IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-690

No. COA22-57

Filed 18 October 2022

Cumberland County, Nos. 10CVS2964, 17CVS6272

JOHN C. CULBRETH, JR., Individually and Derivatively on Behalf of SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, and SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Plaintiffs,

v.

CHRIS MANNING, Defendant.

JOHN C. CULBRETH, JR., Derivatively on Behalf of SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Plaintiff,

v.

GREEN VALLEY SOUTH LLC and SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Defendants.

Appeal by Defendant Manning from Order entered 15 July 2021 by Judge Mary Ann Talley in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2022.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, by Charles E. Coble, Walter L. Tippett, Jr., and Lindsey S. Barber, for plaintiff-appellee.

Hutchens Law Firm, by Natasha M. Barone, H. Terry Hutchens, J. Scott Flowers, and J. Haydon Ellis, for defendant-appellant Chris Manning.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Chris Manning (Defendant) appeals from the trial court's Order entered 15 July 2021, which granted John C. Culbreth, Jr., (Plaintiff), individually and derivatively on behalf of Southeast Development of Cumberland, LLC's (Southeast) Motion to Enforce Settlement Agreement, which included entering judgment against Defendant in the amount of $85,174.50. This is the second time this matter is before us on appeal. *See Culbreth v. Manning*, 277 N.C. App. 221, 2021-NCCOA-177, ¶ 2 (*Culbreth I*). In *Culbreth I*, we vacated the trial court's first Order granting Plaintiff's Motion to Enforce Settlement Agreement and remanded this case for further proceedings. *Id.* ¶ 27. This appeal follows those further proceedings undertaken below. While much of the background of this case may be found in our opinion in *Culbreth I*, relevant to this appeal the Record tends to reflect the following:

¶ 2 Plaintiff and Defendant each own a 50% interest in Southeast, a member-managed limited liability company organized under North Carolina law in 2003. Plaintiff and Defendant have been in dispute over the management of Southeast since (at least) 2010. On 1 April 2010, Plaintiff filed a complaint alleging Defendant mismanaged finances and record keeping (the 2010 Action), and ultimately, on 14 February 2011, the Cumberland County Superior Court entered an Order (2011

Referee Order) appointing Lawrence W. Blake, CPA, as a referee under N.C. R. Civ. P. 53 to "collect, review and examine the financial, banking, corporate and other records of [Southeast]" to determine the members' capital accounts, identify Southeast's assets and liabilities, and prepare a balance sheet and statement of profit and loss. Approximately five years later, on 23 August 2017, Plaintiff derivatively on behalf of Southeast, instituted a second action against Green Valley South LLC (Green Valley), a limited liability company of which Defendant owned a fifty-percent interest (the 2017 Action).

¶ 3 On 10 December 2018, the parties entered into a Settlement Agreement, agreeing "to resolve and to settle all controversies between them, including any claims each may have asserted or could have asserted in the Subject Actions[.]"[1] The Settlement Agreement provided in paragraph 2(e):

> Plaintiff and Defendant will reconcile their respective capital accounts in Southeast pursuant to a report (the "Blake Report") to be prepared by L. W. Blake, CPA ("Blake"), who was previously appointed by the Court to serve as a referee in the 2010 Action. The Blake Report will be completed by February 29, 2019, and shall direct that either Plaintiff or Defendant shall make such payment within 30 days as is necessary to balance their Southeast capital accounts. The Blake Report shall be prepared consistent with the following terms:
>
> (i) Defendant shall deposit $25,000.00 (the "Blake Deposit") with Blake to pay his fees and expenses in completing the Blake

[1] The Settlement Agreement defined, "the 2010 Action and the 2017 Action may be referenced herein as '**the Subject Actions**[.]' " (emphasis in original).

> Report. Defendant shall receive a credit toward his Southeast capital account equal to the amount of the Blake Deposit actually expended and to a refund of the remainder.
>
> (ii) Plaintiff, Defendant, and their respective accounting and legal advisors shall be entitled to communicate with Blake in regard to his preparation of the Blake Report so long as any written communications are contemporaneously provide[d] to counsel for the other party. Blake shall be similarly entitled to seek information from the parties and their advisors.
>
> (iii) Defendant shall be entitled to a credit toward his Southeast capital account equal to the Settlement Payment. Blake shall determine whether the Settlement Payment, or any portion thereof, should be deducted from Plaintiff's capital account.
>
> (iv) The Blake Report shall be binding and not subject to appeal. It may be converted to a judgment in the 2010 Action upon the motion of either Plaintiff or Defendant if the party directed to make the required payment. If the party directed to make a payment completes his obligation to do so, then the 2010 Action shall be promptly dismissed by Plaintiff or by order of the Court, together with cancellations of all Notices of *Lis Pendens* and similar documents clouding title to real property that any Party has filed in regard to the 2010 Action.

In releasing the parties from all claims, the Settlement Agreement maintained "this release shall not be construed to release any claim arising in favor of or against any Party due to an alleged breach of this Agreement or failure to comply with the Blake Report." On 12 November 2019, Blake ultimately transmitted his Report (the Blake Report) to the trial court. The Blake Report provided, "As of December 31, 2018 the capital account of Chris Manning was a deficit of $501,965, the capital account of John C. Culbreth was a deficit of $331,616."

¶ 4 On 5 December 2019, Plaintiff, individually and derivatively on behalf of Southeast, filed a Motion to Enforce Settlement Agreement. In his Motion, Plaintiff requested the trial court enter a judgment directing Defendant pay Plaintiff $170,349.00—the difference in the deficits of Plaintiff's and Defendant's respective capital accounts as calculated in the Blake Report. The trial court heard Plaintiff's Motion on 16 December 2019. However, that morning, around fifteen minutes before the hearing began, Blake filed an Amendment to the Blake Report (the Amendment). The Amendment stated "[b]ased on my calculations, the Plaintiff (Culbreth) is liable to the Defendant (Manning) in the amount of $261,530."

¶ 5 The next day, on 17 December 2019, the trial court entered its Order granting Plaintiff's Motion to Enforce the Settlement Agreement and entered judgment against Defendant in the amount of $170,349.00 in the 2010 Action. This amount was consistent with Plaintiff's Motion to Enforce Settlement Agreement and did not factor in the late-filed Amendment to the Blake Report. On 15 January 2020, Defendant filed Notice of Appeal from the trial court's Order.

¶ 6 On appeal in *Culbreth I*, we concluded: "the trial court's entry of Judgment against Defendant in the amount of $170,349.00 is not consistent with the Settlement Agreement's direction for the capital accounts to be balanced or with the Blake Report's findings." *Culbreth I*, 277 N.C. App. 221, ¶ 26. This was so because while $170,349.00 correctly reflected the *difference* between Plaintiff's and Defendant's

respective capital accounts as determined in the Blake Report, judgment against Defendant in this amount did not serve to *balance* the capital accounts as required by the parties' settlement agreement. Rather, as we illustrated using the Blake Report figures, balancing the capital accounts to create an equal deficit required Defendant to pay $85,174.50 to Plaintiff. Specifically, we explained:

> To determine the amount required to balance the accounts, Plaintiff's $331,616.00 deficit and Defendant's $501,965.00 deficit would be added together, resulting in a combined deficit of $833,581.00 . . . The $833,581.00 deficit would then be divided by the two capital accounts, showing the capital accounts would be balanced with equal deficits of $416,790.50. Therefore, to ultimately balance the two Southeast capital accounts, Defendant would need to pay Plaintiff $85,174.50, which would render the respective capital accounts with equal deficits of $416,790.50.

Id., 277 N.C. App. 221, ¶ 25. We vacated the trial court's Order and remanded the matter to the trial court for further proceedings. We further mandated: "On remand, the trial court may consider all competent evidence before it. Consistent with [N.C. R. Civ. P.] 53(g), the trial court 'may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions.' " *Id.* ¶ 26.

¶ 7 The matter came back before the trial court on remand on 9 July 2021 when the trial court heard arguments from counsel. On 15 July 2021, the trial court entered its Order again granting Plaintiff's Motion to Enforce Settlement Agreement and entered judgment against Defendant in the amount of $85,174.50. On 11 August

2021, Defendant timely filed written Notice of Appeal from the trial court's Order on remand giving rise to the present appeal.

Issue

¶ 8 The dispositive issue in this appeal is whether the trial court acted within its discretion and consistent with this Court's mandate in *Culbreth I* when it entered its Order enforcing the parties' settlement agreement and entering judgment against Defendant in the amount of $85,174.50.

Analysis

¶ 9 In *Culbreth I*, this Court determined the trial court's Order was in the nature of an order adopting a referee's report. "Appellate review of factual findings made by a referee and adopted by the trial court is limited to whether the challenged findings were supported by any competent evidence." *Bullock v. Tucker*, 262 N.C. App. 511, 518-19, 822 S.E.2d 654, 659 (2018) (citations and quotation marks omitted). "Challenged legal conclusions are reviewed de novo." *Id.*

¶ 10 In this second appeal, however, Defendant does not argue the trial court's Order is not supported by competent evidence. Rather, Defendant argues the trial court erred on remand by failing to conduct an evidentiary hearing or reviewing the Blake Report anew, including the Amendment. Defendant points to remarks made by the trial court during the hearing as demonstrating the trial court felt compelled by our prior opinion to enter judgment against Defendant for $85,174.50. As such,

Defendant contends the trial court failed to exercise any discretion or its own judgment on remand by entering judgment consistent with the calculations we made in *Culbreth I*. We disagree.

¶ 11 As a general matter, "[w]hether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003). Nevertheless, following "the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015).

¶ 12 In *Culbreth* I, our instructions provided the trial court with broad discretion to reconsider the evidence before it and to enter its order:

> On remand, the trial court may consider all competent evidence before it. Consistent with Rule 53(g), the trial court "may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C. Gen. Stat. § 1A-1, Rule 53(g)(2).

Culbreth I, 277 N.C. App. 221, ¶26.

¶ 13 On remand here, the trial court did accept new submissions from both parties in addition to hearing arguments of counsel. The trial court was presented with three potential outcomes. Plaintiff argued the trial court should enter judgment upon the Blake Report in the amount of $85,174.50 consistent with the calculation in *Culbreth*

I. Alternatively, Plaintiff contended if the trial court were to revisit the Blake Report, the Blake Report contained errors which if corrected would lead to Plaintiff being owed over $400,000. Conversely, Defendant argued the trial court should accept the Amendment to the Blake Report filed just before the first hearing, which if accepted would result in Defendant being owed $261,530. Indeed, the trial court's written Order after remand reflects it did consider the "competent evidence and matters of record" to include the parties' submissions and the arguments of counsel along with the applicable law. *See Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) ("The trial judge's comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling.").

¶ 14 Notwithstanding these new submissions and arguments, the Record reflects the trial court—consistent with its first ruling— decided the Blake Report remained the operative document and adopted it in full consistent with Rule 53(g) of the North Carolina Rules of Civil Procedure. Specifically, in the exercise of its discretion, the trial court rejected (as it had before) Defendant's proffered Amendment to the Blake Report as untimely, having been filed the morning of the first hearing.[2] As such, the only basis upon which the trial court could enter its Order was the Blake Report.

[2] Defendant makes no argument in this appeal it was error to reject the Amendment.

Having determined to apply the figures from the Blake Report, the trial court was then bound by our decision and calculation in *Culbreth I* to balance the capital accounts of Southeast and to enter judgment against Defendant in the amount of $85,174.50. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) ("as a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.).

¶ 15 Therefore, in the absence of any other competent evidence in the Record—and no argument to the contrary on appeal—the trial court's determination to rely on and adopt the findings of the Blake Report is supported by evidence and supports the trial court's judgment. Thus, the trial court acted within its discretion and consistent with this Court's mandate in *Culbreth I* when it entered its Order enforcing the parties' settlement agreement and entering judgment against Defendant in the amount of $85,174.50. Consequently, the trial court did not err by entering its Order on Plaintiff's Motion to Enforce Settlement Agreement.

Conclusion

¶ 16 Accordingly, for the foregoing reasons, we affirm the trial court's 15 July 2021 Order.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).