An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-234

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

JACKIE S. MUSSELWHITE

Plaintiff,

v. Robeson County
No. 00 CVD 04356

BYRON L. McNEILL, JR. and
wife, FRANKIE P. McNEILL,

Defendants.

Appeal by defendants from judgment entered 6 December 2001 by Judge W. Jeffrey Moore in District Court, Robeson County. Heard in the Court of Appeals 13 November 2002.

*Byron L. McNeill, Jr. and Frankie P. McNeill, for defendant-appellant.*

*Earl H. Strickland, for plaintiff-appellee.*

WYNN, Judge.

On appeal, in three assignments of error, this case presents one issue: May the administrator of an estate, in her personal capacity, become the named beneficiary to a promissory note negotiated on behalf of the estate, for the purpose of collecting a debt owed to the estate and disbursing the payments to the estate's beneficiaries? We answer yes and, therefore, affirm the judgment of the District Court, Robeson County.

Shortly before his death, I. P. Sealey told his sister, Jackie S. Musselwhite, that she was named as the executor in his will. In the course of explaining her role under his will, Mr. Sealey advised his sister that: "I don't have many people who owe me money . . . but Dr. and Mrs. McNeill, [who] are dear friends of mine . . . owe me quiet a bit." However, Mr. Sealey assured Ms. Musselwhite that in collecting the debt she would not "have any problems with Dr. McNeill."

After Mr. Sealey's death, Ms. Musselwhite qualified as the administrator of his estate. In settling the estate, Ms. Musselwhite determined that an open account, with an unpaid balance of $45,000, was owed to Mr. Sealey's antique business by Dr. and Mrs. McNeill. Ms. Musselwhite also discovered that the McNeills were paying between $1,000 and $1,500 on this debt per month at the time of Mr. Sealey's death.

A few months after Mr. Sealey's death, the heirs of the estate were pressuring Ms. Musselwhite to close the estate and to distribute the assets. However, because the McNeills' owed a sizable debt to the estate, Ms. Musselwhite was having difficulty closing the estate. Accordingly, Ms. Musselwhite contacted an attorney to help negotiate an agreement. On 9 June 1999, a compromise was reached and the McNeills signed a promissory note. In the note, the McNeills promised to make nine monthly payments of $1,500 through 10 March 2000 ($13,500) to Ms. Musselwhite, and pay an additional $18,000 to Ms. Musselwhite by 10 October 2000. Ms. Musselwhite decided not to charge interest on the amount "because

[Dr. McNeill] was such a good friend of [Sealey's]." Apparently, to hasten the estate's closing, thus triggering the distribution of the estate's assets evenly among the heirs as directed by Mr. Sealey's will, Ms. Musselwhite became the named beneficiary in the promissory note. Thereafter, after each McNeill check arrived, Ms. Musselwhite endorsed the check to her attorney, and her attorney placed the funds in a trust account for the benefit of the estate's heirs.

Ostensibly, a conflict arose when the McNeills recognized that they had made a note payable to Ms. Musselwhite in her personal capacity rather than to the Estate of I. P. Sealey. The McNeills contend Dr. McNeill "did not read the note because Plaintiff's Attorney had handled real estate transactions for him and they signed the note thinking he was an honest man." From that conflict, this action arose in which Ms. Musslewhite sought enforcement of the note. In response, the McNeills filed a motion under Rule 12(b)(6) seeking dismissal of the complaint because "there was never any debt owed to [Ms. Musselwhite], no action was brought to recover the debt on behalf of the Estate within the two (2) year statutory period, and therefore any money owed had prescribed." We uphold the trial court's denial of the motion to dismiss and grant assurance to the McNeills that under the facts of this matter, paying the debt due under the note satisfies their obligations to the Estate of I. P. Sealey.

From the outset, it should be noted, the record in this case shows sufficiently that the purpose of the McNeills' defense does

not appear to be that they do not accept or intend to repay their debt to the Estate of I. P. Sealey. Instead, the crux of this matter appears to center upon the McNeills' concerns that the debt they owe is due to the Estate of I. P. Sealey, not to Ms. Musselwhite. As with many questions presented to our courts, this appears to be a matter arising from a failure of the parties to fully communicate and understand the nature of their actions.

It is understandable that the McNeills would have a concern over paying a debt under a note made payable to someone other than the Estate of I. P. Sealey. Indeed, generally, to pay money to one who is not owed the debt does not discharge the debt. In essence, what the McNeills appear to seek is assurance that by paying Ms. Musselwhite in her personal capacity, their debt obligation to the Estate of I. P. Sealey will be satisfied. With this opinion, we provide that assurance to the McNeills.

"A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief can be granted under some legal theory." *Farr Associates, Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 880 (2000). "In ruling on the motion, the trial court must take the complaint's allegation as true . . ." *Fuller v. Easley*, 145 N.C. App. 391, 398, 553 S.E.2d 43, 48 (2001). Accordingly, a "motion to dismiss pursuant to Rule 12(b)(6) should not be granted 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be

proved in support of the claim.'" *Baskin*, 138 N.C. App. at 279, 530 S.E.2d at 880 (quoting *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999)). As our Supreme Court has held, the "function of a motion to dismiss is to test the law of the claim, not the facts which support it." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979).

To recover on a promissory note, the party seeking relief must show execution, delivery, consideration, demand, and nonpayment. *Sam Stockton Grading Co. v. Hall*, 111 N.C. App. 630, 632, 433 S.E.2d 7, 8 (1993). Moreover, the party seeking to enforce the promissory note "must be a real party in interest." *Kane Plaza Associates v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465, 467 (1997); N.C. Gen. Stat. § 1-57; N.C. R. Civ. P. 17(a).

In this case, the McNeills challenge only the sufficiency of the complaint insofar as Ms. Musselwhite is the named beneficiary of the promissory note. As stated previously, the McNeills acknowledge their "indebtedness owed to Mr. I. P. Sealey"; they do not argue that the promissory note lacked execution, delivery, consideration, demand, or an absence of nonpayment. Accordingly, in reviewing the trial court's denial, we limit our review to whether Ms. Musselwhite was a real party in interest with a legal right to file the complaint.

Under N.C. Gen. Stat. § 28A-13-3(a)(15), the administrator of an estate has the power to "compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate." Moreover, the "principle is

firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable." *Bank of Northampton v. Town of Jackson*, 214 N.C. 582, 584, 200 S.E. 444, 446 (1939).

Here, Ms. Musselwhite, in her capacity as the administrator of Mr. Sealey's estate, agreed to grant an extended payment schedule, a forbearance, and a reduced payment in consideration for a promissory note signed by the McNeills. Thereafter, Ms. Musselwhite, in her official capacity as administrator of the estate, "assigned" the promissory note to Ms. Musselwhite, in her individual capacity. Although this assignment is seemingly unnecessary, the McNeills do not have standing to challenge the assignment. *See Lipe v. Guilford Nat. Bank*, 236 N.C. 328, 331, 72 S.E.2d 759, 761 (1952). Rather, the heirs, and the heirs alone, have standing to challenge the assignment. *See e.g.*, N.C. Gen. Stat. § 28A-13-10 (2001). Accordingly, this assignment of error is without merit.

In sum, we uphold the trial court's order denying the motion to dismiss; however, in doing so, we fulfill the McNeills' implicit request for assurance that in paying the debt due under this note, they satisfy their obligation to the Estate of I. P. Sealey.

Affirmed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).