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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-201

Filed: 2 October 2018

Sampson County, No. 16 CVD 1422

PAWN & GIFTS, INC., Plaintiff,

v.

WILLIAM THOMAS BRADLEY, JR. d/b/a BRADLEY'S AUCTION SERVICE, Defendant.

Appeal by Defendant from judgment entered 24 July 2017 by Judge Sarah C. Seaton in Sampson County District Court. Heard in the Court of Appeals 5 September 2018.

Daughtry, Woodard, Lawrence & Starling, by W. Joel Starling, Jr., for the Plaintiff-Appellee.

Gregory T. Griffin for the Defendant-Appellant.

DILLON, Judge.

Defendant appeals from a final judgment entered following a bench trial awarding Plaintiff $2,274.00.

I. Background

Plaintiff, Pawn & Gifts, Inc., is a pawn shop which owned a number of firearms. Defendant, William Thomas Bradley, Jr., d/b/a Bradley's Auction Service, is a licensed auction house.

In May 2016, Plaintiff contracted with Defendant to auction off over eighty (80) firearms. The contract provided, in part, that Defendant would receive a commission, not only on the firearms actually sold during the auction, but also on any firearm which Plaintiff withdrew from the auction.

On 4 June 2016, Defendant conducted the auction, selling twenty-four (24) of Plaintiff's firearms. There was evidence that Defendant sold one of Plaintiff's firearms for $200 less than the reserve price.[1] The auction was halted before most of Plaintiff's firearms were ever offered, though the evidence is unclear as to *why* the auction was halted. That is, it is unclear whether Plaintiff withdrew the yet-to-be-offered firearms from the auction or whether the auction was halted for some other reason.

On 1 July 2016, Plaintiff received a check for $5,396 along with a letter from Defendant indicating that the check represented Plaintiff's share of the gross auction proceeds. In the letter, Defendant explained that Plaintiff's share of the proceeds from the *sold* firearms totaled over $7,500, but that Plaintiff's share was reduced to

[1] A reserve or reserve price is a minimum price that a seller is willing to accept for an item at auction, and the seller is only obligated to sell the item if the bid amount meets or exceeds that price.

$5,396 because of the $2,074 commission Defendant earned for Plaintiff's firearms which were withdrawn from the auction.

Shortly after receiving the $5,396 check from Defendant, Plaintiff's president telephoned Defendant expressing his view that Defendant was not entitled to a $2,074 commission for the firearms which were never offered for sale.

In September 2016, Plaintiff deposited the $5,396 check which Defendant had sent to him.

Plaintiff commenced this action seeking $2,342.10. This amount represents (1) the $2,074 commission which Plaintiff claims Defendant wrongfully withheld as a commission for the firearms which were never offered at the auction; (2) $200 for Defendant's breach for selling one of the firearms for $200 less than the reserve set by Plaintiff; and (3) $68.10 in interest.

The matter was tried without a jury. The trial court found for the Plaintiff, awarding $2,274 plus interest. Defendant appeals.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Accord and Satisfaction

Defendant argues that the trial court erred by not determining that Plaintiff's claim was barred by the doctrine of "accord and satisfaction," based on the uncontradicted evidence that Plaintiff accepted Defendant's check for $5,396. In

support of his argument, Defendant cites a number of cases from our Court where we held that "[a] check that [] is tendered in full payment of a disputed claim, [] is held to be an accord and satisfaction as a matter of law." *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 117, 331 S.E.2d 738, 740 (1985). *See also Zanone v. RJR Nabisco*, 120 N.C. App. 768, 773, 463 S.E.2d 584, 588 (1995) ("[W]e believe cashing a check known to be offered as an accord and satisfaction establishes, as a matter of law, [that] the payee intended to accept the offer even though he previously voiced reservations about the amount of the settlement.").

We conclude that whether there was an "accord and satisfaction" was an *issue of fact* to be resolved by the fact-finder – who, in this case, was the trial judge. Our Supreme Court has held that a check which is *clearly tendered* as a full payment, if accepted, establishes accord and satisfaction, as a matter of law:

> The principle is well recognized and enforced in this jurisdiction that when in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim.

Moore v. Greene, 237 N.C. 614, 616, 75 S.E.2d 649, 650 (1953). But our Supreme Court has also held that whether the acceptance of a check constitutes accord and satisfaction is generally an issue for the fact-finder:

> It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury.

Allgood v. Wilmington, 242 N.C. 506, 515, 88 S.E.2d 825, 831 (1955).

In the present case, it would certainly be reasonable to infer from the evidence that Defendant intended for his payment to settle a disputed claim. But we also conclude that it could reasonably be inferred that there was a lack of "the 'unequivocal' intent of one party to make and the other party to accept a lesser payment in satisfaction . . . of a larger claim." *Moore v. Frazier*, 63 N.C. App. 476, 478-79, 305 S.E.2d 562, 564 (1983). For instance, there was no language on either the check or in the letter which clearly expressed that the tendered check was intended to be a settlement of some dispute as to the amount owed. The letter did state that the check represented the balance of what Defendant thought he owed Plaintiff from the auction. While the language of the letter is strong evidence that accord and satisfaction was present, we conclude that the language was not so strong as to establish accord and satisfaction *as a matter of law*. As our Supreme Court has explained, "[t]he sending of [a] check to cover what the defendant claimed was the balance due on the account does not *ipso facto* show conclusively that an accord and satisfaction was the condition annexed to its acceptance. Th[is] ultimate fact can only

be determined by a jury[.]" *Blanchard v. Edenton Peanut Co.*, 182 N.C. 20, 22, 108 S.E. 332, 334 (1921) (emphasis in original).

Defendant argues that under Section 25-3-311 of our General Statutes, Plaintiff's claims are barred by accord and satisfaction. N.C. Gen. Stat. § 25-3-311 (2015). Based on our Court's jurisprudence construing that statute, we must disagree with Defendant that this statute applies to this case as a matter of law. Specifically, we have held that for Section 25-3-311 to apply, "[i]t is not enough for defendant to demonstrate that parties presently disagree as to the amount due, but rather defendant must prove 'the amount of the claim *was* unliquidated or subject to a bona fide dispute' " and that the dispute existed "*prior to* [*the*] *payment*" being tendered. *Hunter-McDonald, Inc. v. Edison Foard, Inc.*, 157 N.C. App. 560, 563, 579 S.E.2d 490, 492 (2003) (emphasis in original) (citations omitted). Indeed, more recently, we held that Section 25-3-311 does not apply where a defendant "failed to introduce evidence demonstrating the existence of a dispute at any time *prior to the tendering of the check*." *In re* Five Oaks Foreclosure, 219 N.C. App. 320, 328, 724 S.E.2d 98, 103-04 (2012) (emphasis added). In the present case, Defendant failed to establish as a matter of law the existence of a dispute between him and Plaintiff concerning the commission prior to Defendant's tendering of the check to Plaintiff. Therefore, Defendant's argument is overruled on this point.

B. Breach of Contract

Defendant next argues that the trial court erred in finding and concluding that Defendant breached his contract with Plaintiff. We conclude, however, that there was sufficient evidence from which the trial court, sitting as the jury, could infer that Defendant breached his contract with Plaintiff. For instance, the contract provided that Defendant was not to sell certain firearms for less than the reserve price set by Plaintiff, but that, during the course of the auction, Defendant allowed one of Plaintiff's firearms to be sold for $200 less than the reserve price set by Plaintiff for that item.

Defendant argues that even if the sale of a single firearm for less than the reserve price constituted a breach, it did not constitute a material breach. Defendant contends that the breach, being non-material in nature, only allowed Plaintiff the remedy of $200; it did not relieve Plaintiff of its obligation to proceed with the auction of the remaining firearms.

For a non-material breach, "the general rule is that the measure of damages is the amount which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed." *Norwood v. Carter*, 242 N.C. 152, 155, 87 S.E.2d 2, 4 (1955) (citation omitted).

If a breach is material, the non-breaching party may be relieved from his obligations under the contract. *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242 (1964).

We conclude that it makes no difference whether Defendant's breach concerning the single firearm was material because Defendant failed to meet his burden of proof that he was entitled to a $2,074 commission for the unsold firearms to offset the approximately $7,500+ he owed Plaintiff for the firearms which were actually sold. Indeed, Plaintiff had met its burden to show that it was entitled to $7,500+ of the proceeds from the firearms that were actually sold. It was Defendant's burden to prove that he had earned a commission for the unsold firearms. *See, e.g., Rose v. Vulcan Materials*, 282 N.C. 643, 667, 194 S.E.2d 521, 537 (1973) (holding that where a plaintiff has proven the gross amount he is entitled to under the contract, the burden shifts to the defendant to prove an offset). As such, it was Defendant's burden to prove that Plaintiff withdrew the firearms from the auction, which entitled Defendant to the commission.

There was conflicting evidence as to whether Plaintiff withdrew its remaining firearms from the auction, which may have entitled Defendant to a commission for those withdrawn firearms, *or* whether Plaintiff did not withdraw the firearms but rather Defendant halted the auction on his own. While the trial court did refer to the conflicting evidence in its judgment, it did not make any finding to resolve the conflict in the evidence. As such, the trial court essentially determined that it was unconvinced about what caused the sale to stop and, therefore, that Defendant failed

to meet his burden. Therefore, as the trial court concluded, Defendant was not entitled to keep the $2,074 commission based on these unsold firearms.[2]

AFFIRMED.

Judge ELMORE concurs.

Judge DAVIS concurs in result only.

Report per Rule 30(e).

[2] We note Defendant's contention that the trial judge relied on her own experiences at auction in reaching her verdict, rather than relying totally on the evidence. Defendant bases his contention on a statement made by the trial judge during the course of the proceedings. We do not believe that the trial judge committed reversible error in this regard. Her written judgment does not indicate that she relied on any of her own experiences to support her findings and conclusions.