IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-303

Filed: 3 September 2019

Guilford County, No. 18-CVS-4854

TODD EDWARD ROTRUCK, Plaintiff,

v.

GUILFORD COUNTY BOARD OF ELECTIONS and JANELLE ROBINSON, Defendants.

Appeal by Plaintiff from order entered 4 October 2018 by Judge John O. Craig in Guilford County Superior Court. Heard in the Court of Appeals 6 August 2019.

Forrest Firm, P.C., by Patrick S. Lineberry and John D. Burns, and Allman Spry Davis Leggett & Crumpler, P.A., by D. Marsh Prause, for Plaintiff-Appellant.

Office of the Guilford County Attorney, by J. Mark Payne, for Defendant-Appellee Guilford County Board of Elections.

COLLINS, Judge.

Plaintiff Todd Rotruck appeals from the trial court's 4 October 2018 order which affirmed Defendant Guilford County Board of Elections' (the "BOE") 24 April 2018 order sustaining Defendant Janelle Robinson's challenge to Plaintiff's eligibility to vote in Guilford County Precinct NCGR2 in the Town of Summerfield. Plaintiff contends that the trial court erred by affirming the BOE Order because the trial court misallocated the applicable burden of proof in its review of the BOE Order, and because the BOE deviated from permissible procedure in conducting the BOE

Hearing, relied upon unsworn witness testimony and unauthenticated documentary evidence, and made findings of fact that were not supported by competent and substantial evidence in the BOE Order. Finding no merit to Plaintiff's arguments, we affirm.

I. Background

The evidence presented to the BOE tended to show the following: Prior to 2016, Plaintiff lived with his family in a home on Lewiston Road in Greensboro (the "Greensboro property"). In the summer of 2016, Plaintiff purchased a home on Strawberry Road in Summerfield (the "Summerfield property"). Plaintiff and his family moved in to the Summerfield property in September 2016, but did not sell the Greensboro property at that time. Plaintiff and his family continued to use the Greensboro property, e.g., as a home office for Plaintiff and his wife, throughout the period that they lived at the Summerfield property. Plaintiff and his family contemplated moving back to the Greensboro property at an unspecified point in the future because they wanted to renovate the Summerfield property.

Renovations began on the Summerfield property sometime in early 2017, and Plaintiff's family, but not Plaintiff, moved back to the Greensboro property in April 2017. In July 2017, Plaintiff filed paperwork with the North Carolina State Board of Elections declaring his candidacy for the Summerfield Town Council, listing his mailing address as that of the Summerfield property. Around the same time, Plaintiff

registered to vote in the precinct covering the Summerfield property, listing the Greensboro property as the site of his prior voter registration. Plaintiff listed the address of the Greensboro property as his mailing address on a number of documents throughout the period he lived at the Summerfield property.

In November 2017, Plaintiff was elected to the Summerfield Town Council. That same month, Plaintiff and his wife sold the Greensboro property, indicating that the Greensboro property was their "primary residence" in the deed. Plaintiff negotiated a temporary lease of the Greensboro property with the new owner that would allow Plaintiff's family to live at the Greensboro property while the renovations of the Summerfield property were completed. Plaintiff moved back to the Greensboro property in December 2017. As of the 17 April 2018 BOE Hearing, Plaintiff and his family had not moved back to the Summerfield property or completed renovations thereupon.

In February 2018, Robinson filed an N.C. Gen. Stat. § 163A-911[1] challenge to Plaintiff's qualification to vote in Guilford County Precinct NCGR2 in the Town of Summerfield, wherein Robinson alleged that Plaintiff was not a resident of the Summerfield property within the meaning of N.C. Gen. Stat. § 163A-842 and

[1] While Plaintiff's appeal of the trial court's order was pending before this Court, the General Assembly recodified N.C. Gen. Stat. § 163A to current N.C. Gen. Stat. §§ 120C, 138A, and 163. 2018 N.C. Sess. Laws ch. 146, § 3.1(a). The subsections of former N.C. Gen. Stat. § 163A that control our analysis of this appeal are currently codified at N.C. Gen. Stat. §§ 163-55, -57, -85, -90.1, and -90.2 (formerly N.C. Gen. Stat. §§ 163A-841, -842, -911, -918, and -919, respectively).

therefore that Plaintiff was not qualified to vote in Summerfield. The BOE held a preliminary hearing on Robinson's challenge on 20 February 2018. The BOE subsequently held a full hearing on 17 April 2018 in which the BOE received evidence and testimony from both Robinson and Plaintiff, among others (the "BOE Hearing").

On 24 April 2018, the BOE entered an order sustaining Robinson's challenge (the "BOE Order"). In the BOE Order, the BOE made a number of findings of fact including, *inter alia*, that: (1) Plaintiff was registered to vote in Summerfield, and Plaintiff's voter registration on file indicated that the Summerfield property's address was Plaintiff's "residence address[;]" (2) Robinson had presented a number of documents to support her allegation that Plaintiff resided at the Greensboro property including, *inter alia*, "the address on file with the Real Estate Commission," which used the Greensboro property's address as Plaintiff's "residential address[;]" and (3) Plaintiff "partially moved from the Greensboro [property] to the Summerfield [property] with the intention of moving back to Greensboro while the Summerfield [property] is being renovated." Based upon these findings of fact, the BOE concluded that: (1) "[t]he evidence adduced showed that [Plaintiff] had not established the Summerfield [property] as a residence within the meaning of the statutes as of the time of the hearing" and that "the Summerfield [property] was a temporary residence;" and (2) Robinson "ha[d] shown by affirmative proof that [Plaintiff] is not

a resident of precinct NCGR2 or of the Town of Summerfield" within the meaning of N.C. Gen. Stat. § 163A-842 *et seq*.

Plaintiff filed the instant lawsuit on 26 April 2018 in Guilford County Superior Court (the "trial court") petitioning for review of the BOE Order pursuant to N.C. Gen. Stat. § 163A-919(c) and moving for injunctive relief. In his complaint/petition, Plaintiff (1) alleged that the BOE (a) failed to follow proper procedures for quasi-judicial hearings and (b) failed to make findings of fact sufficient to support its decision, and (2) requested a temporary restraining order and preliminary injunction prohibiting the BOE from changing Plaintiff's voter registration pending the resolution of this litigation.

On 21 May 2018, the BOE answered, moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and asserted a number of affirmative defenses. On 25 May 2018, Robinson answered, moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (6), and asserted a number of her own affirmative defenses.

The trial court apparently entered an order on 12 June 2018 granting Plaintiff a temporary stay in the case pending resolution of the appeal.[2]

On 4 October 2018, the trial court entered an order affirming the BOE Order (the "Trial Court Order"). In the Trial Court Order, the trial court concluded that, based upon its review of the BOE Order and the whole record before the BOE, the

[2] The order entering the stay is not included in the record on appeal.

BOE Order contains no errors of law and the BOE Order's findings of fact and conclusions of law were "supported by competent, material and substantial evidence and by affirmative proof." The trial court accordingly affirmed the BOE Order and dissolved the 12 June 2018 order temporarily staying the modification of Plaintiff's voter registration.

Plaintiff timely appealed.

II. Discussion

A. Standard of Review

When conducting a hearing regarding a voter registration challenge brought pursuant to N.C. Gen. Stat. § 163A-911, a county board of elections sits as a quasi-judicial body. *See Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 745 (2008). A decision by a county board of elections on a voter registration challenge is appealable to the superior court of the county in which the offices of that board are located. N.C. Gen. Stat. § 163A-919(c) (2018).

In reviewing a county board of elections' decision on a voter registration challenge, "the Superior Court acts as an appellate court." *Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745. Our Supreme Court has said:

> [T]he task of a court reviewing a decision . . . [of] a quasi-judicial body includes:
>
> (1) Reviewing the record for errors in law,
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> (2) [E]nsuring that procedures specified by law in both

> statute and ordinance are followed,
>
> (3) [E]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsuring that decisions [] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980); *see Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745 (applying *Coastal Ready-Mix* in reviewing a voter registration challenge heard before a county board of elections). "The superior court should apply *de novo* review to a petitioner's allegation of error implicating one of the first three [*Coastal Ready-Mix* considerations] and whole-record review to the last two." *Jeffries v. Cty. of Harnett*, 817 S.E.2d 36, 43 (N.C. Ct. App. 2018). Whole-record review "necessitates an examination of all competent evidence before the Board and a determination as to whether the Board's decision was based upon substantial evidence." *Farnsworth v. Jones*, 114 N.C. App. 182, 185, 441 S.E.2d 597, 600 (1994). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference. The court may not consider the evidence which in and of itself justifies the Board's result, without taking into account

contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* at 185, 441 S.E.2d at 600 (internal quotation marks, brackets, and citations omitted); *see also Bennett v. Hertford Cty. Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (1984) ("As distinguished from the any competent evidence test and a *de novo* review, the whole record test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." (internal quotation marks and citations omitted)).

"Subsequent review by this Court is limited to whether the trial court committed any errors of law." *Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745. Accordingly, "[w]e review a superior court's *certiorari* review of a [] quasi-judicial decision to determine whether the superior court: (1) exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *Jeffries*, 817 S.E.2d at 43 (quotation marks and citation omitted).

B. Analysis

Plaintiff contends that the trial court erred by affirming the BOE Order because (1) the trial court misallocated the applicable burden of proof in its review of the BOE Order, and because the BOE (2) deviated from permissible procedure in conducting the BOE Hearing and relied upon unsworn witness testimony and unauthenticated documentary evidence and (3) made findings of fact that were not

supported by competent and substantial evidence in the BOE Order. We address each argument in turn.

1. Scope of review/misallocation of burden of proof

Our first task is to determine whether the trial court exercised the appropriate scope of review. In the Trial Court Order, the trial court concluded, in relevant part, as follows:

> The Court has heard and considered the oral arguments of counsel for all parties, has considered memoranda submitted by all parties through counsel, and has reviewed the file, the record, the exhibits and the transcript of the proceedings before the BOE. The Court has conducted a de novo review and finds that the findings and conclusions of the BOE in [the BOE Order] contain no errors of law. The Court has conducted a whole record review of the evidence, findings and conclusions of the BOE, and applying the whole record test, the Court finds that the findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof.

This language indicates that the trial court reviewed the BOE Order in light of the BOE record and the evidence it contained, and reviewed alleged errors of law in the BOE Order *de novo* and alleged factual errors therein using the whole-record test, as required. *Jeffries*, 817 S.E.2d at 43. We therefore conclude that the trial court exercised the appropriate scope of review.

The Trial Court Order then elaborated upon its application of the whole-record test to the alleged factual issues being reviewed, as follows:

> The evidence tends to show that [Plaintiff] never convincingly severed his residency at the [Greensboro property] to live at the [Summerfield property]. [Plaintiff] never showed sufficient proof that he meant to leave the [Greensboro property] and live at the [Summerfield property]. Without sufficient evidence of an abandonment of the [Greensboro property], the BOE properly found that [Plaintiff's] alleged assertion of a temporary departure from [the Summerfield property], and his avowed intention to return there permanently after construction was completed, did not constitute sufficient proof of his position that his return to the [Greensboro property] was merely temporary.

Plaintiff argues that this language demonstrates that, in reviewing the BOE Order, the trial court misallocated the burden of proof, believing it was Plaintiff who was required to prove to the BOE that Summerfield was his residence. We disagree.

N.C. Gen. Stat. § 163A-918(b) reads as follows: "No [voter registration] challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated." N.C. Gen. Stat. § 163A-918(b) (2018). Since Plaintiff was registered to vote in Summerfield, we agree with Plaintiff that the burden was on Robinson to substantiate her challenge by affirmative proof that Plaintiff was not a resident of Summerfield. *Id.*

However, we read the Trial Court Order as concluding that (1) Robinson had substantiated her allegation that Plaintiff resided at the Greensboro property by

affirmative proof[3] and (2) Plaintiff had failed to rebut Robinson's affirmative proof with evidence of his own proving that he resided at the Summerfield property sufficient to defeat Robinson's challenge. The trial court concluded that the "findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof[.]" The language of N.C. Gen. Stat. § 163A-918(b) setting forth that "the presumption shall be that the voter is properly registered or affiliated" specifically applies only "[i]n the absence of [affirmative] proof[.]" N.C. Gen. Stat. § 163A-918(b). Since the trial court concluded that affirmative proof supported the BOE's findings of fact and conclusions of law, including the BOE's ultimate conclusion that Plaintiff was not a Summerfield resident within the meaning of N.C. Gen. Stat. § 163A, the trial court evidently concluded that Robinson had met her burden of proof, and subsection 918(b)'s presumption was not implicated. We accordingly reject Plaintiff's argument that the trial court misallocated the burden of proof.

2. Impermissible procedure/unsworn testimony/unauthenticated evidence

Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE denied him the opportunity to cross-examine Charlie Collicutt, whose unsworn testimony was used to authenticate Robinson's Exhibit 12 ("Exhibit

[3] Indeed, the record on appeal—which Plaintiff filed—contains an email from Judge Craig to the parties stating: "I believe that the challenger met her burden of providing affirmative proof to the BOE[.]"

12"), which the BOE admitted and relied upon in finding that Plaintiff voted in Greensboro in 2016. We disagree.

Exhibit 12 is an email between Collicutt and Robinson in which Collicutt tells Robinson that Plaintiff voted in Greensboro in 2016 and Summerfield in 2017. Collicutt testified at the BOE Hearing without being placed under oath that the document was authentic. Plaintiff takes issue with Exhibit 12 because it was not authenticated by sworn testimony—let alone testimony subjected to cross-examination—and thus, Plaintiff argues, is not competent evidence to support the BOE's finding of fact that Plaintiff voted in Greensboro in 2016.

Even assuming *arguendo*[4] that Plaintiff was not given the opportunity to cross-examine Collicutt, Plaintiff testified that he was both registered to vote and did in fact vote in Greensboro in 2016, and the record contains Plaintiff's 2017 registration to vote in Summerfield. Exhibit 12 thus merely corroborates other evidence in the record. As such, any error resulting from (1) the BOE's consideration of or reliance upon Exhibit 12 or (2) Collicutt's testimony purporting to authenticate Exhibit 12 was harmless, and cannot be the basis for reversal. *See Andrews v. Haygood*, 188 N.C.

[4] Following Collicutt's unsworn colloquy with the BOE—during which time Robinson was sworn in as a witness—Robinson's counsel asked Robinson two more questions and then rested. BOE Chairman Jim Kimel then asked Plaintiff: "Is there any Cross-Examination? Mr. Rotruck, are there any questions you would like to ask the witness here?" Although Chairman Kimel's questions may be reasonably construed as inviting Plaintiff to cross-examine Robinson, rather than Collicutt, if Plaintiff wanted to ask Collicutt questions about Exhibit 12 or cross-examine him in some way, Plaintiff could have done so at this point (or subsequently by putting Collicutt on as his own witness), but did not.

App. 244, 249, 655 S.E.2d 440, 443 (2008) ("verdicts and judgments will not be set aside for harmless error, or for mere error and no more. Instead, [an appellant] must show not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right." (internal quotation marks and citations omitted)). Plaintiff's argument is therefore unavailing.

Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE refused to allow Plaintiff to elicit testimony from witness Elizabeth McClellan regarding Robinson's purported motivations for bringing the voter registration challenge. We reject this argument as well.

At the BOE Hearing, Chairman Kimel told Plaintiff that any testimony McClellan might provide regarding whether "there have been other [Summerfield Town C]ouncil members where the residency has not come into question"—ostensibly in order to establish Robinson's "political motivation" for bringing the voter registration challenge—would be "not relevant" to the question at issue. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2018). We agree with Chairman Kimel that what did or did not happen to other Summerfield Town Council members is not relevant to the question of Plaintiff's residence, and testimony to that effect would therefore be properly excluded. *See* N.C. Gen. Stat. §

8C-1, Rule 402 (2018) ("Evidence which is not relevant is not admissible."). Moreover, the record shows that Plaintiff had a full opportunity to test Robinson's credibility and purported biases on cross-examination following her testimony, but chose not to do so. Plaintiff's argument accordingly fails.

3. Unsupported findings of fact

Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE found that Plaintiff's address on file with the North Carolina Real Estate Commission ("NCREC") was the address of the Greensboro property without receiving any evidence from the NCREC.

In the BOE Order's finding of fact 5 ("Finding of Fact 5"), the BOE found that Plaintiff's "address on file with the [North Carolina] Real Estate Commission" showed he resided in Greensboro. We have found no evidence in the record to support that aspect of Finding of Fact 5.[5] As a result, we agree with Plaintiff that the portion of Finding of Fact 5 regarding Plaintiff's address on file with the NCREC is without sufficient evidentiary basis in the record, and that the trial court erred by not so concluding.

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[5] At the BOE Hearing, Plaintiff was asked to authenticate a document that Robinson's counsel represented as being produced in connection with a subpoena to the "North Carolina Association of Realtors[,]" and Plaintiff said that it appeared to him as coming from "Greensboro Regional Realtors[.]" In their respective briefs on appeal, both parties describe the document as coming from the local chapter of the "Realtors Association[.]" Wherever the document described by the parties—which is not included in the record on appeal—came from, the parties agree that it did not come from the NCREC, and it thus cannot provide evidentiary support for the challenged portion of Finding of Fact 5.

This Court has said, however:

> Notwithstanding a particular finding of fact being unsupported by material and competent evidence, the action of a quasi-judicial body will be sustained if supported by remaining findings of fact upheld by substantial evidence, the erroneous finding being treated as mere surplusage. *See Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 576, 340 S.E.2d 111, 114 (1986) ("[w]here, after erroneous factual findings have been excluded, there remain sufficient findings of fact based on competent evidence to support the [Industrial] Commission's conclusions, its ruling will not be disturbed").

Tate Terrace Realty Investors, Inc. v. Currituck Cty., 127 N.C. App. 212, 222, 488 S.E.2d 845, 851 (1997). Following *Tate*, we discern no prejudicial error from the portion of Finding of Fact 5 regarding Plaintiff's address on file with the NCREC, since we conclude that the BOE Order is supported by other competent and substantial evidence in light of the whole record, including but not limited to the "deeds, tax records, [and] business records" presented by Robinson at the BOE Hearing listed in Finding of Fact 5 as indicating that Plaintiff had maintained the address of the Greensboro property as his residential address. We accordingly reject Plaintiff's argument that Finding of Fact 5 requires reversal.

Plaintiff finally argues that the trial court erred by affirming the BOE Order because the BOE concluded that Robinson affirmatively proved that Plaintiff was not a Summerfield resident without sufficient evidence to do so. This argument is also unavailing.

N.C. Gen. Stat. § 163A-842 sets forth the criteria used by election officials in determining residency for purposes of voter registration. Subsection 842 reads as follows: "That place shall be considered the residence of a person in which that person's habitation is fixed, and to which, whenever that person is absent, that person has the intention of returning[.]" N.C. Gen. Stat. § 163A-842(1) (2018). Subsection 842 also says that "[i]f a person removes to another . . . precinct . . . within this State, with the intention of remaining there an indefinite time and making that . . . precinct . . . that person's place of residence, that person shall be considered to have lost that person's place of residence in th[e] . . . precinct . . . from which that person has removed, notwithstanding that person may entertain an intention to return at some future time." *Id.* at (5).

Our Supreme Court has said that "residence, when used in the election law, means domicile." *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 606, 187 S.E.2d 52, 55 (1972). The *Hall* Court described domicile as follows:

> Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return (*animus revertendi*); it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave (*animus manendi*). Two things must concur to constitute a domicile: First, residence; second, the intent to make the place of residence a home.

Id. at 605-06, 187 S.E.2d at 55.

As mentioned above, a trial court reviewing a board of elections decision must conclude that the decision was "based upon substantial evidence"—i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"—in light of the whole record. *Farnsworth*, 114 N.C. App. at 185, 441 S.E.2d at 600. In the Trial Court Order, the trial court said that it had "conducted a whole record review of the evidence, findings and conclusions of the BOE, and applying the whole record test, the Court finds that the findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof."

At the BOE Hearing, Robinson introduced documentary evidence and testimony tending to show that Plaintiff's residence was the Greensboro property. Although Plaintiff introduced documentary evidence and testimony of his own tending to show that Plaintiff's residence was the Summerfield property, the trial court did not err in concluding that, in light of the whole record, the BOE was presented with relevant evidence adequate to support its ultimate conclusion that Plaintiff did not reside in Summerfield. We accordingly reject Plaintiff's argument that the BOE's ultimate conclusion was unsupported by the whole record.

III. Conclusion

Because we conclude that the trial court did not err by affirming the BOE Order, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge BERGER concur.