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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-693

Filed 2 January 2024

Wake County, No. 20 CVS 14392

LINDA F. JOHNSON, as Successor Trustee of the LUTHER D. WARNER REVOCABLE TRUST, Plaintiff,

v.

JEFFREY C. BUTLER, Defendant.

Appeal by defendant 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.

Law Offices of Stephen R. Paul, by Taylor S. Hastings, for defendant-appellant.

ARROWOOD, Judge.

Jeffrey Butler (“defendant”) appeals from the trial court’s order granting summary judgment in favor of Linda F. Johnson, successor trustee of the Luther D. Warner Revocable Trust (“plaintiff”). Defendant contends the trial court erred in granting summary judgment because plaintiff failed to satisfy the burden of proving

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claims for breach of trust, breach of fiduciary duty, and constructive fraud. Defendant also contends 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 on a series of three trusts benefitting Luther D. Warner ("Mr. Warner") and Shirley T. Warner ("Mrs. Warner"). The Luther D. Warner Revocable Trust ("LDW Trust") was originally executed on 30 August 2001 naming Mr. Warner as grantor and trustee. On 5 November 2012, Mr. Warner executed an amendment to the LDW Trust naming Anthony Warner Butler ("Anthony") and Dale Place ("Place") as the successor co-trustees. Mr. Warner executed a second amendment to the LDW Trust on 19 November 2015 naming defendant his successor trustee, Place his second successor trustee, and Anthony his third successor trustee. Mr. Warner died on 28 November 2015, making defendant the trustee of the LDW Trust.

The LDW Trust held funds for the benefit of the Shirley T. Warner Revocable Trust ("STW Trust"), Mr. and Mrs. Warner's daughter Paula Gay Warner ("Paula"), and Macedonia United Methodist Church of Cary, North Carolina ("the Church"). The trust instructed a marital share be distributed to the STW Trust upon Mr. Warner's death, and the remainder would be held in a family trust for Paula, and upon her death, the Church. Following the death of Paula on 26 January 2016, the Church was the sole beneficiary of the LDW Trust.

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The LDW Trust also provided that “any individual Trustee or successor Trustee shall receive, and is authorized to charge, as compensation for services rendered hereunder, those fees or commissions equivalent to those generally charged for substantially similar services at the time such services are rendered.” The trust did not contain more specific instructions regarding compensation.

On 28 April 2020, the Church filed a petition to remove defendant as trustee. On 30 June 2020, the trial court entered a consent order accepting defendant’s resignation as trustee and appointing plaintiff as successor trustee.

Plaintiff filed suit against defendants on 1 December 2020, alleging the following claims: breach of fiduciary duty and breach of trust; constructive fraud; conversion and trover; restitution and unjust enrichment; and accounting. Plaintiff alleged that defendant made \$71,254.14 in payments to himself from the LDW Trust, and \$2,090.00 of cash withdrawals from the LDW Trust account with no accounting of those withdrawals.

On 1 March 2021, defendant filed an answer denying liability upon all claims, stating that “he received trustee’s commission totaling approximately \$63,624.49 in accordance with the rate of compensation as defined in N.C. Gen. Stat. § 32-55, the terms and provisions of the Trust, and the law[]” as well as “a property management commission of ten percent (10%) of rent received during his trusteeship for the Trust totaling approximately \$10,286.60.” Defendant stated that his methods for calculating his commissions were “approved by legal counsel[,]” but he did not provide

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evidence that he sought approval of the commissions with the beneficiaries or the court. Further, defendant admitted that cash withdrawals were made from the LDW Trust, and he asserted that “such cash withdraws were used to pay temporary helpers for Mrs. Warner.”

On 27 August 2021, plaintiff filed a motion for summary judgment. In support, plaintiff attached an affidavit stating that defendant had failed to provide an accounting to her for the time he served as trustee, and “over the course of approximately four (4) years,” defendant disbursed a total of \$1,400,882.76 from the three trusts. Financial records attached to the affidavit show defendant paid himself \$71,254.14 from the LDW Trust and \$2,090.00 in cash withdrawals from the LDW Trust. Plaintiff filed a factual memorandum asserting the same facts on 29 September 2021 with an accompanying transcript from a hearing on removing defendant as executor of Mrs. Warner’s estate. During that hearing, defendant testified that he did not provide a formal accounting of the transactions he made as trustee of any of the three trusts, including the LDW Trust.

Defendant filed an affidavit in opposition to plaintiff’s motion for summary judgment on 30 September 2021, reasserting the statements in his answer that he received \$63,624.49 in commission for serving as the trustee of the LDW Trust and \$10,286.60 in commission for managing the trust’s properties, and “[c]ash withdrawals were occasionally made to pay temporary helpers for Mrs. Warner.” Additionally, defendant stated that he “provided the Public Administrator Trustee

detailed financial records” for the LDW Trust after he resigned as trustee, and he “offered to provide any additional information” and cooperation. On 5 November 2021, defendant filed a memorandum of law in opposition to plaintiff’s motion for summary judgment asserting the same facts.

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 the breach of fiduciary duty and constructive fraud claims. Plaintiff dismissed the remaining claims on 1 February 2022. Defendant gave notice of appeal on 23 February 2022.

II. Discussion

Defendant argues that plaintiff failed to meet her burden regarding the claims for breach of fiduciary duty and constructive fraud. Defendant also argues that because he was entitled to compensation under the terms of the LDW Trust and contested the appropriateness of the cash withdrawals, there are genuine issues of material fact as to plaintiff’s claims. 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 the claimant.” *French Broad Place, LLC v. Asheville Sav. Bank, S.S.B.*, 259 N.C. App. 769, 787 (2018) (cleaned up).

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“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:

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

N.C.G.S. § 36C-8-802(a)–(b) (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).

As the LDW Trust’s designated trustee, defendant unquestionably was a fiduciary as defined in § 32-2(a). Therefore, defendant was required to “maintain complete loyalty to the interests of his beneficiaries”—here, the Church. *Fox*, 283 N.C. App. at 348 (cleaned up). Yet, during his trusteeship, defendant transferred funds from the LDW Trust to his personal account on multiple occasions. Under §

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36C-8-802(b), such transactions were thus distinctly ones that were “entered into by [defendant] for [defendant’s] own personal account[.]” § 36C-8-802(b). Consequently, the transactions were voidable by the Church, who was “a beneficiary affected by the transaction[s.]” *Id.*

Defendant contends that he took only \$63,624.49 as commission for his position as trustee, which he was entitled to take under the terms of the LDW Trust. Defendant also argues that his affidavit stating as such is sufficient to show that there is a genuine issue of material fact as to the reasonableness of his commission. However, the trust instrument, while authorizing the trustee to collect a commission, did not specify the rate of the compensation. Pursuant to N.C.G.S. § 32-56, defendant was not authorized to pay himself compensation without approval from the Clerk of Superior Court unless (1) the compensation was less than four-tenths of one-percent of the trust principal, or (2) he had provided notice to all qualified beneficiaries of the trust. Defendant provided no evidence or accounting to support that his compensation was less than four-tenths of one percent or that he gave notice to the Church that he compensated himself from the LDW Trust—thus, he was statutorily obligated to have his compensation approved by the Clerk of Superior Court. Therefore, defendant breached his fiduciary duties by failing to follow the appropriate statutory procedures of compensation.

Additionally, defendant admitted that he did not provide any formal accounting to contest the evidence of the transfers from the LDW Trust to his own

accounts or of the cash withdrawals. The only evidence defendant provided to contest the voidability of the cash withdrawals was that the cash was used to pay Mrs. Warner’s “temporary helpers.” Thus, even in a light most favorable to defendant, no genuine issue of material fact exists that the cash withdrawals constituted a further breach of defendant’s fiduciary duty.

Because defendant, as the nonmoving party, failed “to produce a forecast of evidence demonstrating specific facts, as opposed to allegations” that he did not violate his fiduciary duty of loyalty under § 36C-8-802(b), the trial court did not err in granting plaintiff’s motion for summary judgment for breach of fiduciary duty. *Gaunt*, 139 N.C. App. at 784.

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

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defendant benefit himself.” *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294 (2004).

“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.” *Id.* 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.”).

As discussed above, defendant “obtain[ed] a possible benefit through the alleged abuse of the . . . fiduciary relationship” by transferring funds from the LDW Trust to his personal account and making cash withdrawals in violation of his statutory and fiduciary duties. *Bogovich*, 211 N.C. App. at 9. Consequently, plaintiff “is entitled to a presumption that constructive fraud occurred.” *Id.* Further, defendant failed “to show he acted in an open, fair and honest manner” in these transfers and withdrawals because he failed to produce specific evidence that the transactions accorded with the terms of the trust and were for the exclusive benefit of the beneficiaries. *See Underwood*, 127 N.C. App. at 17. Thus, defendant did not

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rebut plaintiff's presumption. Accordingly, the trial court did not err in granting plaintiff's motion for summary judgment for constructive fraud.

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).