NO. COA12-805
NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

LAWYERS PARALEGAL TRAINING PROGRAMS, LLC, and STEVEN A. McCLOSKEY,
Plaintiffs,

v. Forsyth County
No. 11 CVS 1292

GUILFORD COLLEGE, a nonprofit corporation,
Defendant.

Appeal by plaintiffs from order entered 23 March 2012 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 27 November 2012.

Steven A. McCloskey for plaintiffs.

Smith Moore Leatherwood LLP, by Alexander L. Maultsby and Kip D. Nelson, for defendant.

HUNTER, Robert C., Judge.

Plaintiffs Lawyers Paralegal Training Programs, LLC and Steven A. McCloskey (collectively "plaintiffs" or, individually, "LPTP" or "Mr. McCloskey") appeal from the trial court's 23 March 2012 order granting summary judgment in favor of defendant

Guilford College. After careful review, we affirm the trial court's order.

Background

Mr. McCloskey is a licensed attorney. In 2005 and 2006, he was an instructor in Duke University's paralegal program as an independent contractor. In 2006, he formed LPTP to create and operate for-profit paralegal programs similar to the one at Duke. In December 2006, he contacted Rita Serotkin ("Ms. Serotkin"), Dean of the Center for Continuing Education at Guilford College. After she expressed interest in his program, Mr. McCloskey sent Ms. Serotkin an email on 14 December 2006 describing the paralegal curriculum and providing an estimate of the projected revenues of the program. In this email, Mr. McCloskey offered a "split" of the profits from the program.

The parties met in February 2007 to discuss the program. Mr. McCloskey testified that he prepared a document entitled "Estimates for Guilford College" that estimated the projected revenue of the program. This document did not discuss any profit sharing arrangement. Ms. Serotkin averred that there was no discussion at the February meeting about profit sharing. As a result of this meeting, they agreed to proceed with setting up the program at Guilford College.

Sometime after the meeting, Mr. McCloskey called Ms. Serotkin to discuss the "agreement" to share revenues. Mr. McCloskey testified at his deposition that, during the call, he told Ms. Serotkin, "I did not expect a 50/50 split, and what I had in mind was something more like 60/40, 60 to Guilford and 40 to me. And [Ms. Serotkin] said, well, we'll decide that later after we see how the program goes." Ms. Serotkin claimed that she did not agree during the phone call to any profit sharing arrangement.

From 2007 to 2011, there have been two paralegal programs per year (fall and spring) for a total of eight programs. Plaintiffs and defendant entered into written contracts for each course. Each contract spelled out the details of the courses and established the compensation rates for plaintiffs. Moreover, each contract was signed by the parties. None of these contracts included any language indicating that there would be a split in profits.

On 8 September 2009, Mr. McCloskey emailed Ms. Serotkin about the profit sharing split. Specifically, he requested the opportunity to speak with her about "an equitable split of profits, as [they] discussed when I first brought the idea of a program to you for consideration." Mr. McCloskey alleged that

no meeting occurred "[d]espite Dean Serotkin's assurances that she wanted to meet to discuss the matter[.]" In March 2010, Mr. McCloskey claimed that he met with Ms. Serotkin, and she offered the following split: 95% to defendant and 5% to plaintiffs. Mr. McCloskey rejected the offer. After this meeting, Mr. McCloskey contends that there have been no further meetings nor answers to his demands for payment.

On 22 February 2011, plaintiffs filed a complaint against defendant alleging claims of breach of contract, misrepresentation, unfair or deceptive practices, fraud, constructive trust, and *quantum meruit*. On 2 March 2012, defendant filed a motion for summary judgment. The matter came on for hearing on 19 March 2012. On 23 March 2012, the trial court granted defendant's motion for summary judgment as to all claims. Plaintiffs filed notice of appeal on 20 April 2012.

Argument

Plaintiffs' sole argument on appeal is that the trial court erred by entering summary judgment in favor of defendant.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "When reviewing a summary judgment order this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Boyce & Isley, PLLC v. Cooper*, __ N.C. App. __, __, 710 S.E.2d 309, 315 (2011) (internal quotation marks and citation omitted). The moving party has

> the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

James v. Clark, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (internal quotation marks and citation omitted), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

I. Plaintiffs' Breach of Contract Claim

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007). "It is a well-settled

principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Miller v. Rose*, 138 N.C. App. 582, 587, 532 S.E.2d 228, 232 (2000). "Summary judgment in favor of the defendant is properly entered when the evidentiary forecast discloses that the parties never reached a mutual understanding or meeting of the minds as to the essential terms of the contract." *Elliott v. Duke Univ., Inc.*, 66 N.C. App. 590, 596, 311 S.E.2d 632, 636, *disc. review denied*, 311 N.C. 754, 321 S.E.2d 132 (1984).

Here, plaintiffs are not contending that defendant violated any of the terms of their written contracts. In contrast, plaintiffs' complaint is based on their contention that there was a separate agreement to split the profits of the program, as originally suggested in Mr. McCloskey's 14 December 2006 email. Taking the evidence in a light most favorable to plaintiffs, while there was discussion of profit sharing, the parties never reached any agreement as to what the terms of that agreement would be. The parties discussed the potential for profit sharing during their phone call after the February 2007 meeting and at the March 2010 meeting. During the February phone call, Ms. Serotkin contended that she explicitly rejected Mr.

McCloskey's offer of a 50/50 split. Mr. McCloskey stated that the parties did not reach any definitive agreement with regard to profit sharing during that phone call. During the March meeting, Mr. McCloskey testified that he rejected Ms. Serotkin's offer of a 95/5 split. Thus, taking the evidence in a light most favorable to plaintiffs, there was no meeting of the minds with regard to profit sharing. Therefore, since the parties never reached a mutual agreement with regard to this issue, the trial court did not err in granting summary judgment in favor of defendant.

In support of their argument, plaintiffs contend that the parties' relationship was as joint venturers. Thus, since a joint venture is a kind of partnership and the parties never reached an agreement regarding how they would share the profits, N.C. Gen. Stat. § 59-48(a) would require the parties to split the profits equally in the absence of any agreement to the contrary.

"[T]he essential elements of a joint venture are (1) an agreement to engage in a single business venture with the joint sharing of profits, (2) with each party to the joint venture having a right in some measure to direct the conduct of the other through a necessary fiduciary relationship." *Se. Shelter*

Corp. v. BTU, Inc., 154 N.C. App. 321, 327, 572 S.E.2d 200, 204 (2002) (internal citation and quotation marks omitted). Here, there was no evidence that the parties were engaged in a joint venture agreement. The evidence established that the parties were completely independent entities who had an agreement in which plaintiffs would teach paralegal training classes and receive compensation for their services. While plaintiffs contend that the 14 December 2006 email established that the parties agreed to engage in a business venture and share profits, as discussed above, they never reached an agreement as to profit sharing. Therefore, plaintiffs have failed to establish that the parties were joint venturers.

In addition, plaintiffs allege that the breach of contract claim can be based on the doctrine of partnership by estoppel. Specifically, plaintiffs contend that since the parties acted like joint venturers, it would be unjust to reward defendant for denying they had a joint venture.

Partnership by estoppel is codified in N.C. Gen. Stat. § 59-46 (2011). "The essentials of equitable estoppel or estoppel *in pais* are a representation, either by words or conduct, *made to another*, who reasonably believing the representation to be true, relies upon it, with the result that he changes his

position to his detriment." *Wiggs v. Peedin*, 194 N.C. App. 481, 488, 669 S.E.2d 844, 849 (2008) (emphasis added). Plaintiffs' reliance on the doctrine of partnership by estoppel is misplaced because it speaks to a partnership's liability to a third-party. Here, plaintiffs' claim is not based on any representations to a third-party. Therefore, the doctrine of partnership by estoppel is not applicable to the facts of this case.

II. Misrepresentation[1]

"It has long been held in North Carolina that the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Brinkman v. Barrett Kays & Assoc., P.A.*, 155 N.C. App. 738, 742, 575 S.E.2d 40, 43-44 (2003). While "summary judgment is seldom appropriate" in negligent misrepresentation cases, it is proper if "the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of

[1] It should be noted that although plaintiffs do not state in their brief or their complaint whether they are asserting a claim for intentional or negligent misrepresentation, they allege in their complaint that defendant owed them a duty of care. Therefore, we presume that the claim is for negligent misrepresentation.

the injury." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999). Plaintiffs' claim is based on the alleged statements defendant made with regard to profit sharing.

While the parties discussed the potential for profit sharing, they never reached an agreement with regard to its terms. Thus, there was no actual representation made with any specificity by defendant. The only representation defendant made was that the parties would discuss profit sharing in the future, and defendant followed through with this representation. Defendant met with plaintiffs in March 2010 to specifically discuss this term, and defendant suggested a profit sharing split of 95/5, which plaintiffs flatly rejected. Thus, plaintiffs have failed to establish defendant acted negligently since it actually did what it said it would—discuss a profit sharing arrangement. Therefore, summary judgment was proper with regard to plaintiffs' negligent misrepresentation claim.

III. Unfair or Deceptive Practices

To establish a claim for unfair or deceptive practices pursuant to N.C. Gen. Stat. § 75-1.1 (2011), "a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting

commerce; and (3) the act proximately caused injury to the plaintiff." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002). "A practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." *Huff v. Autos Unlimited, Inc.*, 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996), *cert. denied*, 346 N.C. 279, 487 S.E.2d 546 (1997).

Here, plaintiffs' claim for unfair or deceptive practices is based on defendant's misrepresentations and delay tactics with regard to the alleged agreement to split profits. In support of their claim, plaintiffs rely upon factual allegations they asserted to support their negligent misrepresentation and breach of contract claims. Since there was no agreement to split any profits, there was no deception on the part of defendant with regard to a nonexistent agreement. Thus, as with plaintiffs' other claims based on the same factual allegations, we conclude summary judgment was proper.

IV. Fraud

"While actual fraud has no all-embracing definition, the following essential elements of actual fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made

with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 387 (internal quotation marks omitted). "In order for [a] defendant[] to prevail on [its] motion for summary judgment, [it] did not need to negate every element of fraud. If defendant effectively refutes even one element, summary judgment is proper." *RD&J Prop. v. Lauralea-Dilton Enter., LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498 (2004) (internal quotation marks omitted).

Plaintiffs argue that Dean Serotkin's failure to tell plaintiffs that there would not be an equitable profit split constitutes a "concealment of a material fact." Here, as discussed, there was no agreement to have an equitable profit split. The only agreement was to discuss the terms of a profit sharing arrangement, which defendant did and offered a 95/5 split. Therefore, there was no concealment of any fact, and summary judgment was proper.

V. Constructive Trust

Our Supreme Court has noted that

> [a] constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance

> making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Roper v. Edwards, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988). A constructive trust will not be imposed if there is no fiduciary duty between the parties. *Sec. Nat. Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965). "[A] constructive trust cannot be based upon an unenforceable oral agreement." *Graham v. Martin*, 149 N.C. App. 831, 836, 561 S.E.2d 583, 586 (2002).

Here, there was no evidence that the parties had a fiduciary duty to each other. In contrast, the evidence showed that they were two independent entities that agreed to enter into contracts whereby plaintiffs would teach paralegal training courses, and defendant would pay plaintiffs for their services. Moreover, there was no enforceable agreement regarding profit sharing. Therefore, plaintiffs' claim necessarily fails, and the trial court did not err in granting summary judgment for defendant with regard to this claim.

In support of their argument, plaintiffs contend that because the parties were engaged in a joint venture, under N.C. Gen. Stat. § 59-50(a), defendant was required to "hold a portion of the profits in trust for the plaintiffs' benefit." However,

since the record contains no evidence supporting plaintiffs' allegation that they were joint venturers, and we have specifically rejected this argument above, plaintiffs' argument is without merit. Therefore, defendant was under no obligation to account or hold a portion of the profits in trust.

VI. Quantum Meruit

Finally, plaintiffs allege that the trial court erred in granting defendant's summary judgment motion with regard to their claim for *quantum meruit*.

"To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Wing v. Town of Landis*, 165 N.C. App. 691, 693, 599 S.E.2d 431, 433 (2004). This Court has held that

> [i]t is a well established principle that an express contract precludes an implied contract with reference to the same matter. It is stated in 12 Am. Jur., Contracts, Section 7, page 505: "There cannot be an express and an implied contract for the same thing existing at the same time." Thus, the focus, in the *quantum meruit* context, is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties.

Ron Medlin Const. v. Harris, 199 N.C. App. 491, 495, 681 S.E.2d 807, 810 (2009) (internal citations and quotation marks omitted), *aff'd as modified and remanded*, 364 N.C. 577, 704 S.E.2d 486 (2010).

The record contains uncontroverted evidence that the parties had enforceable contracts related to the paralegal training courses. These contracts established the relative rights and duties for each party and specifically addressed the issue of compensation. Plaintiffs contend that there was a separate agreement, outside the parameters of those contracts, regarding profit sharing. However, profit sharing is a form of compensation. Thus, plaintiffs are requesting the Court to imply a contract regarding the same subject matter as addressed in the express contracts. Therefore, plaintiffs' claim fails as a matter of law because they are precluded from recovering in *quantum meruit*.

Conclusion

Based on the foregoing reasons, we affirm the trial court's order granting defendant's motion for summary judgment.

AFFIRMED.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).