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NO. COA05-24

NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2005

HAROLD M. BARBER and  
LINDA V. SNOW,  
Plaintiffs,

v.

ALSTON W. BURKE,  
Defendant.

Pender County  
No. 03 CVS 240

Appeal by plaintiffs from judgement entered 27 September 2004 and order entered 14 October 2004 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 25 August 2005.

*WARD & SMITH, P.A., by Ryal W. Tayloe, for plaintiffs- appellants.*

*Robert W. Kilroy for defendant-appellee.*

TIMMONS-GOODSON, Judge.

Harold M. Barber (“Barber”) and Linda V. Snow (“Snow”) (collectively, “plaintiffs”) appeal the trial court judgment denying their request for specific performance and the trial court order denying their motion for judgment notwithstanding the verdict, or, in the alternative, a new trial. For the reasons discussed herein, we reverse.

The facts and procedural history pertinent to the instant appeal are as follows: Sometime in the year 2000, plaintiffs became interested in purchasing and developing several residential beach properties located in the Sea Haven Beach community of North Topsail Beach, North Carolina. Plaintiffs planned to first build a residence on one lot, which they could use as a model to show prospective purchasers of other lots. In June 2000, Barber negotiated the purchase of Lot 112. The following day, Barber met with Alston W. Burke (“defendant”) to discuss the sale of an adjacent lot owned by defendant, Lot 111. After settling on a purchase price of \$50,000.00, plaintiffs and defendant entered into an Offer to Purchase and Contract on 18 August 2000.

The Offer to Purchase and Contract did not contain a specific closing date. Instead, the agreement provided that “[a]ll parties agree to execute any and all documents and papers necessary in connection with closing and transfer of title on or before 2 weeks after permits issued[.]” The agreement further provided that it was conditional upon plaintiffs being “able to obtain [a] building permit prior to closing[.]” and it required defendant to “make application and pay the sewer tap fee” associated with Lot 111 and “transfer [the] sewer tap and pump station to [plaintiffs] at closing.”

Defendant secured a sewer tap permit in September 2000 and forwarded it to plaintiffs. Plaintiffs thereafter closed on the sale of Lot 112, as well as the sale of two other lots owned by defendant's brother -- Lot 105 and Lot 107. After receiving the necessary building permits, including one from the Coastal Area Management Authority (“CAMA permit”), plaintiffs began construction of a model residence on Lot 112 in March 2001.

In late January or early February 2002, plaintiffs were nearing completion of the construction of the model residence. At that time, Barber invited defendant to inspect the progress of the residence, and he informed defendant that he “was planning on . . . going ahead with closing because [he had received] a lot of interest” regarding Lot 111 during the construction of the residence on Lot 112. After receiving information from the Coastal Area Management Authority that Lot 111 was “buildable,” plaintiffs began the process of securing a CAMA permit for Lot 111 in May 2002. Because defendant also owned the lot neighboring Lot 111, plaintiffs were required to obtain his consent regarding the construction on Lot 111. On 3 June 2000, defendant signed a consent form regarding the construction on Lot 111, and on or about 6 June 2002, plaintiffs received a CAMA permit for the lot.

Plaintiffs and defendant scheduled a closing for Lot 111 on 2 August 2002. However, due to the failure of the lending institution to deliver the loan package for the lot, the closing was not completed. Defendant thereafter refused plaintiffs' subsequent offers to close. Defendant informed Barber that “he had incurred extra expenses because [of the] delay[] in closing . . . and . . . he was really angry because [plaintiffs] had closed with his brother, [] had contracted with his brother after him and closed with his brother first.” After defendant continued to refuse plaintiffs' attempts to close, plaintiffs filed a complaint against defendant, asserting that defendant's refusals were unjustified and constituted a breach of contract. Defendant thereafter filed an answer denying plaintiffs' contentions and asserting, *inter alia*, that plaintiffs “failed to exercise due diligence and waited two years to obtain a building permit” on the lot, “failed to tender the sales price” for closing, and “are equitably estopped from seeking performance on the contract.”

The case proceeded to trial the week of 20 September 2004. Following the close of all the evidence, plaintiffs moved the trial court for a directed verdict in their favor. The trial court denied plaintiffs' motion and submitted two issues to the jury. On 22 September 2004, the jury found that defendant breached the contract “by non-performance by failing to convey to [] plaintiffs the lands as required by the contract[.]” However, the jury further found that defendant's failure to perform the material term of the contract was “caused by the conduct of [] plaintiffs[.]” Based upon these findings, the trial court entered a judgment concluding that plaintiffs “are not entitled to specific performance” on the contract. On 7 October 2004, plaintiffs filed a motion for judgment notwithstanding the verdict, or, in the alternative, a new trial. On 14 October 2004, the trial court denied plaintiffs' motion. Plaintiffs appeal.

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The issues on appeal are whether the trial court erred by: (I) denying plaintiffs' motion for directed verdict; (II) submitting the second issue to the jury; and (III) denying plaintiffs' post-trial motions.

Plaintiffs first argue that the trial court erred by denying their motion for directed verdict. Plaintiffs assert that they were entitled to judgment in their favor because they were prepared to close the sale of Lot 111 in a "reasonable time" and because defendant never tendered a deed or demanded performance and waived or extended any deadline for closing. We disagree.

When a party moves for directed verdict, the trial court must determine whether the evidence, when viewed in the light most favorable to the non-movant, is sufficient to submit the case to the jury. *Satterfield v. Pappas*, 67 N.C. App. 28, 30-31, 312 S.E.2d 511, 513, *disc. review denied*, 311 N.C. 403, 319 S.E.2d 274 (1984). "The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law." *Id.* at 31, 312 S.E.2d at 513. A non-movant's case is sufficient to withstand judgment as a matter of law where "there is more than a scintilla of evidence supporting each element of [their] case[.]" *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). Furthermore, "[a] verdict may never be directed when there is conflicting evidence on contested issues of fact." *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 98, 337 S.E.2d 94, 98 (1985), *disc. review denied*, 316 N.C. 376, 342 S.E.2d 893 (1986).

This Court has previously recognized that "[t]ime is ordinarily not of the essence of a contract of sale and purchase." *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986). Therefore, where a contract does not specify the time within which a right to purchase should be exercised, "the right must be exercised within a reasonable time." *Id.* Even where a contract includes a specific time or date of purchase, if no provision of the contract expressly indicates that time is of the essence, the parties are given a reasonable time to close the sale and purchase. *Id.* at 639, 347 S.E.2d at 484; *see also Cadillac- Pontiac Co. v. Norburn*, 230 N.C. 23, 29, 51 S.E.2d 916, 920 (1949) (concluding that where a contract provided for closing on or before 20 November 1945, time was not of the essence because "[t]he agreement itself is not worded to avoid the contract altogether or expressly vitiate it, if settlement is not made at that time."); *Walker v. Weaver*, 23 N.C. App. 654, 657, 209 S.E.2d 537, 539 (1974) (holding that time was not of the essence where the contract provided that it was "to be definitely closed within a period of -- 30 -- days" because the statement did not indicate an intention of the parties that all rights and obligations were to terminate if sale was not closed within prescribed time). "Though the determination of reasonable time is generally a mixed question of law and fact and thus for the jury, it becomes a question of law when the facts are simple and admitted and only one inference can be drawn." *Furr*, 82 N.C. App. at 638, 347 S.E.2d at 484.

In *Furr*, we held that the trial court erred by granting a directed verdict in favor of the plaintiffs, noting that "[w]hen the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." *Id.* at 639, 347 S.E.2d at 485. The uncontradicted evidence in *Furr* demonstrated that on 25 August 1983, the parties executed a contract for sale of a house and lot. Forty-nine days later, one defendant refused to accept the

purchase price tendered by the plaintiffs. The plaintiffs filed suit against the defendants, seeking specific performance of the contract's terms. Following presentation of the evidence, the trial court entered a directed verdict in favor of the plaintiffs, thereby ruling on the issue of whether forty-nine days was a reasonable amount of time to close on the property. On appeal, this Court reversed, concluding that in light of the defendant's testimony that she attempted to close on the property several times in September, "we are unable to say that forty-nine (49) days was a reasonable time as a matter of law within which to close on this property." *Id.* We noted that "more than one inference c[ould] be drawn from the facts presented" in the case, and that therefore, "[t]he issue of reasonable time is for the jury." *Id.*

We conclude that the reasoning of *Furr* applies to the instant case. As discussed above, the contract in the instant case did not provide a specific closing date. Instead, it required the parties

to execute "any and all documents and papers necessary in connection with closing and transfer of title on or before 2 weeks after permits issued," and it provided that the sale of defendant's land was conditional upon plaintiffs being "able to obtain [a] building permit prior to closing." Nothing in the contract stated that time was of the essence, and there was no indication that a failure to close within a specific time period would void or continue either of the parties' obligations. At trial, defendant testified that following the parties' execution of the contract, Barber "got in contact" with him and said, "we want to close right away[.]" Defendant testified that he called plaintiffs' attorney's office "several times . . . to try to get [Barber] to close" prior to June 2001. Defendant further testified that Barber advised him in December 2001 "that he was ready to close and it would be just a short while[.]" However, plaintiffs did not schedule a closing until 2 August 2002, approximately one month after plaintiffs received a CAMA permit for the lot. Following the failure of the scheduled closing, plaintiffs received a building permit for Lot 111 on 20 August 2002. In light of the foregoing, we conclude that the trial court did not err by denying plaintiffs' motion for directed verdict.

Plaintiffs next argue that the trial court erred by instructing the jury regarding prevention of performance. Plaintiffs assert that the instruction was improper because the doctrine was inapplicable to the instant case. We agree.

The record in the instant case reveals that, after explaining that the verdict sheet would contain two issues, the trial court instructed the jury in pertinent part as follows:

Issue two. The second issue reads, "Was the defendant's failure to perform a material [term] of the contract, dated August 18, 2002, by failing to convey to the plaintiffs the lands as required by the contract caused by the conduct of the plaintiffs?"

You will answer this issue only if you have answered the first issue, "yes," in favor of the plaintiffs. On this issue, the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiffs knowingly and without justification prevented or hindered defendant's ability to perform a material term of the contract by failing to convey to the plaintiffs the lands as required by the contract, which the plaintiffs contend the defendant has breached. A person does not breach a contract [where] a reason for his noncompliance with a material term[] is the other party's prevention or hindrance conduct.

Finally, as to this second issue, on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the defendant's failure to perform a material term of the contract was caused by the conduct of the plaintiffs, then it would be your duty to answer this issue, "yes," in favor of the defendant. If, on the other hand you fail to so find, then it would be your duty to answer this issue, "no," in favor of the plaintiffs.

Although we note that defendant did not request this instruction and that the trial court offered it over plaintiffs' objection, we also note that "[i]t is the duty of the [trial] court to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the conflicting evidence." *Griffin v. Watkins*, 269 N.C. 650, 653, 153 S.E.2d 356, 359 (1967) (quoting 4 Strong, N.C. Index, Trial § 33 (1961)). Nevertheless, because we conclude that the instruction was not supported by the evidence, we reverse the trial court's judgment.

"The doctrine of prevention is that 'one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.'" *Propst Construction Co. v. Dept. of Transportation*, 56 N.C. App. 759, 762, 290 S.E.2d 387, 388 (1982) (quoting *Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906)). "However, in order to excuse nonperformance, the conduct on the part of the party who is alleged to have prevented performance 'must be wrongful, and, accordingly, in excess of his legal rights.'" *Goldston Brothers v. Newkirk*, 233 N.C. 428, 432, 64 S.E.2d 424, 427 (1951) (quoting Page on Contracts, Vol. 5, § 2919, p. 5145). Furthermore, where the prevention of performance was caused by an independent act of a third party, the other party to the contract is not excused from performing his or her obligations. *See id.*

In the instant case, defendant contends that Barber "prevented performance by his conduct of not closing until he pre-sold the lot or had a buyer." However, we note that at trial, defendant testified on cross-examination that he would have closed the sale of the land on 2 August 2002. Defendant testified that he was "concerned" about Barber buying and closing on lots near his, and that he believed Barber was "stalling" him. The following exchange thereafter occurred:

Q. You know now that he intended to close with you the same day he closed with [defendant's brother], but there was a problem with the bank.

A. Well, I didn't close that day. The word was, sir, let's close and get through with it. Let's get it off the books. And I did everything I could -- and he'll tell you the same thing if he'll tell the truth about it -- to try to get him to close. I did. I did everything I -- and if he'd have called me after the water and sewage tap and said, I need another thing that's going to cost you another 10 or -- another 500 or 600, I would have probably got that too, because I wanted to close.

Q. So when you left there and didn't close that day, August [2] of 2002, when [defendant's brother] closed, it wouldn't have mattered what happened after that, you weren't going to close?

A. I didn't think too much about it until later on when the tax bills started coming

in and all that stuff, and I did, that's when I started thinking about it, because it was costing me more to hold onto the property, and I had held onto it for two years. . . .

In light of the record in the instant case, we are not persuaded that defendant offered sufficient evidence to warrant an instruction on performance prevention. As detailed above, defendant testified that he would have closed the sale of the land on 2 August 2002, and that he “didn't think too much” about closing until his “tax bills started coming in” and reflecting a change in the value of his property. It is undisputed that the closing on 2 August 2002 was prevented because of the independent actions of a third party, the lending institution used by plaintiffs. There is no indication that plaintiffs caused or contributed to the error. Furthermore, there is no indication that plaintiffs engaged in any “stalling” or “pre-selling” following the 2 August 2002 anticipated closing. Instead, the record reveals that plaintiffs contacted defendant several times in an effort to schedule a closing, and that the closing was unsuccessful on the later-scheduled date due to defendant's refusal to participate. In light of the foregoing, we conclude that the record in the instant case does not support an instruction regarding prevention of performance. Accordingly, we hold that the trial court erred by instructing the jury on the doctrine. Because the trial court's error requires reversal of its judgment, we need not address plaintiffs' additional assignments of error. Furthermore, because the jury concluded that defendant breached the contract by refusing to convey his land to plaintiffs, this cause is remanded to the trial court with instructions to enter a new judgment in favor of plaintiffs.

Reversed.

Judges HUDSON and ELMORE concur.

Report per Rule 30(e).

Judge TIMMONS-GOODSON submitted this opinion for filing prior to 31 October 2005.