NO. COA08-356

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

NATIONAL RAILROAD MUSEUM
AND HALL OF FAME, INC.,

Plaintiff,

v. Richmond County
No. 06 CVS 749

CITY OF HAMLET, CARY GARNER,
as Mayor of City of Hamlet,
and individually, BILL BAYLESS,
Councilman for City of Hamlet,
and individually, DAVE FULLER,
as Former Councilman for City
of Hamlet and individually,
BRENT BARBEE, as Former
Councilman for City of Hamlet,
and individually, PAT PRELAR,
Councilman for City of Hamlet,
and individually, and BURT
UNGER, Councilman for City of
Hamlet, and individually,

Defendants.

Appeal by plaintiff from an order entered 16 November 2007 by Judge Mark E. Klass in Richmond County Superior Court. Heard in the Court of Appeals 24 September 2008.

Henry T. Drake, for plaintiff-appellant.

Moser, Garner and Bruner, P.A., by Terry R. Garner, for defendants-appellees.

JACKSON, Judge.

National Railroad Museum and Hall of Fame, Inc. ("plaintiff") appeals from an order granting summary judgment in favor of the City of Hamlet ("defendant"). For the following reasons, we affirm.

In 1900, a railroad depot, which came to be owned by CSX Transportation, Inc. ("CSX"), was constructed within defendant's city limits. This depot has been used by railway traffic for over 100 years.

In the mid-1990's the depot had begun to deteriorate, and CSX began to consider the best way to dispose of the depot. At that time, and for more than twenty years prior, plaintiff occupied a portion of the depot. CSX considered proposals that ranged from demolition to restoration of the depot. After local, State, and federal funding sources became available and expressed interest in favor of restoring the depot, CSX decided not to demolish it. CSX, however, determined that the location of the depot, even if restored, would be unsafe because of the location and configuration of its various railroad tracks. CSX then proposed to transfer ownership of the depot to defendant. On 9 March 2001, CSX sold the depot to defendant pursuant to a bill of sale.

On 12 March 1996, plaintiff and defendant entered into a lease agreement that allowed plaintiff to build a structure on property owned by defendant for the purposes of housing and displaying an historic replica locomotive, the Tornado, as well as other "exhibits, antiques, artifacts, and general materials relating to the development of the railroad industry in North Carolina and the

United States as a whole." Plaintiff's structure was located between 100 and 150 yards south of the depot's location near the CSX railroad tracks. However, plaintiff's structure was not climate controlled, and many of the historic artifacts were deteriorating. After several years in such condition, the Tornado, like the depot, was in need of rehabilitation.

To facilitate the relocation and restoration of the depot, the rehabilitation of the Tornado, and the preservation of plaintiff's other historic artifacts, plaintiff and defendant began to discuss mutually beneficial plans and to raise necessary funds from local, State, and federal sources. To obtain these funds, plaintiff would be required, *inter alia*, to comply with the Professional Museum Standards and to lease its assets to defendant for display for a minimum of twenty-five years.

On 16 June 2004, after obtaining funding to restore the Tornado and the depot, the parties entered into a limited agreement ("Tornado Agreement"). Pursuant to the Tornado Agreement, the parties agreed that the North Carolina Department of Transportation ("Department of Transportation") would transport the Tornado to Raleigh, North Carolina for the purpose of rehabilitation. Plaintiff also agreed to let defendant demolish plaintiff's structure that was erected pursuant to the parties' 1996 lease. In the place of plaintiff's structure, defendant planned to relocate and restore the depot and to build a new structure to display the restored Tornado. However, the Tornado Agreement did not address

any terms related to plaintiff's occupying the depot after it was relocated and restored.

After plaintiff's structure was demolished and the Tornado was transported to Raleigh, the present dispute arose. On 29 June 2006, plaintiff brought this action alleging breach of contract and fraud, and seeking to institute inverse condemnation proceedings. On 19 September 2007, defendant moved for summary judgment. On 5 October 2007, plaintiff moved to amend its complaint. On 16 November 2007, the trial court entered an order granting defendant's motion for summary judgment. Plaintiff appeals.

Plaintiff first argues that the trial court erred in granting summary judgment to defendant in light of defendant's alleged breach of a purported contract with plaintiff. We disagree.

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) (2007). "An issue is 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 374-75, 283 S.E.2d 518, 520 (1981)).

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving

party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984)). This burden can 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. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *See id.*

North Carolina General Statutes, section 160A-11 grants authority to municipalities to enter into contracts. N.C. Gen. Stat. § 160A-11 (2007). A municipality's power to contract may be exercised only by a city council sitting in an open meeting. *See Insurance Co. v. Guilford County*, 225 N.C. 293, 301-02, 34 S.E.2d 430, 435 (1945) ("[I]n order to make a valid and binding contract the board of commissioners must act in its corporate capacity in a meeting held as prescribed by law."). Furthermore, North Carolina General Statutes, section 160A-16 provides that "[a]ll contracts

made by or on behalf of a city shall be in writing. A contract made in violation of this section shall be void and unenforceable unless it is expressly ratified by the council." N.C. Gen. Stat. § 160A-16 (2007).

In the case *sub judice*, as evidence of the purported contract or ratification, plaintiff first offers the minutes from defendant's city council meeting in which the city council unanimously adopted a resolution of support. In pertinent part, the resolution provided "that for the purposes of meeting the local match requirements for funding awards, the City of Hamlet pledges its financial support for the depot project." Plaintiff also offers a funding application by defendant to the Department of Transportation as evidence of the required contract or ratification.

However, neither the resolution of support nor defendant's application for funding are sufficient to constitute either an express contract or a duly ratified agreement between plaintiff and defendant for plaintiff's use of the restored depot. These documents merely provide some evidence that (1) the parties contemplated that some indefinite action would be taken regarding relocating or rebuilding the depot; (2) defendant would provide some unspecified amount of funding, and (3) defendant would seek funds from the Department of Transportation. Notwithstanding the fact that the parties preliminarily had discussed plaintiff's occupying some portion of the relocated, restored depot, the terms never were defined.

These documents stand in stark contrast to the Tornado Agreement which expressly set forth the terms by which the Tornado would be rehabilitated, who would bear the costs of transportation and rehabilitation, and the duration of the agreement. Prior to entering the Tornado Agreement, by letter dated 20 February 2004, defendant's City Manager, Marchell Adams David ("Adams David"), advised Bill Williams ("Williams"), plaintiff's chairman, in pertinent part that

> [a]s you know, the City of Hamlet has been presented an opportunity to restore the landmark Hamlet Passenger Depot to its former glory. It has always been the intent of the project team (City of Hamlet, NCDOT & David E. Gall, Architect) to include the National Railroad Museum & Hall of Fame, Inc. in the restored facility. *However, this task can only be achieved if both federal and state funding guidelines are met. Therefore, it is necessary that the City of Hamlet and the NRM & Hall of Fame enter into an agreement for the leased/loaned ownership of the museum's holdings for a minimum of twenty-five (25) years.*
>
> . . . .
>
> It is the goal of the project team to house . . . a railroad museum[] in the depot. The museum will be owned and operated by the City of Hamlet. The City will supervise the daily activities of the museum in the same manner as all other city functions. The museum's activities (i.e.[,]fundraising, special events, display selections, etc.[]) will be governed by the museum's board of directors, who shall be appointed by the Hamlet City Council. This is the practice exercised in making appointments to all boards and ad hoc committees within the City of Hamlet. The board's membership shall be composed of board members, city representatives[,] and community volunteers. The exact number is yet to be determined. Staffing, security[,] and access to keys are all issues that will be handled by

> the City of Hamlet as the depot and museum are [to be] housed in a city building.
>
> As you are well aware, CSX Transportation, not the City of Hamlet, required that the building be relocated prior to any restoration efforts. In order to do so, the building had to be vacated by all parties. As noted in each of the meetings with you, *an agreement that addresses the leasing of artifacts will be drawn up and the City of Hamlet's commitment to the longevity of the museum will be defined*. The draft of such an agreement was shared with you at the January 2004 meeting. *However, until the NRM& Hall of Fame provides a written response committing to return to the Hamlet Passenger Depot, the agreement cannot be finalized*.

(Emphasis added). Although the parties entered into the Tornado Agreement after Adams David sent this letter to Williams, the Tornado Agreement's limited terms are insufficient to constitute a contract or ratification as required by North Carolina General Statutes, section 160A-16.

Furthermore, in contrast to the parties' 1996 lease, Williams' deposition testimony repeatedly establishes that the parties never entered into a new lease to display the historic artifacts in defendant's depot pursuant to the conditions attached to the receipt of State and federal funds. Even though the parties intended that plaintiff would occupy the restored depot in some capacity, the exact nature of the relationship had not been defined. Williams testified that "[t]here were no terms or condition[s] at that time of any sort what[so]ever."

Upon review, the record fails to satisfy the requirements of section 160A-16. Accordingly, in the absence of a contract, no genuine issue of material fact exists as to defendant's purported

breach. We hold that the trial court did not err in granting summary judgment to defendant as to plaintiff's breach of contract claim.

Next, plaintiff argues that the trial court erred in granting defendant's summary judgment motion because defendant's actions amounted to an unconstitutional taking of plaintiff's property. We disagree.

North Carolina General Statutes, section 40A-51 sets forth the procedures by which a claimant may bring an inverse condemnation action. *See* N.C. Gen. Stat. § 40A-51 (2007). Section 40A-51(a) provides that "[t]he action may be initiated within [twenty-four] months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later." N.C. Gen. Stat. § 40A-51(a) (2007). In pertinent part, subsection (b) provides a procedural threshold requirement such that "[t]he owner *at the time of filing of the complaint shall record a memorandum of action with the register of deeds* in all counties in which the property involved is located." N.C. Gen. Stat. § 40A-51(b) (2007) (emphasis added).

On 29 June 2006, plaintiff commenced the present action by filing its complaint. Contrary to the requirements of section 40A-51(b), plaintiff failed to record a memorandum of action contemporaneously with the filing of its complaint. Accordingly, no genuine issue of material fact exists, and because plaintiff failed to comply with the statutory requirements, defendant is

entitled to judgment as a matter of law. Plaintiff's second argument on appeal is without merit.

Next, plaintiff argues that the trial court erred in granting summary judgment in favor of defendant as to defendant's alleged fraud. We disagree.

"The 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.'" *McGahren v. Saenger*, 118 N.C. App. 649, 654, 456 S.E.2d 852, 855 (1995) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)).

Plaintiff contends that defendant's conduct fraudulently induced plaintiff to enter into the Tornado Agreement and to allow defendant to destroy plaintiff's structure. Furthermore, plaintiff argues that defendant never had any intention of allowing plaintiff to inhabit the rehabilitated depot.

Contrary to plaintiff's assertions, defendant demonstrated its *bona fides* by (1) adopting a resolution of support to provide financial assistance to plaintiff, (2) submitting an application for funds from the Department of Transportation, and (3) informing plaintiff through Adams David's letter prior to the Tornado Agreement that "[i]t has always been the intent of the project team . . . to include [plaintiff] in the restored [depot]." Defendant's letter further explained that "it is necessary that [defendant] and [plaintiff] enter into an agreement for the leased/loaned ownership

of the museum's holdings for a minimum of twenty-five (25) years," but "until [plaintiff] provides a written response committing to return to the Hamlet Passenger Depot, the agreement cannot be finalized."

In light of the foregoing, and taking the evidence in the light most favorable to plaintiff as the non-moving party, we hold that the trial court properly granted summary judgment in favor of defendant as to defendant's alleged fraud.

In plaintiff's final assignment of error, plaintiff asserts that the trial court erred by not ruling on plaintiff's motion to amend its complaint. However, plaintiff fails to provide any argument or cite any authority in support of its assignment of error. Accordingly, we take this, and plaintiff's remaining assignments of error to be abandoned pursuant to North Carolina Rules of Appellate Procedure, Rule 28(b)(6). N.C. R. App. P., Rule 28(b)(6) (2007).

We note that it is regrettable that the parties were unable to come to terms to display artifacts of such historic significance to both the State of North Carolina and the United States. However, for the foregoing reasons, we are constrained to affirm the trial court's order of summary judgment in favor of defendant.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).