

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1340

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

CHRIS A. BOWEN, and wife,  
LUANNA C. BOWEN, STEPHEN  
G. SMITH, and wife, VICKI  
P. SMITH, JANICE M. EVERETT  
and husband, FRANK G. EVERETT,  
III and FRANKLIN E. INDIAN,

Plaintiffs,

v.

Pender County  
No. 04 CVS 317

JOHN B. PARKER, and wife,  
EMILY D. PARKER,

Defendants.

Appeal by plaintiffs from an order entered 23 June 2005 by Judge Benjamin T. Alford in Pender County Superior Court. Heard in the Court of Appeals 12 April 2006.

*Ray C. Blackburn, Jr., for plaintiffs-appellants.*

*Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for defendants-appellees.*

JACKSON, Judge.

Plaintiffs and defendants are adjoining landowners in Topsail Island, North Carolina. A dispute arose between the parties over the rights of plaintiffs to use a walkway and pier located on defendants' property, and in July 2000, plaintiffs filed a

complaint against defendants seeking a resolution of the dispute. The parties resolved the original action through a mediated settlement conference which resulted in a settlement agreement. The settlement agreement was signed by all parties, and filed with the Pender County Clerk of Superior Court on 18 November 2002 and the Register of Deeds for Pender County on 21 November 2002.

The settlement agreement provided that defendants would execute a major Coastal Area Management Act ("CAMA") permit application, seeking permission to dock a total of five vessels at defendants' pier and dock, with the addition of two boat slips being for the benefit of plaintiffs. The parties specifically agreed to the location of the additional boat slips. On 13 November 2002 defendants signed an application for a major CAMA permit, as agreed to in the settlement agreement. The permit application was then filed with the Division of Coastal Management ("DCM") on 21 November 2002.

On 20 February 2003, DCM issued a CAMA Major Development Permit to defendants. The permit allowed for some changes to defendants' pier and dock, but specifically denied defendants' request to create two additional boat slips at the specified location. Plaintiff Frank G. Everett requested a Third Party Hearing on the denial of the additional boat slips, and his request for a hearing eventually was granted. After the denial of the permit for additional boat slips, plaintiffs requested that defendants submit a new CAMA permit application in which the additional boat slips would be relocated from the location stated

in the original permit application to an alternate location. Defendants declined to submit a revised CAMA permit application, citing that they had complied with their responsibilities under the mediated settlement agreement, and that they were not required to submit multiple applications for permits. Defendants also contended the location of the additional boat slips was an issue that specifically was agreed upon by the parties through the settlement agreement, and that plaintiffs could not modify the settlement agreement by changing the location of the boat slips.

On 28 May 2004, plaintiffs filed a complaint seeking to have the trial court compel defendants to comply with the mediated settlement agreement, specifically by requiring defendants to submit or cooperate in the submission of a revised CAMA permit application. Plaintiffs contend defendants are in breach of the spirit and terms of the mediated settlement agreement in that they have refused to cooperate with plaintiffs' efforts to obtain a CAMA permit, as required by the settlement agreement. Defendants filed their answer to plaintiffs' complaint on 24 June 2004. The answer included multiple counterclaims, along with motions to dismiss plaintiffs' complaint based on a lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(1) and 12(b)(6), respectively, of our Rules of Civil Procedure. Defendants filed a motion for summary judgment on 9 May 2005. In an order filed 23 June 2005, the trial court granted defendants' motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), and dismissed plaintiffs' complaint

with prejudice. The trial court found that, based on its rulings, it was unnecessary to rule on defendants' motion for summary judgment. Defendants took a voluntary dismissal, with prejudice, of their counterclaims on 15 July 2005. Plaintiffs now appeal from the trial court's 23 June 2005 order dismissing their action.

Plaintiffs first contend the trial court erred in granting defendants' motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. See N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005).

On appeal, the standard of review of a trial court's grant of a 12(b)(6) motion to dismiss is to determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (citation omitted). "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Id.* (emphasis in original and citation omitted).

Our Supreme Court has held that mediated settlement agreements constitute valid contracts between the settling parties, and the enforcement of agreements is "governed by general principles of contract law." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). "If the contract is clearly expressed, it must be

enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981). To allege a claim for a breach of contract, a plaintiff must allege facts showing the existence of a valid contract, and facts showing there has been a breach of the terms of the contract. *Wall v. Fry*, 162 N.C. App. 73, 77, 590 S.E.2d 283, 285 (2004). When a complaint alleges each of these elements, we have held that it is error to dismiss a breach of contract claim under Rule 12(b)(6). *McLamb v. T.P. Inc.*, \_\_ N.C. App. \_\_, \_\_, 619 S.E.2d 577, 580 (2005) (citing *Toomer v. Garrett*, 155 N.C. App. 462, 481-82, 574 S.E.2d 76, 91 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003)).

The remedy of specific performance in a contract action seeks to "compel a party to do that which in good conscience he ought to do without court compulsion." *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 295, 551 S.E.2d 207, 210 (2001) (quoting *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981)), *disc. review denied*, 356 N.C. 301, 570 S.E.2d 506 (2002). In order for a plaintiff to allege a claim for breach of contract and seek the remedy of specific performance, the plaintiff "must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Munchak*, 301 N.C. at 694, 273 S.E.2d at 285.

In the instant case, plaintiffs' complaint alleges the parties entered into a mediated settlement agreement, pursuant to the terms of which defendants would apply for a CAMA permit to allow additional dock slips to be created on defendants' existing pier and dock. Upon CAMA's rejection of the parties' original permit application, plaintiffs sought to have defendants participate in the submission of a separate CAMA permit application containing a revised configuration for the proposed dock slips. Plaintiffs specifically alleged that the mediated settlement agreement provided defendants "agree to cooperate with Plaintiff's efforts to obtain such a CAMA permit." Plaintiffs' alleged that defendants' refusal to cooperate with the submission of a revised permit application constituted a breach of the express terms of the settlement agreement.

However, plaintiffs fail to allege that any portion of the settlement agreement requires defendants to submit multiple CAMA permit applications. Although the express language of the settlement agreement does call for defendants to "cooperate with Plaintiff's efforts" to obtain "a CAMA permit," it does not require that defendants revise their application, nor does it require defendants to agree to a revised location for the additional dock slips. The settlement agreement specifically provides that the CAMA permit application would be filed within fifteen days after the execution of the settlement agreement, and in the instant case the CAMA permit application was submitted well within this time requirement. The agreement consistently refers to the permit and

permit application in the singular tense, and does not refer to multiple permits or applications. In addition, the settlement agreement states that "[t]he CAMA permit application shall be diligently pursued by the Plaintiffs and shall be concluded, barring delays attributable to agency comments or other agency action beyond the control of Plaintiffs or administrative and/or judicial review, by August 15, 2003." We hold that based on the plain language of the parties' mediated settlement agreement, the parties did not intend for there to be multiple CAMA permit applications.

Therefore, based on the allegations contained in plaintiffs' complaint, we hold plaintiffs failed to allege an actual breach of the terms of the mediated settlement agreement. Thus, the trial court acted properly in granting defendants' motion to dismiss based on Rule 12(b)(6), and plaintiffs' assignment of error is overruled.

Plaintiffs next contend the trial court erred in dismissing their action for a lack of subject matter jurisdiction, based on Rule 12(b)(1) of our Rules of Civil Procedure. As we have held the trial court acted properly in granting defendants' motion to dismiss pursuant to Rule 12(b)(6), we need not address plaintiffs' final assignment of error.

Affirmed.

Judges STEELMAN and GEER concur.

Report per Rule 30 (e).