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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-678

Filed: 18 December 2018

Pender County, No. 16 CVD 691

MINA CAREY dba WILMINGTON DENTAL HEALTH STAFFING, Plaintiff,

v.

MICHAEL L. CHERUBINI, Defendant.

Appeal by defendant from order entered 21 February 2018 by Judge James H. Faison III in Pender County District Court. Heard in the Court of Appeals 15 November 2018.

Ray C. Blackburn, Jr., for defendant-appellant.

C. Adam Lanier, Attorney at Law, PLLC, by C. Adam Lanier, for plaintiff-appellee.

ARROWOOD, Judge.

Michael L. Cherubini (“defendant”) appeals from an order on attorney’s fees and costs entered in favor of Mina Carey, d/b/a, Wilmington Dental Health Staffing (“plaintiff”). For the following reasons, we affirm in part and remand for additional findings.

I. Background

CAREY V. CHERUBINI

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Plaintiff initiated this breach of contract action against defendant in Pender County Small Claims Court seeking \$596.70 in payment for employees provided by plaintiff to defendant's orthodontics practice.

The matter was first tried before a magistrate in small claims court on 3 August 2016. At the conclusion of the trial, the magistrate announced and signed a judgment in open court awarding plaintiff \$1,135.00. Defendant announced his appeal of the magistrate's decision in open court and filed written notice of appeal on 12 August 2016. The matter was then assigned for mandatory arbitration. Following a hearing in the matter, the arbitrator filed an arbitration award on 13 January 2017 in favor of plaintiff in the amount of \$585.00. Defendant appealed the arbitration award by filing a request for trial *de novo* in district court on 1 February 2017. On 15 February 2017, defendant additionally filed a motion in the cause seeking the court's permission to file a counterclaim. The court allowed defendant's motion by order on 11 April 2017 and defendant filed a counterclaim on 12 April 2017 seeking \$600.00 in payment for orthodontic services provided to plaintiff's daughter. Plaintiff denied the material allegations in the counterclaim.

On 5 September 2017, the district court adopted the arbitration award as the judgment of the court, thereby awarding plaintiff \$585.00.

Following entry of the district court's judgment, plaintiff filed a motion for attorney's fees on 28 December 2017 with an attached affidavit of plaintiff's counsel.

Plaintiff sought \$6,647.73 in attorney's fees. Defendant filed a response to plaintiff's motion on 29 January 2018. Plaintiff's motion was heard in Pender County District Court on 15 February 2018. Thereafter, on 21 February 2018, the district court entered an order awarding plaintiff \$6,060.00 in attorney's fees and additionally ordering defendant to pay all unpaid court costs and arbitration fees.

Defendant filed written notice of appeal from the 21 February 2018 order on attorney's fees on 5 March 2018. Defendant also filed a motion to stay the order pending this appeal on 27 March 2018, which the district court granted on 5 April 2018.

II. Discussion

On appeal, defendant first challenges the trial court's award of attorney's fees.

This Court has explained that

“[t]he award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion.” *Town of N. Topsail Beach v. Forster-Pereira*, 194 N.C. App. 763, 766, 670 S.E.2d 590, 592 (2009). However, “the trial court's discretion [in awarding attorney's fees] is not unrestrained.” *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001), *disc. review denied*, 355 N.C. 500, 563 S.E.2d 191 (2002). For example, attorneys' fees may not be awarded in the absence of express statutory authority. *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996).

Lacey v. Kirk, 238 N.C. App. 376, 398-99, 767 S.E.2d 632, 648 (2014), *disc. review denied*, 368 N.C. 250, 771 S.E.2d 321 (2015). The issue of whether attorney's fees are permitted by statute presents a question of law reviewed *de novo* by this Court. *See*

Silva v. Lowes Home Improvement, 239 N.C. App. 175, 178, 768 S.E.2d 180, 183 (2015) (“Questions of statutory interpretation are questions of law and are reviewed *de novo* by an appellate court.”).

Here, defendant first argues the district court’s award of attorney’s fees was not proper under North Carolina law. Defendant cites various authority in support of his assertion that attorney’s fees in contract cases are disfavored under our case law and are limited by our statutes. The sources cited by defendant, however, acknowledge that attorney’s fees are recoverable when expressly allowed by statute. *See Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980) (“[T]he general rule has long obtained that a successful litigant may not recover attorneys’ fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.”); *Harborage Property Owners Ass’n, Inc. v. Mountain Lake Shores Development Corp.*, 145 N.C. App. 290, 298, 551 S.E.2d 207, 212 (2001), *disc. review denied and appeal dismissed*, 356 N.C. 301, 570 S.E.2d 506 (2002); *see also* N.C. Gen. Stat. §§ 6-20 and 7A-305(d)(3) (2017) (together allowing the recovery of costs in the discretion of the court, including “counsel fees, as provided by law.”).

Pertinent to this case originating in small claims court, N.C. Gen. Stat. § 7A-37.1(c2) allows a court to award attorney’s fees to a party that prevails in small claims

court, then in arbitration, and finally in a trial *de novo*. Specifically, the statute provides as follows:

- (c2) In appeals in small claims actions under Article 19 of Chapter 7A of the General Statutes, if (i) the arbitrator finds in favor of the appellee, (ii) the arbitrator's decision is appealed for trial de novo under [N.C. Gen. Stat. §] 7A-229, and (iii) the arbitrator's decision is affirmed on appeal, then the court shall consider the fact that the arbitrator's decision was affirmed as a significant factor in favor of assessing all court costs and attorneys' fees associated with the case in both the original action and the two appeals, including the arbitration fee assessed under subsection (c1) of this section, against the appellant.

N.C. Gen. Stat. § 7A-37.1(c2) (2017).

Defendant acknowledges the statute, but contends each appeal in this matter achieved a different result and, therefore, the purpose of N.C. Gen. Stat. § 7A-37.1(c2), which defendant posits is to “discourage litigants from repeatedly rehashing the same issues and evidence[,]” is not achieved. While defendant's argument is sensible, there is no such limiting language in the statute. The statute only requires that the arbitrator's decision be in favor of the appellee and that the decision is affirmed on appeal. Here, plaintiff obtained a favorable result against defendant at every stage of litigation. Thus, irrespective of legal theories underlying defendant's case, we hold N.C. Gen. Stat. § 7A-37.1(c2) provides express authority for the award of attorney's fees to plaintiff in this case. The trial court did not err.

Defendant also stresses that there is no case law addressing the relationship of N.C. Gen. Stat. § 7A-37.1(c2) and the long line of North Carolina cases that disallow attorney's fees in contract cases and asserts that allowing plaintiff to recover attorney's fees in this contracts case would overrule those prior cases. We are not convinced. As mentioned above, those cases cited by defendant acknowledge that attorney's fees are properly awarded when authorized by statute. N.C. Gen. Stat. § 7A-37.1(c2) is merely the statute authorizing the attorney's fee award in this case and similar cases that follow the same trajectory through small claims court, arbitration, and district court with the appellee prevailing at each stage. This case has no impact on cases not originating in small claims court.

In addition to arguing the attorney's fees in this case were not authorized by law, defendant argues "[t]he trial court . . . failed to make any findings of fact which would allow this Court to determine whether there was an abuse of discretion."

In *Lacey*, this Court further explained that

[i]f the trial court decides to award a reasonable attorneys' fee, it must make findings of fact that support the award, including the " 'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629 (quoting *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989)). In addition, a trial court is entitled to examine a number of other factors in the course of determining the reasonableness of an attorneys' fee award, including "the nature of litigation[,] nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success

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or failure of the attorney's efforts." *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592 (citation and quotation omitted). As a result, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *Id.* (quoting *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (citation omitted)).

Lacey, 238 N.C. App. at 399, 767 S.E.2d at 648.

In this case, the trial court issued a single finding regarding the reasonableness of the attorney's fees awarded to plaintiff. That finding states that "[c]ounsel's [a]ffidavit contains expenses that appear to reflect the reasonable costs of litigation." The trial court further concluded that "[p]laintiff is entitled to recover attorney's fees and costs associated with this action, except for mileage expenses listed in the affidavit." While the trial court's single finding and conclusion do indicate that the court considered the reasonableness of the fees, they are insufficient to allow this court to perform a meaningful review. Consequently, we remand this matter to the trial court for additional findings as required by *Lacey*.

Lastly, defendant asserts arguments that the trial court erred by failing to enter judgment on his counterclaim. Defendant points out that the record is devoid of any disposition of the counterclaim and contends this Court should reverse the 5 September 2017 entry of judgment. However, defendant's notice of appeal designates that he is appealing only from the order on attorney's fees and costs

entered in Pender County District Court on 21 February 2018. Defendant’s notice of appeal makes no reference to the 5 September 2017 judgment.

Among the requirements of a notice of appeal, Rule 3 of the North Carolina Rules of Appellate Procedure provides that “[t]he notice of appeal . . . shall designate the judgment or order from which appeal is taken” N.C.R. App. P. 3(d) (2018). Our Courts have held that “[t]he provisions of Rule 3 are jurisdictional” and “[i]n order to confer jurisdiction on the state’s appellate courts, appellants . . . must comply with the requirements of Rule 3” *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Because defendant’s notice of appeal only identified the 21 February 2018 order on attorney’s fees and costs, this Court’s review on this appeal is limited to that order.

III. Conclusion

For the reasons discussed, we hold attorney’s fees are authorized in this case but the trial court made insufficient findings to support the award.

AFFIRMED IN PART AND REMANDED FOR ADDITIONAL FINDINGS.

Judges TYSON and INMAN concur.

Report per Rule 30(e).