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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-692

Filed 2 January 2024

Wake County, No. 20 CVS 14359

LINDA F. JOHNSON, as Successor Trustee of the SHIRLEY T. WARNER REVOCABLE TRUST, Plaintiff,

v.

JEFFREY C. BUTLER and BLAIRE BUTLER, Defendants.

Appeal by defendants from order entered 28 January 2022 by Judge A. Graham Shirley, II, in Superior Court, Wake County. Heard in the Court of Appeals 29 November 2023.

Narron Wenzel, P.A., by M. Kemp Mosley and Samantha Richardson, for plaintiff-appellee.

The Law Offices of Stephen R. Paul, by Taylor S. Hastings, for defendants-appellants.

ARROWOOD, Judge.

Jeffrey Butler (“defendant Jeffrey”) and Blaire Butler (“defendant Blaire”) (collectively “defendants”) appeal from the trial court’s order granting summary judgment in favor of Linda F. Johnson, successor trustee of the Shirley T. Warner Revocable Trust (“plaintiff”). Defendants contend the trial court erred in granting

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summary judgment because plaintiff failed to satisfy the burden of proving claims for breach of trust, breach of fiduciary duty, and constructive fraud. Defendants also contend that a genuine issue of material fact remained in controversy. For the following reasons, we affirm the trial court's order.

I. Background

This case is centered around a series of trusts benefitting Luther D. Warner ("Mr. Warner") and Shirley T. Warner ("Mrs. Warner"). The Shirley T. Warner Revocable Trust ("STW Trust") was originally executed on 30 August 2001 naming Mrs. Warner as grantor and trustee and Mr. Warner as successor trustee. On 19 November 2015, Mr. Warner, acting as Mrs. Warner's Attorney in Fact,¹ executed an amendment to the STW Trust in which Mrs. Warner resigned as trustee, Mr. Warner was appointed as successor trustee, and defendant Jeffrey was appointed as second successor trustee. Mr. Warner died on 28 November 2015, making defendant Jeffrey the trustee of the STW Trust.

By the time of Mr. Warner's death, Mrs. Warner was suffering from advanced Alzheimer's disease or dementia. The STW Trust directed the trustee to "pay or apply such part or all of the income and principal of this trust as it deems necessary for the proper health, support and maintenance of the grantor, her spouse and minor children, if any[.]" Following Mr. Warner's death and the death of her only child,

¹ Mrs. Warner executed a durable general power of attorney on 5 September 2012 naming Mr. Warner as her attorney in fact.

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Paula Gay Warner, Mrs. Warner became the primary beneficiary of the STW Trust, with the Macedonia United Methodist Church of Cary, North Carolina (“the Church”) as the sole residuary beneficiary.

In addition to defendant Jeffrey serving as Mrs. Warner’s agent and attorney in fact, defendant Blaire entered into an independent contractor agreement with the STW Trust. The agreement directed defendant Blaire to “[p]rovide all human resource services for the purpose of providing Shirley Warner with care givers as needed” and to remain on call at all times to assist Mrs. Warner. The initial agreement was for the term of 1 January to 31 December 2017 and directed the STW Trust to pay defendant Blaire \$12.00 per hour. The agreement was unmodifiable “except by amendment reduced to writing and signed by both the Trust and [defendant Blaire].”

Mrs. Warner died on 17 January 2020, and defendant Jeffrey qualified as the executor of her estate on 13 March 2020. Upon Mrs. Warner’s death, the Church became the sole beneficiary of the STW Trust.

On 4 March and 28 April 2020, the Church filed petitions to remove defendant Jeffrey as trustee. On the eve of a hearing on those petitions, the trial court entered a consent order accepting defendant Jeffrey’s resignation as trustee and appointing plaintiff as successor trustee.

Following her appointment as successor trustee, plaintiff requested, received, and reviewed detailed financial records for the STW Trust and created detailed

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accountings. Defendant Jeffrey did not provide any formal accountings from his trusteeship.

On 1 December 2020, plaintiff filed suit against defendants, alleging the following claims: breach of fiduciary duty and breach of trust; constructive fraud; conversion and trover; civil conspiracy; restitution and unjust enrichment; and punitive damages. Plaintiff alleged that between 15 January 2016 and 13 January 2020, defendant Jeffrey made payments or distributions to defendant Blaire through the STW Trust in excess of \$633,088.00, generally in monthly installments of \$10,000.00 or \$15,000.00 per month. The complaint noted that defendant Blaire would have needed to work 833.33 hours per month to justify a \$10,000.00 monthly payment pursuant to the independent contractor agreement, but a thirty-day month “consists of only 720 hours.”

Plaintiff further alleged that between 9 March 2016 and 13 January 2020, defendant Jeffrey made payments or distributions from the STW Trust to himself in excess of \$655,564.00, including more than \$500,000.00 in the month before Mrs. Warner’s death. The complaint also included allegations regarding other payments from the STW Trust as follows: (1) Amazon purchases of approximately \$189,888.00, with reimbursements of \$62,576.99; (2) Paypal purchases or payments of approximately \$2,528.00; (3) catering and meal delivery services totaling approximately \$46,621.00; (4) grocery bills totaling approximately \$38,925.00; (5) fast food orders totaling approximately \$15,500.00; (6) laundry services totaling

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approximately \$33,687.00 during a period of less than six months; (7) consulting services totaling approximately \$41,000.00; and (8) “unexplained checks payable to ‘cash’ and ATM and other cash withdrawals” totaling approximately \$35,188.00. The complaint included several attached exhibits, including a copy of the independent contractor agreement, defendant Jeffrey’s trustee resignation documents, and extensive summaries of transaction details and balance sheets from the STW Trust.

When questioned at the removal hearing about the transactions, specifically the approximately \$500,000.00 disbursed between 2 January and 17 January 2020, defendant Jeffrey stated he “was back paying [himself] for times that [he] had nursed [Mrs. Warner], which was not part of [his] trustee duties[,]” and that he “charged \$30 an hour plus overtime.” Defendant Jeffrey also testified that he was providing himself a one-percent commission for his services as trustee.

On 1 March 2021, defendants filed an answer denying liability upon all claims. On 27 August 2021, plaintiff filed a motion for summary judgment. On 5 November 2021, defendants filed a memorandum of law in opposition to plaintiff’s motion for summary judgment.

Plaintiff’s motion for summary judgment came on for hearing in Superior Court, Wake County on 10 November 2021. On 28 January 2022, the trial court entered an order granting partial summary judgment in favor of plaintiff on claims for breach of fiduciary duty and breach of trust, constructive fraud, and civil conspiracy, in the amount of \$1,658,608.60. On 1 February 2022, plaintiff entered a

voluntary dismissal of the remaining claims against defendants. On 23 February 2022, defendants filed notice of appeal.

II. Discussion

Defendants contend the trial court erred in entering summary judgment because plaintiff failed to satisfy the burden of proving claims for breach of trust, breach of fiduciary duty, and constructive fraud. Defendants also contend that a genuine issue of material fact remained in controversy. We disagree.

A. Standard of Review

“Our standard of review from an order granting summary judgment is de novo.” *Bryan v. Kittinger*, 282 N.C. App. 435, 437 (2022) (citing *Forbis v. Neal*, 361 N.C. 519, 524 (2007)). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.G.S. § 1A-1, Rule 56(c) (2023). Additionally, “all inferences of fact must be drawn against the movant and in favor of the party opposing the motion.” *Forbis*, 361 N.C. at 524 (cleaned up).

This Court has held that “[a]n issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *In re Alessandrini*, 239 N.C. App. 313, 315 (2015). Further, “[a] party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim

is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.” *Id.* “Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000).

B. Breach of Fiduciary Duty

“To establish a claim for breach of a fiduciary duty, claimants are required to produce evidence that (1) defendants owed them a fiduciary duty of loyalty; (2) defendants violated their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs.” *French Broad Place, LLC v. Asheville Sav. Bank, S.S.B.*, 259 N.C. App. 769, 787 (2018) (cleaned up).

“Fiduciary relationships are characterized by confidence reposed on one side, and resulting domination and influence on the other.” *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (cleaned up). Such characteristics are “readily apparent” in trustee-beneficiary relationships. *Id.*; see N.C.G.S. § 32-2(a) (2023) (defining “fiduciary” as “a trustee under any trust, expressed, implied, resulting or constructive . . . or any other person acting in a fiduciary capacity for any person, trust or estate.”).

A trustee owes duties of good faith, loyalty, and prudent administration. See N.C.G.S. §§ 36C-8-801, 802, 804. Trustees must “maintain complete loyalty to the

interests of their beneficiaries.” *Fox v. Fox*, 283 N.C. App. 336, 348 (2022) (cleaned up). “Should there be any self-interest on the trustee’s part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee’s removal.” *In re Wills of Jacobs*, 91 N.C. App. 138, 143 (1988) (citation omitted). In addition to this longstanding common law rule, a trustee’s duty of loyalty is also prescribed by statute. Specifically:

(a) A trustee shall administer the trust solely in the interest of the beneficiaries.

(b) [A] sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account, or that is otherwise affected by a conflict between the trustee’s fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

- (1) The terms of the trust authorized the transaction; [or]
- (2) The court approved the transaction[.] . . .

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee’s fiduciary and personal interests, the transaction is rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with:

- (1) The trustee’s spouse or a parent of the trustee’s spouse;
- (2) The trustee’s descendants, siblings, ancestors, or their spouses;
- (3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or

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(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment.

N.C.G.S. § 36C-8-802(a)–(c) (2023).

Additionally, North Carolina statute governs compensation of trustees when the terms of the trust do not explicitly state the rate of the trustee's compensation. *See* N.C.G.S. §§ 32-54, 32-55, 32-56 (2023). Our law states that where the “terms of the trust do not specify the trustee's compensation, the trustee is entitled to receive from the assets of the trust compensation that is reasonable under the circumstances.” § 32-54(a). However, a trustee may pay compensation from the trust assets “without prior approval of the clerk of superior court *only if*: (1) [t]he annual amount of compensation does not exceed four-tenths of one percent (4/10 of 1%) of the principal value of the assets of the trust[;]” or “(2) [n]otice has been given pursuant to G.S. 32-55 [to all qualified beneficiaries] and no qualified beneficiary or representative of a qualified beneficiary has initiated a proceeding . . . for review of the reasonableness of the compensation within 20 days after notice has been given by the trustee” § 32-56 (emphasis added).

In this case, defendant Jeffrey established a fiduciary relationship between himself and the STW Trust and owed several fiduciary duties, including those of good faith, loyalty, and prudent administration. In less than five years, however, defendant Jeffrey paid approximately \$633,088.37 to defendant Blaire and

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approximately \$655,564.56 to himself. Pursuant to § 36C-8-802(c), these transactions are rebuttably presumed to be affected by a conflict of interest. Defendants raise several arguments in opposition, including that defendant Jeffrey owed no duty to the remainder beneficiary, and that “the record is void of any contest as to whether Mrs. Warner directed or ratified the transactions in dispute.”

These arguments are unavailing. Defendants’ argument that defendant Jeffrey owed no duty to the remainder beneficiaries while Mrs. Warner was alive is misplaced; the underlying cause of action concerns breaches of fiduciary duty to the STW Trust, not to the Church. Further, Defendants failed to present an accounting prior to or at the hearing to rebut the presumption of a conflict of interest. We additionally note that although Mrs. Warner had entered into a durable power of attorney with defendant Jeffrey prior to her death, the record reflects that Mrs. Warner was suffering from advanced Alzheimer’s disease around the time the power of attorney was entered.

In addition to breaching the duty of loyalty, defendant Jeffrey breached the duty of prudent administration with the nature and amounts of payments to himself and defendant Blaire. The independent contractor agreement set defendant Blaire’s payment at \$12.00 per hour, yet defendant Jeffrey paid her \$10,000.00 and \$15,000.00 per month. Defendant Jeffrey’s “back paying” himself for care giving duties was not substantiated by any record of an agreement between himself and the STW Trust to provide those services, nor a comprehensive record of hours worked.

Finally, defendant Jeffrey testified that he gave himself a one-percent commission for his service as trustee, but failed to give notice to qualified beneficiaries of any proposed payment of compensation.

In sum, defendants repeatedly breached their fiduciary duties to the STW Trust, and these breaches substantially and unjustifiably diminished the STW Trust. The trial court properly granted plaintiff's motion for summary judgment as to this claim.

C. Constructive Fraud

“Although the elements of constructive fraud and breach of fiduciary duty overlap, each is a separate claim under North Carolina law.” *Chisum v. Campagna*, 376 N.C. 680, 706 (2021) (cleaned up). Constructive fraud requires

proof of circumstances (1) which created the relation of trust and confidence (the ‘fiduciary’ relationship), and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

Bogovich v. Embassy Club of Sedgefield, Inc., 211 N.C. App. 1, 8 (2011) (cleaned up).

Thus, “[t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.” *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294 (2004).

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An inherently fiduciary relationship “may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *King v. Bryant*, 369 N.C. 451, 464, (2017) (citation and quotation marks omitted). “When . . . the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred.” *Bogovich*, 211 N.C. App. at 9 (citing *Forbis*, 361 N.C. at 528–29). “Once the presumption arises, the alleged fiduciary may rebut the presumption by showing . . . that the confidence reposed in him was not abused.” *Forbis*, 361 N.C. at 529 (citation and internal quotation marks omitted); *see also Est. of Smith By & Through Smith v. Underwood*, 127 N.C. App. 1, 17 (1997) (“Once a plaintiff establishes a prima facie case of breach of fiduciary duty, the burden shifts to the defendant to show he acted in an open, fair and honest manner.”).

In this case, plaintiff established that both defendants had a confidential and fiduciary relationship with the STW Trust and Mrs. Warner. As previously discussed, defendant Jeffrey had a fiduciary relationship with the STW Trust as its trustee and with Mrs. Warner as her agent under power of attorney. Defendant Blaire was also in a fiduciary relationship with the STW Trust and Mrs. Warner by virtue of the independent contractor agreement and her purported role as caregiving coordinator. Due to Mrs. Warner’s health condition, a confidential and fiduciary

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relationship existed because of the “special confidence reposed [on defendant Blaire], who in equity and good conscience [was] bound to act in good faith and with due regard to the interests of [the STW Trust and Mrs. Warner].” *King*, 369 N.C. at 464.

Furthermore, defendants clearly benefitted from their transactions with the STW Trust. Although a number of expenses went to goods or services involved in Mrs. Warner’s care, many of the transactions were unexplained, unrelated to Mrs. Warner’s care, breached existing agreements, or occurred after Mrs. Warner’s death. This includes more than \$189,000.00 in Amazon purchases, of which \$62,576.99 was reimbursed, which defendant Jeffrey stated was due to his belief that the card had been “accidentally used[.]” It also includes the direct payments totaling over \$600,000 to each defendant. Defendants have failed to present sufficient evidence or argument to rebut the presumption that constructive fraud occurred. Accordingly, the trial court properly granted plaintiff’s motion for summary judgment.

D. Civil Conspiracy

In order for a plaintiff to recover damages upon a claim of civil conspiracy, the following elements must be established: (1) an agreement between two or more individuals; (2) sufficiently alleged wrongful overt acts; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme. *See Bottom v. Bailey*, 238 N.C. App. 202, 212 (2014); *Shope v. Boyer*, 268 N.C. 401, 405 (1966).

. Where civil conspiracy is established, “all of the conspirators are liable, joint

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and severally, for the act of any one of them done in furtherance of the agreement.”
Fox v. Wilson, 85 N.C. App. 292, 301 (1987) (citation omitted).

In this case, an agreement existed between the defendants, namely the independent contractor agreement. Plaintiff’s evidence established that the agreement and the payments pursuant to the agreement were sufficiently alleged wrongful acts. Defendant Jeffrey paid defendant Blaire significantly more than the agreed \$12.00 per hour rate. Although defendants argue that defendant Blaire’s excessive payment was for working “overtime,” as an independent contractor, defendant Blaire was not entitled to overtime, nor did the agreement provide for any adjusted pay rate based on hours worked. The payments and distributions amounted to an injury to the STW Trust and plaintiff, as well as establishing that the conspiracy was pursuant to a common scheme. Accordingly, the trial court properly granted plaintiff’s motion for summary judgment with respect to civil conspiracy.

III. Conclusion

For the foregoing reasons, there was no genuine issue of material fact, and the trial court properly granted plaintiff’s motion for summary judgment. We affirm the trial court’s order.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).