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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-928

Filed: 21 August 2018

Cumberland County, No. 13-CVS-8726

GEORGE BURNS, MACK McCANN, and CHARLES BARTLETT, Trustees of Park's Chapel Free Will Baptist Church, Plaintiffs,

v.

KINGDOM IMPACT GLOBAL MINISTRIES, INC., Defendant.

Appeal by Defendant from order entered 19 June 2017 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 8 February 2018.

Yarborough, Winters & Neville, P.A., by J. Thomas Neville, for Plaintiffs-Appellees.

Locus & Associates, P.A., by James H. Locus, Jr., for Defendant-Appellant.

INMAN, Judge.

Defendant Kingdom Impact Global Ministries, Inc. ("Defendant"), appeals from an order lifting a stay pending appeal, enforcing a judgment, and releasing funds to Plaintiffs George Burns, Mack McCann, and Charles Bartlett ("Plaintiffs") following affirmation of a final judgment by this Court and denial of a petition for

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discretionary review by our Supreme Court. *Burns v. Kingdom Impact Global Ministries, Inc.*, ___ N.C. App. ___, 797 S.E.2d 21, *disc. rev. denied*, 369 N.C. 564, 799 S.E.2d 45 (2017). Defendant contends that the trial court erred in ordering the release of funds not contained within the undertaking set by the trial court in its order staying execution pursuant to Section 1-292 of our General Statutes and in awarding costs and attorneys' fees to Plaintiffs pursuant to Section 47B-6 of same. After careful review, we modify and affirm the trial court's order in part and vacate and remand in part.

I. FACTUAL AND PROCEDURAL HISTORY

This is the second appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual histories of the litigation are included in our decision in the prior appeal. *See Burns*, ___ N.C. App. at ___, 797 S.E.2d at 22-25.

In 2011, two properties belonging to the trustees of Parks Chapel Free Will Baptist Church (the "Trustees") were conveyed by deed to Defendant by Frances Jackson, purportedly on behalf of the Trustees. Plaintiffs filed suit on behalf of the Trustees alleging various causes of action against Defendant, including falsely signing an invalid deed, registering a false claim by filing a false deed, slander of title, and trespass. Plaintiffs' complaint sought to void the transfer, quiet title, recover monetary damages for loss of use of the properties, and recoup attorneys' fees.

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Defendant filed an answer and counterclaim. The parties filed competing motions for summary judgment and the trial court entered summary judgment in favor of Plaintiffs on all causes of action.

Defendant appealed the summary judgment order to this Court and sought a stay of execution pending appeal before the trial court. The trial court entered an order staying execution pending appeal pursuant to Rule 62(d) of the North Carolina Rules of Civil Procedure and Section 1-292 of our General Statutes on 11 August 2015 (the “First Bond Order”). In the First Bond Order, the trial court found as a fact that Defendant had secured a \$30,000 bond “represent[ing] the \$2,000.00 rental amount of the properties covered in the order for summary judgment for a twelve month period.” The trial court also found that Defendant had agreed to, *inter alia*, deposit the actual rents into a trust account, pay all taxes on the properties, maintain insurance on the properties, and provide an accounting of rents, taxes, and insurance payments to Plaintiffs.

Despite the trial court’s finding of fact that Defendant had secured a bond in the amount of \$30,000, the decretal portion of the First Bond Order does not mention the maintenance of such a bond. Instead, it states that execution is stayed:

under the terms and conditions of the bond issued pursuant to Rule 62(d) of the North Carolina Rules of Civil Procedure and N.C. Gen[.] Stat. § 1-292 which are set as follows:

1. [Defendant] will collect the rent for all of the properties covered in the order for summary judgment in the amount

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of \$2,000.00 and deposit the same in an account in trust.

2. [Defendant] shall maintain all of the properties . . . [by] paying all of the taxes and insurances on all of the properties covered

3. If the tenant of the properties . . . shall fail to timely pay rent . . . , [Defendant] shall cause the tenant to be evicted.

4. [Defendant] shall, upon request of [Plaintiffs], provide an accounting of all monies received for rent and payment of taxes and insurance as hereinabove described.

5. [Defendant] shall not enter into or modify the essential terms of the existing lease agreement . . . without the consent of the Plaintiffs. Furthermore, [Defendant] shall not enter into a new lease agreement without the consent of the Plaintiffs. However, this provision shall not be construed to preclude [Defendant] from enforcing the terms of the existing lease and/or insuring [sic] the leased premises are properly maintained.

(emphasis added).

As noted *supra*, this Court affirmed the trial court's entry of summary judgment. *Burns*, ___ N.C. App. at ___, 797 S.E.2d at 28. Defendant filed a petition for discretionary review with our Supreme Court and a motion for stay of execution with the trial court pending resolution of the petition.

The trial court entered a second stay on 28 February 2017 (the "Second Bond Order," together with the First Bond Order as the "Bond Orders"). The Second Bond Order is substantially identical to the First Bond Order, except it orders Defendant to pay all rents previously held in trust into the Cumberland County Clerk of Court.

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Our Supreme Court denied Defendant's petition on 3 May 2017. *Burns*, 369 N.C. 564, 799 S.E.2d 45. On 6 June 2017, Plaintiffs moved to lift the stay, enforce the judgment, and release the funds held by the Cumberland County Clerk of Court. The trial court lifted the stay on 19 June 2017 (the "Release Order"). The Release Order provided for Plaintiffs to receive: (1) \$72,003.21, representing both the \$30,000 bond secured by Defendant *and* the \$42,003.21 in actual rents collected by Defendant and deposited into the clerk of court as required by the Bond Orders; (2) \$21,300 in attorneys' fees; and (3) \$1,416.83 in court costs. Defendant filed timely notice of appeal from the Release Order on 10 July 2017.

II. ANALYSIS

Defendant appeals the trial court's award of \$72,003.21 to Plaintiffs, arguing that it is inconsistent with the requirements of Section 1-292 and the Bond Orders entered by the trial court. As a practical matter, Defendant also argues that Plaintiffs are not entitled to receive both the amount of the bond secured by Defendant and the actual rents paid into the clerk of court. We hold that the trial court erred in awarding Plaintiffs funds not within the scope of the Bond Orders.

Defendant also appeals the award of attorneys' fees pursuant to Section 47B-6, contending that the trial court failed to make certain findings of fact as required by statute. We hold that the trial court erred in awarding Plaintiffs attorneys' fees without making those necessary findings of fact.

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A. Standards of Review

Defendant does not set forth the applicable standards of review in his principal brief. Plaintiffs assert the abuse of discretion standard applies without citing any caselaw for the proposition. Neither approach complies with the North Carolina Rules of Appellate Procedure. 28 N.C. R. App. 28(b)(6) (2018) (“The argument shall contain a concise statement of the applicable standard(s) of review for each issue The . . . statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.”).

Although we review the amount set for an appeal bond for abuse of discretion, *cf. Currituck Assoc. Residential P’ship v. Hollowell*, 170 N.C. App. 399, 402, 612 S.E.2d 386, 388 (2005), that is not the issue raised in Defendant’s appeal. Rather, Defendant appeals the amount awarded to Plaintiffs in the Release Order, arguing that the award exceeded the amount Plaintiffs were entitled to recover under the Bond Orders. Defendant asserts that the Release Order is contrary to this Court’s holding that “[f]or many years, the law in North Carolina has provided that a person wrongfully restrained could elect either (1) to recover only the amount of the bond . . . or (2) to forego his action on the bond and bring an independent tort suit for malicious prosecution.” *In re Simon*, 36 N.C. App. 51, 56, 243 S.E.2d 163, 166 (1978) (citations omitted). Errors of law are reviewable *de novo*, *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999), and we apply that standard to

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the question of the amount recoverable by Plaintiffs under the Bond Orders and Section 1-292. *See also Simon*, 36 N.C. App. at 56, 243 S.E.2d at 166 (applying an apparent *de novo* standard to the amount recoverable on two bonds, including a bond under Section 1-292, without expressly declaring the standard of review applied).

The award of costs and fees, which Defendant argues was in error because the requirements of the applicable statute were not met, is subject to *de novo* review. *See, e.g., Doan v. Doan*, 156 N.C. App. 570, 575, 577 S.E.2d 146, 150 (2003) (discussing standards applicable to a statutory award of fees and costs). If the statutory requirements are met, we then review the amount of the award for an abuse of discretion. *Id.* at 575, 577 S.E.2d at 150.

B. Release of Funds

Section 1-292 provides for stays of execution on judgments for real property on the following conditions:

[T]he execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking.

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N.C. Gen. Stat. § 1-292 (2017). The parties acknowledge this statute governs the stay of execution entered in this case, and dispute only the amount to which Plaintiffs are entitled as a result of the stay's dissolution.

The amount of a bond paid by a party to stay execution of a judgment pending appeal is "fixed by [the] judge . . . and . . . specified in the undertaking[.]" N.C. Gen. Stat. § 1-292. After an appeal is resolved and the stay of execution is lifted, an appellee who elects to recover statutory damages instead of pursuing a malicious prosecution claim against the appellant is limited to that same amount. *Simon* 36 N.C. App. at 56, 243 S.E.2d at 166. So we turn to the Bond Orders to determine the amount of damages Plaintiffs were entitled to recover.

Although each of the Bond Orders includes a finding that Defendant has secured a \$30,000 bond, the decree in each order sets no bond amount, and instead requires Defendant to retain the actual rents collected from the properties. Though the parties both present competing arguments as to the trial court's intent in entering the Bond Orders and as to their intent in agreeing to the terms, neither the \$30,000 appeal bond obtained by Defendant prior to entry of the First Bond Order nor transcripts of either hearing on the Bond Orders is included in the record on appeal. As a result, we are constrained by the plain language of the Bond Orders themselves. Because neither one requires the maintenance of a \$30,000 appeal bond, we hold that

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the trial court erred in permitting Defendants to recover that amount beyond the \$42,003.21 in actual rents collected.¹

We note that the Bond Orders themselves appear to deviate in some respects from the requirements of Section 1-272 because they do not “fix” a discrete “sum” not to be exceeded in Plaintiffs’ recovery.² Neither party, however, argues that the Bond Orders themselves are void or invalid for noncompliance with the statute. “An order issued ‘contrary to the method of practice and procedure established by law’ is classified as irregular.” *R. E. Uptegraff Mfg. Co. v. Int’l Union of Elec., Radio, and Mach. Workers, AFL-CIO Local Union No. 189*, 20 N.C. App. 544, 549, 202 S.E.2d 309, 313 (1974) (quoting *Collins v. N.C. State Highway Comm’n*, 237 N.C. 277, 284, 74 S.E.2d 709, 715 (1953) (additional citations omitted)). Such “an irregular order stands as the judgment of the court and is binding on the parties until it is corrected.” *Uptegraff* at 549, 202 S.E.2d at 313 (citations omitted). No party appealed from either of the Bond Orders. No party has argued in this appeal that the Bond Orders require correction. The recovery available to Plaintiffs is therefore limited to the express terms of the Bond Orders, irregularities and all.

¹ Section 1-292 contemplates an undertaking in the form of a surety bond. However, a surety bond is not the only acceptable undertaking, and cash deposits may be made instead: “[i]n lieu of any written undertaking or bond required by law in any matter, before any court of the State, the party required to make such undertaking or bond may make a deposit in cash or securities . . . of the amount required by law . . . in lieu of the said undertaking or bond . . .” N.C. Gen. Stat. § 58-75-1 (2017).

² This is in notable contrast to the appeal bond ordered in a stay entered in the instant appeal. That order, included in the record, stayed any execution on the cost and attorneys’ fee awards, and states in the decretal portion that “Defendant . . . shall maintain this secured bond in the amount of \$22,716.83 for the duration of the appeal . . .”

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C. Costs and Attorneys' Fees

Defendant argues that the trial court erred in allowing Plaintiffs to recover costs and attorneys' fees under Section 47B-6 in the Release Order. The statute provides a trial court with discretion to award "all costs incurred . . . , including a reasonable attorney's fee," to a prevailing party when it finds "that any person has intentionally registered a false or fictitious claim [to real property.]" N.C. Gen. Stat. § 47B-6 (2017). Because the statute requires a factual finding, and no such finding was made, we vacate the award of costs and attorneys' fees and remand the issue to the trial court.

We acknowledge that the trial court granted summary judgment on Plaintiffs' causes of action, including filing a false or fictitious claim under Section 47B-6. However, costs and attorneys' fees are available only upon an *intentional* filing of such a claim, and the statute expressly requires an explicit factual finding to that effect. N.C. Gen. Stat. § 47B-6. No such finding exists in the record, either in the summary judgment order or in the Release Order. We cannot ignore the statutory mandate for such a finding. As with costs and attorneys' fees recoverable under Section 75-16.1 of our General Statutes, which are allowed only upon additional factual findings concerning willful intent beyond those necessary to state a valid unfair or deceptive trade practices act violation, *cf. Barbee v. Atlantic Marine Sales & Serv., Inc.*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 121-22 (1994), the trial court

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in this case can award costs and attorneys' fees only if it first makes a factual finding that Defendant's filing of a false or fictitious claim was intentional. We therefore vacate the award of costs and attorneys' fees and remand this case to the trial court to determine whether such a finding is proper.³ If the trial court does find that Defendant intentionally filed a false or fictitious claim, it may then order recovery of \$1,416.83 in costs and \$21,300 in attorneys' fees.

We reject Defendant's contention that the award of costs and attorneys' fees in the Release Order is improper because, as set forth *supra*, a party seeking to recover under an appeal bond is limited in its recovery to the amount of the bond itself. The summary judgment order entered in this case, which was stayed by the Bond Orders, did not establish the amount of costs recoverable and held the issue of attorneys' fees open for "a separate hearing . . . upon motion of Plaintiffs . . ." No appealable final order setting the amount of costs and fees recoverable had been entered at the time of appeal. *See, e.g., In re Cranor*, ___ N.C. App. ___, 786 S.E.2d 379, 382 (2016) ("Because the . . . order for attorneys' fees . . . did not set *the amount* of the fee award

³ Defendant does not argue that the amounts awarded were unreasonable or improper, and contends only that the requirements for the award were not met. This Court has previously recognized the basis of an attorneys' fees award and the reasonableness thereof as separate factual issues, treating and correcting only those raised on appeal. *See, e.g., N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 442-43, 462 S.E.2d 824, 828 (1995) (reversing and remanding an attorneys' fees award to make necessary findings concerning the reasonableness of the award only, even where this Court recognized the trial court failed to make necessary findings establishing the basis of the award, because that was the only issue raised on appeal). Therefore, on remand the trial court need not make findings concerning the reasonableness of the amount of costs and fees awarded, as that issue was not challenged on appeal.

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. . . it was not a final order.”) (emphasis in original). The Bond Orders did not encompass the recovery of costs and attorneys’ fees, as no such fees had been awarded in the order on summary judgment.

Our holding finds additional support in the manner in which awards of attorneys’ fees are appealed. This Court has expressly held that “an appeal from an award of attorneys’ fees may not be brought until the trial court has finally determined the amount to be awarded.” *Triad Women’s Center, P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010). In that case, the trial court awarded summary judgment and attorneys’ fees, but left the amount of said fees to be determined later. *Id.* at 356, 699 S.E.2d at 659. We held that any appeal of the fee award would be interlocutory without a final determination as to the amount of fees recoverable and, because the fee award was the sole basis of the appellant’s appeal from the summary judgment order, we dismissed the appeal. *Id.* at 358, 699 S.E.2d at 660-61.⁴ Applying *Triad Women’s Center* to the instant case: (1) the undertaking staying execution of the summary judgment order pending appeal could not have encompassed the award of costs and fees, as that award was not yet final and

⁴ We note that since this Court’s decision in *Triad Women’s Center*, our Supreme Court has clarified that a summary judgment order deciding the merits of an action but leaving open an award of costs or fees are final judgments subject to immediate appeal. *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013). *Duncan*, however, did not disturb the holding in *Triad Women’s Center* that an award of attorneys’ fees is interlocutory where the amount of such an award has not been set. See *Sanders v. State Pers. Comm’n*, 236 N.C. App. 94, 99, 762 S.E.2d 850, 854 n 1 (2014) (“Under *Duncan*, an unresolved collateral issue does not render a judgment or order deciding the main issues interlocutory. However, an appeal of the collateral issue of attorney fees, itself, is interlocutory if the trial court has not set the amount to be awarded.”).

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appealable; and (2) this Court's affirmation of the summary judgment order did not resolve the validity of the award, as it was neither discussed within that opinion nor subject to appeal at that time. *See, e.g., Medlin v. N.C. Specialty Hosp., LLC*, 233 N.C. App. 327, 341, 756 S.E.2d 812, 821 (2014) (addressing immediately appealable orders on the merits but dismissing a portion of the appeal as to attorneys' fees where the amount of the award had not been set).

III. CONCLUSION

The Bond Orders entered in this action, though irregular, did not require Defendant to maintain a \$30,000 appeal bond as part of the undertaking staying execution on the summary judgment order. The trial court therefore erred in allowing Plaintiffs to recover that amount in addition to the \$42,003.21 actually encompassed within the terms of the Bond Orders' undertaking. The trial court also erred in awarding attorneys' fees absent a factual finding of intent as required by Section 47B-6. We therefore vacate the award of costs and attorneys' fees and remand these issues to the trial court for a factual finding resolving whether Defendant intentionally filed a false or fictitious claim such that costs and attorneys' fees are proper.

In sum, we: (1) reduce Plaintiffs' damages award under the Bond Orders to \$42,003.21 and affirm that portion of the Release Order as modified; and (2) vacate the award of costs and attorneys' fees in the amounts of \$1,416.83 and \$21,300,

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respectively, and remand those issues for the additional required factual findings set forth herein.

MODIFIED AND AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and DILLON concur.

Report per Rule 30(e).