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NO. COA09-13

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

BAKER CONSTRUCTION CO., INC.,  
Plaintiff,

v.

Alamance County  
No. 08 CVS 1897

CITY OF BURLINGTON and  
HAWTHORNE, LLC,  
Defendants.

Appeal by plaintiff from judgments entered 18 September 2008 and 14 November 2008 by Judge Michael R. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 18 May 2009.

*Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher Alan Raines, for plaintiff-appellant.*

*City Attorney Robert M. Ward; and Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for City of Burlington defendant-appellee.*

*Boxley, Bolton, Garber & Haywood, L.L.P., by Kenneth C. Haywood and Matthew J. Morrison, for Hawthorne, LLC, defendant-appellee.*

HUNTER, JR., Robert N., Judge.

#### Facts

The present appeal arises from a complaint filed on 18 June 2008, by Baker Construction Co, Inc. ("plaintiff"), against Hawthorne, LLC ("Hawthorne"), and the City of Burlington ("City of Burlington") in Alamance County Superior Court. The facts of the

underlying dispute were set forth in plaintiff's complaint as follows.

Plaintiff entered into a contract with Hard Rock Development Associates, LLC ("Hard Rock Development"), to install water and sewer lines ("utility lines") for a subdivision in Alamance County, the Hawthorne Subdivision.

Despite plaintiff's performance in full, Hard Rock Development failed to pay plaintiff \$758,189.22 for the installation of the utility lines, and thus, breached the contract. The record does not disclose that the plaintiff sought relief under N.C. Gen. Stat. § 44A-7, *et seq.*, or attached the construction contract to the complaint.

The real estate on which plaintiff installed the utility lines is divided into two separate tracts: the first tract of 38 acres owned by Hard Rock Development, and the second tract adjoining the first held by the North Carolina Department of Transportation ("NCDOT") right-of-way for NC Highway 49 and Timber Trail. The tract of land formerly owned by Hard Rock Development was subject to a deed of trust for debt and was foreclosed. On 22 December 2006, this tract was transferred by the Trustee's Deed to defendant Hawthorne, LLC ("Hawthorne"). The utility lines installed on the Department of Transportation's right-of-way were installed pursuant to an Encroachment Agreement under which the NCDOT did not become owner of the utility lines and under which the City of Burlington ("City of Burlington") assumed the responsibilities of the agreement upon conveyance of the utility lines to City of

Burlington. Plaintiff also alleges that it had not been paid in full for the installation of and work on the utility lines, and that plaintiff had not conveyed or relinquished its ownership of the utility lines or its work related to the installation of the utility lines.

Plaintiff alleged that Hawthorne plans to complete the Hawthorne Subdivision utilizing the utility lines installed by plaintiff. Plaintiff further alleged in its complaint that City of Burlington, or Hawthorne, or both, intended to seize, or had seized the utility lines to deliver water to Hawthorne Subdivision.

In its 18 June 2008 complaint, plaintiff set forth four claims for relief: declaratory relief seeking to quiet title to the utility lines; injunctive relief to permanently enjoin defendants from using the utility lines; conversion for defendants' alleged unauthorized use of the utility lines seeking the reasonable value of the utility lines in excess of \$759,000.00 from defendants; and unjust enrichment due to defendants' potential to generate revenue from use of the utility lines.

On 7 August 2008, plaintiff and City of Burlington entered into a consent preliminary injunction enjoining the City of Burlington from using the utility lines. The injunction was to remain in effect until a trial or hearing on the merits of the claim.

Both defendants filed motions to dismiss. In an order and judgment dated 18 September 2008, Judge Morgan granted City of Burlington's motion to dismiss plaintiff's unjust enrichment claim

as the claim was barred by the defense of governmental immunity and for failure to state a claim for which relief can be granted. Additionally, Judge Morgan dismissed plaintiff's remaining claims against City of Burlington for failure to state a claim for which relief can be granted. Finally, the order dissolved the consent preliminary injunction between plaintiff and City of Burlington. From this order, plaintiff appeals. In a second order and judgment dated 14 November 2008, Judge Morgan granted Hawthorne's motion to dismiss plaintiff's claims for failure to state a claim for which relief can be granted. From this order, plaintiff appeals.

Standard of Review

The "standard of review on a motion to dismiss for failure to state a claim is *de novo* review." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). The purpose of a motion to dismiss is to test "the legal sufficiency of the complaint." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). This Court must determine "'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.'" *S.N.R. Mgmt. Corp.*, 189 N.C. App. at 606, 659 S.E.2d at 448 (citation omitted). "'For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.'" *Sutton*, 277 N.C. at 98, 176 S.E.2d at 163 (citations omitted). Dismissal of a complaint under Rule 12(b)(6)

is proper when "on its face the complaint reveals that no law supports the plaintiff's claims." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

#### Analysis

The *sine qua non* of plaintiff's complaint is that water and sewer lines which it installed on property now owned by defendants are the personal property of Baker Construction. Its theory is "that Baker Construction purchased the materials for the lines, installed the lines, installed much of the lines in the NCDOT right-of-way, has not been paid for the lines, has not conveyed the lines and has otherwise not lost ownership of the lines."

The sole authority which plaintiff cites in support of its argument is *Oil Co. v. Cleary*, 295 N.C. 417, 421, 245 S.E.2d 720, 723 (1978), which states: "[A]n agreement between the owner of a chattel and the owner of the realty upon which the chattel is affixed, that the chattel shall remain the personal property of the owner, need not be in writing . . . [and] may be 'express or implied.'" (citation omitted). Moreover, "'[a] building, or other fixture which is ordinarily a part of the realty, is held to be personal property when placed on the land of another by contract or consent of the owner.'" *Id.* at 420, 245 S.E.2d 722 (citation omitted). This argument is not persuasive under the facts alleged in the complaint, because plaintiff has incorrectly characterized building materials incorporated into an improvement on land with goods which may become fixtures.

N.C. Gen. Stat. § 25-1-101, *et seq.*, the Uniform Commercial Code ("UCC") provides the statutory authority for commercial transfer of goods and security interest in goods, including fixtures. "'Fixtures' means goods that have become so related to particular real property that an interest in them arises under real property law." N.C. Gen. Stat. § 25-9-102(41) (2007). "A security interest under this Article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this Article in ordinary building materials incorporated into an improvement on land." N.C. Gen. Stat. § 25-9-334(a) (2007).

*Oil Co.* concerned a dispute over gasoline dispensing equipment: two gasoline pumps, two underground storage tanks and an air compressor. *Oil Co.*, 295 N.C. at 418, 245 S.E.2d at 720. This property was subsequently sold to a bona fide purchaser for value. *Oil Co.* involves a licensee and trade fixtures. The regulation of goods, fixtures and leases of trade fixtures including security interests is regulated under the UCC in Articles 2A and 9. The facts presented in this case are distinctly different.

Underground water and sewer lines could not be logically characterized as trade fixtures. As argued, plaintiff purchased the underground water and sewer lines and furnished the labor for their installation. As such, these cannot be characterized under the UCC definitions as "fixtures" but are building materials incorporated into improvements to real property.

This Court has stated previously that "'[a] fixture has been defined as that which, though originally a movable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character[.]'" *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986) (citation omitted).

The determinative factor for whether a chattel annexed to real property becomes part of the real property or retains its character as personal property is the intent with which the chattel was annexed to the land. *Id.* When the owner of the land and the person that annexes the chattel are the same person, a rebuttable presumption arises that the owner's intention was for the chattel to become part of the realty. *Id.* at 692, 340 S.E.2d at 513; see *Oil Co.*, 295 N.C. at 423, 245 S.E.2d at 725. When the party affixing the chattel is not the owner of the realty, as in the present case, the Court's inquiry focuses on the intent of the parties, express or implied, at the time of the annexation. *Little*, 79 N.C. App. at 692, 340 S.E.2d at 513.

Defendants in the present case were not parties to the agreement made between plaintiff and Hard Rock Development to construct the utility lines. Furthermore, neither defendant possessed a legal interest in the land at the time of plaintiff's installation of the utility lines. Rather, Hawthorne, the current owner of the real property, acquired the property by Trustee's Deed following foreclosure on Hard Rock Development's deed of trust. In such instances, "[w]hen the rights of a third party, who is

unconnected to the land or the original transaction involving the annexation of the chattel, are concerned, the question is how the intent of the parties to the transaction is manifested to the third party through 'physical facts and outward appearances.'" *Wilson v. McLeod Oil Co., Inc.*, 327 N.C. 491, 515-16, 398 S.E.2d 586, 599 (quoting *Little*, 79 N.C. App. at 693, 340 S.E.2d at 513).

We ascertain plaintiff's intent regarding the utility lines from "external indicia" such as "the relationship of the annexor to the land[,] . . . the nature of the chattel attached and its relationship or necessity to the activity conducted on the land, and the manner in which the chattel is attached." *Little*, 79 N.C. App. at 693, 340 S.E.2d at 513.

The utility lines are pipes designed to supply fresh water to and remove waste water from a residential subdivision. It cannot reasonably be disputed that the utility lines are essential to a residential subdivision. Furthermore, the manner in which the chattel is annexed to the land is another means of assessing a party's intent regarding the annexation of the chattel. *Id.* at 692, 340 S.E.2d at 513. Here, the utility lines were annexed to the land by underground installation. Thus, the nature of the chattel, its necessity to the activity conducted on the land, and the manner of annexation to the land support our conclusion that plaintiff intended for the chattel to become part of the realty.

In our determination of whether the utility lines became real property or remained personal property, we also must look to the manifestation of plaintiff's intent to defendant Hawthorne.



Agreements between a landowner and the owner of a chattel affixed to the land are binding on subsequent purchasers if the purchaser has actual or constructive notice of the original agreement. *Oil Co.*, 295 N.C. at 420, 245 S.E.2d at 723. To bind the subsequent purchaser, plaintiff must produce sufficient evidence to demonstrate an understanding between the owner of the land and plaintiff that the chattel was to remain plaintiff's personal property after annexation, and that defendant had knowledge of the understanding when defendant purchased the real property. *See id.* at 424, 245 S.E.2d at 725.

The second significant distinction between *Oil Co.* and the fact exigent in this case is that transfer of the property in this case came about by foreclosing an encumbrance on real estate which predated the installation of the water and sewer lines. Had plaintiff and the owner of the property intended the water and sewer lines to be treated as "fixtures" or "leases" exempt from the terms of the pre-existing mortgage, plaintiff should have taken steps to perfect his interest in the fixtures pursuant to N.C. Gen. Stat. § 25-2A-309(4) (2007), which reads:

The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

- (a) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

- (b) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of real estate.

However, the requirements for perfecting a fixture are also subject to N.C. Gen. Stat. § 25-2A-309(6) which reads:

Notwithstanding subsection (4)(a) of this section but otherwise subject to subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction.

Even if building materials used to make improvements to real property could theoretically be a "fixture," had plaintiff wished to perfect a security interest in the lines, a UCC fixture filing would be required to protect this interest against the interests of an encumbrance entered prior to the beginning of the construction or the installation of the "fixture." Because the underground water and sewer lines cannot be legally characterized as fixtures or personal property, they have become part of the realty which was foreclosed. As part of the foreclosure, the water and sewer lines clearly fall within the terms of the property encumbered, and the utility lines on the property contained within the right-of-way would be appurtenances to the property encumbered which would be conveyed in any foreclosure.

The record is void of any evidence that Hawthorne had notice of this intention or that plaintiff took steps to perfect a security interest. Here, while plaintiff has alleged that it was not paid for the utility lines by Hard Rock Development, plaintiff has provided no evidence to indicate that Hawthorne had notice of an agreement or fixture filing between plaintiff and Hard Rock Development that the utility lines were to remain plaintiff's personal property. Absent a showing to the contrary, "[i]f personal property is attached to the real estate and is adapted to the purposes for which the real estate is being used, it will be presumed that the party attaching it intended that it should be part of the real estate[.]'" *Little*, 79 N.C. App. at 694, 340 S.E.2d at 514 (quoting 1 Thompson on Real Property, 1980 Replacement, § 55, at 206 (1980)). Plaintiff installed the utility lines underground and adapted them to the purpose for which the land was being used, a residential subdivision. As plaintiff has provided no evidence in the record to indicate the utility lines were not to become part of the real estate, the law presumes the utility lines did become part of the realty. Thus, plaintiff's argument that its intent for the utility lines to remain personal property was binding upon Hawthorne is without merit, and the trial court did not err in dismissing plaintiff's claim.

Plaintiff next alleges the trial court erred in dismissing its claim for declaratory relief in the form of quieting title to establish plaintiff's ownership of the utility lines. In seeking a claim for declaratory judgment, plaintiff relies on the invalid

conclusion that the utility lines are personal property. As this Court has concluded that the utility lines lost their character as personal property when plaintiff annexed the utility lines to the land, plaintiff's claim for declaratory relief fails. Thus, the trial court did not err in dismissing plaintiff's claim for declaratory relief and plaintiff's argument on appeal is dismissed.

Plaintiff next alleges the trial court erred in dismissing its claim of conversion against Hawthorne and City of Burlington. Plaintiff alleged in its complaint that defendants converted plaintiff's personal property by their use of the utility lines. Although plaintiff argues the utility lines are personal property, this Court's finding that the utility lines are real property negates plaintiff's claim for conversion. "A claim for conversion does not apply to real property." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414, 537 S.E.2d 248, 264 (2000); see *McNeill v. Minter*, 12 N.C. App. 144, 146, 182 S.E.2d 647, 648 (1971). Thus, we find plaintiff's claim is without merit, and the trial court did not err in dismissing the claim.

Plaintiff next alleges that the trial court erred in dismissing its claims against Hawthorne and City of Burlington for unjust enrichment. Plaintiff claims both defendants were unjustly enriched by seizing the utility lines installed by plaintiff. A claim of unjust enrichment requires that "property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received, but that the defendant has

failed to make restitution for the property or benefits." *Norman*, 140 N.C. App. at 417, 537 S.E.2d at 266.

As stated in its brief, plaintiff installed the utility lines pursuant to a contract with Hard Rock Development. Neither Hawthorne nor City of Burlington were party to the contract. Furthermore, Hawthorne took possession of the utility lines through a trustee's deed resulting from a foreclosure sale of the property formerly owned by Hard Rock Development. Thus, the circumstances under which Hawthorne obtained the benefit of the utility lines does not create a legal or equitable obligation on the part of Hawthorne or City of Burlington to compensate plaintiff for the utility lines. "[W]here a third person benefits from a contract entered into between two other persons . . . the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person." 66 AM. JUR. 2D *Restitution and Implied Contracts* § 32 (2009). Furthermore, this Court has limited the scope of a claim of unjust enrichment such that the benefit conferred must be conferred directly from plaintiff to defendant, not through a third party. See *Effler v. Pyles*, 94 N.C. App. 349, 353, 380 S.E.2d 149, 152 (1989). As Hawthorne acquired possession of the utility lines as a result of a trustee's deed, plaintiff did not confer any benefit directly to Hawthorne. Therefore, the trial court did not err in dismissing plaintiff's claim.

Plaintiff also alleges the trial court erred in dismissing its claim of unjust enrichment against City of Burlington based on

governmental immunity. We find the case law to be clear that "sovereign immunity bars recovery on the basis of *quantum meruit* in an action against the State upon a quasi contract or contract implied in law." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998); see *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001). While governmental immunity may be waived by consent or by a valid contract, no such waiver exists in the present case. *Data Gen. Corp.*, 143 N.C. App. at 103, 545 S.E.2d at 248 (declining to imply a contract in law "in derogation of sovereign immunity to allow a party to recover under a theory of *quantum meruit*"). As City of Burlington was not a party to the contract between plaintiff and Hard Rock Development for the installation of the utility lines, and it did not consent to waive governmental immunity, the trial court did not err in dismissing plaintiff's claim.

In its final claim, plaintiff alleges the trial court erred in dissolving the consent preliminary injunction between plaintiff and City of Burlington. The terms of the preliminary injunction specify that the injunction is to last until a hearing on the merits. "[I]t is well settled in this State that "[a] dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.'" *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 701 (2008) (citations omitted). Here, the trial court granted both Hawthorne's and City of Burlington's motions to dismiss for plaintiff's failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6)

of the North Carolina Rules of Civil Procedure. Furthermore, the trial court did not specify that the dismissals were made without prejudice. Thus, plaintiff has received an adjudication on the merits and the trial court did not err in dissolving the preliminary injunction. Plaintiff's assignment of error is overruled.

In conclusion, we find the trial court did not err in dismissing plaintiff's claims against both Hawthorne and City of Burlington for failure to state a claim upon which relief can be granted. Plaintiff based its claims on the incorrect conclusion that the utility lines at issue were personal property. We conclude the utility lines are real property, not fixtures. Additionally, we conclude the trial court did not err in dismissing plaintiff's claim of unjust enrichment against City of Burlington based on the defense of sovereign immunity. City of Burlington did not waive its sovereign immunity nor was it party to a contract with plaintiff subjecting it to liability. Finally, as the trial court reached a decision on the merits of plaintiff's claims, the trial court did not err in dissolving the preliminary injunction between plaintiff, Hawthorne, and City of Burlington.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).