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NO. COA05-1589

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

DAVID JORDAN,  
Plaintiff,

v.

Duplin County  
No. 04 CVS 61

BRANCH BANKING & TRUST COMPANY,  
Defendant.

Appeal by plaintiff from an order entered 19 September 2005 by Judge W. Allen Cobb, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 16 August 2006.

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

*Constangy, Brooks & Smith, LLC, by Timothy R. Newton and Kristine M. Howard, for defendant-appellee.*

BRYANT, Judge.

David Jordan (plaintiff) appeals from an order entered 19 September 2005 granting summary judgment in favor of Branch Banking & Trust Company (defendant). For the reasons stated herein, we affirm the trial court's order.

*Facts*

In August 2003, plaintiff accepted the position of Financial Center Manager for the Rose Hill branch of Branch Banking & Trust Company. Throughout plaintiff's interview process, defendant's representatives stressed that plaintiff would be required to move

to Rose Hill and become active in the community if he were to take the position. Plaintiff stated his willingness to comply with these requirements, and touted community activities in which he had been involved in the past, such as the Boy Scouts, the fire department, and his church. At his hiring, plaintiff agreed in writing to involve himself in Rose Hill community activities. Plaintiff never asked defendant for clarification of what was meant by "community activities."

In November 2003, defendant evaluated plaintiff's performance during his first ninety days of employment, and decided that his efforts to become involved in the Rose Hill community were unsatisfactory. On 13 November 2003, defendant gave plaintiff a "60 Day Performance Plan" which spelled out specific community activities that plaintiff would be required to pursue within sixty days in order to keep his job.

On 6 January 2004, plaintiff's attorney wrote to defendant, complaining that plaintiff was being unfairly required to attend church in Rose Hill, to enroll his child in the Rose Hill public school system rather than in a Christian academy, and to become active in certain community clubs. Defendant responded on 15 January 2004 with a memorandum in which defendant explained that plaintiff had misunderstood his job requirements. The memo clarified that plaintiff was not required to attend church at all, let alone any particular church, and that it was entirely up to plaintiff where to send his child to school. Defendant also reiterated the requirement that plaintiff be involved in the Rose

Hill community, and gave him another opportunity to comply by extending his probationary period by sixty days.

On 27 January 2004, plaintiff filed his complaint, alleging that defendant fraudulently induced him to leave his old job and accept defendant's job offer. On 22 February 2004, defendant terminated plaintiff's employment, citing his failure to satisfy the conditions of his job.

Plaintiff's complaint alleges that defendant concealed from him certain facts pertaining to job requirements; that defendant's misrepresentations with regard to those requirements were reasonably calculated to deceive and intended to deceive plaintiff; that plaintiff reasonably relied upon defendant's misrepresentations in taking the job; and that plaintiff suffered various injuries as a result of defendant's conduct. Defendant's answer of 11 March 2004 denies any misrepresentation or concealment of job requirements.

On 2 June 2005, defendant filed a Motion for Summary Judgment. A summary judgment hearing was conducted on 6 July 2005, and the trial court granted summary judgment for defendant on 19 September 2005. Plaintiff appeals to this Court following notice of appeal dated 23 September 2005.

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Plaintiff presents a single issue on appeal: whether the trial court erred by granting defendant's Motion for Summary Judgment.

*Standard of Review*

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment "shall be rendered forthwith 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) (2005). The burden of establishing a lack of any triable issue is upon the movant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). If a defendant moving for summary judgment presents material that effectively negates even one of the essential elements of the plaintiff's claim, summary judgment should be granted in the defendant's favor. *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 162, 247 S.E.2d 654, 656 (1978). It is not necessary that the defendant negate all of the essential elements. *Id.*

Once the moving party meets its burden, the nonmovant, in order to survive the summary judgment motion, must "produce a forecast of evidence demonstrating that the [nonmovant] will be able to make out at least a prima facie case at trial."

*Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. The nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). In deciding upon a motion for summary judgment, a trial court must draw all inferences of fact against the movant and in favor of the nonmovant. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.

The essential elements of plaintiff's fraudulent misrepresentation claim are: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party. *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986); *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 74-75, 598 S.E.2d 396, 401, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004). If defendant successfully negated any of these elements of plaintiff's case, then the trial court properly granted summary judgment in defendant's favor.

Plaintiff sought to demonstrate to the trial court that defendant induced him to leave his old job and to work for defendant by concealing a number of the requirements of his new position. Had he known of these requirements, plaintiff claimed, he would not have accepted the position with defendant. First, plaintiff claimed defendant required him to attend a local church in Rose Hill, and to enroll his child in public school in Rose

Hill. In support of its Motion for Summary Judgment, defendant demonstrated that neither of these was actually required of plaintiff.

There was simply no evidence plaintiff's employment with defendant was dependent upon attending any particular church. Church involvement was merely a suggestion as to how plaintiff might satisfy his community activity requirement. In fact, it was plaintiff himself who suggested this possibility.

With regard to the alleged requirement that plaintiff enroll his child in public school in Rose Hill, the forecast of evidence does indicate that this became one of defendant's expectations. However, defendant presented evidence indicating this expectation arose only after plaintiff himself told defendant's representatives that he planned to enroll his child in the Rose Hill public school system. It was not a condition of plaintiff's employment from the moment of his hiring, as plaintiff contends. In opposing the summary judgment motion, plaintiff failed to contest defendant's material on this point, instead merely reiterating what defendant had already admitted: that defendant eventually came to expect that plaintiff would enroll his child in public school in Rose Hill.

Further, defendant's memorandum to plaintiff, dated 15 January 2004, made it quite clear that defendant did not intend to condition plaintiff's employment on attendance of any church, or on his child's attendance of any particular school. Thus, the uncontroverted evidence shows that neither of these actions was required of plaintiff by defendant. Defendant cannot have

fraudulently misrepresented "requirements" of plaintiff's job if they were not, in fact, requirements.

Plaintiff also took issue with a number of job requirements that were first spelled out to him in detail four months after he took the job with defendant. In the "60 Day Performance Plan" dated 13 November 2003, defendant specified the following job requirements for plaintiff: (a) attend meetings of the Rose Hill Chamber of Commerce; (b) join the local Lions Club; (c) become a member of the Rose Hill Parks and Recreation Department; (d) join the local Boy Scouts group; (e) join the Rose Hill Parent-Teacher Organization; and (f) take a position on the board, or be an officer, of at least two of the above named organizations.

Plaintiff's fraudulent misrepresentation claim rested on the fact that these particular requirements were not made clear to him at his hiring. It is uncontested, however, that plaintiff understood at his hiring that involvement in the Rose Hill community would be an important condition of his employment. Plaintiff also acknowledged in his deposition that these particular requirements qualify as community activities. The fact that defendant did not describe to plaintiff at his hiring each and every form of community involvement that might be expected of him does not equate with fraudulent misrepresentation.

If plaintiff desired greater clarification of his duties, there is nothing to suggest that he could not have received it by simply asking. This Court has stated in the past that "when the party relying on the false or misleading representation could have

discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999); see also *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 59-60, 554 S.E.2d 840, 846-47 (2001) (holding that a creditor failed to state claims for negligent misrepresentation and fraudulent concealment where the creditor did not allege that he could not have learned of the borrower's financial history through exercise of due diligence). No such allegation is to be found in plaintiff's complaint.

Also, defendant's materials show that participation in these particular community activities became a condition of plaintiff's employment only after plaintiff failed, over a period of approximately four months, to become sufficiently active in the Rose Hill community. Once defendant felt it necessary to delineate more specific job requirements, the Performance Plan itself made them very clear to plaintiff. Plaintiff produced no forecast of evidence to the contrary. Thus, insofar as these particular activities were required of plaintiff, they were not misrepresented or concealed.

Each of plaintiff's claims of concealed or misrepresented job requirements was thus negated by defendant. Plaintiff did not produce a forecast of evidence to demonstrate that he was actually required to attend any particular church, nor that he was required to enroll his child in public school in Rose Hill. Neither did



plaintiff demonstrate any ability to prove those activities that truly were required of him were ever concealed or misrepresented. As a result, the first essential element of fraudulent misrepresentation, false representation or concealment of a material fact, is not satisfied. Even when all inferences of fact are drawn against defendant and in plaintiff's favor, plaintiff failed to set forth specific facts showing there was a genuine issue for trial. The trial court therefore properly granted defendant's Motion for Summary Judgment. Accordingly, this assignment of error is overruled.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).