IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-898

No. COA22-331

Filed 20 December 2022

Durham County, No. 19 CVS 3033

WFP, LLC, Plaintiff,

v.

REHAB BUILDERS, INC. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, Defendants.

REHAB BUILDERS, INC., Third-Party Plaintiff,

v.

APPLIED CONSTRUCTION TECHNOLOGY, INC., JMA CONSTRUCTION LTD COMPANY, DANIEL W. PATTERSON D/B/A CLEAN AMERICA RESTORATION/ CLEAN AMERICA, LLC, JDAVIS ARCHITECTS, PLLC and OSTERLUND ARCHITECTS, PLLC, Third-Party Defendants.

APPLIED CONSTRUCTION TECHNOLOGY, INC., Fourth-Party Plaintiff,

v.

SHARP ROOFING, LLC, Fourth-Party Defendant.

Appeal by defendant and third-party plaintiff from order entered 23 July 2020 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 15 November 2022.

Carruthers & Roth, P.A., by Jack B. Bayliss, Jr., for defendant and third-party plaintiff-appellant Rehab Builders, Inc.

Hamilton, Stephens, Steele & Martin, PLLC, by Allen L. West and Kenneth B. Dantinne, for third-party defendant-appellee Osterlund Architects, PLLC.

Ragsdale Liggett PLLC, by Melissa Dewey Brumback and John M. Nunnally, for third-party defendant-appellee JDavis Architects, PLLC.

ARROWOOD, Judge.

¶ 1 Defendant and third-party plaintiff Rehab Builders, Inc. ("Rehab"), appeals from the trial court's order granting motions to dismiss for third-party defendants Osterlund Architects, PLLC ("Osterlund") and JDavis Architects, PLLC ("JDavis") (collectively, "defendants"). Rehab contends that the trial court erred in granting defendants' motions to dismiss because Rehab stated a claim against defendants for negligence and breach of implied warranty. For the following reasons, we affirm.

I. Background

¶ 2 On or about 1 March 2015, WFP, LLC ("WFP") and Rehab entered into a construction contract related to the property located at 201 E. Center Street in Mebane, North Carolina ("the project"). Under this contract, Rehab agreed to perform "certain construction services" for the project. However, after "Rehab completed substantial portions of its work required under the [c]ontract[,]" WFP and Rehab entered into a settlement agreement to compromise and settle disputes that had

arisen between them. The settlement agreement between Rehab and WFP was signed on 4 May 2016, and read, in pertinent part:

> [Rehab], does hereby remise, release, acquit and forever discharge WFP and WFP's parents and subsidiary corporations, insurers, predecessors, successors, assigns, officers, directors, affiliates, members, managers, sureties, *agents* and employees (collectively, the "WFP associates") of and from every and any and all manner of action and actions and cause and causes of action . . . whether known or unknown and whether presently existing or existing hereafter, which Rehab . . . have had or shall hereafter have, for reason of, relating to or arising out of the Contract or Project . . . .

(emphasis added)

¶ 3 On 20 June 2019, WFP filed a complaint against Rehab, alleging they performed defective work on the project. Specifically, WFP alleged that Rehab breached their contract, breached the express and implied warranties related to its work on the project, and made claims related to the performance bond held by Travelers Casualty and Surety Company of America ("Travelers"). Rehab answered WFP's complaint on 12 September 2019, denying all claims and asserting multiple defenses. One such defense was that the settlement agreement barred WFP's recovery and their claim should therefore be dismissed.

¶ 4 Thereafter, Rehab filed a third-party complaint against multiple companies, including defendants, on 17 October 2019. In their third-party complaint, Rehab alleged that defendants were negligent and breached their implied warranty to

Rehab. Specifically, Rehab asserted that defendants owed them "a duty of care arising under common law and arising out of their contracts with each other and with their contracts with WFP" since that "duty extended to Rehab and its subcontractors." Furthermore, Rehab contended defendants breached implied warranties by representing "to Rehab that they possessed the professional skills, competence and experience to" design, construct, and renovate the property. Lastly, Rehab alleged that they were "not fully and fairly compensated by WFP[,]" and defendants' actions "compel[led] Rehab to accept [an] unfair and unfavorable settlement with WFP[.]" Defendants filed separate motions to dismiss.

¶ 5 In their motions, defendants argued that Rehab did not have a claim for breach of warranty because there was no contractual privity between defendants and Rehab. Furthermore, defendants contended that Rehab's negligence claim failed because: (1) it was outside the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(5); (2) Rehab waived any negligence claim against defendants by signing a settlement agreement with WFP; and (3) Rehab's negligence claims only sought pass through damages, which is not allowed under North Carolina law.

¶ 6 The matter came on for a hearing on defendants' Motions to Dismiss on 13 July 2020 in Durham County Superior Court, Judge Hudson presiding. The trial court granted defendants' motions to dismiss on 23 July 2020, dismissing all claims against defendants pursuant to Rule 12(b)(6). On that same day, the trial court filed

an order asserting that CBRE HMF, Inc., the Secretary of Housing and Urban Development ("HUD"), and Government National Mortgage Association ("GNMA") were necessary parties to the action. The case was thereafter removed to federal court.

¶ 7 On 14 January 2022, the federal court remanded the case back to state court, finding that because all claims against HUD and GNMA were voluntarily dismissed, the federal court lacked original jurisdiction and declined to retain supplemental jurisdiction. Rehab filed a notice of appeal from the order granting defendants' motions to dismiss on 4 February 2022.

II. Discussion

¶ 8 On appeal, Rehab argues that the trial court erred in granting defendants' motions to dismiss because their third-party complaint stated claims for negligence and breach of implied warranty, for which relief could be granted. Furthermore, they contend the lower court improperly considered the settlement agreement, and even if it could consider the agreement, it did not preclude Rehab's claims against defendants.

A. Standard of Review

¶ 9 "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken

as true. On a motion to dismiss, the complaint's material factual allegations are taken as true." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

> Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. (citation omitted). On appeal of such a motion, "this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* at 74, 752 S.E.2d at 663-64 (citation omitted).

¶ 10 We note that although Rehab argues that the trial court used the wrong standard of review, this contention is without merit. Rehab argues that because the trial court used the term "in its discretion" in its order, it utilized the incorrect standard of review and therefore the case must be remanded. However, this allegation ignores the order in its entirety.

¶ 11 The order specifically states that the trial court considered the motions, briefs, pleadings, citations, and arguments of counsel, and that the motion was granted "pursuant to Rule 12(b)(6)[.]" This Court addressed a similar argument in *Page v. Lexington Insurance Company*. 177 N.C. App. 246, 252, 628 S.E.2d 427, 430-31

(2006). There, this Court held that although the trial court used the phrase "forecast of the evidence" in its ruling on the defendant's 12(b)(6) motion, the trial court used specific 12(b)(6) language and expressly stated the materials it considered in making its decision. *Id.* at 252, 628 S.E.2d at 431. Accordingly, this Court found the trial court applied the correct standard and the order was affirmed. *Id.*

¶ 12 Here, as in *Page*, Rehab's argument is based on three isolated words in the trial court's order, and the record does not otherwise reflect that the trial court utilized the wrong standard of review. Furthermore, this argument ignores the fact that the trial court specifically references the correct standard of review. Accordingly, we find Rehab's argument is without merit.

B. Motion to Dismiss Negligence Claims

¶ 13 Rehab first contends the trial court erred in granting defendants' 12(b)(6) motion, dismissing Rehab's negligence claim. Specifically, Rehab argues: (1) that their claim was brought within the applicable statute of limitations; (2) they sought direct damages from defendants; and (3) the trial court improperly considered the settlement agreement, and even if it could consider the agreement, it did not bar their claims against defendants. We disagree with Rehab's contention that the settlement agreement was incorrectly considered and their argument that the settlement agreement does not preclude their claims.

¶ 14 In deciding a Rule 12(b)(6) motion, "the trial court need only look to the face of

the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation omitted). Rule 12(b) further provides, in pertinent part:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2021) (emphasis added).

¶ 15 However, if a document "is *both the subject of the action and specifically referenced in the complaint*, a dispositive motion under Rule 12 is not thereby converted into a Rule 56 motion for summary judgment." *See Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 242, 742 S.E.2d 803, 808 (2013) (citations omitted) (emphasis added). This Court found that the "obvious purpose" of this limitation is to eliminate "any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings." *Coley v. N.C. Nat. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979).

¶ 16 Here, we cannot conclude that the trial court considered matters outside the complaint and converted the 12(b)(6) motion to a Rule 56 motion. Rehab specifically

referenced the settlement agreement in their third-party complaint when they stated that defendants' actions "compel[led] [them] to accept [an] unfair and unfavorable settlement with WFP[.]" Furthermore, Rehab cannot contend they were unfairly surprised by defendants' submission of the settlement agreement, considering they themselves relied on the settlement agreement as an affirmative defense in their answer to WFP's complaint. Therefore, Rehab cannot be surprised by the trial court's desire to familiarize itself with the settlement agreement. *See id.* ("Certainly[,] the plaintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint."). Accordingly, the trial court properly considered the settlement agreement.

¶ 17 However, Rehab claims that the agreement, even if properly considered, still does not preclude their claims. We disagree. Despite Rehab's contention that a settlement agreement and a release are distinguishable, both are contractual in nature and are thereby governed and interpreted by "the principles . . . of contracts[.]" *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 395, 594 S.E.2d 37, 42 (2004) (citations omitted); *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citations omitted) ("A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be

interpreted and tested by established rules relating to contracts.").

¶ 18 "Under North Carolina law, 'when the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties.' Thus, 'it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Fin. Servs. of Raleigh, Inc.,* at 395, 594 S.E.2d at 42-43 (citations and brackets omitted). Furthermore, our Court has granted full effect to agreements which, "by [their] express terms," provide for discharge of tortfeasors for any claims arising out of a particular incident. *See Battle v. Clanton*, 27 N.C. App. 616, 621, 220 S.E.2d 97, 100 (1975), *disc. review denied*, 289 N.C. 613, 223 S.E.2d 391 (1976).

¶ 19 For example, in *Sykes v. Keiltex Industries, Inc.*, we held that "a valid general release which by its terms unambiguously release[d] defendant[s] from the liability charged in [the] plaintiff's complaint, constitute[ed] a bar to [the] claim[.]" *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 485, 473 S.E.2d 341, 344 (1996) (citation omitted). In *Sykes*, the document in question stated the plaintiff "hereby . . . release[s], acquit[s], and forever discharge[s]" the defendant, their agents, and "all other persons, firms, corporations, associations or partnerships of and from any and all claims . . . which the undersigned now has or which may hereafter accrue . . . in any way growing out of . . . or to result from the incident" in question. *Id.* at 485, 473

S.E.2d at 343. Therefore, the trial court's dismissal of the complaint was affirmed. *Id.* at 488, 473 S.E.2d at 345.

¶ 20 The settlement agreement here uses almost identical language, and we find no reason why the clear terms of the agreement should not be honored since it is unambiguous. Furthermore, we find Rehab's contention that the settlement agreement cannot be used to preclude the claims against defendants since they were not parties to the agreement, is likewise without merit. The settlement agreement specifically included WFP's agents as a party bound by the contract, and this Court has held that architects are agents of those by whom they are employed. *Greensboro Hous. Auth. v. Kirkpatrick & Assocs., Inc.*, 56 N.C. App. 400, 402, 289 S.E.2d 115, 117 (1982) (citations omitted).

¶ 21 Since we have determined the trial court did not err in dismissing Rehab's third-party complaint for this reason, we need not address Rehab's additional arguments that their negligence claim was not barred by the statute of limitations and that they sought direct damages and not "pass through" damages from defendants. Accordingly, we hold the trial court properly considered the settlement agreement and did not err by granting defendants' motion to dismiss since the settlement agreement effectively barred Rehab's claims against defendants.

C. Motion to Dismiss Breach of Implied Warranty Claims

¶ 22 Rehab next contends that the trial court erred in dismissing their claim for

breach of implied warranty against defendants. Rehab, recognizing that this Court has held the " 'general rule' is that parties must be in privity of contract" to assert such a claim, urges us "to recognize an exception . . . due to the unique working relationship between" architects and general contractors. We decline to do so.

¶ 23 As Rehab acknowledges, our Supreme Court has held that "[a]bsent privity of contract, there can be no recovery for breach of warranty[.]" *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 641, 131 S.E.2d 367, 370 (1963) (citations omitted). Since "[t]his Court is bound by precedent of the North Carolina Supreme Court[,]" we cannot recognize an exception to this general rule. *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (2003) (citation omitted). Accordingly, Rehab's argument that the trial court erred in dismissing its claim for breach of implied warranty is without merit.

III. Conclusion

¶ 24 For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges INMAN and CARPENTER concur.

Report per Rule 30(e).