NO. COA05-1334

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

CHAD WAGNER,
Plaintiff,

v. New Hanover County
No. 04 CVS 2366

BRANCH BANKING AND TRUST COMPANY,
Defendant.

Appeal by plaintiff from order entered 8 July 2005 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 12 April 2006.

Bruce H. Robinson, Jr. for plaintiff-appellant.

Murchison, Taylor & Gibson, PLLC, by Michael Murchison, for defendant-appellee.

GEER, Judge.

Plaintiff Chad Wagner appeals from an order granting summary judgment in favor of defendant Branch Banking and Trust Company. Plaintiff argues that defendant negligently failed to obtain title insurance on plaintiff's real property when defendant provided plaintiff with a loan secured thereon. Because plaintiff has failed to establish that defendant owed him any duty to obtain title insurance, we affirm the order of the trial court.

Defendant provided plaintiff with a $50,000.00 debt consolidation loan that was secured by certain real property owned by plaintiff. When plaintiff later sold that property, he discovered it was subject to a prior outstanding judgment in the amount of $23,447.25. Because neither plaintiff nor defendant had obtained title insurance prior to defendant's loan to plaintiff, plaintiff was required to satisfy the judgment from the proceeds of the sale.

Plaintiff sued defendant, alleging defendant was negligent in failing to obtain title insurance. Defendant filed a motion for summary judgment, and, after considering affidavits submitted by both parties and plaintiff's deposition, the trial court granted summary judgment in favor of defendant. Plaintiff has timely appealed to this Court.

Discussion

Plaintiff's only argument on appeal is that the trial court erred by granting summary judgment to defendant because defendant "agreed to see that title insurance was procured," and, therefore, had a legal duty to ensure it was done. 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.R. Civ. P. 56(c).

The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen.*

Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). This Court reviews decisions granting summary judgment *de novo*. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

"Negligence is a failure to exercise proper care in the performance of some legal duty owed by a defendant to a plaintiff under the circumstances." *Carlson v. Branch Banking & Trust Co.*, 123 N.C. App. 306, 312, 473 S.E.2d 631, 635 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 162 (1997). "To establish a prima facie case of negligence liability, the plaintiff must show: (1) that the defendant owed [him] a duty of care; (2) that the conduct of the defendant breached that duty; (3) that the breach actually and proximately caused the plaintiff's injury; and (4) that the plaintiff sustained damages as a result of the injury." *Holshouser v. Shaner Hotel Group Props. One Ltd. P'ship.*, 134 N.C. App. 391, 394, 518 S.E.2d 17, 21, *disc. review denied in part*, 351 N.C. 104, 540 S.E.2d 362 (1999), *aff'd per curiam in part*, 351 N.C. 330, 524 S.E.2d 568 (2000). Accordingly, "'[i]n the absence of a legal duty

owed to the plaintiff by [the defendant], [the defendant] cannot be liable for negligence.'" *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (second and third alterations original) (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998)).

A duty of care, supporting a negligence claim, may arise out of a contractual relationship. *Olympic Prods. Co. v. Roof Sys., Inc.*, 88 N.C. App. 315, 322, 363 S.E.2d 367, 371 ("A duty of care may arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." (internal quotation marks omitted)), *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988). For this reason, this Court has acknowledged that a lender has a duty to perform those responsibilities specified in a loan agreement, but has declined to impose any duty beyond those expressly provided for in the agreement. *See Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999) ("[A] lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party."); *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 150, 493 S.E.2d 814, 818 (1997) ("[I]n the absence of [an] allegation of an express contractual provision between the instant parties requiring [defendant lender] to ensure application of the loan funds at issue to an agreed purpose, plaintiffs were owed no

such legal duty."); *Carlson*, 123 N.C. App. at 315, 473 S.E.2d at 637 (defendant bank owed no duty to monitor use of loan proceeds absent express contractual provision so requiring).

In the present case, plaintiff has pointed to nothing in the loan agreement that addresses the issue of title insurance, and we have found no provision that could reasonably be construed as controlling the parties' responsibilities with respect to title insurance. Consequently, pursuant to *Camp*, *Perry*, and *Carlson*, plaintiff has failed to establish that defendant had a duty, arising from the parties' contractual relationship, to ensure title insurance was obtained.

Plaintiff nevertheless argues that defendant assumed a duty by agreeing to obtain title insurance. This Court has held that a "[d]uty may [also] be imposed if one party undertakes to render services to another and the surrounding circumstances are such that the first party should recognize the necessity to exercise ordinary care to protect the other party or the other party's property; and failure to do such will cause the danger of injury to the other party or the other party's property." *Williams v. Smith*, 149 N.C. App. 855, 858, 561 S.E.2d 921, 923 (2002).

The record, however, contains no evidence that defendant ever agreed to obtain title insurance on plaintiff's property. Plaintiff's affidavit states only that he "requested . . . [Tammy Godwin, a business banker with defendant,] to be sure that title insurance was obtained," and does not state whether she in fact agreed to do so. Likewise, in plaintiff's deposition he testified

only that "I requested that we have a title search and title insurance," but again does not say whether Ms. Godwin in fact agreed to ensure title insurance was obtained. Later in the deposition, plaintiff noted that he "definitely requested" title insurance, but again makes no mention of how Ms. Godwin responded to this request. Then, when plaintiff was pressed about whether he "specifically recalled asking Ms. Godwin . . . directly to perform a title search and secure a title policy," he responded only, "I don't recall how that occurred."

Only plaintiff's unverified complaint specifically alleged that "defendant agreed to obtain the title insurance on the property pledged as collateral for the loan." Unsworn statements may not, however, be considered for summary judgment purposes. *See Venture Props. I v. Anderson*, 120 N.C. App. 852, 855, 463 S.E.2d 795, 797 (1995) (concluding that "the trial court acted properly in refusing to consider [unverified pleadings]"), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996). Thus, plaintiff presented no evidence that defendant ever "undert[ook] to render [the] service[]" to plaintiff of ensuring title insurance was obtained. *Williams*, 149 N.C. App. at 858, 561 S.E.2d at 923.

Plaintiff bore the burden of "produc[ing] a forecast of evidence" demonstrating that defendant had a legal duty to obtain title insurance. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. Because plaintiff failed to do so, the trial court properly entered summary judgment.

Affirmed.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).