IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-961

Filed 19 September 2023

Wake County, No. 20 CVS 007911

SAADI HASAN ELWIR, BROOKSIDE MARKET OF RALEIGH, INC., Plaintiffs,

v.

THE BOUNDARY, LLC, THE BOUNDARY HOLDINGS, LLC, DUANE WILLIAMS and TAD LOWDERMILK, Defendants.

Appeal by Plaintiffs from orders entered 20 April 2022 by Judge James P. Hill in Wake County Superior Court. Heard in the Court of Appeals 9 May 2023.

Stam Law Firm, PLLC, by R. Daniel Gibson, for Plaintiffs-Appellants.

Morningstar Law Group, by Christopher T. Graebe and J. William Graebe, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiffs Saadi Hasan Elwir and Brookside Market of Raleigh, Inc. ("Brookside"), appeal from the trial court's grant of summary judgment to Defendants The Boundary, LLC ("Boundary"), and its agents, Duane Williams and Tad Lowdermilk, on Plaintiffs' claims regarding the parties' contract for the sale of

Plaintiffs' business. Plaintiff[1] contends the trial court erred by (1) striking portions of Plaintiff's affidavit in opposition to summary judgment for inconsistency; and (2) determining there were no genuine issues of material fact and Defendants were entitled to summary judgment on all claims. We affirm the trial court's orders.

I. Factual and Procedural Background

Plaintiff is the owner and operator of Brookside, a grocery store in a mixed-use building in Raleigh. Brookside shares a storefront with another business, Brookside Pizza, which Plaintiff does not own.

Boundary formed in 2016 to purchase the building where Brookside is located. After acquiring the building, Boundary's agents approached Plaintiff about buying Brookside and terminating Plaintiff's lease. Plaintiff expressed a willingness to sell Brookside and its inventory to Defendants, and the parties spoke in person two or three times to discuss the terms of sale. On 8 February 2017, Plaintiff and Defendants "memorialized [those terms] in a contract" terminating Plaintiff's lease of the space where Brookside was located (now owned by Defendants) and transferring Brookside to Defendants.

Over the next eighteen months, Defendants encountered difficulties acquiring a permit from the Alcoholic Beverage Commission that would enable them to serve alcohol as they desired at Brookside, including the remaining inventory they would

[1] For ease of reading, we refer hereafter to Plaintiffs as "Plaintiff," as Elwir acted throughout this case for his own interests and as representative of Brookside Market of Raleigh, Inc.

receive in their purchase of Brookside. The ABC officer assigned to the case expressed concerns that two separate entities, Brookside and Brookside Pizza, would operate out of the same storefront while only one of the two was licensed to sell alcohol. The ABC officer informed Defendants that selling alcohol at Brookside would be illegal at that time, and that any permit Plaintiff previously held was improperly granted. Defendants believed this to be a material impairment to their purchase of Brookside and attempted to negotiate a rescission of the written contract "for reasons of mutual mistake of prior and/or existing fact(s) and illegality." Though evidence showed that Defendants believed an agreement to rescind was reached, evidence of the parties' communications conflicted on this issue and Plaintiff attempted to enforce the February 2017 contract. Brookside Pizza later vacated the premises, potentially mooting the concerns the ABC officer had with Defendants' sale of alcohol out of the Brookside storefront.

Plaintiff first sued Defendants in September 2018, but voluntarily dismissed that action. Defendants defended the first action, in part, by contending that there was no lawfully executed written contract binding the parties because Plaintiff had signed the February 2017 contract in his own name but had failed to sign on behalf of Brookside as an entity.

Plaintiff filed the present action against Defendants in July 2020 claiming Defendants breached the parties' February 2017 contract for the sale of Brookside, along with seven other claims stemming from the alleged contract. In October 2020,

Defendants filed an answer and affirmative defenses arguing, *inter alia*, that an enforceable contract never existed between the parties, or, in the alternative, the contract had been rescinded.

In February 2022, Defendants moved for summary judgment on Plaintiff's claims, once again contending that there was no enforceable contract currently in place between the parties because the February 2017 written contract was never properly executed, any agreement between the parties was later rescinded, and any agreement between the parties must fail for illegality. Plaintiff then filed an affidavit in opposition to summary judgment, alleging, *inter alia*, that the parties had entered into an oral agreement for the sale of Brookside prior to their written agreement. Defendants moved to strike Plaintiff's affidavit because it "asserted[ed] for the first time the existence of an . . . oral agreement that preceded by four months the proposed written contract that [Brookside] never executed."

On 23 March 2022, the trial court entered a written order granting Defendants' motion to strike. On 20 April 2022, the trial court entered a written order granting summary judgment in favor of Defendants without stating which ground it relied upon in reaching its conclusion. Plaintiff timely appeals.

II. Analysis

Plaintiff contends the trial court "made two independent errors": (1) striking "portions of [Plaintiff's] affidavit even though the affidavit was consistent with [Plaintiff's] pleadings and deposition testimony," and (2) determining "there were no

genuine issues of material fact and Defendants were entitled to judgment as a matter of law." Each of these alleged errors, and each of Plaintiff's claims before the trial court, turns on a single operative issue: whether Plaintiff alleged in his initial pleadings and position before the trial court the existence of an oral contract. We hold that Plaintiff failed to properly plead the existence of an oral contract, and therefore affirm the trial court's orders.

A. Striking the Affidavit

Plaintiff first argues the trial court erred by striking portions of his affidavit in opposition to summary judgment because those portions referenced a prior, oral contract between the parties. "Rulings on motions to strike, including motions to strike affidavits, are reviewed . . . deferentially for abuse of discretion." *Zander v. Orange Cnty.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2023), No. COA22-691, 2023 WL 4339347, at *5 (N.C. Ct. App. July 5, 2023). "Furthermore, 'the [affiant party] must show not only that the trial court abused its discretion in striking an affidavit, but also that prejudice resulted from that error.'" *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 226, 768 S.E.2d 582, 596 (2015) (citation omitted).

Plaintiff points to three instances evidencing an oral contract prior to his affidavit: Plaintiff's complaint, Defendants' statute of frauds defense, and Plaintiff's deposition.

Plaintiff contends that the language of his complaint asserts the existence of both an oral and a written contract between the parties. The factual statement of the

complaint began with the following assertions:

> 9. On or about February 8, 2017, Defendants Boundary and Boundary Holdings (together "Defendant Companies") and Plaintiffs entered into an agreement to buyout Plaintiffs' sublease (the "Sublease).
>
> 10. The Sublease was for the operation of a general store located at 1000 Brookside Drive, Raleigh, NC 27601 (the "Premises").
>
> 11. Plaintiffs and Defendant Companies also entered into a limited asset sale and transfer agreement for the inventory held on the Premises at the time of the termination of the Sublease.
>
> 12. The agreements were memorialized in a contract attached as Exhibit A (the "Contract").

The complaint then stated the following in the first claim for breach of contract:

> 29. Plaintiff and Defendants entered into a Contract for Defendants to purchase inventory and for Defendants to buy Plaintiff out of the value of its Sublease.

Plaintiff directs this Court's attention to the word "memorialized" in paragraph 12 of the complaint, arguing that this Court has consistently defined "memorialize" to mean making something to remember a prior event. *See Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 673, 541 S.E.2d 733, 737 (2001) (stating an oral contract reached over the telephone was "memorialized by letter"); *Tutterrow v. Leach*, 107 N.C. App. 703, 709, 421 S.E.2d 816, 820 (1992) (same); *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 223–24, 693 S.E.2d 723, 732 (2010) ("It was up to the jury to decide whether this testimony acknowledged an oral agreement to later be

memorialized in writing or whether these were just negotiations."). However, *Filmar* and *Tutterrow* each used writings between the parties to assess a party's contacts with the forum state for purposes of personal jurisdiction and were not pressed with the question whether an oral contract was sufficiently pled where the written contract failed. *Filmar*, 141 N.C. App. at 673, 541 S.E.2d at 737 (holding "the single act of mailing a letter" did not amount to minimum contacts); *Tutterrow*, 107 N.C. App. at 709, 421 S.E.2d at 820 (holding telephone calls and a handful of letters were not sufficient minimum contacts with North Carolina). Further, in *Kornegay*, this Court assessed whether all the evidence presented during trial, including dueling testimonies, was sufficient to submit the issue of a contract's formation to the jury—not whether purported evidence of an oral contract was included in a party's initial pleadings. *Kornegay*, 204 N.C. App. at 220, 693 S.E.2d at 730 ("[The d]efendants . . . argue that the trial court should have granted their motion for JNOV because [the] plaintiff presented insufficient evidence to create a jury question as to the existence of an enforceable, divisible contract.").

We disagree with Plaintiff's characterization of the term "memorialize" in the context of his complaint. The complaint refers to a single point in time, 8 February 2017, when the parties negotiated and entered into a contract. The breach of contract claim further references a single contract formed between the parties. Plaintiff describes two agreements between the parties which ultimately became multiple terms within the February 2017 contract, but references and claims a breach of only

a single resulting contract. To hold the language of the complaint pled the existence of any oral contract(s) would be tantamount to a holding that a reference to the oral negotiations of a contract's terms is sufficient to plead a prior, oral contract. We cannot say that a reasonable defendant would have understood that Plaintiff intended to pursue a claim for breach of an oral contract from the language of the complaint. *See Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) ("A pleading complies . . . if it gives sufficient notice . . . to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get any additional information he may need to prepare for trial.").

Plaintiff also argues that Defendants must have understood that Plaintiff pled the existence of an oral contract because Defendants included a statute of frauds defense in their answer. Because Defendants' signature appears on the alleged February 2017 written contract, Plaintiff contends that the only valid, legal reason for Defendants to plead a statute of frauds defense would be to oppose an oral contract. *See* N.C. Gen. Stat. § 22-2 (2017) (stating certain contracts "shall be void unless said contract . . . be put in writing and signed by the party to be charged therewith"). We appreciate Plaintiff's insinuation that Defendants must have included only supported and credible defenses in their answer, but this Court is not prepared to agree that only legally sound and valid claims and defenses are ever asserted by parties during the initial stages of a case.

Finally, Plaintiff contends the stricken portions of his affidavit align with

statements made in his deposition taken during earlier discovery. Assuming the language of the affidavit coalesced with Plaintiff's deposition testimony, Plaintiff cannot show prejudice from the trial court's strike of those portions of his affidavit. *See Supplee*, 239 N.C. App. at 226, 768 S.E.2d at 596. Any testimony regarding an oral contract would not support an issue that could be presented to the jury at trial because Plaintiff pled no oral contract claim in his complaint. The trial court did not abuse its discretion, or cause prejudice to Plaintiff, by striking portions of Plaintiff's affidavit alleging the existence of an oral contract because Plaintiff failed to plead the existence of an oral contract prior to the summary judgment stage.

B. Summary Judgment

Defendants contend that there were genuine issues of material fact which precluded the trial court's grant of summary judgment. "This Court reviews a grant of summary judgment de novo." *Lake v. State Health Plan for Tchrs. & State Emps.*, 380 N.C. 502, 512, 869 S.E.2d 292, 302 (2022).

To succeed in a motion for summary judgment, the movant "must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976). "The movant may meet this burden by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an

essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Boudreau v. Baughman*, 322 N.C. 331, 342–43, 368 S.E.2d 849, 858 (1988). "[A]ny doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated" and "the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted).

Plaintiff argues the trial court erred by granting summary judgment because there were two genuine issues of material fact to be resolved: "(1) whether the parties made an oral contract and (2) whether the parties' contract was illegal." As discussed in section II.A. above, we disagree with Plaintiff's first asserted factual issue. Plaintiff failed to plead the existence of an oral contact at the outset of this case and was not permitted to do so for the first time in his efforts to oppose summary judgment.

Plaintiff also contends there was a genuine factual dispute whether Defendants were legally allowed to sell the alcoholic inventory they intended to purchase from Plaintiff at Brookside. Even if we agree that there was a material factual dispute within this evidence, Plaintiff's argument fails. Plaintiff makes no argument on appeal that the trial court erred because a valid, written contract existed, and we hold that he failed to claim the existence of an oral contract. *See Soc'y*

for Hist. Pres. of Twentysixth N.C. Troops, Inc. v. City of Asheville, 282 N.C. App. 700, 707, 872 S.E.2d 134, 140 (noting a party seeking to enforce a contract or allege a claim for breach of that contract must show the elements of an existing, valid contract), *review allowed, writ allowed sub nom.*, 880 S.E.2d 679 (N.C. 2022). Further, Defendants also distinctly argued as a ground for their motion for summary judgment in the trial court below that any existing contract for sale of Brookside had been rescinded. Plaintiff also makes no argument challenging this ground on appeal. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Plaintiff has not shown that a valid, executed contract exists between the parties for the sale of Brookside, and, therefore, there are no contractual terms and circumstances from which a genuine issue of material fact could arise in this case.

III. Conclusion

For the reasons stated above, the trial court did not err in striking portions of Plaintiff's affidavit or in subsequently granting Defendants' motion for summary judgment because Plaintiff failed to plead the existence of an oral contract prior to the summary judgment stage.

AFFIRMED.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).