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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-915

No. COA22-431

Filed 29 December 2022

Mecklenburg County, No. 21 CVS 823

SHIRELL R. BATES, Plaintiff,

v.

STAPLES, INC. (USR PARENT, INC.), Defendant.

Appeal by plaintiff from judgment entered 29 November 2021 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2022.

Shirell R. Bates, pro se, for Plaintiff-Appellant.

Little Mendelson, PC, by Kevin M. Cleys, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Plaintiff appeals from judgment after the trial court granted Defendant's motion for summary judgment. On appeal, Plaintiff argues the trial court erred when it: (1) allowed the matter to move forward despite Defendant failing to timely serve Plaintiff with its "Defenses and Answers"; and (2) granted Defendant's motion for summary judgment because a genuine dispute of material fact existed as to whether Plaintiff established a prima facie case of discrimination.

I. Factual & Procedural Background

¶ 2 On 10 August 2018, Shirell R. Bates (“Plaintiff”), an African American woman who, at the time, was thirty-four-weeks pregnant with twins, entered a Staples office supply store located at 8322 Pineville-Matthews Road in Charlotte. **{Appellant’s Br. p 4}**. The General Manager, Tonya Stephenson (the “Manager”), suspected that Plaintiff was shoplifting and requested that an off-duty police officer, who was shopping at the store at the time, speak with Plaintiff. **{Tv III p 52}**. During the conversation between Plaintiff and the officer, which lasted approximately three minutes, Plaintiff “voluntarily showed [her] stomach” to the officer, demonstrating that she was not shoplifting. **{Tv III p 57}**. Satisfied, the officer thanked Plaintiff and advised the Manager that Plaintiff was not shoplifting. **{R Suppl. 7/29/22 p 68}**. Plaintiff then purchased the goods she had selected and left the store. **{R Suppl. 7/29/22 p 124}**.

¶ 3 On 19 January 2021, Plaintiff initiated this action *pro se* by filing a Summons and Complaint against “Staples Inc.” and served the same upon the proper defendant, USR Parent, Inc. (“Defendant”). **{R pp 5-10}**.

¶ 4 In her initial complaint, Plaintiff asserted claims against Defendant pursuant to: (1) Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (“Title II”); (2) 42 U.S.C. § 1981 (“Section 1981”); (3) 42 U.S.C. § 1983 (“Section 1983”); and (4) the Consumer Bill of Rights. **{R pp 6-9}**. On 18 February 2021, Defendant filed a Motion

to Dismiss, which the trial court partially granted, dismissing Plaintiff's Title II and Consumer Bill of Rights claims. **{R p 18}**. On 9 April 2021, Defendant filed and served its Defenses and Answers addressing the Sections 1981 and 1983 claims, without contesting jurisdiction. **{R pp 11-17}**.

¶ 5 On 9 November 2021, after discovery concluded, Defendant filed a Motion for Summary Judgment, which the trial court granted by order (the "Order") on 29 November 2021. **{R p 20}**. Plaintiff timely filed and served Notice of Appeal on 22 December 2021. **{R pp 21-22}**.

II. Jurisdiction

¶ 6 The Order is a final judgment, and jurisdiction therefore lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Standard of Review

¶ 7 "The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). A motion for summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

¶ 8 In ruling on a motion for summary judgment, all factual inferences must be "drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379, 381 (1975). If there are any genuinely

unresolved material issues of fact, summary judgment should be denied. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).

IV. Analysis

¶ 9 The two issues before the Court, respectively, are whether: (1) Plaintiff preserved the issue of the propriety of Defendant’s service of its Defenses and Answers for appellate review; and (2) the trial court erred in determining no genuine issue of material fact existed as to Plaintiff’s claims before entering the Order.

A. Preservation for Appellate Review

¶ 10 As an initial matter, we consider Plaintiff’s contention that the trial court erred by allowing the case to move forward into discovery, despite a lack of evidence to show that “Defendant’s ‘Defenses and Answers’ were surrendered in custody of the United States Postal Service as required [by N.C. R. Civ. P. 5(b)(2)].” **{Appellant’s Br. p 6}**.

¶ 11 In its brief, Defendant responds by asserting this Court does not have jurisdiction to review the issue of service because Plaintiff failed to move for entry of default judgment pursuant to Rule 55 of the North Carolina Rules of Civil Procedure, which the trial court advised Plaintiff was the only way to contest the propriety of Defendant’s service of its answer. **{Tv II p 41}**. For the reasons discussed below, we agree with Defendant.

¶ 12 A motion for judgment by default may be decided by the court “if the party against whom judgment is sought fails to serve a written response, stating the

grounds for opposing the motion within 30 days” of the motion. N.C. R. Civ. P. 55(b)(2)(b). “In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make” N.C. R. App. P. 10(a)(1).

¶ 13 In this case, the record tends to show the trial court advised Plaintiff that the only way to contest the propriety of Defendant’s service of its answer was through a motion pursuant to Rule 55. **{Tv II p 41}**. Contrary to the trial court’s advice, Plaintiff made neither an oral nor written motion; thus, the issue of the propriety of Defendant’s service was not preserved for appellate review, which deprives this Court of jurisdiction to review the matter. *See Gouch v. Rotunno*, 2022-NCCOA-650, ¶ 8 (2022) (noting that when a motion is not heard in court, the judge does not “issue any rule, either oral or written”; hence, the issue is not preserved for appellate review).

B. Summary Judgment

¶ 14 Next, we consider whether the trial court erred when it determined that no genuine dispute of material fact existed as to Plaintiff’s claims under Sections 1981 and 1983 before granting Defendant’s motion for summary judgment.

¶ 15 A motion for summary judgment should be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment

as a matter of law.” *Forbis*, 361 N.C. at 523, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)). A genuine issue of material fact is “one that can be maintained by substantial evidence.” *Daughtridge v. Tanger Land, LLC.*, 373 N.C. 182, 187, 835 S.E.2d. 411, 415 (2019). If any genuinely unresolved material issues of fact exist, summary judgment should be denied. *See Singleton*, 280 N.C. at 464, 186 S.E.2d at 403.

1. Section 1983 Claim

¶ 16 We begin by considering whether the trial court erred in determining that no genuine issue of material fact existed as to Plaintiff’s claims under Section 1983 before entering summary judgment for Defendant. In her brief, Plaintiff argues that Defendant “became a State actor” by conspiring with an off-duty police officer to deprive her or her rights. **{Appellant’s Br. p 9}**. We disagree.

¶ 17 Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983 (2016). Liability under Section 1983 “only extends to persons acting under color of law, a requirement equivalent to that of state action under the

Fourteenth Amendment.” *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995); *see also Hailey v. Tropic Leisure Corp.*, 275 N.C. App. 485, 492, 854 S.E.2d 132, 138 (2020) (noting there must be engagement between a private party and state official for the acts of the private party to arise to state action or action “under the color of law”).

¶ 18 The facts clearly show that Defendant is a private company, and the officer who approached Plaintiff was neither contracted by Defendant nor was he on-duty during his conversation with Plaintiff. For those reasons, Defendant is not a “state actor” and therefore cannot be held liable under Section 1983. *See United Auto Workers*, 43 F.3d at 906; *see also* 42 U.S.C. § 1983.

2. Section 1981 Claim

¶ 19 Next, we turn to whether the trial court correctly granted Defendant’s motion for summary judgment regarding Plaintiff’s discrimination claim under Section 1981. Plaintiff contends that she is a member of a protected class and was denied the right to contract for goods that were otherwise afforded to white customers. **{Appellant’s Br. p 8}**. Defendant does not dispute that Plaintiff is a member of a protected class, but asserts that nevertheless, Plaintiff’s ability to contract for goods was not denied. After careful review of the record, we conclude Plaintiff fails to meet the burden of showing a prima facie case of discrimination under Section 1981 and accordingly, the trial court did not err by granting Defendant’s motion for summary judgment.

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¶ 20 To establish a prima facie case of discrimination under Section 1981, a plaintiff must show,

(1) that [she] is a member of a protected class; (2) [she] sought to enter into a contractual relationship with the defendant; (3) [she] met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) [she] was denied the opportunity to contract for goods or services that was otherwise afforded to white customers.

Williams v. Staples, Inc., 372 F.3d 662, 667 (4th Cir. 2004) (emphasis added). The plaintiff bears the burden of proof, and if met, the defendant must demonstrate that it had “a legitimate, nondiscriminatory reason” for its conduct. *Id.* at 668.

¶ 21 Here, the undisputed facts show that Plaintiff was able to complete her purchase after a brief interruption. Plaintiff fails to provide any material facts that suggest she was denied the opportunity to contract for goods or services, thus failing to meet her burden of proof. *See id.* at 668; *see also* 42 U.S.C. § 1981. Therefore, we hold the trial court correctly dismissed Plaintiff's discrimination claim under Section 1981 and granted Defendant's motion for summary judgment.

V. Conclusion

¶ 22 We conclude that this Court does not have jurisdiction to review the propriety of service of Defendant's Defenses and Answers, nor did the trial court err in granting Defendant's motion for summary judgment.

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AFFIRMED.

Judges DIETZ and GORE concur.

Report per Rule 30(e).