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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-283

No. COA20-492

Filed 15 June 2021

Guilford County, No. 18 CVS 1024

STEPHEN LAWING and DONNA LAWING, Plaintiffs,

v.

CHADWICK P. MILLER, C.P. MILLER, INC., DANNY EDWARD EATON, II, and
DANNY EATON PLUMBING, LLC, Defendants.

Appeal by Plaintiffs from order and judgment entered 28 January 2020 by
Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of
Appeals 9 March 2021.

Stephen E. Lawing for Plaintiffs-Appellants.

*Roberson Haworth & Reese, P.L.L.C., by Shane T. Stutts, for Defendants-
Appellees.*

GORE, Judge.

¶ 1

Stephen Lawing and Donna Lawing (collectively, “Plaintiffs”) appeal from a trial court’s award of an attorney fee pursuant to N.C. Gen. Stat. § 75-16.1 in favor of Chadwick P. Miller and C.P. Miller, Inc. (collectively, “Defendants”). Defendants Danny Edward Eaton, II and Danny Eaton Plumbing, LLC have settled their portion of the attorney fee award and have been dismissed from this action. We conclude

that the trial court was within its sound discretion to award a reasonable attorney fee. However, we vacate and remand the award amount for further findings of fact consistent with this opinion.

I. Factual and Procedural Background

¶ 2 In December of 2007, Plaintiffs entered into a written contract with Defendants for the construction of Plaintiffs' home. In August of 2017, Plaintiffs discovered a one-quarter inch gap where a plumbing pipe failed to connect to the back of a bathtub overflow opening, which allowed water to flow into the walls and floor underneath. On 28 September 2018, Plaintiffs filed a complaint purporting to assert a claim for fraud and a Chapter 75 claim for unfair and deceptive trade practices. Plaintiffs contend that Defendants defectively constructed their home and misrepresented that it was constructed in a workmanlike manner. Further, Plaintiffs argued that Defendants were barred from asserting the six-year statute of repose pursuant to N.C. Gen. Stat. § 1-50(a)(5)(e), because they were "guilty of fraud, or willful or wanton negligence in . . . construction of an improvement to real property[.]" N.C. Gen. Stat. § 1-50(a)(5)(e) (2020).

¶ 3 The trial court's findings of fact encompass the procedural history of this action.

3. Plaintiffs' Complaint failed to make any specific allegations of fraud against the Defendants to satisfy the requirements of Rule 9 of the North Carolina Rules of Civil

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4. Plaintiffs' Complaint failed to allege any acts of willful or wanton conduct wherein Defendants intentionally demonstrated a disregard of or indifference to the rights and safety of others or their property or acted with wicked purpose.

5. On December 7, 2018, the Court granted Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

6. On January 16, 2019, the Court denied Plaintiffs' Rule 59 motion[.]

7. On January 28, 2019, attorney Shane Stutts sent a letter to STEPHEN LAWING, in his capacity as attorney of record for Plaintiffs, along with a motion for attorney's fees (hereinafter "Miller Letter"). The Miller Letter proposed to withdraw the motion if Plaintiffs agreed not to calendar any further hearings in Superior Court or file a Notice of Appeal.

8. Plaintiffs, through attorney STEPHEN LAWING, did not respond to the Miller Letter other than filing a Notice of Appeal.

9. On February 11, 2019, attorney Scott Brown sent a letter to STEPHEN LAWING, in his capacity as attorney of record for Plaintiffs, along with a motion for attorney's fees (hereinafter "Eaton Letter"). The Eaton Letter proposed to withdraw the motion if Plaintiffs agreed not to calendar any further hearings in Superior Court or file a Notice of Appeal.

10. Plaintiffs, through attorney STEPHEN LAWING, did not respond to the Eaton Letter other than filing a Notice of Appeal.

11. After all appellate briefs were filed, the Court of

Appeals granted Defendants' motion to dismiss Plaintiffs' appeal.

12. Defendants as the prevailing parties calendared respective motions for attorney's fees pursuant to N.C.G.S. §75-16.1[.]

¶ 4 Pursuant to N.C. Gen. Stat. § 75-16.1, and acting in reliance on the motions, affidavits, and arguments of counsel, the trial court awarded attorney's fees in favor of Defendants Miller in the amount of \$12,000.00 and Defendants Eaton in the amount of \$13,000.00. On 3 March 2020, Plaintiffs timely entered written notice of appeal.

II. Discussion

¶ 5 The issue before this Court is whether the trial court properly exercised its discretion and awarded a reasonable attorney fee to the prevailing party where Plaintiff asserted a claim under Chapter 75 for unfair and deceptive trade practices. Despite Plaintiffs' repeated reference to Defendants as "wrongdoers" and Plaintiffs as "innocent parties," this Court dismissed Plaintiffs' previous appeal in COA 19-481, and Plaintiff's arguments concerning whether the previous appeal was properly dismissed or attempts to relitigate the predicate facts of this controversy are not properly before this Court.

This Court employs a two-pronged standard of review in considering a trial court's award of fees pursuant to N.C. Gen. Stat. § 75-16.1(1). First, we determine whether any competent evidence supports the trial court's findings of fact and whether these findings support the court's

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conclusions of law. Second, we review the trial court's fee award for abuse of discretion. A trial court abuses its discretion only when its award of fees is "manifestly unsupported by reason or wholly arbitrary."

Faucette v. 6303 Carmel Rd., LLC, 242 N.C. App. 267, 278, 775 S.E.2d 316, 325 (2015)

(internal citations omitted).

¶ 6 N.C. Gen. Stat. § 75-16.1 provides for a statutory attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, *in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party*, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

...

(2) The party instituting the action *knew, or should have known*, the action was *frivolous and malicious*.

N.C. Gen. Stat. § 75-16.1 (2020) (emphasis added).

¶ 7 Plaintiffs challenge finding of fact 3 as not supported by competent evidence. However, as the trial court determined, a general assertion that Defendants fraudulently misrepresented the home to be habitable based solely upon the alleged gap behind the bathtub does not meet the standard of particularity as required by Rule 9. We conclude the trial court's findings to be based on competent evidence.

¶ 8 Here, Defendants are the prevailing party, and the trial court is within its discretion to fix a reasonable attorney fee if it finds that Plaintiffs knew, or should

have known, that the action was malicious or frivolous. Plaintiffs failed to make sufficiently specific allegations of fraud, and their claim was barred by the Statute of Repose. The findings of fact support a conclusion that Plaintiffs, at the very least, should have known that the action was frivolous or malicious. Plaintiffs argue that Defendants failed to state with any particularity the grounds for relief in their motion for attorney fees in accordance with Rule 7(b)(1). However, the record reveals the following in Defendants' motion for Attorney's Fees:

3) That Plaintiffs knew or should have known that their 2018 Complaint alleging construction defects related to the construction of their home in 2008 failed to include any specific allegations of fraud and was frivolous and malicious as being well beyond the 6-year Statute of Repose for construction and improvements to real property set forth in N.C.G.S. §1-50.

Defendants did not merely cite the rule number but specified grounds for the motion with particularity. The allegations were sufficient to support an award.

¶ 9 Plaintiff argues that the trial court failed to make findings of fact or conclusions of law to support the award. Furthermore, they argue that Defendants failed to present evidence sufficient to support the award of attorney fees.

¶ 10 In an award of attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1, "the trial court must make findings of fact to support the award. Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of

the attorney.” *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). In this case, the trial court does have discretion to fix a reasonable attorney fee, but it must make specific findings of fact to support that award.

¶ 11 Counsel for Defendants submitted an affidavit detailing the time spent and costs incurred, but the trial court did not make any specific findings beyond indicating that it relied upon the motion and affidavits in making its determination. The affidavit indicates \$17,632.80 in legal fees and expenses, but the trial court reduced that award to \$12,000. It is entirely unclear how a reasonable fee of \$12,000 was determined absent specific findings on the record specifying “time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney.” *Id.*

¶ 12 The findings of fact must reflect this determination and a conclusory assertion that the award was reasonable is insufficient for this Court’s review. *See Cotton v. Stanley*, 94 N.C. App. 367, 370, 380 S.E.2d 419, 421 (1989) (“This order is deficient in that the findings of fact are inadequate to enable this Court to determine whether or not the award of attorneys’ fees was reasonable.”)

¶ 13 We hold that the trial court was authorized to award a reasonable attorney fee pursuant to N.C. Gen. Stat. § 75-16.1. However, the order is vacated with respect to the amount of the award and remanded for further findings of fact. “On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive

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such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion.” *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 2021-NCCOA-41, ¶ 43 (quotation marks and citation omitted).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).