NO. COA06-780

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

B. ELLIOTT ENTERPRISE, INC.,

Plaintiff,

v. Forsyth County
No. 05 CVS 1323

JOHN MARK MITCHELL,

Defendant.

Appeal by plaintiff from order entered 16 February 2006 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2007.

Parrish, Smith & Ramsey, LLP, by Steven D. Smith, for plaintiff-appellant.

Hendrick & Bryant, LLP, by Matthew H. Bryant and Kenneth C. Otis, III, for defendant-appellee.

JACKSON, Judge.

On 13 March 2002, Bryan Elliott ("Elliott"), president of B. Elliott Enterprise, Inc. ("plaintiff"), and John Mark Mitchell ("defendant") entered into a contract pursuant to which plaintiff agreed (1) to purchase real property and construct a home for defendant on that property, and (2) that the price for these actions would be "costs plus $10.00 per sq. ft. with the total cost not to exceed $500,000 including lot, unless approved by

[d]efendant." Over the course of the next year, plaintiff constructed the home on the purchased property. In February 2003, Elliott, on behalf of plaintiff, informed defendant that the cost to complete the home now would be close to $600,000.00. Defendant agreed to the higher amount, and subsequently was qualified for a loan for the higher amount. In late March, or early April 2003, Elliott, on behalf of plaintiff, notified defendant that the cost to complete the home now would be $712,000.00, minus the $10,000.00 that defendant already had paid. Defendant refused to pay this new amount, and the parties then agreed that plaintiff would attempt to sell the home to someone else.

Plaintiff eventually sold the home for $760,000.00 in July 2004. On 25 February 2005, plaintiff filed the instant action against defendant alleging claims for breach of contract and anticipatory repudiation of a contract, defamation, and tortious interference with a contract. On 2 May 2005, defendant filed his answer, which included a motion to dismiss, and numerous affirmative defenses. Defendant filed a motion for summary judgement on all of plaintiff's claims on 26 January 2006, which the trial court granted on 16 February 2006. Plaintiff appeals from the dismissal with prejudice of all of its claims. Additional facts relevant to the instant appeal will be discussed below as needed.

The order from which plaintiff appeals grants defendant summary judgment on each of plaintiff's claims. However, on appeal, plaintiff presents arguments regarding only the breach of

contract claim and does not mention the defamation or tortious interference with contract claims. Therefore, plaintiff's appeal of summary judgment on the defamation and tortious interference with contract claims are deemed abandoned. *See* N.C. R. App. P. 10(a) (2006) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."); N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

"'We review the trial court's grant of summary judgment *de novo*.'" *Johnson v. Wornom*, 167 N.C. App. 789, 791, 606 S.E.2d 372, 374 (quoting *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004)), *disc. review denied*, 359 N.C. 411, 612 S.E.2d 321 (2005).

> Summary judgment is proper "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." "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial,'" or, alternatively, must produce an excuse for not doing so. "The nonmoving party 'may not rest upon the mere allegations of his pleadings.'" Thus where, "the moving party by affidavit or otherwise presents materials in

> support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him."

Wall v. Fry, 162 N.C. App. 73, 76-77, 590 S.E.2d 283, 285 (2004) (internal citations omitted).

Here, both parties agree that they entered into a contract on 13 March 2002, pursuant to which plaintiff would purchase real property and construct a home for defendant on that property, and that the price for these actions would be "costs plus $10.00 per sq. ft. with the total cost not to exceed $500,000 including lot, unless approved by [defendant]." Both parties also agree that the original contract specifically provided that:

> 5. This is a turn-key job and all work and expense of any sort relative to the construction, including building permits shall be paid by the Contractor. The Contractor will provide Contractor's Liability Insurance, Builder's Risk Insurance, and Workman's Compensation Insurance on the project.
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> . . . .
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> 12. The Contractor will be entitled to additional compensation for services requested that are not covered by the plans and specifications attached hereto, and for costs and expenses incurred by the Contractor as a result of changes made by the Buyer. The Buyer reserves the right to order work changes in the nature of additions, deletions, or modifications to the plans and specifications or, drawings without invalidating this contract, but the Buyer agrees to make corresponding adjustments and to pay for any additional costs for the work performed and to make corresponding adjustments at any time

> before completion of the contract. All work order changes shall be in writing, signed by Buyer and Contractor, and shall specify the adjustment, if any, to the contract price.

The evidence presented by both parties indicated that following the signing of the original contract, defendant made changes to the layout of the planned home, and added windows and doors to the specifications. Both parties testified in their depositions that these changes occurred very early in the process, and that they were made prior to the concrete footings of the house being poured. At no time did plaintiff provide defendant with any written work order change, much less any written work order change specifying what effect the changes would have on the contracted for price of $500,000.00.

Defendant testified that he was aware that the cost of the completed home could go above the $500,000.00 contract price, but that he and Elliott discussed that the price could not go any higher than $550,000.00. In January 2003, Elliott realized that the cost to finish the home was going to be more than $100,000.00 over the contract price, and at that point the home was only half way completed. In February 2003, Elliott provided defendant with numbers indicating that the cost of the home would be close to $600,000.00. In response, defendant obtained a letter from his bank that stated that he was qualified for a loan up to $600,000.00. Both parties tend to agree that this effectively modified their original contract, and that they now had a contract for $600,000.00.

Some time after the modification to their original agreement, defendant made changes to the screened-in porch that was planned for the home. Following this change, in late March or early April 2003, Elliott notified defendant that the cost of the home would now total $712,000.00, minus the $10,000.00 which defendant already had paid. Defendant rejected plaintiff's attempt to modify the contract, and informed plaintiff that he could possibly pay $680,000.00, but that in order to be qualified by his bank for the new amount, he would need a new signed contract. Plaintiff and defendant did not enter into a new signed contract, and in fact, plaintiff specifically rejected defendant's offer of $680,000.00 by not signing a new contract. Elliott testified that he would not have signed a contract for a new contract price of $680,000.00.

During his deposition, Elliott testified that at all times he had the ability to re-estimate the cost of the job and to obtain written change orders from defendant. He stated that he does not know what effect the particular changes made by defendant had on the final cost of the job, but that the majority of the changes occurred before major work on the project started, and before the footings were poured. Elliott testified that he had the ability to stop the project and make sure the parties agreed upon a price above the initial $500,000.00. However, Elliott did not do this until six months after the initial contract was signed, and until the home was half-way finished. Moreover, plaintiff attempted to change the price of the contract on two separate occasions without providing defendant with any written change orders specifying the

adjustment to the contract price, as was required by the parties' original contract.

"In the making of a contract[,] it is essential that the parties thereto assent to the same thing in the same sense, and their minds must meet as to all the terms." *Sides v. Tidwell*, 216 N.C. 480, 483, 5 S.E.2d 316, 318 (1939). Thus,

> "'[i]n order to constitute a valid . . . agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement [is] so vague and indefinite that it is not possible to collect from it the full intent of the parties[,] it is void[.]'"

Holder v. Mortgage Co., 214 N.C. 128, 133, 198 S.E. 589, 591-92 (1938) (citation omitted). "'Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.'" *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (citation omitted), *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). Not all breaches of a contract constitute an actionable claim. A breach will only be considered actionable if it is material in nature, and is "one 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 v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807-08 (1996)).

In the instant case, the parties readily agree that they modified their original contract with respect to the price term; however, there was no evidence presented that either party agreed to a waiver of the requirement calling for written change orders specifying adjustments to the contract price as a result of changes made to the plans. At no time during the process did plaintiff provide any written change orders to defendant. When plaintiff informed defendant that it could not perform the contract for the modified contract price of $600,000.00, this constituted a breach of the parties' contract. Plaintiff's attempt to modify the contract again by offering a new price of $712,000.00 was rejected by defendant, and plaintiff's refusal to abide by the modified contract constituted a breach.

As there was no genuine issue of material fact in dispute as to whether or not plaintiff had breached the parties' contract, the trial court acted properly in granting summary judgment in favor of defendant. Plaintiff's assignment of error is overruled.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).