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NO. COA05-580

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

TIMOTHY C. KUDLINSKI, and
wife, LAURIE S. KUDLINSKI,
Plaintiffs,

v.

Vance County
No. 03 CRS 917

RICHARD H. NORWOOD, and
wife, JOAN L. NORWOOD,
Defendants.

Appeal by plaintiffs from order entered 25 January 2005 by Judge Narley L. Cashwell in Vance County Superior Court. Heard in the Court of Appeals 7 December 2005.

Norman & Gardner, by Larry E. Norman, for plaintiffs-appellants.

Smith Moore LLP, by Sidney S. Eagles, Jr., Montaye Sigmon McGee, and Elizabeth Brooks Scherer, for defendants-appellees.

GEER, Judge.

Plaintiffs Timothy C. and Laurie S. Kudlinski appeal the entry of summary judgment in favor of defendants Richard H. and Joan L. Norwood in connection with the sale of a house by the Norwoods to the Kudlinskis. Because the Kudlinskis have failed to forecast sufficient evidence to support each element of their cause of action for fraud, we affirm.

Facts

In September 1997, the Kudlinskis bought a house in Henderson, North Carolina from the Norwoods. In connection with the sale, the Norwoods gave the Kudlinskis a Residential Property Disclosure Statement in which the Norwoods indicated that they had no knowledge of any "damage to or abnormality of the roof, chimneys, floors, foundation, basement, or load-bearing walls, or any leak in the roof or basement." After the Kudlinskis moved in, however, they "realized that the house had serious structural and foundation problems." A professional inspection "found major structural damage including serious foundation damage, a failing floor system and basement flooding."

On 23 September 2003, the Kudlinskis commenced a civil action against the Norwoods, alleging that the Norwoods had committed fraud by misrepresenting and concealing the true condition of the house. On 30 December 2004, the Norwoods moved for summary judgment. In opposition, the Kudlinskis submitted a single affidavit signed by each of them and the Norwoods' responses to the Kudlinskis' request for admissions. After reviewing these materials, the trial court granted summary judgment in favor of the Norwoods. The Kudlinskis have timely appealed to this Court.

Discussion

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56. The moving party bears the burden of showing a lack of

triable issues of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once the moving party meets this burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

"The essential elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (quoting *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981)). The Norwoods argue that the Kudlinskis have presented no competent evidence that the Norwoods knew of the facts they allegedly misrepresented or concealed. See *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498 (2004) ("The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud."); *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190, 374 S.E.2d 135, 137 (1988) ("[D]efendant could not, of course, be liable for concealing a fact of which it was unaware.").

As evidence of the Norwoods' knowledge, the Kudlinskis relied exclusively upon their joint affidavit, which asserted that James L. Thompson of Thompson Brothers Construction Co. told the

Kudlinskis that he had visited the home when it was owned by the Norwoods and:

that he personally showed the defendants Norwood the severe structural problems that had developed in the house and that he specifically discussed with the defendants Norwood the foundation, flooring and cracking problems and recommended making repairs. He further stated, upon reexamining the property after we [(the Kudlinskis)] purchased it, that it was evident that none of the repairs he had recommended were ever made.

In response to a request for admissions from the Kudlinskis, the Norwoods admitted that they knew Mr. Thompson, but denied that he had discussed water problems with them or had recommended any repairs.

Rule 56(e) of the North Carolina Rules of Civil Procedure provides that affidavits "opposing [summary judgment] . . . shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Because hearsay is generally not admissible as evidence, "[h]earsay matters included in affidavits should not be considered by a trial court in entertaining a party's motion for summary judgment." *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998).

The Kudlinskis' statements in their affidavit swearing to what Mr. Thompson said about his conversation with the Norwoods are hearsay. The Kudlinskis have not made any argument that these statements fall into any recognized exception to the hearsay rule. Accordingly, the Kudlinskis' affidavit fails, contrary to Rule

56(e), to "set forth such facts as would be admissible in evidence" that the Norwoods knew of the facts they had allegedly misrepresented or concealed. As this is an essential element of the Kudlinskis' fraud claim against the Norwoods, the Kudlinskis have failed to "produce a forecast of evidence demonstrating that [they would] be able to make out at least a prima facie case at trial." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.¹ Consequently, the trial court properly granted summary judgment.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).

¹Because the entry of summary judgment can be sustained on this ground, we need not consider the Norwoods' arguments pertaining to the sufficiency of the Kudlinskis' evidence regarding the other elements of fraud. See *RD&J Props.*, 165 N.C. App. at 745, 600 S.E.2d at 498 ("In order for defendants to prevail on their motion for summary judgment, they did not need to negate every element of fraud. 'If defendant effectively refutes even one element, summary judgment is proper.'" (quoting *Ramsey*, 92 N.C. App. at 190, 374 S.E.2d at 137)).