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NO. COA14-968
NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

JOHN R. MINAR,
Plaintiff,

v.

Guilford County
No. 10 CVD 12467

CAROLYN CLARK MURRAY,
Defendant.

Appeal by Plaintiff from order entered 7 June 2012 by Judge Susan Burch in Guilford County District Court. Heard in the Court of Appeals 22 January 2015.

Higgins Benjamin, PLLC, by Stephen E. Robertson, for Plaintiff-appellant.

Hill Evans Jordan & Beatty, PLLC, by Elaine Hedrick Ashley, for Defendant-appellee.

DILLON, Judge.

John R. Minar ("Husband") appeals from a trial court's order for partial summary judgment in favor of Carolyn Clark Murray ("Wife"). For the following reasons, we reverse the trial court's order and remand for further proceedings.

I. Background

Husband and Wife separated in 2010. Immediately prior to their separation, they lived in a home (the "Marital Home") which

they owned as tenants by the entirety; however, the mortgage on the Marital Home was in Husband's name only.

On 26 May 2010, Husband and Wife entered into a Separation Agreement and Property Settlement Agreement (the "Agreement"). The Agreement provided, in part, for the disposition of the Marital Home. The Agreement stated that the Marital Home was to be disposed of in one of two ways: (1) Wife would be awarded the Marital Home *if* she "refinance[d], obtain[ed] an assumption, or otherwise fully satisf[ied] the mortgage owed in Husband's name" within sixty (60) days of the Agreement's execution, in which case, Husband would receive \$40,000.00 as a "stipulated distributive award" in exchange for his interest in said Home; (2) If Wife were unable to arrange for the satisfaction of Husband's mortgage within sixty (60) days, then the Marital Home would be listed with a broker and the net sales proceeds would be divided, with Wife receiving 55% and Husband receiving 45%.

Wife did not cause the mortgage in Husband's name to be satisfied by 25 July 2010 and subsequently would not cooperate with Husband in having the Marital Home listed. Accordingly, Husband commenced this action against Wife seeking various relief including an order for specific performance compelling Wife to

cooperate in listing the Marital Home for sale pursuant to the terms of the Agreement.

Wife filed her responsive pleading which contained her answer, including affirmative defenses and counterclaims, alleging in part that Husband hindered her in her efforts to arrange for the satisfaction of the mortgage.

Wife filed a motion for summary judgment, with supporting affidavits and documentation. Essentially, in her affidavit, Wife stated that she arranged for the payoff of Husband's mortgage by having her father purchase the Marital Home for an amount that would have satisfied Husband's mortgage obligation, but that Husband prevented her from performing under the Agreement by refusing to cooperate in selling the Marital Home to her father.

Husband filed affidavits in opposition to Wife's motion for summary judgment.

Following a hearing on the matter, the trial court entered an order granting partial summary judgment in favor of Wife, ordering Husband to cooperate in selling the Marital Home to Wife's father based on his offer, but held open other claims pending in the action that were unrelated to the disposition of the Marital Home.

Husband appealed from the partial summary judgment order; however this Court, by opinion filed 4 June 2013, dismissed the

appeal as interlocutory based on the unresolved claims unrelated to the disposition of the Marital Home. See *Minar v. Murray*, ___ N.C. App. ___, 745 S.E.2d 375, 2013 N.C. App. LEXIS 572 (N.C. App. 2013) (unpublished). The parties have since entered into a consent order resolving the other claims unrelated to the disposition of the Marital Home, and Husband again filed notice of appeal from the trial court's partial summary judgment order.

II. Analysis

On appeal, Husband contends that the trial court erred in granting summary judgment in favor of Wife, compelling Husband to cooperate in selling the Marital Home to Wife's father, and in return accept \$40,000.00 as his stipulated distributive share. Specifically, he argues that there were issues of fact concerning the purported offer by Wife's father to purchase the Marital Home and his purported refusal to cooperate with such sale. We agree and, for the reasons stated below, reverse the judgment of the trial court pertaining to the disposition of the Marital Home and remand for further proceedings consistent with this opinion.¹

¹ Plaintiff also raises other arguments regarding the disposition of the Marital Home including anticipatory repudiation, hearsay, and whether Defendant was able to refinance the mortgage. Based on our ruling reversing summary judgment, which was the relief requested by Plaintiff, we need not address these arguments.

In appeals from a trial court's ruling on a party's motion for summary judgment,

[t]his Court's standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant. The standard of review for an order granting a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Green v. Kearney, ___ N.C. App. ___, ___, 719 S.E.2d 137, 140 (2011) (marks omitted).

In the present case, the trial court essentially determined that Wife's failure to satisfy Husband's mortgage was caused by Husband's refusal to cooperate in selling the Marital Home to Wife's father. In other words, the trial court determined as a matter of law that Wife was excused from meeting the sixty (60) day deadline under the Agreement to satisfy Husband's mortgage based on an affirmative defense that Husband prevented Wife from performing.

It is undisputed that the Agreement was executed on 26 May 2010 and, therefore, Wife had until 25 July 2010 - sixty (60) days after its execution - to "refinance, obtain an assumption, or otherwise fully satisfy the mortgage" in Husband's name.

Otherwise, as provided under the Agreement, the Marital Home would be listed for sale with a broker.²

The trial court concluded, and we agree, that the Agreement allowed the Wife to arrange a sale of the Marital Home to her father as a means to "otherwise fully satisfy the [Husband's] mortgage[,] " provided that any such sale closed by 25 July 2010. The clear intent of the Agreement was to remove Plaintiff's name from the mortgage as part of the final resolution of the parties' marital property following their legal separation and to allow Wife the opportunity to an award of the Marital Home if she were able to arrange for Husband's mortgage to be satisfied by 25 July 2010. Husband does not appear to argue against this point.

Further, we agree that Husband was under an obligation to cooperate with Wife in not thwarting her efforts to perform under the Agreement. As we have held:

[T]he law wisely and justly deems that every party to a contract impliedly promises to do all those things reasonably necessary to enable the contract purposes to be realized, and to refrain from doing those things that would render the contract ineffective. . . .

[T]he law will imply an agreement by the parties to a contract to do and perform those

² Presumably, Husband believes that the 45% of net proceeds from the sale of the Marital Home on the open market would be greater than the \$40,000.00 he would otherwise receive if he is compelled to sell to Wife's father.

things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's rights to receive the fruits of the contract.

Allen v. Allen, 61 N.C. App. 716, 718-19, 301 S.E.2d 514, 515-16 (1983). "The doctrine of prevention is that 'one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.'" *Propst Construction Co. v. Dept. of Transportation*, 56 N.C. App. 759, 762, 290 S.E.2d 387, 388 (1982) (quoting *Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906)). See also *Mullen v. Sawyer*, 277 N.C. 623, 633, 178 S.E.2d 425, 431 (1971) ("It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.").

Husband, however, argues that summary judgment was inappropriate because there were factual issues regarding the purported offer by Wife's father and Husband's purported refusal to cooperate. We agree.

It is undisputed that the Agreement provided Wife until 25 July 2010 to remove Husband's name from the mortgage on the Marital

Home. Wife's affidavit produced in support of her motion for summary judgment suggested that she was having trouble refinancing the mortgage in her own name but had arranged for her father to purchase the Marital Home as a solution to meet the sixty (60) day deadline, stating as follows:

15. That on or about July 1, 2010 since the refinance appeared that it might be lengthy, my father, Thomas A. Clark, made a bona fide offer to purchase the Property in order to help get the existing mortgage out of the [Husband's] name pursuant to the Agreement and pursuant to conversations the [Husband] and I had prior to signing the Agreement as evidenced by emails. I even informed the [Husband] that I would forego the \$40,000 and allow him to keep the money as if the property was being refinanced pursuant to the Agreement. A copy to the Offer to Purchase Real Estate is attached hereto and incorporated by reference as Exhibit O.

16. That on or about July 15, 2010, my father, Thomas A. Clark, was prequalified by Envoy Mortgage to purchase the Property. A copy of the letter from Envoy verifying that my father was prequalified is attached hereto and incorporated by reference as Exhibit P.

17. That the [Husband] refused to sell the Property, and I quote, "to your dad", end quote. The objective was to remove the [Husband's] name and interests from the Property pursuant to the Agreement and in a timely fashion.

However, as Husband points out, though Wife states in her affidavit that her father made the offer to purchase the Marital Home "on or

about 1 July 2010," the signatures of Wife's father as "Buyer" and of Wife as "Owner" on the copy of the written offer attached to the affidavit is dated 25 August 2010 - a full month *after* the deadline imposed by the Agreement for Wife to perform. Further, the written offer states that Wife's father would have until 30 days after his offer was fully accepted by Wife and Husband to close, which would have placed the closing well past the 25 July 2010 deadline, even assuming the offer was made on 1 July 2010. Additionally, as Husband also points out, Wife's affidavit does not disclose *when* Husband indicated to her that he would not sell the Marital Home to Wife's father.

In sum, we believe that Husband had a duty to cooperate in Wife's attempt to arrange for her father to purchase the Marital Home, provided that such offer required the closing to take place by 25 July 2010. However, we agree with Husband that there is a genuine issue of fact whether Wife's father was in a position to close by 25 July 2010 and was prevented from doing so by Husband's actions. Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).