring of 2008, the plaintiffs became aware of the change in tax law after having entered into purchase contracts with a buyer for the subject properties. *Id.* Evidence indicated that the sale of the subject properties failed based on the leases' inclusion of the new tax provision. *Id.* The plaintiffs sued the defendant for legal malpractice. The trial court granted summary judgment in favor of the defendant and the plaintiffs appealed to our Court. *Id.* Our Court upheld the trial court's grant of summary judgment in favor of the defendant based on the defense of contributory negligence, stating that

> [i]t is well established in North Carolina that "[o]ne who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance. Although plaintiffs try to

> suggest that this rule may be altered when the party has retained an attorney to review the contract, this Court has held otherwise: "[Plaintiff's] attorney owed her a duty to review and explain to her the legal import and consequences which would result from her executing the [contract]. *However, this duty does not relieve her from her own duty to ascertain for herself the contents of the contract she was signing.*"

Id. at 359, 716 S.E.2d at 31 (citations omitted). The plaintiffs argued that "special circumstances," specifically their custom and practice of relying on the defendant to review their leases and notify them of any changes or additions as compared to their prior leases, excused their failure to read the leases. *Id.* at 360, 716 S.E.2d at 32. Our Court held that because the plaintiffs failed to "act[] with reasonable prudence[,]" they were not entitled "[t]o escape the consequences of a failure to read because of special circumstances . . . ." *Id.* (citation omitted). Accordingly, our Court held that although the defendant had the duty to advise the plaintiffs regarding the leases, "that duty did not relieve [the] plaintiffs from their duty to read the leases themselves." *Id.* at 359, 716 S.E.2d at 31.

Here, the record evidence tended to show that plaintiff was educated, graduating from college with a bachelor's degree and pursuing some time in graduate school. The 11 September 2009

subordination agreement that was prepared by the defendant and signed by plaintiff, provided as follows:

> THIS SUBORDINATION AGREEMENT RESULTS IN YOUR SECURITY INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.
>
> . . . .
>
> THAT WHEREAS, [C&R] did execute a deed of trust, dated FEBRUARY 18, 2009, to [defendant], as trustee, covering a note in the sum of $165,000.00, dated FEBRUARY 18, 2009, in favor of [plaintiff], which deed of trust was recorded in Deed Book 1703 Page 478-482, on, Official Records of CALDWELL county; and
>
> WHEREAS, Owner has executed, or is about to execute, a deed of trust and note in the sum of $35,000.00 in favor of PARKWAY BANK hereinafter referred to as "Lender;" payable with interest and upon the terms and conditions described therein, which deed of trust is to be recorded concurrently herewith; and
>
> WHEREAS, it is a condition precedent to obtaining said loan that said deed of trust last above mentioned shall unconditionally be and remain at all times a lien or charge upon the land hereinbefore described, prior and superior to the lien or charge of the deed of trust first above mentioned[.]
>
> . . . .
>
> Beneficiary [(plaintiff)] declares, agrees and acknowledges that:
> . . . (c) It intentionally and unconditionally waives, relinquishes and

> subordinates the lien or charge of the deed of trust first above mentioned in favor of the lien or charge upon said land of the deed of trust in favor of Lender above referred to and understands that in reliance upon, and in consideration of, this waiver, relinquishment and subordination, specific loans and advances are being and will be made and, as part and parcel thereof, specific monetary and other obligations are being and will be entered into which would not be made or entered into but for said reliance upon this waiver, relinquishment and subordination[.]

Plaintiff testified in a deposition that when presented with the subordination agreement, he did not ask what it was because he "just trusted [defendant]." He further testified to the following:

> Q. Mr. Keyes, did you read [the Subordination Agreement] over before you signed it?
>
> A. Obviously, not.
>
> Q. Obviously, not?
>
> A. Well, I did not realize that I could not retain the ownership of my building unless I paid them off first --
>
> Q. Okay. And --
>
> A. -- in a foreclosure situation.
>
> Q. But to get back to the point, you didn't read [the Subordination Agreement] before you signed it, sir, is that correct?
>
> A. Well, I know I read it. I did not

> understand it.
>
> Q. Did you tell Mr. Delk, I don't understand this document?
>
> A. No, I didn't.

Plaintiff conceded that defendant never informed him it was anything other than a subordination agreement and that "he didn't trick [him] into signing" the subordination agreement. Plaintiff also testified that he was not in any way incapacitated when he signed this document.

The 27 July 2010 notice of satisfaction, also prepared by the defendant, stated as follows:

> I, [defendant], TRUSTEE certify that the debt or other obligation in the amount of $165,000.00 secured by the Deed of Trust executed by [C&R] to [defendant], Trustee for [plaintiff] as beneficiary and recorded in the Caldwell County registry on the 18th day of February 2009, in Book 1703, Page 478 was satisfied on the 20th day of July, 2010.

Plaintiff signed the notice of satisfaction under a line reading "[c]onsented to by." At his deposition, plaintiff testified that on 20 July 2010, defendant did not explain the legal significance nor satisfactorily explain the notice of satisfaction but merely stated, "[s]ign here more or less." Although he did not understand the notice of satisfaction after

reading it, plaintiff did not ask defendant to explain the document to plaintiff. Plaintiff testified as follows:

> Q. Now, when you signed [the Notice of Satisfaction], Mr. Keyes, Mr. Delk didn't trick you in any way by telling you it was something other than a Notice of Satisfaction, correct?
>
> A. No.
>
> Q. He didn't cover it up and ask you to sign it without looking at it, right?
>
> A. No.
>
> Q. He gave you a chance to read it?
>
> A. Yes.

The foregoing deposition testimony shows that although there was some evidence that plaintiff read the subordination agreement and notice of satisfaction and plaintiff did not understand its legal ramifications, plaintiff did not make any effort to communicate this misunderstanding to defendant nor did plaintiff request clarification from defendant. There is also no evidence that defendant prevented plaintiff from reading the documents or that he misrepresented the documents to plaintiff. Even assuming *arguendo*, without deciding, that defendant served as plaintiff's attorney in these matters, plaintiff failed to act with reasonable prudence by ascertaining for himself the contents of the documents he was signing. These facts, showing

that plaintiff failed to exercise ordinary care for his own safety against injury, clearly establish contributory negligence on the part of plaintiff.

Relying on *Vail*, plaintiff argues that his failure to read and understand the documents he signed may be excused "where a person who stands in a fiduciary relationship to the signer makes misrepresentations about the document to the signer upon which the latter relies." In *Vail*, the plaintiff directed her son, as her agent, to have a deed to a small lot ("Vail Alley") prepared so that she could convey it to him. Plaintiff's son,

> in breach of his trust, surreptitiously substituted the description of the larger, more valuable Vail homeplace on South Main Street; that by fraudulently suppressing the true state of facts while silently pretending that the deed contained the Vail Alley property, he thereby procured from his mother lands not intended by her to be conveyed, and that she, under the circumstances of the confidential relation with her son, was lulled into security by his fraud and signed the deed without discovering, in the exercise of due diligence, the true state of facts.

Vail, 233 N.C. at 115, 63 S.E.2d at 207. The *Vail* Court noted that "the failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties." *Id.* at 116, 63 S.E.2d at 207. This was based on the reason "that a

confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation." *Id.* However, we find *Vail* readily distinguishable from the case before us. *Vail* did not involve a legal malpractice claim, but was rather, a claim to set aside a deed for fraud. Moreover, the evidence in *Vail* tended "to show elements of positive fraud and deception, reasonably calculated to dull the mother's call to vigilance and justify her in not discovering the contents of the deed[.]" *Id.* at 115, 63 S.E.2d at 206. In the present case, there was no evidence that defendant's actions consisted of a false representation or concealment of a material fact as plaintiff testified that "there were no tricks involved." Consequently, we reject plaintiff's reliance on *Vail*.

Based on the foregoing, we hold that summary judgment was properly allowed as to plaintiff's claims of legal malpractice based on plaintiff's contributory negligence.

IV. Conclusion

The order of the trial court, granting summary judgment in favor of defendant, is affirmed.

Affirmed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).