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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-572

No. COA20-825

Filed 19 October 2021

Forsyth County, No. 18-CVS-5258

KYLE MCKINNEY, Plaintiff,

v.

WILLIAM CHANDLER ESHLEMAN,
Individually, d/b/a THE GALLERY
ON 1ST ST, d/b/a CHANDLER'S
INTERNATIONAL AUCTIONS &
ESTATE SALES, Defendants.

Appeal by Defendants from judgment and order entered on 22 April 2020 by Judge Lora Cubbage in Forsyth County Superior Court. Heard in the Court of Appeals 25 August 2021.

Fox Rothschild LLP, by Matthew Krueger-Andes and Robert H. Edmunds, Jr., and McAllister, Aldridge & Kreinbrink, PLLC, by Kenneth W. McAllister, for the Plaintiff-Appellee.

The Law Office of Michelle Vincler, by Michelle Vincler, for the Defendants-Appellants.

JACKSON, Judge.

I. Factual and Procedural Background

In December 2014, Kyle McKinney (“Plaintiff”) hired William Chandler

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Eshleman (“Defendant”) to auction much of her deceased husband’s property. Plaintiff was the executor of her husband’s estate, and Defendant was good friends with the deceased for about 20 years. Defendant was a licensed auctioneer in North Carolina who conducted business under the assumed names of Chandler’s International Auction & Estate Sales and Chandler’s International Auctions (hereinafter collectively referred to as “Defendant”).

¶ 2 At Plaintiff’s expense, Defendant traveled to Plaintiff’s home in Montana to pack hundreds of items onto a rental truck and transport them to his place of business in Winston-Salem, North Carolina. Prior to Defendant’s arrival, Plaintiff had already boxed many of the items, which she inventoried on a handwritten list. On 17 December 2014, the parties contracted for Defendant to auction Plaintiff’s consigned goods. Attached to the consignment contract was a list of items (“Chandler’s List”) which was handwritten by Defendant in Plaintiff’s presence. Plaintiff’s pre-packaged items, which Defendant did not inspect prior to leaving Montana, were not included on Chandler’s List. Even after transporting them to North Carolina, Defendant never prepared a full inventory of Plaintiff’s items.

¶ 3 About a month later, the North Carolina Auctioneer Licensing Board (“NCALB”) suspended Defendant’s auctioneer’s license for 90 days. Although Defendant had been under investigation by the NCALB since April 2014, he did not inform Plaintiff of the investigation, nor did he inform her when his license was

suspended.

¶ 4 After his suspension was lifted, Defendant conducted a total of eight online auctions that included Plaintiff's consigned items, dated 24 January, 25 January, 30 May, 31 May, 3 July, 2 August, 13 December 2015, and 5 March 2016. Plaintiff received three total interim consignor settlement statements from Defendant, which covered the auctions from January, May, and July 2015. Each statement reflected a listing that purported to be all the items sold, the net proceeds to be paid to Plaintiff, the deduction of Defendant's commission, and whether any consigned items remained unsold. The first two statements indicated that there were unsold consignment items of Plaintiff's, but the third and final statement indicated that none of Plaintiff's inventory remained. The last payment to Plaintiff, from the third consignment statement, was dated 20 July 2015. Plaintiff did not receive statements or payments for the auctions of her items conducted on 2 August, 13 December 2015, or 5 March 2016.

¶ 5 For months, Plaintiff repeatedly called and emailed Defendant and his wife, who worked for the auction business, about the unpaid balances and unsold items that remained in Defendant's possession. On 6 June 2016, Plaintiff specifically inquired about her unsold items, indicating to Defendant that she was arranging a pickup and needed to know what size vehicle to get. That same day, Defendant responded that Plaintiff's items were stored in "one box" which he would retrieve

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within a couple weeks; he also told Plaintiff he would have his shipper contact her to arrange the shipment. Thereafter, no one contacted Plaintiff about the possibility of shipment, despite Plaintiff continuing to call and email about the unsold goods. Plaintiff received varying responses from Defendant and his wife about the remaining consigned goods, including that the goods were not easily accessible, Defendant and his wife were too busy to retrieve them, the goods would be retrieved when “weather allows,” and the goods were considered forfeit under the terms of the contract. Defendant and his wife also repeatedly assured Plaintiff that there were no payment discrepancies. Plaintiff did not receive the box of her unsold items until retrieved by her counsel in August 2019.

¶ 6 Plaintiff pursued multiple remedies. In January 2018, Plaintiff filed a complaint against Defendant with the NCALB, and on 5 October 2018, Plaintiff filed suit. On 14 October 2019, Plaintiff received a letter from the NCALB indicating that a consent order was entered against Defendant based on the NCALB finding that Defendant comingled funds. Defendant admitted to the violation and was issued a letter of reprimand.

¶ 7 A bench trial was held in February 2020. At trial, Plaintiff introduced detailed evidence of her unsold consigned items, cross-referencing Defendant’s auction listings, as well as sold items that she was not timely paid for. Based on this evidence, the estimated value of her damages was \$29,274.00, excluding any items that did not

appear on Chandler's List, items from the box returned in August 2019, and hundreds of smaller items that were never returned to Plaintiff. Despite initially representing that he no longer possessed Plaintiff's items, Defendant admitted at trial that he still had some of Plaintiff's valuable jewelry stored in a safe. Because of the inconsistent testimony, the trial court found that Defendant and his wife were not credible witnesses.

¶ 8 The trial court ultimately found and concluded that (1) Defendant unlawfully converted Plaintiff's unsold items, (2) Defendant breached the consignment contract by failing to return Plaintiff's items and failing to timely pay her in full for the auctions of her consigned items, and (3) several of Defendant's actions were unfair or deceptive trade practices.¹ The trial court ordered Defendant to return Plaintiff's jewelry within ten days and trebled Plaintiff's actual damages of \$29,274.00 under N.C. Gen. Stat. § 75-16, for a total of \$87,822.00 in damages.

¶ 9 Defendant filed a timely written notice of appeal.

II. Analysis

A. Standard of Review

In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light

¹ The trial court's findings and conclusions will be elaborated as needed in the analysis below.

of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of N.C., LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010)

(internal citation omitted).

B. Conversion

¶ 10 Defendant argues that the trial court erred in finding conversion because: (1) Defendant did not refuse to surrender Plaintiff's property, but instead he merely refused to incur the expense of shipping, and "it is clear that the Plaintiff was not *forced* to file a lawsuit to retrieve her items"; and (2) Defendant's refusal to return the property was not wrongful, because Plaintiff was "free to arrange for the return of her items had she just notified the Defendants" and "[n]o act by the Defendant . . . interfered with Plaintiff's ability to attempt to retrieve her property." Both of Defendant's arguments are without merit.

¶ 11 "[C]onversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burlison's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (internal quotation and citation omitted).

Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into

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possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort. When demand is made, and absolute, unqualified refusal to surrender, which puts the plaintiff to the necessity of force or a lawsuit to recover his own property, is of course a conversion.

Hoch v. Young, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203 (1983) (internal quotation and citation omitted).

¶ 12 Here, Defendant’s first argument is belied by the trial court’s finding that “Plaintiff never requested that Defendant Eshleman pay for the return shipping of her unsold consigned items[,]” and, in fact, the only items returned to Plaintiff were returned at her expense. This finding was amply supported by competent evidence. Plaintiff testified that she knew she had to pay for shipment and was waiting on Defendant’s shipper to contact her, and none of the emails between Plaintiff and Defendant support his contention that Plaintiff expected him to pay the shipping costs. In fact, the emails between the parties directly support the conclusion that Defendant refused to surrender Plaintiff’s property. On 30 March 2017, Defendant emailed Plaintiff,

I will not use my personal time to inventory or dig out a couple of boxed items of no monetary value, nor will I incur the costs to have people move items around which were offered to you when accessible. . . . Once I get to your items in storage—when weather allows this summer, I will personally drop these with a shipper. You can then pay to have the items properly packed for shipping and sent anywhere you choose. Regardless, our terms are clear on

the contract. The items are considered forfeit.

Defendant's argument that Plaintiff was not "forced" to file a lawsuit to retrieve her items is also completely without merit. Plaintiff did not receive the boxed items until August 2019, almost a year after this lawsuit was filed. Additionally, at the time of trial and years after Plaintiff first inquired about her items, Defendant admitted that he still had Plaintiff's jewelry in his possession.

¶ 13 Defendant's second argument is similarly without merit. Our precedent does not require that Defendant's refusal be wrongful, just that Plaintiff's demand for her property was made and met by Defendant's refusal to surrender. *See e.g., Hoch*, 63 N.C. App. at 483, 305 S.E.2d at 203. The trial court found that "Plaintiff called and e-mailed Defendants regarding her goods and their availability for pick up or shipment on numerous occasions," and "Defendants interfered with Plaintiff's ability to replevy these goods." Again, competent evidence of the parties' email correspondence and Plaintiff's testimony support these findings.

¶ 14 Therefore, we agree with the trial court's conclusion on conversion because Defendant wrongfully refused to surrender Plaintiff's property and his arguments on appeal are meritless.

C. Breach of Contract

¶ 15 Defendant argues that the trial court erred in concluding Defendant breached the consignment contract because (1) the statute of limitations had run for any breach

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resulting from the January, May, and July 2015 auctions, and (2) the evidence does not support the trial court's finding of breach. We disagree with both arguments.

¶ 16 Breach of contract results from a party's nonperformance or defective performance of a contractual duty. *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 692, 564 S.E.2d 641, 644 (2002). The statute of limitations for a breach of contract claim in North Carolina is three years from the date of breach. N.C. Gen. Stat. § 1-52(1) (2019). The statute of limitations begins to run when a claim accrues. *Abram v. Charter Med. Corp.*, 100 N.C. App. 718, 721, 398 S.E.2d 331, 333 (1990). Generally, a cause of action accrues at the time the contract is breached. *Id.* However, when there are a series of wrongful acts, the statute of limitations is tolled until the last wrongful act occurs under the continuing wrong doctrine. *See Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 70, 813 S.E.2d 218, 226 (2018). In deciding whether to apply the continuing wrong doctrine, a court

must examine the wrong alleged by the plaintiff to determine if the purported violation is the result of continual unlawful acts, each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the continual ill effects from an original violation. If the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation[.]

Id. (internal marks and citations omitted).

¶ 17 Regarding Defendant's first argument, we hold that the continuing wrong

doctrine applies, and the statute of limitations had not run on Plaintiff's breach of contract claim. Defendant's contention that breach based on nonpayment should be limited to any items listed and sold after 20 July 2015,² is unavailing, because Defendant engaged in "continual unlawful acts" of nonpayment up until the last auction of Plaintiff's goods in March 2016. Therefore, Plaintiff's claim for breach of contract was filed well within the three-year statute of limitations when she filed her complaint on 5 October 2018, because the limitations period continued to renew through March 2016 under the continuing wrong doctrine.

¶ 18 Regarding Defendant's second argument, we again hold that the trial court's findings of fact are supported by competent evidence, and those factual findings support the legal conclusion that Defendant breached the consignment contract. The trial court made the following detailed findings of fact:

8. On or about December 17, 2014, Plaintiff and Defendant Eshleman executed a consignment contract (hereinafter "Contract") that listed Plaintiff as the consignor and Defendant Eshleman as auctioneer. Attached to the Contract [were] six (6) pages of itemized property [and] a description of the items, which were handwritten by Defendant Eshleman in presence of

² Defendant does not clarify in his brief how limiting the breach of contract claim to acts occurring after 20 July 2015 would impact the damages in this case, if at all. Plaintiff was not paid for three auctions that took place after this date, and Defendant continued to unlawfully possess some of Plaintiff's unsold consignment items until trial. Moreover, the trial court's calculation of damages appears to be equally, if not primarily, based on the conversion claim. Because Defendant's statute of limitations argument can be resolved under the continuing wrong doctrine, we need not address these discrepancies.

Plaintiff. This consignment inventory form is sometimes hereinafter referred to as “Chandler’s List”.

9. The Plaintiff had numerous other items that were not boxed or packaged by Defendant Eshleman or identified on Chandler’s List. Defendant Eshleman told Plaintiff to put these boxes and other items on the truck and that he would provide a list of all of the items transported to Winston-Salem to Plaintiff.

10. On or about December 18, 2014, Defendant Eshleman left Plaintiff’s residence to transport Plaintiff’s items to North Carolina for listing at auction. Plaintiff e-mailed several pages of a handwritten list of items taken to North Carolina to Defendant Eshleman on December 19, 2014. Defendants never prepared an inventory of all of Plaintiff’s items that were transported to North Carolina to the Plaintiff, as promised.

...

16. Defendant Eshleman conducted eight (8) auctions that included Plaintiff’s consigned items. All of these sales were performed on the online auction platform LiveAuctioneers.com. The auctions were held on January 24 and 25, 2015, May 30 and 31, 2015, July 3, 2015, August 2, 2015, December 13, 2015, and March 5, 2016.

...

18. Plaintiff did not receive consignment accounting or payments from the Defendants after the third statement for the auctions conducted on August 2, 2015, December 13, 2015, or March 5, 2016. Plaintiff received no payments beyond the first three (3) payments set forth above. The three (3) interim prior accountings received by the Plaintiff stated that inventory remained. The final summary document directly contradicted the three (3) prior accountings and indicated that “no inventory remains for the consignment order”.

...

25. At trial, Plaintiff submitted lists with photographs, references to past online auctions of her goods listed by Defendant Eshleman, lot numbers for the auction items and evidence of the value of several items at the time of original purchase. Plaintiff's evidence consisted of self-created Excel spreadsheets of items that she categorized as "sold but not paid for," "items not sold but listed at auction but not returned," "items sold at auction for an amount greater than she was paid", and an extensive list of "items not returned". The list of items that Plaintiff reported as "not sold and not returned" included photographs of a diamond and sapphire ring, a 3.44 carat Ceylon sapphire, a 7.3 carat ruby and a ring with three (3) heads. The estimated value for these four (4) items cumulatively was stated by the Plaintiff as \$23,489.00. Plaintiff listed the auction dates of some of the above-listed jewelry and the lot numbers of each auction and referenced some items to Chandler's list. Plaintiff also listed numerous vintage books one being Ulysses Grant's memoirs allegedly signed by him, though not verified, and many other items that were never offered for auction, sold or returned.

...

28. Plaintiff provided evidence of damages in the amount of \$46,220.80 for items that were not returned to her or were sold without the payment of net proceeds. This amount was based on the list Defendant Eshleman created and items that appeared in Plaintiff's handwritten list that was subsequently provided to Defendant Eshleman via email, which included items not listed on Chandler's List. This value did not include hundreds of other smaller items that were never returned to Plaintiff.

29. Plaintiff also testified and produced evidence that showed that \$29,247.00 of the \$46,220.80 value were items listed on Chandler's List, which was signed and acknowledged by Defendant Eshleman when he picked up

the items in Montana.

...

33. Defendant Eshleman testified that he believed the items not retrieved by Plaintiff were abandoned property, of which Defendant became the owner. . . . Nothing in the Contract provides Defendant Eshleman an ownership right in any goods consigned to him that were not sold, reclaimed or picked up by Plaintiff.

¶ 19 Because there is ample evidence to support these factual findings, including Plaintiff's testimony, records of the parties' emails, and detailed spreadsheets of Plaintiff's consigned items cross-referencing Defendant's auction listings, these findings are binding on appeal. Therefore, we do not disturb the trial court's conclusion that Defendant breached the consignment contract because there was competent evidence to support that (1) Defendant failed to timely pay Plaintiff in full for the sale of her consigned items, and (2) Defendant failed to return Plaintiff's unsold items.

D. Unfair or Deceptive Trade Practices (“UDTP”)

¶ 20 Under N.C. Gen. Stat. § 75-1.1 (2019), unfair or deceptive commercial acts or practices are unlawful. “[A] trade practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers[,]” and “deceptive if it has the capacity or tendency to deceive.” *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61-62, 418 S.E.2d 694, 700 (1992) (internal marks and citations omitted). Whether a particular act is an unfair or deceptive practice is a

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question of law. *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007).

¶ 21 Here, the trial court found the following acts to be unfair and deceptive trade practices:

[1] Defendant Eshleman never advised the Plaintiff that his auctioneer license was under investigation and had been under investigation for several months, that a disciplinary hearing was held, and that his license was suspended for a ninety (90)-day period by the NCALB on January 12, 2015 through April 30, 2015;

[2] That Defendant Eshleman failed to provide the Plaintiff with a list of all the items that Plaintiff delivered to him under consignment as required by the regulations of the NCALB and N.C. Gen. Stat. § 85B-7(b);

[3] That Defendant Eshleman converted Plaintiff's goods for his own use and benefit without the authorization of the Plaintiff and did so knowingly; and

[4] That the NCALB accepted the consent order offered by Defendant Eshleman, which provides that Defendant Eshleman violated N.C. Gen. Stat. § 85B-7(b) and Section 21 NCAC 4B.0603(c), which require an auctioneer to hold seller's auction proceeds in a custodial/trust/escrow account separate from other types of personal business funds prior to distribution to the auctioneer's sellers.

¶ 22 Defendant contends that each of these findings cannot support a UDTP claim. Because we do not disturb the trial court's findings of fact, the question for this Court is whether, as a matter of law, these acts are unfair or deceptive. Because we conclude that Defendant's acts of conversion can singularly support Plaintiff's UDTP

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claim, we affirm the trial court’s UDTP conclusion based on this claim and need not address Defendant’s other UDTP arguments.

¶ 23 “[A]cts of conversion may constitute unfair and deceptive trade practices[.]” *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 83, 665 S.E.2d 478, 487 (2008). See *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 375, 614 S.E.2d 555, 561 (2005) (holding that the conversion of plaintiff’s property supported a UDTP claim where defendant “deni[ed] [] any realistic opportunity to remove the goods,” and “fail[ed] to respond to plaintiff’s prompt inquiries”); *Love v. Pressley*, 34 N.C. App. 503, 505, 516-17, 239 S.E.2d 574, 576, 583 (1977) (holding that defendant-landlord’s conversion of plaintiff-tenant’s property supported plaintiff’s UDTP claim where defendant removed plaintiff’s property from the premises and then failed to answer or return plaintiff’s phone calls inquiring about the property).

¶ 24 Defendant argues that there were no “aggravating circumstances” to support the conversion of Plaintiff’s property as an unfair or deceptive trade practice.³ We disagree and hold that the conversion claim on its own supports the trial court’s

³ Defendant bases this argument on our precedent holding that “a mere breach of contract” cannot independently support a UDTP claim unless supported by aggravating circumstances. *Governor’s Club Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 266, 567 S.E.2d 781, 797 (2002). However, given the aggravating circumstances found by the trial court, this argument is misplaced, and as explained, our precedent allows conversion to support a UDTP claim.

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finding of unfair and deceptive trade practices in violation of § 75-1.1, because the record evidence and the trial court’s findings establish that Defendant not only unlawfully converted Plaintiff’s property as discussed *supra*, but he did so “egregious[ly], immoral[lly], oppressive[ly], unscrupulous[ly]” and “with a tendency to deceive.” *Branch Banking & Trust Co.*, 107 N.C. App. at 61-62, 418 S.E.2d at 700.

¶ 25 Like the defendants in *Eley* and *Love*, Defendant was unresponsive to Plaintiff’s requests to retrieve her goods and gave Plaintiff no realistic opportunity to recover her property. Beginning in June 2016, Plaintiff made repeated requests to Defendant for the return of unsold items which were met by Defendant’s numerous excuses as to why he could not retrieve her property. Additionally, Defendant repeatedly represented to Plaintiff that her goods were stored in “one box,” but at trial, for the first time, Defendant admitted that some of Plaintiff’s valuable jewelry was stored in a safe.

¶ 26 In August 2019, months after initiating these court proceedings and years after her first request, Plaintiff finally received a box of her goods. However, at trial, she still had not received the items stored in Defendant’s safe. Again, Defendant offered conflicting excuses to the trial court for the delays in retrieving her various items, including:

- (1) The box of her goods was “not something you could ship easily UPS or FedEx.”

(2) “[W]e offered to get [the safe containing Plaintiff’s jewelry] out. The ground’s been saturated and we haven’t been able to get a forklift back to get it out.”

(3) “[T]he items were forfeited.”

(4) “We didn’t know and I had forgotten in a little over two years that they had even put that box in there.”

(5) “[It] literally boils down to where [the items are] located and how much rain and how wet the last six or eight weeks have been. And [] a 5,000 pound safe takes a major forklift, all-terrain, in-the-mud forklift. It’s not gravel. It’s not paved to be able to lift these things out in a level area safely.”

¶ 27 Accordingly, we affirm the trial court’s finding that Defendant engaged in unfair and deceptive trade practices by converting Plaintiff’s property and need not discuss the other UDTP findings.

III. Conclusion

¶ 28 For the foregoing reasons, we hold that the trial court did not err in finding and concluding that Defendant unlawfully converted Plaintiff’s items, breached the consignment contract, and engaged in unfair or deceptive trade practices. We therefore affirm the order and judgment.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).