IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-273

Filed: 15 November 2016

Avery County, No. 14 CVS 181

ALBERT GERSING, Plaintiff,

v.

ANGELO ACCETTURO, Defendant.

Appeal by plaintiff from order entered 10 December 2015 by Judge R. Gregory Horne in Avery County Superior Court. Heard in the Court of Appeals 8 September 2016.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for plaintiff-appellant.

Gerald R. McKinney for defendant-appellee.

McCULLOUGH, Judge.

Albert Gersing ("plaintiff") appeals from the trial court's entry of summary judgment in favor of Angelo Accetturo ("defendant"). For the reasons stated herein, we affirm.

I. Background

On 31 July 2014, plaintiff filed a "Verified Complaint" against defendant. Thereafter, on 1 June 2015, plaintiff filed a "First Amended Verified Complaint." Plaintiff alleged as follows: Between February 1997 and May 1997, plaintiff, through

his wholly owned corporation Woodland Holdings Company ("Woodland Holdings"), acquired approximately 850 to 900 acres of land in Avery County ("Wilderness Trail Acreage"). In November 2004, Woodland Holdings conveyed the Wilderness Trail Acreage to Downtown Development Company of Banner Elk, LLC ("Downtown Development"). Defendant was the principal owner of Downtown Development. Downtown Development agreed to pay $4,050,000.00. At closing, Downtown Development paid $50,000.00 towards the purchase price and then executed a promissory note and purchase money deed of trust conveying $4,000,000.00 security interest in the Wilderness Trail Acreage to Woodland Holdings. Between 2004 and 2008, defendant through multiple entities owned and controlled by defendant, developed the Wilderness Trail Acreage into a real estate subdivision called "Wilderness Trail." During this same time, Wilderness Trial Acreage was divided up and transferred among and between several entities owned and controlled by defendant. Woodland Holdings' collateral was modified numerous times and reduced to a tract of property comprised of 25 lots consisting of 15.5 acres, known as the "Sporting Club" or "Sporting Complex" (hereinafter referred to as "Sporting Complex Property").

Plaintiff alleged that the reduction in collateral was evidenced by a September 2008 deed of trust granted to Woodland Holdings by Wilderness Trail Development Corporation ("September 2008 Deed of Trust"). Defendant is the president and

majority shareholder of Wilderness Trail Development Corporation ("WTDC"). Paragraph 13 of the September 2008 Deed of Trust contained a partial release provision that provided that "Grantor [WTDC] shall be entitled to release One (1) lot for each payment of $100,000.00." In April 2009, Woodland Holdings assigned the 2008 Deed of Trust and promissory note to plaintiff.

Plaintiff further alleged that on or before 9 July 2009, plaintiff entered into an agreement with WTDC to purchase Lot 2F of the Sporting Complex Property. Because Lot 2F was part of the property constituting the collateral of the September 2008 Deed of Trust, it was subject to the partial release provision. On 9 July 2009, plaintiff acquired Lot 2F from WTDC. Although plaintiff was entitled to be paid $100,000.00 for the release of Lot 2F at closing, no funds were paid to plaintiff as required under the terms of the Partial Release Provision. Plaintiff alleged that the balance of the closing funds were disbursed to WTDC. In addition, plaintiff alleged that on or before 9 June 2009, the following parties entered into an agreement with WTDC to purchase lots within the Sporting Complex Property: Fred and Donna Raber (the "Rabers") to purchase Lot 24F; Joseph Barra ("Mr. Barra") to purchase Lot 3F; and Charles E. Boswell, IV ("Mr. Boswell") to purchase Lot 25F. On 9 June 2009, WTDC conveyed Lots 24F, 3F, and 25F to the Rabers, Mr. Barra, and Mr. Boswell, respectively. Although all of these lots were subject to the Partial Release Provision, no release fee was paid to plaintiff at closing or otherwise.

Seeking to recover the release fees, plaintiff filed suit against defendant and WTDC in Avery County, North Carolina ("the first litigation") – 10 CVS 09; *Albert Gersing v. Wilderness Trail Development Corporation; Angelo Accetturo, et al.* The parties settled and on 13 April 2010, a settlement agreement was entered ("Settlement Agreement"). Pursuant to the terms of the Settlement Agreement, defendant agreed to grant plaintiff a first position lien on the Sporting Complex Property. Plaintiff alleged that defendant did not give plaintiff notice of any other lien rights held by any person or entity in and with respect to the Sporting Complex Property. WTDC executed and delivered a new promissory note in the principal sum of $2,071,610.80 that stated "This Note is given TO EVIDENCE A DEBT, and is secured by a DEED OF TRUST, which is a FIRST lien upon the property therein described" ("2010 Promissory Note"). The 2010 Promissory Note was secured by a deed of trust on the Sporting Complex Property minus Lots 2F, 3F, 24F, and 25F ("2010 Deed of Trust"). The 2010 Deed of Trust, executed by defendant on behalf of WTDC, states, "THIS IS A FIRST LIEN UPON THIS PROPERTY."

Plaintiff alleged that in early 2011, defendant filed a lawsuit in Avery County against plaintiff ("second litigation") – 11 CVS 27; *Angelo Accetturo and Wilderness Trail Development Corporation v. Albert Gersing, et al.* Defendant brought various defamation claims against plaintiff. After the second litigation was filed, WTDC failed to make a required payment under the 2010 Promissory Note and thus,

plaintiff filed a counterclaim against WTDC for breach of the 2010 Promissory Note. Defendant's claims were dismissed with prejudice and defendant, on behalf of WTDC, agreed to enter into a consent judgment with respect to plaintiff's counterclaim for breach of the 2010 Promissory Note.

In addition, plaintiff alleged that after entry of the consent judgment, plaintiff began the process of discovering WTDC's assets. In August 2012, while plaintiff was conducting its post-judgment discovery process, WTDC filed a voluntary Chapter 7 Bankruptcy Petition. In early 2014, plaintiff filed a motion with the Bankruptcy Court to lift the automatic stay in order to foreclose on the 2010 Deed of Trust. In February 2014, the Bankruptcy Court granted plaintiff's motion. In March 2014, plaintiff discovered that he did not hold a first position lien upon the Sporting Complex Property despite the express language in the Settlement Agreement, 2010 Promissory Note, and 2010 Deed of Trust. Another creditor of WTDC had a validly perfected lien on the Sporting Complex Property, superior to plaintiff's 2010 Deed of Trust. On 9 December 2010, ENV Environmental Consulting Services, Inc. ("ENV") filed a "Notice of Claim of Lien on Real Property" on the Sporting Complex Property ("Claim of Lien"). The Claim of Lien related back to work performed in 2004, a date earlier than the recording of the 2010 Deed of Trust. ENV perfected its claim of lien and brought an action to enforce it in 11 CVS 137 – *ENV Environmental Consulting Services, Inc. v. Angelo Accetturo individually and d/b/a Astro Development Group,*

Wilderness Trail Development Corporation, Wilderness Trail Holdings, LLC; and DDC Investment Holdings, LLC. In December 2012, a consent judgment was entered against those defendants in the sum of $85,000.00. ENV holds a first position lien on the Sporting Complex Property, thereby relegating plaintiff's 2010 Deed of Trust to a second position lien.

Plaintiff alleged that at the time plaintiff entered in the Settlement Agreement, plaintiff had no actual or constructive notice of ENV's claims with respect to the Sporting Complex Property while defendant was aware and had notice of ENV's claims. Plaintiff alleged that defendant made numerous written statements with the intent of inducing plaintiff to enter into and accept the Settlement Agreement, 2010 Promissory Note, and 2010 Deed of Trust and that plaintiff reasonably relied upon defendant's false representations. As such, plaintiff brought forth the following claims: fraudulent concealment; fraud in the inducement; fraudulent warranties; breach of fiduciary duty; punitive damages; and, rescission.

On 29 June 2015, defendant filed a "Motion to Dismiss[,] Answer to Amended Complaint and Affirmative Defenses." Defendant argued that plaintiff failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant also brought forth the following affirmative defenses: lapse of statute of limitations; *res judicata*; compulsory counterclaim; estoppel; and, laches.

On 28 August 2015 defendant filed a "Motion for Summary Judgment" as to all of plaintiff's claims.

Following a hearing held at the 8 September 2015 civil session of Avery County Superior Court, the trial court entered an order on 10 December 2015, entering summary judgment in favor of defendant and dismissing plaintiff's claims with prejudice. Plaintiff appeals from this order.

II. Discussion

Plaintiff's sole issue on appeal is that the trial court erred by granting summary judgment in favor of defendant as to all of plaintiff's claims. Specifically, plaintiff argues that his three fraud claims, fraudulent concealment, fraud in the inducement, and fraudulent warranties, were supported by evidence presented to the trial court. Furthermore, plaintiff contends that his claims are not barred by the statute of limitations, the doctrine of unclean hands, or *res judicata*, plaintiff's failure to obtain title insurance does not insulate defendant, affirmative misrepresentations were made by defendant, and plaintiff's claims are not moot.

Rule 56 of the North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "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) (2015). "All facts asserted by the

adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

N.C. Gen. Stat. § 1-52(9) provides that actions for "relief on the ground of fraud" must be brought within three years. "[T]he cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud[.]" N.C. Gen. Stat. § 1-52(9) (2015). "For purposes of N.C.G.S. § 1-52(9), 'discovery' means either actual discovery or when the fraud *should have been discovered* in the exercise of 'reasonable diligence under the circumstances.' " *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citation omitted) (emphasis added).

In the case before us, the basis of plaintiff's claims is that had defendant not fraudulently concealed ENV's claims with respect to the Sporting Complex Property, plaintiff would not have entered into and accepted the Settlement Agreement, 2010

Promissory Note, and 2010 Deed of Trust. The record demonstrates that plaintiff and defendant entered into the Settlement Agreement on 13 April 2010. Pursuant to the terms of the Settlement Agreement, defendant agreed to grant plaintiff a first position lien on the Sporting Complex Property. Thereafter, on 9 December 2010, ENV filed a "Notice of Claim of Lien on Real Property" on the Sporting Complex Property with the Clerk of Superior Court for Avery County. As of 9 December 2010, plaintiff either had record notice or in the exercise of reasonable diligence should have discovered ENV's lien on the Sporting Complex Property. Because plaintiff did not file his complaint against defendant until 31 July 2014, his claims are barred by the three year statute of limitations. Accordingly, the trial court did not err by granting summary judgment in favor of defendant and dismissing plaintiff's claims.

III. Conclusion

The 10 December 2015 order of the trial court, granting summary judgment in favor of defendant and dismissing plaintiff's claims with prejudice, is affirmed.

AFFIRMED

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).