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NO. COA05-1087

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

CLINARD OIL COMPANY, INC.,  
Plaintiff,

v.

Davidson County  
No. 03 CVS 3630

OIL PRODUCTS COMPANY t/d/b/a  
OIL PRODUCTS CO. and DALLAS  
LYNN EDMUNDSON,  
Defendants.

Appeal by Defendants from judgment entered 14 April 2005 by Judge Larry G. Ford in Superior Court, Davidson County. Heard in the Court of Appeals 28 March 2006.

*Kluttz, Reamer, Hayes, Randolph & Adkins, LLP, by Glenn S. Hayes and Nathan C. Prater for defendants-appellants.*

*Wyatt, Early, Harris, & Wheeler, by Stanley Hammer and James R. Hundley, for plaintiff-appellee.*

WYNN, Judge.

An account becomes stated and binding on both parties if after examination the party sought to be charged unqualifiedly approves of it and expresses his intention to pay it.<sup>1</sup> In this appeal, Defendants contend the trial court erred in granting Plaintiff's motion for directed verdict on its claim based upon account stated or open account. Because the record reveals that Plaintiff

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<sup>1</sup> See *Carroll v. McNeill Indus., Inc.*, 296 N.C. 205, 250 S.E.2d 60 (1978).

satisfied each element for an account stated claim, we uphold the grant of directed verdict for Plaintiff.

The facts pertinent to this appeal indicate that Plaintiff Clinard Oil Company ("Clinard Oil") is an oil jobber that purchases petroleum products for sale to retail convenience stores and to wholesale providers, such as Defendant Oil Products Company ("Oil Products"). In 2000, Oil Products began purchasing various petroleum products from Clinard Oil on an "as needed" basis for delivery to its customers, including three retail convenience stores. With Oil Products' permission, Clinard Oil eventually began delivering petroleum products directly to Oil Products' customers, including Jack's Grocery, Pine Ridge General Store and Lentz General Store in Rowan County. Clinard Oil continued to bill Oil Products for petroleum products delivered to these Oil Products' customers.

Initially, Oil Products had fifteen days from the date of the invoice to pay Clinard Oil for its product delivery. Subsequently, Clinard Oil gave Oil Products thirty days to pay outstanding invoices. In June 2003, after a check from Oil Products to Clinard Oil "did not clear," Clinard Oil began requiring Oil Products to pay with a certified check on delivery, plus an additional amount for each load of product delivered in an effort to decrease the balance on Oil Products' account. Thereafter, Clinard Oil would not allow its drivers to unload product at Oil Products' customers until it received a certified check from Lynn Edmundson, Oil Products' owner and operator.

On Labor Day weekend in 2003, Oil Products requested product delivery from Clinard Oil; however, Clinard Oil refused because Oil Products was unable to pay in advance for the delivery as required by the parties' agreement. When various Oil Products' customers, namely the convenient store owners, did not receive petroleum for their pumps during the Labor Day weekend in 2003, the customers contacted Clinard Oil and requested direct shipments. Clinard Oil provided the direct shipments to the convenience stores and, thereafter, Clinard Oil continued to directly deliver petroleum to these former Oil Products' customers.

In December 2003, Clinard Oil filed a complaint against Oil Products based on open account, or, in the alternative, account stated, and demanded \$431,692.68. The complaint also named Dallas Lynn Edmundson as a defendant based upon an unconditional guaranty agreement. Subsequently, Oil Products and Ms. Edmundson (collectively "Defendants") filed a counterclaim, alleging unfair trade and deceptive practices and tortious interference with contract, based on Clinard Oil's dealings with Oil Products' former customers.

At the close of the evidence, the trial court directed a verdict in Clinard Oil's favor on the account claim. After Plaintiff's rebuttal testimony by former Oil Products' customers, who testified that they did not have a contract agreement with Oil Products and that they had not been solicited by Clinard Oil for business, the trial court granted a directed verdict against

Defendants on their counterclaims. The trial court entered a judgment for \$431,692.71 against Defendants. Defendants appeal.

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Before addressing the merits of Defendants' appeal, we first note the applicable standard of review. To determine whether to grant a motion for a directed verdict, "the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. . . ." *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 531, 551 S.E.2d 546, 551-52 (2001) (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993)). Thus, the trial court must accept the evidence of the non-moving party as true, and must resolve all contradictions, conflicts and inconsistencies in the evidence in the non-moving party's favor. *Eatman v. Bunn*, 72 N.C. App. 504, 506, 325 S.E.2d 50, 52 (1985). The trial court may grant a motion for directed verdict only if the evidence is insufficient, as a matter of law, to support a verdict for the non-moving party. *Id.* (quoting *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974)). We review a trial court's grant of a motion for directed verdict *de novo*. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004).

On appeal, Defendants first contend the trial court erred in granting Clinard Oil's motion for directed verdict on its claim based upon account stated or open account. Specifically, Defendants contend there was conflicting evidence presented at

trial on the issue of whether an account stated or open account existed. Defendants' argument is without merit.

To establish an account stated, a party must show: "(1) a calculation of the balance due; (2) submission of a statement to plaintiff; (3) acknowledgment of the correctness of that statement. . . ; and (4) a promise, express or implied, by plaintiff to pay the balance due." *Carroll*, 296 N.C. at 209, 250 S.E.2d at 62. Relying on its decision in *Little v. Shores*, 220 N.C. 429, 431, 17 S.E.2d 503, 504 (1941), our Supreme Court explained:

An account becomes stated and binding on both parties if after examination the part[y] sought to be charged unqualifiedly approves of it and expresses his intention to pay it. . . . The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due. . . .

*Carroll*, 296 N.C. at 209, 250 S.E.2d at 62.

In this case, Plaintiff alleged a debt based upon an open account, "or in the alternative, upon account stated." Specifically, Plaintiff's complaint alleged:

5. The present balance due on that open account is the sum of \$431,692.68, plus interest after the date [of] Judgment, and court costs.

6. The Plaintiff has made repeated demand of the Oil Products for the payment of this sum, which demands have been refused.

The record reveals that Clinard Oil satisfied each element for an account stated claim. In its answer to the complaint, Oil Products admitted that demand had been made for the sums set forth

in the complaint. Furthermore, Clinard Oil introduced into evidence at trial, without objection, a statement of Oil Product's account, which reveals that Oil Products last paid Clinard Oil on 3 September 2003, and that this last payment reduced the balance due on the account to \$431,692.71. Moreover, Ms. Edmundson testified that she did not dispute Clinard Oil's accounting of Oil Products' business with them, and Defendants' counsel argued at the hearing on the motion for directed verdict that, "[w]hat Ms. Edmundson does not dispute is the accounting they have for the amount that's owed. When its owed and how its owed is still at issue." However, the record reveals that "how" and "when" the money was owed was not at issue either, as Ms. Edmundson testified that invoices were initially due within fifteen days, and later thirty days, of receipt. Plaintiff filed this complaint on 12 December 2003, more than ninety days after the last payment on the account, and after demand was made on Oil Products, based on Defendants' admission in its answer to the complaint. Therefore, Ms. Edmundson's own testimony establishes that Defendants did not dispute the amount of the balance due, Defendants intended to pay it, and that the invoices were due no more than thirty days after receipt of the invoice.

Based on this evidence, we conclude the trial court did not err in directing a verdict in Plaintiff's favor on the account stated claim. Because we hold the trial court did not err in directing a verdict in Plaintiff's favor on the account stated claim, we need not address Defendants' argument that the trial

court erred in granting Plaintiff's motion for directed verdict based on open account. Defendants' assignments of error related to these issues are, therefore, rejected.

Defendants next contend the trial court erred in directing a verdict against them on their counterclaims of unfair and deceptive trade practices and tortious interference with contract. We disagree.

Paragraph nine of Oil Products' counterclaim alleges:

9. The Defendant relied upon the Plaintiff's good faith in providing sensitive financial and business information to the Plaintiff, and relied upon the Plaintiff's representations that it had no intention of stealing the Defendants' market locations, and upon which affirmations, the Defendants relied to their detriment, such that the Plaintiff's actions constituted unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1, *et. Seq.*, as egregious or oppressive behavior which affects commerce in the State of North Carolina, or alternatively that such behavior constituted a tortuous interference by the Plaintiff with the right to contract of the Defendants with their customers, and which activity proximately caused damage to the Defendants by substantially interfering with the Defendant Oil Products Company's cash flow and profits, which would have enabled the Defendants to reduce the Defendant Oil Products Company's debt with the Plaintiff and which actions have damaged the Defendants in an amount greater than \$10,000.00.

To prevail on a claim of unfair and deceptive trade practices, a party must prove (1) an unfair and deceptive trade practice; (2) in or affecting commerce; (3) which proximately causes actual injury. See N.C. Gen. Stat. § 75-1.1 (2005); *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 85, 590 S.E.2d 15, 18 (2004); *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d

476, 482 (1991). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

Here, Oil Products argues that it presented evidence that Clinard Oil refused to supply product during Labor Day weekend in 2003 on short notice, and, thus, prevented Oil Products from making alternative plans to honor its delivery obligations to its customers. Oil Products argues that based on this evidence, a jury could find that Clinard Oil intentionally manipulated the supply of product to Oil Products and, therefore, destroyed Oil Products' relationships with its customers.

Contrary to Defendants' assertion, the uncontradicted evidence presented at trial reveals that Clinard Oil refused to deliver product to Oil Products during Labor Day weekend in 2003 because Oil Products was unable to provide a certified check for payment as required by the parties' arrangement. Mr. Clinard testified:

They needed one [delivery] on Monday, the first of September, and, of course, Wednesday, we would be happy to deliver, but we have to have payment for it. And of course, she [Ms. Edmundson] said, "Well, the banks are closed." And I said, "Well I'm not disagreeing with you that the banks are closed." Obviously, the [outstanding Oil Products] balance didn't get here by one or two misinterpretations or things not being followed through properly, and like I said, where this was, we were at the point we would not come [deliver] unless we got certified funds for it.

Defendants contend that it paid Clinard Oil \$12,000.00 in advance to deliver petroleum during Labor Day weekend in 2003. While Ms.



Edmundson testified on direct examination that she paid Clinard Oil \$12,000.00 for delivery of product to their bulk plant over Labor Day weekend, on cross-examination she testified that the \$12,000.00 was the extra amount required by Clinard Oil to lower Oil Products' balance on its account. Indeed, as it relates to the delivery on Labor Day weekend in 2003, Ms. Edmundson testified that "[b]y the arrangement [she] had to give the transport driver the certified check[,]"" but was unable to get a certified check on Labor Day because the banks were closed. She further testified that Oil Products paid an extra amount each time it requested delivery in efforts to lower the balance on its account with Clinard Oil. Thus, Mr. Clinard's and Ms. Edmundson's testimony establish that Clinard Oil's refusal to deliver product to Oil Products during Labor Day weekend in 2003 was due to Oil Products' failure to provide the required certified funds for delivery. Because there is no evidence in the record to support Defendants' argument that Clinard Oil intentionally manipulated the supply of petroleum to Oil Products on Labor Day weekend 2003, and, therefore, engaged in unfair trade and deceptive practices, we reject Defendants' assignment of error.

In its next argument on appeal, Defendants contend that a false statement made by a Clinard Oil employee to an Oil Products' customer during Labor Day weekend in 2003 constituted an unfair trade and deceptive practice. Specifically, Defendants contend that based on the evidence presented at trial, a jury could conclude that "[Plaintiff] knowingly, or in reckless disregarding

of the truth, made . . . statements which were both false and designed to injure or destroy [Defendants'] business[,]” citing to *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 453 S.E.2d 146 (1995). We disagree.

A former Oil Products' customer testified that when he did not receive fuel during Labor Day weekend in 2003, he called Clinard Oil and was told “Lynn [Edmundson] had not called [Clinard Oil] and did not have a load of fuel on the way to [their] store.” However, Mr. Clinard and Ms. Edmundson testified that Ms. Edmundson had requested petroleum delivery for Labor Day weekend, but that it was not supplied because she said that she could not provide a certified check for payment. Defendants contend this false statement by a Clinard Oil employee constituted an unfair and deceptive trade practice. Even assuming that a Clinard Oil employee told one of Oil Products' customers that Ms. Edmundson had not requested petroleum delivery for Labor Day weekend in 2003, the undisputed evidence reveals that Clinard Oil was not delivering petroleum to any of Oil Products' customers that weekend pursuant to a request from Oil Products because Oil Products failed to pay for delivery. While a Clinard Oil employee may have misconstrued the facts regarding Oil Products' request for delivery of petroleum to its customers, that action does not constitute the type of egregious conduct which amounts to an unfair and deceptive trade practice.

Likewise, we reject Defendants' argument that Clinard Oil's proposal in early 2003 to sell directly to Oil Products' customers

is evidence of a pattern of unfair competition. Mr. Clinard testified that in an effort to help reduce Oil Products' debt to Clinard Oil, he offered to sell directly to Oil Products' customers, to which it was already directly delivering petroleum, and pay Oil Products a penny per gallon so that its debt could be reduced. He further testified that Ms. Edmundson was not receptive to this proposal. Ms. Edmundson corroborated Mr. Clinard's testimony as it related to the "penny per gallon offer" and her refusal of the offer. She testified that she countered Mr. Clinard's offer with an offer to sell Oil Products to Clinard Oil and provided Mr. Clinard with "sensitive financial information" about the company; however, Mr. Clinard declined to purchase Oil Products. Viewing this evidence in the light most favorable to Defendants, we conclude this was a mere proposal to reduce Oil Products' debt to Clinard Oil by selling directly to Oil Products' customers, and not an unfair and deceptive trade practice. As there is no evidence to support a claim for unfair and deceptive trade practices, we hold that the trial court did not err in directing a verdict against Defendants on its unfair trade and deceptive acts claim. Accordingly, Defendants' assignment of error is rejected.

In its final argument on appeal, Defendants contend the trial court improperly directed a verdict against it on its claim of tortious interference with contract rights. Defendants' argument is without merit.

To prevail on a claim for interference with contract, a party must prove: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff." *Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 584, 561 S.E.2d 276, 285 (2002) (quoting *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

As Oil Products failed to prove that it had an enforceable contract with any third party of which it accused Clinard Oil of interfering, we conclude that the trial court properly granted Clinard Oil's motion for a directed verdict on Oil Products' tortious interference with contract claim. Indeed, Ms. Edmundson testified that Oil Products did not have a supply agreement with Jack's Grocery, Pine Ridge General Store, or Lentz General Store, and that they were free to do business with other oil suppliers. While Oil Products may have had an ongoing relationship with these convenience stores, there is no evidence that Oil Products had protected contract rights with these customers with whom Clinard Oil allegedly interfered.

Even assuming *arguendo* that Oil Products had protected contract rights with these convenience stores, there is simply no evidence that Clinard Oil induced the customers not to perform any contract that it had with Oil Products. Although Ms. Edmundson

testified that Clinard Oil "stole" Oil Products' customers, the owners of the convenience stores in question testified that they terminated their relationship with Oil Products because "they just couldn't deliver," or "because they let me run out of fuel." Moreover, these store owners all testified that Clinard Oil did not solicit their business. Based on our review of the evidence, we hold that the trial court correctly directed a verdict against Defendants as it relates to their interference with a contract claim against Clinard Oil. Accordingly, Defendants' assignment of error is rejected.

Affirmed.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).