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P R O C E E D U R E .

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-991

Filed: 21 April 2015

Durham County, No. 13 CVS 1865

STARK LAW GROUP, PLLC, Plaintiff,

v.

RONALD and DEBORAH NEWTON, Defendants.

Appeal by defendants from order and judgment entered 20 March 2014 and
order entered 22 April 2014 by Judge W. Osmond Smith, III in Durham County
Superior Court. Heard in the Court of Appeals 3 February 2015.

*Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for
plaintiff-appellee.*

Perry, Perry & Perry, P.A., by Maria T. Singleton, for defendants-appellants.

DAVIS, Judge.

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Ronald Newton and Deborah Newton (collectively “Defendants”) appeal from the trial court’s order and judgment granting the motion of Stark Law Group, PLLC (“Plaintiff”) to enforce a settlement agreement. After careful review, we affirm.

Factual Background

On 8 February 2013, Plaintiff filed suit against Defendants in Durham County Superior Court seeking to recover unpaid attorneys’ fees in the amount of \$24,239.22 arising from Plaintiff’s legal representation of Defendants between 2008 and 2011. Defendants filed a motion to dismiss the action on 23 May 2013 pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. On 29 May 2013, Defendants served Plaintiff with written discovery requests, including interrogatories and a request for the production of documents.

A mediation was held on 11 July 2013 in an attempt to settle the parties’ dispute. A settlement agreement (“the Settlement Agreement”) was ultimately signed by the parties on or about 30 September 2013 in which Defendants agreed to make an initial payment of \$1,000.00 and then make 12 monthly installment payments of \$1,000.00, for a total of \$13,000.00.

Section 3(c) of the Settlement Agreement stated as follows:

Non-payment. If Defendants have not paid the settlement amount in full within the time required hereunder, Plaintiff shall have the right to continue to prosecute the above-referenced civil action against Defendants, and shall further be entitled to recover all costs and fees, including a reasonable attorney’s fee,

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incurred in connection with prosecution of this civil action where Plaintiff prevails at trial.

Following the execution of the Settlement Agreement, no voluntary dismissal of the lawsuit was taken. Instead, the parties filed a joint motion for a stay of all proceedings in the lawsuit as provided for in Section 3(d) of the Settlement Agreement. On 4 November 2013, Judge Paul C. Ridgeway entered an order denying the joint motion, stating that “this case shall be [sic] remain on the February 3, 2014 calendar for further report to the Court and for assignment of a mediator and determination of a new date for trial if the case is not fully resolved.”

On 3 February 2014, a status conference (“the February 3 Hearing”) was held before Judge W. Osmond Smith, III. While it is undisputed that Judge Smith ultimately agreed to continue the matter until the next session of court (17 February 2014), the parties differ in their accounts as to exactly what transpired during the February 3 Hearing.¹ Defendants assert that no indication was given that Judge Smith would consider a motion to enforce the Settlement Agreement at the next court date. Rather, they claim, the continuance was simply to allow Defendants’ attorney of record (who could not be present at the February 3 Hearing) to participate in the status conference. Plaintiff, conversely, contends that Judge Smith stated during the

¹ The February 3 Hearing was not recorded and, for this reason, no transcript of the proceedings exists.

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February 3 Hearing that he would be willing to entertain a motion to enforce the Settlement Agreement on the next court date.

On 17 February 2014, the parties again appeared before Judge Smith. At that hearing (“the February 17 Hearing”), after the parties presented their respective views on how the litigation should proceed, Plaintiff’s counsel asked the court to enforce the Settlement Agreement. After hearing arguments of counsel, Judge Smith stated that he would allow Plaintiff’s motion.

On 20 March 2014, Judge Smith entered an order granting Plaintiff’s motion to enforce the Settlement Agreement, directing Defendants to immediately pay \$5,000.00² to Plaintiff and to thereafter pay \$1,000.00 per month until the total \$13,000.00 amount due under the Settlement Agreement was paid in full. Following the entry of the trial court’s order, Defendants filed a “motion to amend judgment, or in the alternative, relief from judgment” pursuant to Rules 52(b), 59, and 60. A hearing was held on Defendants’ motion on 22 April 2014, and on that same date, Judge Smith entered an order denying the motion. Defendants filed a timely notice of appeal to this Court as to both the 20 March 2014 and the 22 April 2014 orders.

Analysis

² The trial court’s ruling that \$5,000.00 was immediately due and payable was predicated on the fact that Defendants had failed to make any of the five monthly payments of \$1,000.00 provided for under the Settlement Agreement from the date on which the agreement was entered in September 2013 through the date of the February 17 Hearing.

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On appeal, Defendants essentially make three arguments. They contend that (1) Plaintiff's oral motion to enforce the Settlement Agreement was not properly before Judge Smith at the February 17 Hearing based on their failure to receive adequate notice; (2) Judge Smith's 20 March 2014 order improperly overruled Judge Ridgeway's 4 November 2013 order; and (3) Judge Smith's 20 March 2014 order misinterpreted the terms of the Settlement Agreement. We address each of Defendants' arguments in turn.

I. Trial Court's Consideration of Motion to Enforce Settlement Agreement at February 17 Hearing

Defendants first contend that the trial court lacked the authority to hear Plaintiff's oral motion to enforce the Settlement Agreement at the February 17 Hearing because they were not given prior notice that the motion would be heard on that date. This argument lacks merit.

As an initial matter, we note that "[a] settlement agreement is interpreted according to general principles of contract law[.]" *Cabarrus Cty. v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 425, 614 S.E.2d 596, 597, *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005); *see also Clayton v. Branson*, 170 N.C. App. 438, 450, 613 S.E.2d 259, 268 ("A settlement agreement is a contract resolving a dispute without a trial. Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts.")

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(citation and internal quotation marks omitted)), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

We have held that “[a] motion to approve and enforce a settlement agreement is treated as a motion for summary judgment when reviewed by this Court. Therefore, we review the trial court’s order *de novo* to determine if there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *John WM. Brown Co. v. State Employees’ Credit Union*, __ N.C. App. __, __, 752 S.E.2d 185, 188 (2013) (internal citation omitted); *see also Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 694-95, 682 S.E.2d 726, 732-33 (2009) (“Other jurisdictions have treated motions to enforce settlement agreements as motions for summary judgment. . . . We find the reasoning of these cases persuasive and consistent with North Carolina practice[.]”). Therefore, it is appropriate to examine the notice and proof requirements applicable to summary judgment motions.

It is well-settled that the standard of review for an order granting a motion for summary judgment requires a two-part analysis of whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.

Id. at 695, 682 S.E.2d at 733 (internal citations and quotation marks omitted).

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Rule 56 states, in pertinent part, that a motion for summary judgment “shall be served at least 10 days before the time fixed for the hearing. . . . The judgment sought shall be rendered forthwith 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.R. Civ. P. 56(c).

This Court has held that

[w]hile Rule 56 notice is mandatory . . . that notice can be waived: [D]ismissing a party’s claim or defense by summary judgment is too grave a step to be taken on short notice; unless, of course, the right to notice that those opposing summary judgment have under Rule 56(c) is waived. This waiver is possible because the notice required by Rule 56 is procedural notice as distinguished from constitutional notice. A party waives notice of a motion by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence.

Anderson v. Anderson, 145 N.C. App. 453, 456, 550 S.E.2d 266, 268-69 (2001)
(internal citations, quotation marks, brackets, and ellipses omitted).

In the present case, Judge Smith noted that he had previously expressed at the February 3 Hearing a willingness to entertain a motion to enforce the Settlement Agreement at the 17 February 2014 session of court. Defendants attempt to rely on an affidavit from the attorney for Defendants who attended the February 3 Hearing, which stated that (1) Plaintiff did not actually move the court to enforce the

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Settlement Agreement on that date; and (2) defense counsel's understanding following the February 3 Hearing was simply that the trial court would hold another status conference on 17 February 2014 "for the parties to address the status of [the] matter at that time." However, the affidavit does not overtly deny that Judge Smith may have stated his willingness to consider a motion to enforce the Settlement Agreement at the 17 February session of court.

Even assuming *arguendo* that Defendants did not receive actual notice at the February 3 Hearing, we believe that Defendants waived their entitlement to such notice. When Judge Smith initially asked Defendants' counsel at the February 17 Hearing if she wished to be heard in response to the request of Plaintiff's counsel that the court enforce the Settlement Agreement, defense counsel stated that she was "not prepared to go forward on any motion related to enforcement of the judgment[.]" However, the transcript of the entire proceeding makes clear that her reluctance to go forward on that issue was *not* because (1) she was unprepared to argue the legal effect of Defendants' failure to make payments under the Settlement Agreement and the accompanying remedies available to Plaintiff; but rather because (2) she needed additional time to pursue discovery *in order to defend the underlying lawsuit*.

The remainder of the hearing focused on the remedies available to Plaintiff based on Defendants' failure to make payments as required under the Settlement Agreement. Defendants' attorney fully participated in the argument, vigorously

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contending that based on Section 3(c) of the Settlement Agreement, Plaintiff's only remedy for Defendants' breach of the agreement due to non-payment was to resume litigation of the underlying lawsuit (with the possibility of recovering its litigation-related attorneys' fees in the event Plaintiff ultimately prevailed).³

We are therefore satisfied that Defendants waived any objection based on a lack of prior notice. *See Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667-68, 248 S.E.2d 904, 907 (1978) ("By attending the hearing of the motion . . . and participating in it and failing to request a continuance or additional time to produce evidence, plaintiff waived any procedural notice required.").⁴

In their brief, Defendants also reference the fact that Plaintiff "offered no evidence, other than the settlement agreement, tending to show its entitlement to judgment as a matter of law." We agree that the better practice would have been for Plaintiff to have filed a written motion with the trial court supported by affidavit testimony (or other admissible evidence) both authenticating the Settlement

³ While the transcript reflects that Defendants' attorney requested additional time to obtain evidence, it is clear that she was seeking more time to conduct discovery on Plaintiff's claims in the underlying lawsuit.

⁴ Defendants also claim that their lack of notice resulted in a denial of their constitutional right to due process. *See State v. Poole*, __ N.C. App. __, __, 745 S.E.2d 26, 34 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation and internal quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013). As discussed above, however, the transcript of the February 17 Hearing demonstrates that Defendants' counsel was given a full and fair opportunity to meaningfully participate at the hearing and to explain Defendants' position in response to Plaintiff's motion to enforce the Settlement Agreement. Therefore, Defendants have failed to show a due process violation.

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Agreement and attesting to the fact that Defendants had failed to make the payments required therein.

However, Defendants' attorney neither objected to Plaintiff's counsel handing up the Settlement Agreement to Judge Smith at the February 17 Hearing nor contested the representation made by Plaintiff's counsel that Defendants had failed to make any of the requisite payments called for under the agreement. Accordingly, no genuine issue of material fact existed as to whether (1) the parties had entered into a settlement agreement; (2) the document handed up to Judge Smith was, in fact, a genuine copy of their Settlement Agreement; or (3) Defendants were in breach of the Settlement Agreement through their failure to make payments. Therefore, we conclude that Judge Smith did not err in ruling on Plaintiff's motion. *See Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 120, 344 S.E.2d 97, 100 (1986) ("From an analysis of the language of the contract, its purposes and subject matter, the trial court properly determined that there was no genuine issue of material fact and that appellee was entitled to judgment as a matter of law.").

II. Effect of Judge Ridgeway's 4 November 2013 Order

Defendants next argue that Judge Smith erred in enforcing the Settlement Agreement because his order overruled Judge Ridgeway's 4 November 2013 order. We disagree.

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Defendants are correct that one superior court judge may not overrule or modify a prior ruling made by another superior court judge in the same action. *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003). However, that is not what happened here. The only issue before Judge Ridgeway was whether the parties' joint motion for a stay should be granted. In his 4 November 2013 order, Judge Ridgeway denied the motion, ruling that the case would remain on the 3 February calendar "for further report to the Court" and that the case would go forward in the event it was not resolved. Nothing in his order purported to affect the ability of other judges to make future substantive rulings in the case nor would he have had the authority to issue such an order. Defendants' argument to the contrary is meritless.

III. Interpretation of Settlement Agreement

Defendants' final argument is that the trial court committed legal error in its interpretation of the Settlement Agreement. Specifically, Defendants contend that under the terms of the Settlement Agreement Plaintiff's *only* remedy in the event of Defendants' breach due to non-payment was the ability to resume litigation of its underlying claim against Defendants and to recover its attorneys' fees in the event it prevailed in the litigation.

As noted above, "[a] settlement agreement is interpreted according to general principles of contract law[.]" *Systel Bus. Equip. Co.*, 171 N.C. App. at 425, 614 S.E.2d at 597. "[A] party has two options in deciding how to specifically enforce the terms of

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[a] settlement agreement.” *Hardin*, 199 N.C. App. at 708, 682 S.E.2d at 741 (citation and internal quotation marks omitted). A party can “(1) take a voluntary dismissal of his original action and then institute a new action on the contract, or (2) seek to enforce the settlement agreement by petition or motion in the original action.” *Id.* (citation, internal quotation marks, and emphasis omitted).

“The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning.” *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (internal citations and quotation marks omitted).

Notably, neither Plaintiff nor Defendants contended in the trial court (nor contend on appeal) that the Settlement Agreement contains an ambiguity. “If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties.”

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Williams v. Habul, 219 N.C. App. 281, 292, 724 S.E.2d 104, 111-12 (2012) (internal citations and quotation marks omitted).

At the heart of the parties' dispute is the question of what remedies are available to Plaintiff for Defendants' failure to make the required payments under the Settlement Agreement. The parties agree that Section 3(c) addresses this issue but disagree as to its meaning. Section 3(c) states as follows:

Non-payment. If Defendants have not paid the settlement amount in full within the time required hereunder, Plaintiff shall have the right to continue to prosecute the above-referenced civil action against Defendants, and shall further be entitled to recover all costs and fees, including a reasonable attorney's fee, incurred in connection with prosecution of this civil action where Plaintiff prevails at trial.

Plaintiff contends, and Judge Smith agreed, that this provision — when read in context with the Settlement Agreement as a whole — gave it two alternative remedies for Defendants' breach: (1) the right to resume litigation of the underlying dispute and, if successful, recover its litigation-related attorneys' fees; *or* (2) the right to enforce the payment obligations imposed on Defendants in the Settlement Agreement. Defendants, conversely, contend that the former remedy is the *only* remedy available to Plaintiff in the event of Defendants' breach by non-payment.

In making this argument, Defendants assert that Section 3(c) of the Settlement Agreement must be construed *in pari materia* with Section 6, which states:

In the event this agreement is required to be enforced

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through a court of law as a result of breach of any of the terms set forth herein, excluding failure to pay by Defendants as set forth at subsection 3(a) above (considering said failure carries its own consequences), by either party, the non-breaching party shall be entitled to recover all costs and fees, including a reasonable attorney's fee, incurred to enforce it against the breaching party.

Based on our reading of the Settlement Agreement, we believe that Plaintiff's interpretation is correct. There is no language in Section 3(c) providing that the "litigation" remedy was meant to be exclusive so as to preclude Plaintiff from asking the court to enforce the payment provisions of the Settlement Agreement. Rather, through the parties' use of the phrase "shall have the right," Section 3(c) simply provided Plaintiff with an *additional* remedy in the event Defendants breached by non-payment. *See Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 718-19, 375 S.E.2d 673, 676 ("Defendants contend that the lease agreements explicitly called for [the plaintiff] to pay attorney fees in the event defendants had to utilize legal avenues to collect deficiencies under the lease. In our view, the lease language can be read so as to provide defendants with a *choice* of remedies, only one of which calls for attorney fees." (emphasis added)), *disc. review denied*, 324 N.C. 436, 379 S.E.2d 249, 249-50 (1989).

Nor do we agree with Defendants that Section 6 of the Settlement Agreement limited Plaintiff's remedy to the resumption of litigation of the underlying claim with the chance to recover its attorneys' fees as a prevailing party. While Defendants are

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correct that provisions in a contract must be read *in pari materia*, see *Davis v. The Dennis Lilly Co.*, 330 N.C. 314, 319, 411 S.E.2d 133, 136 (1991) (“[A] contract is to be construed as a whole with each clause and word being considered with reference to its other provisions.”), we do not believe Plaintiff’s interpretation runs afoul of this principle of construction. Pursuant to Section 6, a breach of the Settlement Agreement by one of the parties unrelated to non-payment (such as, for example, a breach of the confidentiality provision contained in Section 5) would permit the non-breaching party to seek judicial enforcement of the provision at issue and to recover its enforcement-related reasonable attorneys’ fees. We do not perceive a conflict between (1) the existence of such a remedy to the parties under Section 6; and (2) the availability to Plaintiff of the two alternative remedies discussed above in the event of a breach caused by Defendants’ failure to make the required payments.⁵

We are also unpersuaded by Defendants’ attempt to rely on the language in Section 6 referencing the fact that Defendants’ failure to make the payments required under the Settlement Agreement “carries its own consequences.” We interpret those “consequences” to include Plaintiff’s election between the remedies of (1) seeking enforcement in court of the payment terms in the Settlement Agreement (without the

⁵ We note the enforcement remedy available for breach by non-payment — unlike the enforcement remedy in Section 6 — would not permit Plaintiff to recover its attorneys’ fees incurred in connection with its enforcement of the Settlement Agreement. Judge Smith recognized this distinction by refusing to award attorneys’ fees to Plaintiff in either his 20 March 2014 order or his 22 April 2014 order.

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prospect of recovering its enforcement-related attorneys' fees); and (2) continuing to prosecute the underlying lawsuit (with the prospect of recovering its litigation-related attorneys' fees if it prevails).

Accordingly, we hold that Judge Smith's ruling was correct. Defendants' argument on this issue is therefore overruled.

Conclusion

For the reasons stated above, we affirm the trial court's 20 March 2014 and 22 April 2014 orders.

AFFIRMED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).