

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1119

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

ALL STATE RESTAURANT
EQUIPMENT CO., INC.,
Plaintiff

v.

Guilford County
No. 05 CVS 12291

SYMPOSIUM WESTSIDE, LLC
d/b/a SYMPOSIUM CAFE',
Defendant

Court of Appeals

Appeal by defendant from judgment entered 14 June 2006 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 21 March 2007.

Slip Opinion

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by George W. House and Kathleen A. Gleason, for plaintiff-appellee.

Egerton & Associates, P.A., by Kurt B. Aktug, for defendant-appellant.

CALABRIA, Judge.

Symposium Westside, LLC, d/b/a Symposium Cafe', ("defendant"), appeals from an order granting summary judgment in favor of All State Restaurant Equipment Co., Inc. ("plaintiff"). We affirm.

The pleadings and affidavits filed by plaintiff allege the following: in 2005, defendant contacted plaintiff regarding the purchase of restaurant furniture and equipment. On 9 May 2005, plaintiff submitted a proposed purchase order for defendant's

review quoting the cost of restaurant furniture, including restaurant chairs manufactured by Eagle. The estimated total cost of the merchandise was \$72,475.38. To place an order, defendant was required to submit to plaintiff a deposit in the amount of \$21,742.62, an amount representing approximately thirty percent of the total price. On 24 May 2005, defendant accepted plaintiff's proposal by tendering a check to plaintiff in the amount of \$21,742.62.

Plaintiff placed an order with Eagle, the chair manufacturer, on 17 May 2005. After the order was placed, plaintiff and Eagle agreed 21 July 2005 would be the estimated shipping date for the chairs. On 3 August 2005, Eagle informed plaintiff of a delay in the chair shipment. On the same day, plaintiff informed defendant of the delay. On 9 August 2005, defendant requested that plaintiff freeze the chair shipment. However, on 10 August 2005, defendant requested that plaintiff reinstate the chair order. On 11 August 2005, a portion of the chair order was shipped to defendant and defendant received the shipment. The remaining portions of the order were shipped on 23 August 2005 and 29 September 2005. Defendant received both shipments. On 30 September 2005, plaintiff billed defendant for the remaining balance due for the chairs and other equipment. Despite repeated attempts by plaintiff to collect the remaining balance, defendant refused to pay any portion of the amount due.

On 12 December 2005, plaintiff filed a complaint alleging breach of contract based on defendant's refusal to pay the

remaining balance due on the purchase of the chairs. On 16 February 2006, defendant filed an unverified answer to plaintiff's complaint, generally denying most of the allegations. The answer included motions to dismiss based upon N.C. Rules of Civil Procedure 12(b)(4) and (5), alleging that plaintiff failed to serve defendant properly and that defendant lacked "necessary minimum contacts to North Carolina to establish specific jurisdiction consonant with due process."¹ On 26 May 2006, plaintiff filed a motion for summary judgment, along with an affidavit by plaintiff's sales manager. Defendant did not file an affidavit or any other documents in opposition to the summary judgment motion.² Superior Court Judge Steve A. Balog granted plaintiff's motion for summary judgment on 14 June 2006. From the order granting summary judgment, defendant appeals.

Defendant's only assignment of error in this case is that the "trial court erred in allowing Plaintiff's Motion for Summary Judgment." Review of an order granting "summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of

¹Defendant has not raised any issue regarding jurisdiction on appeal and in the record has stipulated that defendant was properly served with the complaint and that both parties "were properly before the [c]ourt and the [c]ourt had jurisdiction over these parties."

²Defendant filed a one sentence "Motion to Amend Answer to Include Counterclaim" on 5 June 2006, the day of the summary judgment hearing, with a calendar request for the motion to be heard on 3 July 2006. There is no indication in the record that this motion was ever noticed for hearing or heard.

summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones." *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 602, 630 S.E.2d 221, 227 (2006) (quoting *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citations omitted)).

The standard of review for a trial court's grant of a motion for summary judgment is *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004). Viewing the evidence in the light most favorable to the non-moving party, we determine if any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "In determining if a grant of summary judgment is proper, we consider 'admissions in the pleadings, depositions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.'" *Williams v. HomeEq Servicing Corp.*, __ N.C. App. __, __, 646 S.E.2d 381, ___ (July 3, 2007) (No. COA06-674) (quoting *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 707, 567 S.E.2d 184, 187 (2002) (citation omitted)).

Once the plaintiff has filed a motion for summary judgment supported by an affidavit, "under section (e) of Rule 56 the burden is on the defendant to introduce evidence in opposition to the motion setting forth 'specific facts showing that there is a genuine issue for trial.'" *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986) (quoting N.C. Gen. Stat. §

1A-1, Rule 56(e) (1983)). The defendant "then must come forward with a forecast of his own evidence." *Id.* "An answer filed by defendant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact." *Id.*

In this case, the defendant filed an unverified answer containing general denials and no affidavit. Under Rule 56 of the North Carolina Rules of Civil Procedure, the defendant had the burden to forecast evidence showing that "there is a genuine issue for trial." *Amoco, supra.* As there is no genuine issue of material fact raised by the pleadings and affidavit, we must then consider whether the trial court's conclusion that the plaintiff was entitled to entry of judgment was legally correct.

Formation of a valid contract "requires an offer, acceptance and consideration." *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002) (citing *Copy Products, Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983)). "The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted)). A breach of contract is actionable when there is a "material breach . . . that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long*, 160 N.C. App. at 668, 588 S.E.2d at 4 (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807-08 (1996)).

In this case, a valid contract was formed when defendant accepted plaintiff's offer by tendering a check in the amount required by plaintiff as a deposit. Defendant breached the contract by refusing to pay the remaining balance due under the purchase order. Because defendant's breach was material, plaintiff is entitled to judgment as a matter of law.

Therefore, we determine that no genuine issue of material fact was present and that plaintiff was entitled to summary judgment as a matter of law.

Affirmed.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).