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NO. COA08-855

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

LA COSTA DEVELOPMENT  
CORPORATION,

Plaintiff,

v.

Onslow County  
No. 07 CVS 4412

TOWN OF NORTH TOPSAIL  
BEACH,

Defendant.

Appeal by plaintiff from judgment entered 11 May 2008 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 14 January 2009.

*Ward & Smith, P.A., by Cheryl A. Marteney, for plaintiff.*

*Robert W. Kilroy for defendant.*

ELMORE, Judge.

Plaintiff-appellant La Costa Development Corporation (La Costa) appeals from a superior court order granting summary judgment to the Town of North Topsail Beach (Town). La Costa originally sought enforcement of the issuance of a Conditional Use Permit (CUP) granted by the Town on 1 September 2005. For the reasons stated herein, we reverse the order.

I.

La Costa owns a 2.82 acre ocean-adjacent tract of land in the town of North Topsail Beach in Onslow County. In 2005, La Costa submitted a site-specific development plan and plat for a Planned Residential Development for the La Costa Bay Project (Project) to the Town, seeking a CUP. La Costa submitted its plan in accordance with North Topsail Beach Code, Art. III, Sec. 7-31(b).

On 11 August 2005, the Town's Planning Board reviewed and recommended approval of La Costa's CUP. The Town's Board of Aldermen conducted a public hearing and subsequently approved La Costa's CUP for the Project on 1 September 2005. In a letter notifying La Costa of the approval, the Town's Manager cited section 7-34(a) of the North Topsail Beach Code, which states in part that "a zoning right that has been vested an [sic] provided in this article shall remain vested for a period of two (2) years." The letter also stated that "[a] building permit for construction will be issued by the Town upon receipt of all required state, federal permits and guarantee of improvements."

Soon thereafter, La Costa began the process of developing the Project pursuant to the approved plan and CUP. In order to obtain a building permit from the Town, La Costa sought various other development and site plan approvals, including approval of a sedimentation and erosion control plan, a storm water permit, and an appropriate Coastal Area Management Act (CAMA) permit. Additional plans included obtaining professional architectural and engineering design services; highway connection permits from the North Carolina Department of Transportation; water and sewer

connection permits from Onslow Water and Sewer Authority and North Topsail Utilities, Inc.; and major development permits from the North Carolina Department of Environment and Natural Resources - specifically, the Division of Coastal Management (DCM). By mid-July 2007, La Costa had acquired all required permits for issuance of a building permit from the Town with the exception of a CAMA permit.

In order to apply for its required CAMA permit, La Costa needed the first line of stable, natural vegetation (Vegetation Line) determined and staked at the Project site. For purposes of a CAMA permit application, the Vegetation Line may only be determined by an officer or agent of DCM. Pursuant to N.C. Gen. Stat. § 113A-121, cities and counties may issue permits such as CAMA permits through DCM-approved implementation and enforcement programs authorizing municipal and county officials to act as division agents known as Local Permit Officers (LPO). N.C. Gen. Stat. § 113A-121 (2007). An LPO goes through Coastal Resources Commission training regarding CAMA and its implementing regulations and procedures in order to make on-site decisions typically involving determinations of CAMA areas of environmental concerns.

In this instance, Deborah Hill was both the Town's Planning and Zoning Officer as well as its LPO. Because it had previously worked with Hill and former LPOs on other projects within the Town's limits and on its coastline, La Costa requested Hill's assistance as LPO to stake the Vegetation Line. On 16 July 2007, agents for La Costa met with Hill at the Project site to discuss

the determination of the Vegetation Line. Although Hill represented to La Costa that she would return to the site on 18 July 2007 to conduct the Vegetation Line determination, Hill did not return. La Costa contacted both Hill and the Town several times requesting that Hill make the Vegetation Line determination to no avail and was never provided an explanation of the delay.

La Costa contacted the DCM directly for a determination of the Vegetation Line at the Project. DCM officials informed La Costa that the Project required a CAMA major development permit (CAMA Permit) and Hill was not authorized to make the Vegetation Line determination because her jurisdiction as an LPO was limited to minor permits. La Costa was also informed that DCM had placed the Town "on probation" at that time, and that, even if Hill had been authorized under ordinary circumstances to make the Vegetation Line designation, she was not authorized to take any action on behalf of CAMA during the probationary period. La Costa alleged that at no time did the Town or Hill notify them of these circumstances.

DCM field representatives flagged the Project's Vegetation Line on 2 August 2007 and issued a CAMA Permit to La Costa in October 2007. La Costa subsequently submitted its application for a building permit along with all other prerequisite permits to the Town on 7 October 2007. The Town refused to issue La Costa a building permit, stating in part:

6. At no time prior to August 31, 2007, two years after the Conditional Use Permit was issued, did Plaintiff apply for and/or receive a Building Permit.

7. On or about October 7, 2007, Plaintiff made application to the Town for a Building Permit.

8. The application for Building Permit filed by Plaintiff was untimely.

La Costa filed a petition on 14 November 2007 seeking a writ of mandamus and/or a mandatory injunction against the Town to obtain a building permit for the Project. In response, on 17 January 2008, the Town filed an answer, counterclaim, and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007). In its counterclaim and related motion, the Town alleged that: La Costa's CUP was issued pursuant to North Topsail Beach Town Ordinance § 7-34 and in accordance with N.C. Gen. Stat. § 160A-385.1; La Costa failed to make a timely application for a building permit within the prescribed two-year period from the time of the issuance of the CUP; and that, as a result of La Costa's failure to satisfy the requisite time requirement, its complaint should be dismissed with prejudice under Rule 12(b)(6).

The Town filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 10 March 2008 with an accompanying affidavit from its permit specialist. N.C. Gen. Stat. § 1A-1, Rule 56 (2007). La Costa filed its own motion for summary judgment on 28 March 2008 with an affidavit from one of La Costa's principals and officers. Following a hearing, Judge Jenkins granted the Town's motion for summary judgment on 1 May 2008, stating that "the 'Conditional Use Permit' dated September 1, 2005 . . . expired by it's [sic] own terms, on August 31, 2007,

pursuant to Ordinance and N.C.G.S. 160A-385.1, and no common law vested rights exist." La Costa filed its notice of appeal on 30 May 2008.

II.

In its first assignment of error, La Costa contends that the trial court erred in granting the Town's motion for summary judgment in that the representations, actions, and omissions of Hill as Town's Planning and Zoning Officer as well as its LPO contributed to La Costa's failure to meet the two-year CUP deadline, thus creating an issue of material fact. We agree.

The parties made cross-motions for summary judgment to the trial court. Summary judgment is proper only where "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). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (quotations and citations omitted; alteration in original). "If defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, set forth specific facts showing that

there is a genuine issue for trial." *Brevard v. Barkley*, 12 N.C. App. 665, 668, 184 S.E.2d 370, 372 (1971). The standard of review for summary judgment is *de novo*. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385.

La Costa asserts that due to Hill's representations, actions, and omissions, the Town should be estopped from considering its CUP to have expired on its own terms. "Estoppel is for the protection of innocent persons. They, only, may claim its benefits." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (citation omitted). The essential elements that must be established by the party claiming estoppel against the party to be estopped are:

- (1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert;
- (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; [and]
- (3) knowledge, actual or constructive, of the real facts.

*Hawkins v. Finance Corp.*, 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953). "If the evidence in a particular case raises a permissible inference that these elements exist, but there are other inferences to be drawn from the evidence to the contrary, estoppel is a question of fact for the jury to determine." *Meachan v. Board of Education*, 47 N.C. App. 271, 278, 267 S.E.2d 349, 353 (1980). Although the State is not subject to estoppel to the same extent as

a private individual or corporation, our Supreme Court has stated that "an estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the [entity]." *Id.* at 279, 267 S.E.2d at 354 (citation omitted; alterations in original).

Applying these principles to the present case, we conclude that there is a genuine issue of material fact as to whether the Town may be estopped from considering whether La Costa's CUP expired by its own terms based upon the representations, actions, and omissions of Hill as the Town's Planning and Zoning Officer and LPO. Mark Evans, a principal, officer, and shareholder of La Costa, submitted an affidavit in support of La Costa's motion for summary judgment in which he described his past real estate development experience on North Topsail Beach and his interactions with Hill. In this he stated the following: he has had extensive experience with Hill and her predecessor in his years of real estate development on North Topsail Beach and other coastal areas; marking the "first line of vegetation" for CAMA permit purposes typically took about a week to ten days when working with Hill; on or about 16 July 2007, La Costa representatives met with Hill at the Project site and specifically asked when she would "flag the [applicable] first stable line of vegetation" for the Project; although Hill stated that she would make the marks on 18 July 2007, Hill failed to mark the line as agreed and La Costa and its agents

were unable to make contact with her from 19 July 2007 through 27 July 2007. Evans also stated in his affidavit that, after contacting the DCM, La Costa learned that

Hill was not authorized to mark the first line of vegetation for a major CAMA permit; [Mr. Jason Dail of DCM] further told me that, the Town was 'on probation' with DCM at that time, and that, even if Ms. Hill was authorized to mark the first line of vegetation under ordinary circumstances, she was not authorized to take any action on behalf of CAMA during that period of probation.

Based upon this information, per his affidavit, Evans and other La Costa officers, agents, and employees

suspected that Ms. Hill was intentionally delaying the marking of the first line of vegetation even though La Costa had timely requested that marking, and that the intentional delay was for the purpose of ensuring that La Costa did not timely receive its [sic] CAMA permit, thus rendering it impossible for La Costa to obtain issuance of its building permit prior to September 2, 2007[,] and that the Town would then refuse to issue a building permit claiming that La Costa had not timely applied for its building permit.

Evans asserted that due to Hill's failure to timely mark the first line of stable vegetation after representing that she would and that she had the authority to do so led to the delays in La Costa's application to the Town for a building permit. Evans believed that, had it not been for Hill's representations, actions, and omissions, "La Costa could and would have timely applied directly to DCM and would have received its CAMA permit in time to file its building permit application before September 1, 2007." La Costa contends that such representations and omissions by Hill were

intentionally incorrect and improper and, therefore, the Town should be estopped from declaring La Costa's CUP as having expired by its own terms.

We find that Hill's representations, actions, and omissions raise a genuine question of material fact as to whether the Town is estopped from using the expiration of La Costa's to deny issuance of the building permit. We further find that the application of the principles of estoppel in the present case would not impair the exercise of the Town's governmental powers. *Meachan*, 47 N.C. App. at 278, 267 S.E.2d at 353.

Thus, we reverse the trial court's decision to grant summary judgment to the Town. We decline to address La Costa's remaining assignments of error.

Reversed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).