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NO. COA05-1325

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

PAUL FLAHIVE,

Plaintiff,

v.

Rowan County  
No. 03 CVS 1564

RMA HOME SERVICES, INC.,  
(Formerly REMODEL AMERICAN,  
INC.)

Defendant.

Appeal by plaintiff from an order entered 27 September 2004 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 19 April 2006.

*Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for plaintiff-appellant.*

*Andresen & Associates, by Kenneth P. Andresen, for defendant-appellee.*

JACKSON, Judge.

Paul Flahive ("plaintiff") appeals from summary judgment entered 27 September 2004 in favor of RMA Home Services, Inc. ("defendant").

From 11 February 1997 to 14 November 2002, plaintiff was employed by defendant as a Sales Consultant. On 1 April 1998, plaintiff transferred from Minnesota to North Carolina pursuant to

his employment to help open defendant's offices in Georgia, South Carolina, and North Carolina. On 23 July 1998, plaintiff signed a Release Agreement and a Sales Consultant Employment Agreement ("Employment Agreement") with defendant. The Employment Agreement specified the terms of plaintiff's employment with defendant, specifically stating that plaintiff's employment is terminable at any time. On 22 August 2000, plaintiff entered into an Incentive Stock Option Agreement with defendant that vested on 22 August 2003, and provided that plaintiff continued to be employed with defendant as of that date. On 14 November 2002, defendant terminated plaintiff's employment.

On 16 June 2003, plaintiff filed a complaint against defendant for breach of the Employment Agreement and the Incentive Stock Option Agreement. Plaintiff alleged in his complaint, *inter alia*, that:

4. The Incentive Stock Option Agreement and the Sales Consultant Employment Agreement were material inducements for [plaintiff] to enter into the written settlement agreement. Pursuant to the Employment Agreement and Incentive Stock Option Agreement additional verbal promises and representations were made by the Defendant as to the value of the Incentive Stock Option Agreement and the way the Defendant would treat and pay [plaintiff].

5. The Defendant terminated the Plaintiff in violation of the Employment Agreement and failed to fulfill its obligations pursuant to the Incentive Stock Option Agreement. In addition, the Defendant's verbal promises and representations were made in breach of the duties of good faith and fair dealings inherent in all written contracts.

6. As a direct and proximate result of the Defendant's breach of the Employment

Agreement, [plaintiff] has been damaged in excess of \$15,000 which damages include but are not limited to lost wages, lost benefits, lost experience, [sic] loss of reputation and goodwill and pain and suffering.

7. As a direct and proximate result of the Defendant's breach of the Incentive Stock Option Agreement, [plaintiff] has been damaged in an amount in excess of \$15,000, which damages include but are not limited to the lost income from the value of the stock options.

Plaintiff concluded his complaint by seeking relief for breach of the Employment Agreement and breach of the Incentive Stock Option Agreement. Plaintiff failed to allege any other cause of action.

On 17 July 2003, defendant filed its answer and counterclaim asserting affirmative claims for relief. On 12 August 2004, defendant filed a motion for summary judgment. After a hearing on 20 September 2004, the Honorable W. Erwin Spainhour granted defendant's motion. On 16 March 2005, defendant took a voluntary dismissal without prejudice on defendant's counterclaims. Plaintiff now appeals to this Court.

On appeal, plaintiff argues that the trial court committed reversible error in granting defendant's motion for summary judgment and dismissing the complaint. However, plaintiff fails to argue in his appellate brief that the trial court erred because there were genuine issues of material fact for plaintiff's breach of contract claim. Instead, plaintiff argues that defendant fraudulently induced plaintiff to enter into the Employment

Agreement and the Incentive Stock Option Agreement, and that the contracts were unconscionable.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states that "in order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P., Rule 10(b)(1) (2006). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." *Id.*

As has been said many times, 'the law does not permit parties to swap horses between courts in order to get a better mount,' *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934), meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court. *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002).

*Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003), *disc. rev. denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Thus, "a contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990).

In the present case, plaintiff only alleges a claim for breach of contract in plaintiff's complaint for breach of the Employment Agreement and Incentive Stock Option Agreement. The trial court granted defendant's motion for summary judgment as to plaintiff's claims. Plaintiff properly assigned error to the trial court's

order, stating: "[t]he trial court erred by entering Summary Judgment for the Defendant on the grounds that the pleadings, discovery materials, and evidence before the trial court demonstrated that there were genuine issues of material fact and that defendant failed to show it was entitled to judgment as a matter of law." However, on appeal, plaintiff only argues that defendant fraudulently induced plaintiff to sign the Employment Agreement and the Incentive Stock Option Agreement, and that both contracts were unconscionable. Plaintiff's contentions that defendant fraudulently induced him, and that the Employment Agreement and the Incentive Stock Option Agreement were unconscionable cannot be raised for the first time on appeal because they were not raised at the trial court. We cannot evaluate the merits of a fraudulent inducement or unconscionability claim on appeal when the record lacks any indication plaintiff's complaint contained allegations of these claims and the trial court had an opportunity to rule on these issues. Therefore, plaintiff has failed to present a timely request, objection or motion on his claims for fraudulent inducement and unconscionability as he argues them for the first time on appeal. Accordingly, we dismiss plaintiff's appeal.

DISMISSED.

Judges TYSON and GEER concur.

Report per Rule 30(e).