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NO. COA03-432-2

NORTH CAROLINA COURT OF APPEAL

Filed: 15 August 2006

O & M INDUSTRIES,  
Plaintiff,

v.

Davidson County  
No. 02 CVS 0062

SMITH ENGINEERING CO., a/k/a  
SMITH ENVIRONMENTAL CORPORATION,  
KURZ TRANSFER PRODUCTS, L.P.,  
and KURZ & PARTNERS, L.P.,  
Defendants.

Appeal by defendant Kurz Transfer Products, L.P. from an order entered 15 November 2002 by Judge Christopher M. Collier in Davidson County Superior Court. Heard in the Court of Appeals 14 January 2004. A unanimous panel of this Court reversed the order of the superior court granting summary judgment for plaintiff. See *O & M Indus. v. Smith Eng'g Co.*, 165 N.C. App. 705, 601 S.E.2d 330 (2004) (COA03-432) (unpublished). Heard in the Supreme Court, on discretionary review pursuant to N.C. Gen. Stat. § 7A-31, on 18 October 2005. By decision entered 27 January 2006, the Supreme Court reversed the opinion of the Court of Appeals and remanded for consideration of defendant's remaining assignments of error. See *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 624 S.E.2d 345 (2006). Heard on remand by a panel of the Court of Appeals reconstituted per order of the Supreme Court entered 20 February 2006. By order entered 27 April 2006, this Court allowed additional briefing by the parties on the remaining assignments of

error.

*Hendrick & Bryant, LLP, by Matthew H. Bryant, for plaintiff-appellee.*

*Smith, Currie & Hancock, LLP, by Michael W. Knapp, David Hill Bashford, and Harry R. Bivens, for defendant-appellant Kurz Transfer Products, L.P.*

*Taylor, Penry, Rash & Riemann, PLLC, by Rolly L. Chambers, for defendant-appellant Kurz Transfer Products, L.P.*

BRYANT, Judge.

On remand from the North Carolina Supreme Court, this Court (re)considers defendant's argument that the trial court erred in granting plaintiff's motion for summary judgment under separate theories of equitable estoppel and novation. For the reasons stated herein, we affirm the decision of the trial court to award plaintiff summary judgment in light of defendant's remaining assignments of error.

*Facts & Procedural History*

Kurz Transfer Products, L.P., (defendant) is a tenant of a manufacturing facility in Lexington, North Carolina. In December 2000, defendant contracted with Smith Engineering Co. (Smith) to design, manufacture, and install various equipment at the facility (the project), including a regenerative thermal oxidizer system (RTO). Smith subcontracted with O & M Industries (plaintiff) to manufacture the RTO. Pursuant to its subcontract with Smith, plaintiff shipped the completed RTO to defendant on or about 6 June 2001.

Concerned about Smith's financial position, plaintiff served

defendant with a Notice of Claim of Lien (June Notice) on 8 June 2001 in the amount of \$113,655.00. Smith contacted plaintiff about the June Notice and plaintiff responded by letter on 15 June 2001 (the letter). Smith faxed a copy of the letter to defendant. The letter reads:

This letter is to advise you [Smith] that the documents sent to KURZ [defendant] on June 12, 2001 are not a lien, but merely a preliminary notice to the owner informing them that we, as a subcontractor, are furnishing improvement to their property and should payment not be received for these improvements, we have the right to then file a mechanics lien. It is our normal business practice, as well as a legal requirement in many states, that we supply owners with a preliminary notice, which is for their protection.

Currently your payable [sic] to us on this job is well within our current terms and as has been done in the past, we will furnish you lien releases for any payments received on account.

After receiving the June Notice and a faxed copy of the letter, defendant made two payments to Smith; one for \$164,831.25 on 6 July 2001, and one for \$150,000.00 on 1 August 2001. Smith ceased work on the project on 13 August 2001. On 22 August 2001, Smith informed defendant that it had filed for bankruptcy. The next day, plaintiff served defendant with another Notice of Claim of Lien (August Notice) in the amount of \$127,392.12.

On 10 January 2002, plaintiff filed a complaint against defendant and Smith for failure to make payments on services provided by plaintiff. Plaintiff obtained a default judgment against Smith and moved for summary judgment against defendant. Defendant also moved for summary judgment, arguing *inter alia* that

the additional costs necessary to complete the project barred plaintiff from recovery. The trial court denied defendant's motion, allowed plaintiff's motion, entered judgment against defendant in the amount of \$113,655.00 plus interest, and awarded attorney's fees and costs.

On appeal by defendant, this Court reversed the trial court's decision on the ground that there was an issue of material fact concerning the cost to complete the project. On discretionary review, the North Carolina Supreme Court reversed and remanded this Court's decision, holding defendant's two payments to Smith made defendant personally liable to plaintiff under N.C. Gen. Stat. § 44A-20(b). *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 624 S.E.2d 345 (2006). The Supreme Court found that questions about the sufficiency of retained funds and defendant's costs to complete its project were not relevant to plaintiff's statutory right to recover from defendant under N.C. Gen. Stat. § 44A-20(b). *Id.* at 271, 624 S.E.2d at 350. The version of N.C. Gen. Stat. § 44A-20(b) at issue provides:

If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are claimed, the lien shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice was received prior to payment.

N.C. Gen. Stat. § 44A-20(b) (2003).

*Issue on Appeal & Standard of Review*

This Court now (re)considers the two remaining assignments of error regarding defendant's separate theories of equitable estoppel and novation. The issue on remand is whether the theories of equitable estoppel or novation have merit and therefore present genuine issues of material fact.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citing *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982)). "In assessing whether the moving party established the absence of any genuine issue of material fact, the evidence presented should be viewed in the light most favorable to the nonmoving party." *Jones v. City of Durham*, 360 N.C. 81, 84, 622 S.E.2d 596, 599 (2005). "Once the [movant] makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 135 N.C. App. 442, 447, 520 S.E.2d 603, 607 (1999). On appeal, this Court reviews an order granting summary judgment *de*

*novo. McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

*Equitable Estoppel*

Defendant first contends that the trial court erred in granting plaintiff's summary judgment motion because there is a genuine issue of material fact as to whether plaintiff was equitably estopped to enforce the June Notice under N.C. Gen. Stat. § 44A-13. We disagree.

In reviewing a claim of equitable estoppel, summary judgment is appropriate when only one inference can be drawn from the undisputed facts of the case. *Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) (citation omitted). When other inferences may be drawn from contrary evidence, however, equitable estoppel becomes a question of fact for the jury to decide. *Id.*

The essential elements of equitable estoppel apply in relation to the party estopped and the party claiming the estoppel. *Keech v. Hendricks*, 141 N.C. App. 649, 653, 540 S.E.2d 71, 75 (2000). As related to the party estopped, the elements are:

"(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) [with the] intention or expectation that such conduct shall be . . . relied and acted upon; [and] (3) knowledge, actual or constructive, of the real facts."

*Id.* at 653, 540 S.E.2d at 74-75 (quoting *Hawkins v. Finance Corp.*, 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953)) (omission in original).

As related to the party claiming the estoppel, [the elements] are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

*Id.*

In the instant case, defendant contends that evidence produced through discovery was sufficient to raise an issue of material fact under the theory of equitable estoppel. To support this argument, defendant relies on: (1) representations made in plaintiff's letter to Smith; (2) plaintiff's conduct in sending the letter to Smith; and (3) defendant's conduct in making subsequent payments to Smith.

To prevail under its theory of equitable estoppel, defendant must forecast evidence showing, *inter alia*, that plaintiff's representations to defendant were false or, at the very least, reasonably calculated to be inconsistent with plaintiff's later assertion that the June Notice to defendant perfected a lien on funds under N.C. Gen. Stat. § 44A-18 (grant of lien upon funds; subrogation, and perfection), N.C. Gen. Stat. § 44A-19 (notice of claim of lien upon funds), and N.C. Gen. Stat. § 44A-20 (duties and liability of obligor). Here, the representations at issue are those set forth in the letter.

Defendant contends that plaintiff should be estopped to assert a perfected lien on funds because plaintiff "obviously intended" defendant to make payments to Smith. This assertion is based on language in the first paragraph of the letter, which states, in

part, that the June Notice was "not a lien" and that plaintiff would later file a lien "should payment not be received." Plaintiff contends that the doctrine of estoppel does not apply because the letter contained no false representation and concealed no material facts. For the following reasons, we agree with plaintiff.

The letter does not make false representations about the legal import of the June Notice. By referencing "Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina," the June Notice provided sufficient indication to defendant that its subsequent actions involving Smith would be subject to legal consequences pursuant to the statute. The letter does not indicate plaintiff's intent to exempt defendant from incurring personal liability upon making "wrongful payments" to Smith after receiving the June Notice. Therefore, any intent by plaintiff to have defendant make payments to Smith is irrelevant insofar as plaintiff's factual representations were consistent with the legal import of the June Notice.

Because defendant chose to pay Smith after receiving the June Notice, plaintiff's subsequent assertion of fact was not inconsistent with the letter, which made no attempt to change the legal import of the June Notice, including defendant's obligations to plaintiff under N.C. Gen. Stat. § 44A-20(b). N.C.G.S. § 44A-20(b) (2005) (stating obligor personally liable to the party entitled to lien upon funds where obligor, after receipt of notice of claim of lien upon funds, makes further payments against the

entitled party's interests); see also *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 624 S.E.2d 345 (2006) (holding defendant in this case personally liable to plaintiff because it made payments to Smith after receiving the June Notice).

Defendant also contends that, in sending the letter, plaintiff "knew or reasonably should have foreseen" that defendant, as a party to the transaction to acquire the RTO, would also receive a copy of the letter from Smith. However, defendant fails to provide a forecast of evidence showing that plaintiff knew about Smith's plan to forward a copy of the letter to defendant.

Defendant further contends that it justifiably relied on plaintiff's letter in making payments to Smith. Assuming *arguendo* that plaintiff's representations were false, defendant fails to provide a forecast of evidence showing: (a) that it lacked knowledge and the means of knowledge of the truth as to the legal import of the June Notice; (b) that its reliance on the letter was reasonable; and (c) that, in relying on the letter, its position was changed prejudicially. *Keech v. Hendricks*, 141 N.C. App. 649, 540 S.E.2d 71 (2000); *Adkins v. Adkins*, 82 N.C. App. 289, 291, 346 S.E.2d 220, 221-22 (1986) (essential element of equitable estoppel defense is defendant's reasonable reliance upon assertions by plaintiff).

The record evidence indicates that defendant had knowledge of the legal import of the June Notice. On 31 August 2001, prior to the filing of plaintiff's complaint, defendant's Controller wrote a memo which states, in pertinent part: "In addition, Kurz

[defendant] has received a 'notice of claim of lien' in the amount of \$113,655. Kurz [defendant] is obligated to withhold at least this amount from payment to Smith until the open item is resolved." Furthermore, in its answer to plaintiff's amended complaint, defendant admits that it knew about its legal obligation to plaintiff after receipt of the June Notice. *Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 161-62, 284 S.E.2d 697, 700 (1981) (judicial admissions establish facts that cannot be subsequently tried); *Brown v. Lyons*, 93 N.C. App. 453, 458, 378 S.E.2d 243, 246 (1989) (summary judgment cannot be avoided by submitting new evidence which contradicts prior judicial admissions).

Defendant failed to forecast evidence demonstrating that all the essential elements of equitable estoppel have been met. The record evidence indicates that plaintiff intended defendant to rely upon the June Notice, not the letter, which was specifically addressed to Smith. Thus, defendant failed to demonstrate that plaintiff intended or expected defendant to rely on its conduct by sending the letter to Smith. Furthermore, defendant failed to demonstrate that plaintiff's representations were false, misleading, "obviously intended," or reasonably calculated to convey facts inconsistent with plaintiff's subsequent assertions of fact. Therefore, the trial court did not err in granting plaintiff summary judgment in light of defendant's equitable estoppel defense. This assignment of error is overruled.

*Novation*

Defendant next contends that the trial court erred in granting plaintiff's summary judgment motion because there is a genuine issue of material fact as to whether plaintiff's August Notice of Claim of Lien (August Notice) was a novation of the June Notice of Claim of Lien (June Notice). Plaintiff, however, contends the contract doctrine of novation does not apply to a statutorily created lien and, therefore, the trial court's grant of summary judgment in its favor was appropriate.

It is well established that

the essential requisites of a novation are [1] a previous valid obligation, [2] the agreement of all the parties to the new contract, [3] the extinguishment of the old contract, and [4] the validity of the new contract . . . . Ordinarily . . . in order to constitute a novation, the transaction must have been so intended by the parties.

*Bowles v. BCJ Trucking Servs., Inc.*, 172 N.C. App. 149, 153, 615 S.E.2d 724, 727 (citations and quotations omitted), *disc. review denied*, 360 N.C. 60, 623 S.E.2d 579 (2005). "Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished." *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 367 (1959) (citation omitted). "Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument, the question is one of law for the courts . . . ." *Id.* at 644, 109 S.E.2d at 368.

Defendant contends that the evidence it presented to the trial court showed plaintiff intended the August Notice to supersede and

novate the June Notice and, at the very least, the evidence presented a genuine issue of material fact for a jury. Defendant's novation argument rests on the presumption that circumstances surrounding the June Notice were sufficient to create an "old contract" and that plaintiff's August Notice was sufficient to create a valid "new contract" to which all parties agreed. However, in its pleadings, defendant asserts lack of "contractual privity" as a defense against plaintiff's claim against them under the theory of contractual privity. This runs contrary to defendant's novation argument, which depends entirely on the existence of a valid contractual relationship between defendant and plaintiff. Defendant presents no evidence to reconcile the contradiction between its own pleadings and the essential requisites of novation.

Defendant failed to forecast evidence demonstrating that all the requisite elements of novation have been met. Instead of creating a contractual relationship, the June Notice created a statutory relationship between defendant and plaintiff, not a contractual obligation. Therefore, the trial court did not err in granting plaintiff summary judgment in light of defendant's novation defense. This assignment of error is overruled.

#### *Conclusion*

Defendant failed to forecast evidence demonstrating that all the essential elements of equitable estoppel and novation have been met. Further, when viewed in the light most favorable to defendant, the record evidence fails to show that there is a

genuine issue as to any material fact under these theories. Thus, the trial court did not err in granting plaintiff summary judgment.

Affirmed.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).