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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-691

No. COA21-770

Filed 18 October 2022

Cumberland County, No. 19 CVS 2212

MAHER MOHD ALI EL-HATTO and AHMAD MOHAMMAD ALI EL-HATTO by and through his Attorney-in-Fact, MAHER MOHAMMAD EL-HATTO, Plaintiffs,

v.

HASAN MOHAMMAD ALI EL-HATTO, Defendant.

Appeal by Plaintiffs from order and final judgment entered 13 July 2021 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 10 August 2022.

Macrae, Perry, Macrae & Whitley, L.L.P., by Gregory T. Whitley, for Plaintiffs-Appellants.

The Charleston Group, by Jose A. Coker and R. Jonathan Charleston, for Defendant-Appellee.

WOOD, Judge.

¶ 1

Plaintiffs Maher Mohd Ali El-Hatto and Ahmad Mohammad Ali El-Hatto (“Plaintiffs”) appeal an order and final judgement entered following a non-jury trial held during the June 28-29, 2021, Civil Superior Court Session of Cumberland County. Plaintiffs contend that the trial court erred in finding (1) a 2014 agreement

(“Agreement”) entered in the country of Jordan¹ between the parties did not control the ownership of a residential property in Cumberland County (“Subject Property”); (2) the Agreement did not create an affirmative duty on Mr. Hassan El-Hatto (“Defendant”) to convey the property to Plaintiff Ahmad; and (3) the Agreement did not create a constructive trust for the benefit of Plaintiff Ahmad. Additionally, Plaintiffs contend the trial court erred in finding that Defendant and his wife are the rightful owners of the Subject Property and erred in denying their motion to stay the proceedings. Based upon the reasoning below, we affirm the trial court’s order and final judgment.

I. Factual and Procedural Background

¶ 2

Plaintiffs and Defendant are three of seven brothers who are natives of Jordan with numerous business ventures in the United States and in Jordan. In 1980, Defendant moved from Jordan to North Carolina to attend Shaw University, and after graduating, remained in North Carolina to start his own business. On July 8, 1988, Defendant entered into an option to purchase contract on the Subject Property with Edward and Geraldine Tighe, which is recorded in the Cumberland County Register of Deeds. On December 7, 1988, Defendant exercised his option to purchase the Subject Property, and the Tighes executed a North Carolina general warranty

¹ Officially, the Hashemite Kingdom of Jordan.

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deed to Defendant. The deed is recorded in the Cumberland County Register of Deeds.

¶ 3 On the same day, Defendant secured a mortgage from Southern National Bank in his personal name for the Subject Property, by executing a deed of trust with Southern National Bank as the Beneficiary. Defendant paid an initial down payment of \$20,000 for the Subject Property. In 1989, Defendant married and in 1990, he and his wife moved into the residence on the Subject Property. Thereafter, Defendant became a U.S. citizen. Defendant's parents and siblings, including Plaintiffs, stayed with Defendant and his wife at the Subject Property whenever they visited North Carolina.

¶ 4 In 1995, Defendant traveled to Jordan at his father's request to assist in operating his father's business and managing his investments. Consequently, Defendant executed a general Power of Attorney on February 2, 1995, granting Plaintiff Maher the authority to manage his personal and real property, including paying the taxes and related expenses on the Subject Property, and granting access to Defendant's bank accounts in order to manage his business investments. Plaintiff Maher stayed at the Subject Property between 1995 and 2014 while Defendant resided in Jordan. On July 26, 2000, Defendant paid the mortgage balance on the Subject Property, and the deed of trust was canceled on August 2, 2000.

¶ 5 The parties' father died in 2012, bequeathing certain property intended to be

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distributed amongst his seven sons as heirs to his estate. On April 10, 2014, the seven brothers, including the parties, entered into an Agreement in Jordan with the intent to allocate evenly the family's real and personal assets. The Agreement was prepared in Arabic and later translated into English. According to its terms, the brothers agreed that they "would like jointly to divide" their "movable and immovable funds . . . registered in their names separately and/or in partner with each other." The Agreement contains the phrase, "the following pieces of lands indicated in the attached list, attachment no. (1) indicated in it[.]" which appears to reference an attachment identifying "the pieces of land" intended to be distributed amongst the brothers, including "the complete pieces of lands in [the] USA." The brothers first purported to agree that several pieces of property including "the complete pieces of lands in [the] USA . . . should be returned to the brother [Defendant]." The Agreement then states that the brothers "agreed jointly on distributing pieces [of property] mentioned above as follows: . . . 3. [Plaintiff] Ahmad[:] All pieces of land located in [the] USA and its investments." Additionally, the Agreement contained an arbitration provision identifying a Jordanian arbitrator to resolve disputes arising out of the Agreement.

¶ 6

In 2014, Defendant and his wife left Jordan and returned to the Subject Property in North Carolina. Upon their return to the residence, they discovered it was in a state of disrepair. On May 2, 2014, Defendant revoked his Power of Attorney

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previously appointing Plaintiff Maher. Thereafter, Defendant discovered he was unable to obtain construction permits needed to repair the Subject Property because of a pending condemnation action by the North Carolina Department of Transportation (“NCDOT”) as part of an expansion plan for roadways. On March 11, 2015, Defendant and his wife filed a complaint and request for declaratory judgment against NCDOT relating to the Subject Property. On February 7, 2019, Defendant, his wife, and NCDOT entered into a settlement agreement.

¶ 7

Subsequently, Defendant and his wife executed a deed for highway right of way to NCDOT on the Subject Property, which is recorded in the Cumberland County Register of Deeds, and Defendant and his wife received the amount of \$340,000.00 in return. On April 9, 2019, Plaintiffs filed an unverified complaint against Defendant concerning the Subject Property and the NCDOT settlement funds. Plaintiffs asserted claims including: (1) a constructive trust was created for the benefit of all seven brothers alleging that Plaintiff Maher paid for all of the costs associated with the Subject Property while Defendant was a “strawman”; (2) an express trust was created through the Agreement of which Plaintiff Ahmad was the beneficiary; and (3) a request for a preliminary injunction to prevent Defendant from receiving the NCDOT settlement funds until the brothers could agree on the division of the proceeds. On October 24, 2019, Defendant filed a verified Answer, Motions to Dismiss, Motion to Compel Arbitration, and a Counterclaim. On or about December

23, 2019, Plaintiffs filed their Response to Defendant's counterclaim.

¶ 8

Plaintiffs later pursued arbitration proceedings in Jordan on January 10, 2021, while continuing this litigation in North Carolina. On May 5, 2021, Plaintiffs filed a motion to stay proceedings until such time as the arbitration claims in the country of Jordan were complete. On May 25, 2021, the trial court denied both Plaintiffs' motion to stay proceedings and Defendant's motion to dismiss Plaintiffs' complaint. During the pre-trial conference on June 28, 2021, the trial court granted Plaintiffs' oral motion to dismiss Defendant's counterclaims.

¶ 9

Cumberland County Superior Court Judge Gale M. Adams conducted a bench trial on June 28 and 29, 2021. The trial court entered an order on July 13, 2021, finding that attachment no. (1) which purportedly identified the properties to be distributed under the terms of the Agreement did not accompany the Agreement presented at trial. The trial court also found that (1) certain property listed for distribution in the first paragraph of the Agreement was not included in the provisions as to "how the property listed in paragraph one is to be distributed" and (2) the provisions dividing the property between the brothers "mentions property not included in paragraph one" so that there was inconsistency in the Agreement. The court further noted that "[t]o date, the brothers . . . have not executed those transfers and it appears that the deadline for compliance has passed."

¶ 10

Additionally, the trial court found that Plaintiffs did not plead or give

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reasonable notice as to the applicability of foreign law and that “[no] party offered proof of the law of Jordan as to the proper interpretation of the contract as it relates to the rights of the parties or the applicability of Jordanian law to enforcement of [Plaintiffs’] claims of a constructive and/or parol trust-express trust.” The court determined that the Agreement never expressly referenced or identified the Subject Property and that there are “no other written agreements between [Defendant] and any of his siblings, including [Plaintiffs], that expressly reference or identify the division or distribution of the Subject Property.” Further, the trial court found that both parties had testified that several brothers own vacant land in the United States which do not contain houses and that the Agreement includes sections which specifically lists houses or other structures as part of the transfer of land.

¶ 11 The trial court noted that Defendant is the “only legal owner identified of record for the Subject Property by the Cumberland County Register of Deed’s Office and . . . Tax Office [as being] responsible for paying the taxes for the Subject Property.” Defendant “paid or authorized to be paid on his behalf through [Plaintiff Maher] the Cumberland County taxes for the Subject Property.” The trial court also found that “Plaintiffs have never paid or reimbursed Defendant the purchase price of the Subject Property.”

¶ 12 The trial court further found that Plaintiffs had not plead “any declaratory relief or breach of contract/agreement in their [c]omplaint”; their complaint did not

“allege a constructive trust was created by the [Agreement] specifically”; and “[t]here is no evidence in the Court file that Plaintiffs made a demand for arbitration in the [c]omplaint or in any subsequent filing.”

¶ 13 In its conclusions of law, the trial court concluded that because Jordanian law was not raised or proven by the parties, the Agreement would be interpreted under North Carolina substantive contract law. As to Plaintiffs’ constructive trust claim, the court concluded that Plaintiffs failed to show the existence of an agreement by which the parties agreed Defendant was to “constructively hold the Subject Property in trust for the brothers, to include [Plaintiff Ahmad]” and that there was insufficient evidence Defendant acquired the Subject Property through fraud, breach of duty, or some other circumstances making it inequitable for Defendant to retain the Subject Property. The trial court determined that neither the 2014 Agreement nor the actions and deeds of the parties operated to create an express trust for the Subject Property. The court also concluded that because: (1) the parties did not take measures so that Jordanian law would apply to the interpretation and enforcement of the Agreement; (2) Plaintiffs did not file claims for declaratory relief or breach of contract; and (3) the brothers never executed any transfers or deeds to the Subject Property, as indicated in the Agreement, so that “[Defendant] retained ownership until such time as a valid transfer of ownership occurred.”

¶ 14 Additionally, the trial court found that the “Agreement on its face appears

vague, ambiguous, inconsistent, and incomplete” because the Agreement did not specify the Subject Property, so Plaintiffs are not “entitled to recover the proceeds from the sale of the Subject Property[.]” The trial court further held that “Defendant and his wife are the lawful owners of the Subject Property and are entitled to the [NCDOT] settlement proceeds.” Finally, the trial court held that the parties should not “dismiss their claims and be bound by arbitration” and this “decision is one to be made by the parties, not the Court.” Plaintiffs filed and served written notice of appeal on August 3, 2021.

II. Discussion

¶ 15 Plaintiffs raise several issues on appeal. Each will be addressed in turn.

A. Standard of Review

¶ 16 “[W]hen the trial court sits without a jury, the standard of review on appeal 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 of such facts.” *Daly v. McKenzie*, 250 N.C. App. 611, 615, 795 S.E.2d 120, 123 (2016) (citation omitted). “If the court’s factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary.” *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001). The trial court’s conclusions of law are reviewed *de novo*. *Id.* at 247, 542 S.E.2d at 341. “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.”

Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, 272 N.C. App. 240, 245, 846 S.E.2d 540, 544 (2020) (citation omitted).

B. The 2014 Jordanian Agreement

¶ 17 First, Plaintiffs contend the trial court should have found that the Agreement controlled the disposition of the Subject Property as well as the proceeds from the NCDOT settlement and that the Agreement created an “affirmative duty” for Defendant to convey the property to Plaintiff Ahmad.

¶ 18 We note Plaintiffs’ complaint failed to plead specific performance of the Agreement, declaratory relief, or breach of the written Agreement. “Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court. . . .” *N.C. Nat. Bank v. Carter*, 71 N.C. App. 118, 122, 322 S.E.2d 180, 183 (1984). Plaintiffs never moved to amend their pleadings to include a claim for declaratory relief or a breach of contract against Defendant. “When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” *Rink & Robinson, PLLC v. Catawba Valley Enters., LLC*, 220 N.C. App. 360, 367, 725 S.E.2d 426, 431 (2012) (quoting N.C. Gen. Stat. § 1A-1, R. 15(b) (2021)).

¶ 19 Here, Defendant’s trial counsel objected and argued that the only causes of action before the trial court were constructive trust as to Plaintiff Maher and an express trust as to Plaintiff Ahmad.

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¶ 20 Pertaining to the disposition of property, “[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith.” N.C. Gen. Stat. § 22-2 (2021). Real property “can only be conveyed by *deed*, that is, an instrument of writing signed, sealed, and delivered.” *Strain v. Fitzgerald*, 128 N.C. 396, 398, 38 S.E. 929, 930 (1901). To create a valid contract, “the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.” *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 657, 267 S.E.2d 584, 586 (1980) (citation omitted). This Court has held, “in order that there may be a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract.” *Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 490, 623 S.E.2d 793, 798 (2006) (citation omitted). “Where the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract.” *Montgomery v. Montgomery*, 110 N.C. App. 234, 238-39, 429 S.E.2d 438, 441 (1993) (citation omitted).

¶ 21 Plaintiffs contend that the Agreement clearly acknowledged the different ownership statuses of the properties, and by the clear language of the Agreement, the parties intended it to include all of the properties owned by the brothers, such that

the Subject Property was subject to the Agreement's terms. We disagree.

¶ 22 While the purported Agreement in question was in writing and Defendant signed this Agreement, the record before us shows it did not specify the Subject Property and there was never a conveyance by Defendant of the Subject Property by deed. Instead, the record shows the chain of title for the Subject Property as: Defendant and the Tighes executing a general warranty deed to purchase the Subject Property in December 7, 1988; Defendant securing a mortgage from Southern National Bank also on December 7, 1988; Defendant's mortgage for the Subject Property being marked as "paid and satisfied" by Southern National Bank on July 26, 2000; and Defendant and NCDOT executing a deed for highway right of way as to the Subject Property on March 5, 2019. All of these transactions are recorded in the Cumberland County Register of Deed's Office.

¶ 23 The trial court correctly found Defendant to be "the only legal owner identified of record for the Subject Property by the Cumberland County Register of Deed's Office and the Cumberland County Tax Office responsible for paying the taxes for the Subject Property." Further, the record evidence tends to show that none of the brothers or partners have executed any legal instrument to transfer ownership of any property alleged to be subject to the terms of the Agreement. The trial court's findings support the trial court's conclusion that "the [siblings] never executed any transfers or deeds to the Subject Property, as indicated in the [Agreement], therefore

[Defendant] retained ownership until such time as a valid transfer of ownership occurred.”

¶ 24

We agree with the trial court’s finding that the terms of the Agreement on its face are vague, ambiguous, and inconsistent. The record demonstrates that several of the brothers owned real property in the United States including undeveloped land, commercial buildings, and residential homes. The parties offered conflicting testimony as to whether the Agreement applied to undeveloped land and investment properties only, as certain provisions in the Agreement specifically identified land while others identified commercial buildings or residential homes. The trial court bears the duty of “determin[ing] the weight and credibility of [the] evidence,” and we presume that the trial court disregards any incompetent evidence. *Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342 (quoting *Patterson v. Taylor*, 140 N.C. App. 91, 97, 535 S.E.2d 374, 378 (2000)). The record evidence supports the trial court’s finding that the Agreement “does not expressly reference or identify the Subject Property,” that the parties testified to one or more of the brothers owning land in the United States that does not contain homes, and that in certain sections of the Agreement, houses or other structures are specifically listed as part of the transfer of land. As such, the trial court correctly concluded that the Agreement did not control the disposition of the Subject Property or the proceeds of the NCDOT settlement.

C. Constructive Trust

¶ 25 Next, Plaintiffs allege the trial court erred in finding that the Agreement did not create a constructive trust of the Subject Property for the benefit of Plaintiff Ahmad. We disagree.

¶ 26 In *Rhue v. Rhue*, this Court stated,

A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

189 N.C. App. 299, 305, 658 S.E.2d 52, 57-58 (2008) (quoting *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)). Evidence of the establishment of a constructive trust “is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient.” *Bryant v. Kelly*, 279 N.C. 123, 130, 181 S.E.2d 438, 442 (1971) (citations omitted). Further, a constructive trust is imposed if the property was acquired through “fraud, breach of duty, or other wrongdoing.” *Barrett v. Coston*, 261 N.C. App. 311, 315, 820 S.E.2d 573, 576 (2018). A constructive trust “cannot be based upon an unenforceable oral agreement.” *Id.*

¶ 27 We note Plaintiffs’ complaint did not allege that the Agreement created a constructive trust as to Plaintiff Ahmad. Instead, Plaintiffs alleged in their complaint that in the “late 1980’s, an informal agreement was reached between Plaintiff Maher and [Defendant] in which Plaintiff Maher would make all payments on [the Subject

Property] . . . while . . . (Plaintiff Maher) and all the brothers under the [A]greement . . . lived at the house for various periods of time during the next twenty to thirty years.” The complaint’s claim for relief as to constructive trust further alleged that Defendant “was merely a ‘strawman’ holder of the [Subject] Property, when in fact his brother [Plaintiff] Maher was paying for the [Subject] [P]roperty, [so that] an implied constructive trust was formed that the [Subject] Property was to be for the benefit of all the seven brothers.”

¶ 28 The record shows Plaintiffs never made a motion to amend the complaint to assert that the Agreement created a constructive trust as to Plaintiff Ahmad, nor was the issue of constructive trust tried by the consent of the parties. Defendant’s counsel timely objected to any evidence of a constructive trust. Again, we note that “[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” *Rink & Robinson, PLLC*, 220 N.C. App. at 367, 725 S.E.2d at 431 (quoting N.C. Gen. Stat. § 1A-1, R. 15(b)). Opposing counsel must have objected to the evidence to preclude a finding that the issues were tried by consent. *Id.* Here, Defendant’s counsel argued the causes of action being tried were a constructive trust as to Plaintiff Maher and an express trust as to Plaintiff Ahmad, and timely objected to the introduction of any evidence to the contrary.

¶ 29 Plaintiffs did not present evidence of any written agreement purporting to be

a trust of the Subject Property. Plaintiff Maher testified that he alone entered into an agreement with the Tighes to buy the Subject Property but had Defendant's name placed on the general warranty deed because he was the only brother who had U.S. citizenship. Plaintiff Maher also alleged that he made the majority of payments for the Subject Property from his business profits. Plaintiff Maher offered two nonsufficient funds checks dated from 1988 that were addressed to Mr. Tighe as evidence of his "informal" agreement with Defendant. He further testified that Mr. Tighe took him to court after his checks, which were intended to pay for part of the Subject Property, bounced.

¶ 30 The record contains numerous legal documents for the Subject Property, including the option to purchase the property, the general warranty deed, and the deed for a highway right of way to NCDOT, which all list Defendant as the owner. Neither Plaintiffs' names nor signatures appear on these documents. We conclude the trial court correctly determined there was insufficient evidence of fraud, breach of duty, or some other circumstances – requisite elements of a constructive trust – to make it inequitable for Defendant to retain the Subject Property.

D. Plaintiff's Motion to Stay the Proceedings

¶ 31 Finally, Plaintiffs contend the trial court should have stayed this action pending the resolution of the parties' pending arbitration proceedings in Jordan. We disagree.

¶ 32 The standard of review for a trial court’s denial of a motion to stay is abuse of discretion. *See Buchanan v. N.C. Farm Bureau Mut. Ins. Co.*, 270 N.C. App. 383, 388, 841 S.E.2d 598, 602 (2020). The record before us indicates the trial court denied Plaintiffs’ Motion to Stay on June 7, 2021. Plaintiffs did not include the trial court’s Order Denying Motion to Stay as an order from which appeal is taken. Plaintiffs’ notice of appeal designates only the trial court’s July 13, 2021 final order and judgment.

¶ 33 Notice of appeal is governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Rule 3 states that the appellant “shall designate the judgment or order from which appeal is taken” N.C. R. App. P. 3(d). “Rule 3 is jurisdictional, and if the requirements of the rule are not complied with, the appeal must be dismissed.” *Gause v. New Hanover Reg’l Med. Ctr.*, 251 N.C. App. 413, 424, 795 S.E.2d 411, 419 (2016) (citation omitted). Plaintiffs’ notice of appeal fails to identify or imply the Order Denying Motion to Stay as an issue for appellate review. Therefore, we dismiss this issue.

III. Conclusion

¶ 34 For the reasons stated above, we hold that the trial court’s findings are supported by competent evidence, and the trial court’s conclusion that Defendant is the lawful owner of the property and is entitled to receive the NCDOT settlement funds are supported by its findings of fact. Accordingly, we affirm the order and

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judgment of the trial court.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).