NO. COA06-142

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

DOMINGO SOTO, an individual and "O" SO CLEAN AUTO SPA HANDWASHING/DETAIL CLINIC, INC., a North Carolina Corporation,
Plaintiff-Appellants

Wake County
No. 02 CVS 16980

v.

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MICHAEL SCOTT BUCHANAN, an individual and THE "HANDSCRUB" CARWASH, INC., a North Carolina Corporation,
Defendant-Appellees

Appeal by plaintiffs from an order granting defendants' motion for summary judgment on 19 January 2005, and judgment entered 25 January 2005 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 11 October 2006.

Hemming & Stevens, P.L.L.C., by Aaron C. Hemmings, for plaintiff-appellants.

Broughton Wilkins Smith Sugg & Thompson, P.L.L.C., by Benjamin E. Thompson III for defendant-appellees.

CALABRIA, Judge.

Domingo Soto ("Soto") and "O" So Clean Auto Spa Handwashing/Detail Clinic, Inc. (collectively "plaintiffs") appeal from an order granting summary judgment and an order granting a directed verdict in favor of Michael Scott Buchanan ("Buchanan")

and The Handscrub Carwash, Inc. (collectively "defendants"). We affirm.

In July of 2000, Soto entered into an agreement with Buchanan in which Soto would purchase Buchanan's car washing business. The parties agreed that plaintiffs would pay defendants $65,000 for the ownership and good will of the defendants' business. The agreement allowed Buchanan to continue operating his window tinting business on the site of the car wash rent-free for four years, and obligated the plaintiffs to make monthly rent payments of $3,180.23. The plaintiffs were also obligated to pay all utility bills for the new business. The parties further agreed that neither would operate a business that competed with the other's business.

The agreement called for the plaintiffs to pay an initial payment of $5,000, with the balance of $60,000 to be paid later. Plaintiffs paid the $5,000 and on 13 November 2000 made a second payment of $15,000. That same day, Soto wrote a letter to Buchanan memorializing the agreement. The letter was signed by both parties. On 23 March 2001, plaintiffs made the final payment of $45,000 and Soto wrote a second letter to Buchanan. That letter was signed by both parties as well.

Until August 2001, plaintiffs operated the "O" So Clean Auto Spa at the defendants' location of 3334 Capital Boulevard in Raleigh. Plaintiffs timely paid all their rent payments until September 2001. In his deposition, Soto stated he had to be hospitalized in September of 2001 and therefore fell behind in the lease payments. Soto testified, "I was in the hospital and I guess

nobody knew how to contact me. Nobody wanted to tell me what was going on. And nobody wanted to stress me out. . . . So my family really kept a lot of things from me, and the rent, obviously, fell behind." Orlando Soto, Domingo Soto's son, stated in a 19 August 2003 deposition that he wrote a check to Buchanan for the rent for September 2001, but the check was returned for insufficient funds.

Buchanan testified in his deposition on 14 August 2003 that he told the plaintiffs they could either pay the rent by 15 October 2001 or leave the property. Buchanan further stated that on 5 October 2001 he changed the locks on the property, "[b]ecause I have several thousand dollars' worth of film and equipment that I didn't want leaving because we were having a disagreement." After locking the Sotos out of the business and declaring them in breach of the lease agreement, Buchanan rented the car wash site to two other individuals, charging them an initial payment of $5,000 as well as monthly rent payments.

On 23 December 2002, plaintiffs filed suit against defendants in Wake County Superior Court, alleging breach of contract, tortious interference with prospective economic advantage, conversion, unjust enrichment, moneys had and received, and unfair and deceptive trade practices. The defendants counterclaimed seeking $6,485.46 for rent monies owed from September and October 2001. The case was heard in January 2005 by Judge Evelyn W. Hill. The defendants moved for summary judgment on the plaintiffs' unjust enrichment claim, and that motion was granted on 19 January 2005. The defendants subsequently moved for directed verdict and Judge

Hill granted that motion as well, entering judgment for defendants on 25 January 2005. From the order granting the defendants' motion for summary judgment and the final judgment entered on 25 January 2005, the plaintiffs appeal.

I. Summary Judgment

The plaintiffs initially argue that the trial court erred in granting the defendants' motion for summary judgment on the issue of whether the plaintiffs had unjustly enriched the defendants. 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. Gen. Stat. § 1A-1, Rule 56(c) (2005).

Plaintiffs' claim for unjust enrichment depends on whether there was a contract between the parties. A claim for unjust enrichment does not lie in tort or contract, but in quasi contract or contract implied by law. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract." *Id.*

Soto stated in his 19 August 2003 deposition that he began speaking with Buchanan in July of 2000, and that the two began negotiating for the sale of the defendants' car wash business. Soto stated that Buchanan offered to sell the business to him at a cost of $65,000, and he accepted. The agreement was memorialized

in a 13 November 2000 letter from Soto to Buchanan, and in a writing signed by the parties and dated 23 March 2001. The 23 March 2001 writing by Soto stated as follows:

> As per our Agreement Reached July 2000. I am paying you $45,000 this date. This brings the total paid to you to $65,000 for the purchase of the car wash formerly known as Handscrub.
>
> (1) I agree not to pursue any business ventures which may be detrimental to your business i.e. tinting of windows.
>
> (2) You in turn agree to do the same i.e. car wash.
>
> (3) I also agree that no monies will be expected by me from you for the next 4 years beginning Sept 2000 ending Sept 2004 for the use of the tinting bay.
>
> (4) I agree that all Rent/lease payment will be made on a timely basis

A contract requires an offer and acceptance, consideration, and a meeting of the minds as to essential terms. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980). "The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968).

Here, the parties' testimony and the writings introduced into evidence clearly establish that the parties entered into a contract for the sale of the business and lease of the defendants' premises by plaintiffs. As such, the plaintiffs can recover only in contract, and cannot gain the equitable relief provided by an unjust enrichment claim. This assignment of error is overruled.

II. Directed Verdict

Plaintiffs next argue that the trial court erred in granting the defendants' motion for directed verdict.

> The standard of review for a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*.

Herring v. Food Lion, __ N.C. App. __, __, 623 S.E.2d 281, 284 (2005) (citations omitted). Plaintiffs cite several grounds for their argument.

First, plaintiffs contend that the statute of frauds does not cover the parties' oral modification of the lease because the modification was only for a period of several weeks. Because we determine that the lease period exceeded three years and was thus subject to the statute of frauds, and accordingly determine that any modification is subject to the statute's formalities, we find this argument to be unavailing.

The stipulations in the pre-trial order provide that the parties had an agreement calling for the plaintiffs to pay defendants $3,180.23 in monthly rent for the duration of the agreement, although the lease agreement was never reduced to writing or was not included in the record, other than the 23 March 2001 contract's recitation that all rent/lease payments will be made on a timely basis. The parties further stipulated that the defendants was not obligated to pay rent to the plaintiffs for the

first four years of their arrangement. Thus, the plaintiffs' lease necessarily exceeded three years and, as such, fell under North Carolina's statute of frauds. North Carolina Gen. Stat. § 22-2(2005) provides:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Id.

A modification of a contract falling under the statute of frauds also must satisfy the statute of frauds' formalities. "When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are ineffectual." *Clifford v. River Bend Plantation, Inc*., 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984). Because the modification of the agreement fell under the statute of frauds and was not recorded pursuant to the statutes' formalities, the oral modification by the parties here was ineffectual.

Secondly, the plaintiffs contend that the trial court erred in determining that there was no consideration given for the modification of the lease agreement.

> [I]t may be said that the term 'consideration,' in the sense it is used in legal parlance, as affecting the enforceability of contracts, consists either

> in some right, interest, gain, advantage, benefit or profit accruing to one party, usually the promisor, or some forbearance, detriment, prejudice, inconvenience, disadvantage, loss or responsibility, act, or service given, suffered, or undertaken by the promisee.

Exum v. Lynch, 188 N.C. 392, 395, 125 S.E. 15, 17 (1924).

Viewed in the light most favorable to the plaintiffs, the defendants promised to modify the lease, giving plaintiffs until 15 October 2001 to pay the rent monies owed. However, no benefit was conferred on the defendants, and no detriment was suffered by the plaintiffs. Thus, no consideration was given for the modification. Plaintiffs argue that the defendants' forbearance from evicting plaintiffs constituted consideration, and speculate that the defendants may have received a benefit by not having to immediately evict the plaintiffs and find a new tenant. This argument is unavailing, as it is based on conjecture and speculation and, as such, is unsupported by the record. "Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by defendant for a directed verdict." *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971). This assignment of error is without merit.

Finally, the plaintiffs contend that they established a cause of action for breach of the lease agreement and for breach of the opportunity to purchase the business. Because we have determined that the oral modification was ineffectual, plaintiffs were in breach of the lease agreement when they failed to make timely

payments. As such, the defendants did not breach the lease by changing the locks prior to 15 October 2001.

"[I]t is settled that where one party is unable to perform his part of the contract he cannot be entitled to the performance of the contract by the other party." *Edgerton v. Taylor*, 184 N.C. 571, 577, 115 S.E. 156, 159 (1922); Restatement (Second) of Contracts § 237 (1981).

Plaintiffs also contend that defendants breached their contract to purchase the business by failing to turn over customer lists, goodwill, and anything else of value except for some cleaning supplies. The two letters memorializing the contract to purchase the business do not specifically mention any of these items as being part of the agreement. The letters simply state that the plaintiffs agree to purchase the business formerly known as "Handscrub" Carwash, Inc., from defendants, and mention nothing about customer lists or other specific items.

Further, there was no testimony that the contract in question was for anything beyond the sale of the business itself. When testifying on direct examination, Domingo Soto was asked, "[Y]ou indicated that you purchased the business. Did you purchase any existing customers or lists [of existing customers]?" Soto answered, "Never." Thus there is no evidence in the record that the contract entered into by plaintiffs and defendants was for anything but the sale of the business itself and the opportunity for the plaintiffs to operate the business at defendants' site provided they made timely rent payments. When the plaintiffs materially

breached that contract by failing to pay rent, defendants' obligations under the contract were discharged. Accordingly, this assignment of error is without merit. The orders of the trial court are affirmed.

Affirmed.

Judges HUNTER and HUDSON concur.

The Judges participated and submitted this opinion for filing prior to 1 January 2007.

Report per Rule 30(e).