NO. COA09-265

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

LEXINGTON FURNITURE INDUSTRIES, INC.,

Plaintiff,

v.

Guilford County
No. 08 CVS 2562

FURNCO INTERNATIONAL CORPORATION: FURNCO INTERNATIONAL (NORTH AMERICA), INC.,

Defendants.

Appeal by defendant from judgment entered 17 October 2008 by Judge Ronald Spivey in Guilford County Superior Court. Heard in the Court of Appeals 16 September 2009.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King, III and John S. Buford , for plaintiff-appellee.

Ferguson, Stein, Chambers, Gresham & Sumter, PA, by John W. Gresham, for defendant-appellant.

JACKSON, Judge.

Furnco International Corporation ("defendant") appeals the 17 October 2008 judgment granting summary judgment to Lexington Furniture Industries, Inc. ("plaintiff") and awarding plaintiff

$750,000.00, in addition to $60,507.17 in pre-judgment interest. For the reasons stated below, we reverse.

Plaintiff is a furniture manufacturer based in Thomasville, North Carolina. Defendant is an investment holding company incorporated in the British Virgin Islands. On or about 5 July 2006, the parties entered into a Trademark License Agreement ("agreement"). Pursuant to this agreement, plaintiff allowed defendant to use its trademark on certain products — specifically, floor coverings, kitchen cabinets, vanities with sinks, and fireplaces ("licensed products") — and sell those products to Costco. Defendant would pay plaintiff a percentage of its net sales of the products as royalties, with a minimum of sixteen payments of $50,000.00 each. The payments were due on 1 January, 1 April, 1 July, and 1 October of each contract year. Plaintiff also agreed not to "manufacture, market, distribute, license or sell any Licensed Products [to Costco]" during the agreement's term and for six months following the expiration of the agreement.

Unfortunately, defendant was unable to market the licensed products to Costco or to generate $50,000.00 pursuant to the agreement. Defendant asked plaintiff to delay the due date of the first payment from 1 January 2007 to 1 July 2007, and plaintiff agreed. Defendant made its 1 July 2007 payment of $50,000.00 but refused to make additional payments.

On 2 January 2008, plaintiff filed its complaint seeking damages and interest for breach of contract. On 14 March 2008, defendant filed its answer, which included numerous affirmative

defenses. On 18 July 2008, plaintiff moved for summary judgment, which the trial court granted on 17 October 2008, awarding plaintiff a principal amount of $750,000.00 and interest totaling $60,507.17. Also on 17 October 2008, plaintiff voluntarily dismissed its claim, without prejudice, against a previously-included defendant, Furnco International (North America). Defendant's appeal addresses only the amount of the award.

Defendant's sole argument is that the trial court erred as a matter of law by awarding plaintiff the entire amount owed under the installment contract. We agree.

When the trial court grants a motion for summary judgment, "the two critical questions of law on appeal are whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law." *North River Ins. Co. v. Young*, 117 N.C. App. 663, 667, 453 S.E.2d 205, 208 (1995) (citing *Berkeley Federal Savings and Loan Assn. v. Terra Del Sol*, 111 N.C. App. 692, 433 S.E.2d 449 (1993), *disc. rev. denied*, 335 N.C. 552, 441 S.E.2d 110 (1994)). We conduct a *de novo* review of an order granting summary judgment. *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 605, 630 S.E.2d 221, 229 (2006) (citations omitted). Here, we are concerned only with whether the amount of the award pursuant to the grant of summary judgment was correct as a matter of law.

One party's anticipatory repudiation generally "will give rise to an action for total breach of the contract." *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 626, 414 S.E.2d 568, 573 (1992) (citing John D. Calamari & Joseph M. Perillo, Contracts § 12-4 (3d ed. 1987)), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993). This general rule, however, "does not apply in the case of repudiation of an installment contract which contains no acceleration clause." *Id.* (citing *Roberts Co. v. Mills, Inc.*, 8 N.C. App. 612, 619, 175 S.E.2d 289, 293 (1970)). In that instance, "the aggrieved party is not entitled to immediately sue for the total amount of the contract, but must wait until each installment becomes due." *Id.* (citing *Roberts Co.*, 8 N.C. App. at 619, 175 S.E.2d at 293).

Plaintiff has argued, and our research has shown, that many jurisdictions that have addressed the issue of anticipatory repudiation with respect to installment contracts have focused on two questions: (1) whether the contract is unilateral or bilateral and (2) whether the non-breaching party has fully performed its contractual obligations. *See, e.g.*, *N.Y. Life Ins. Co. v. Viglas*, 297 U.S. 672, 680, 80 L. Ed. 971, 976 (1936) ("[A] party to a contract who has no longer any obligation of performance on his side but is in the position of an annuitant or a creditor exacting payment from a debtor, may be compelled to wait for the instalments as they severally mature[.]"); *Long Island R.R. Co. v. Northville Ind. Corp.*, 362 N.E.2d 558, 563 (N.Y. 1977) ("The doctrine of anticipatory breach has not generally been applied to all types of

contracts, its application being limited ordinarily to bilateral contracts embodying some mutual and interdependent conditions and obligations."); *Phelps v. Herro*, 137 A.2d 159, 163 (Md. 1957) ("[W]ith reference to unilateral contracts, or bilateral contracts that have become unilateral by full performance on one side, for the payment of money in the future, without surety or other conditions involved, . . . the text writers and decisions are in general accord that the doctrine of anticipatory breach has no application."). *See also Long Island R.R. Co.*, 362 N.E.2d at 563-66 (comprehensively summarizing the position of a majority of courts with respect to the various factors that inform an anticipatory repudiation analysis). However, North Carolina caselaw, as defendant emphasizes, is not consistent with these distinctions. Instead, North Carolina jurisprudence is clear that a party must sue as payments become due, rather than aggregate its claims, when the contract at issue is an installment contract with no acceleration clause.

Defendant argues, and we agree, that this Court's decision in *Starling v. Still* is comparable to the instant case. *Starling v. Still*, 126 N.C. App. 278, 485 S.E.2d 74 (1997). In *Starling*, plaintiff sold his accounting practice to defendants. Defendants were required to pay plaintiff in quarterly installments, and plaintiff promised to introduce his clients to defendants, to assist defendants in the smooth transition of services, and not to compete with defendants for a period of five years. Defendants were unable to retain as many of plaintiff's clients as they had

anticipated, and after paying one installment to plaintiff, ceased their contractual payments. The trial court granted plaintiff's motion for summary judgment and awarded plaintiff the remainder of the payments due on the contract. This Court reversed only with respect to the amount of the award, holding that "[i]n the absence of [] a provision for acceleration, a failure to pay some of the installments entitles the creditor to recover only the amount of the unpaid installments." *Id.* at 284, 485 S.E.2d at 78 (quoting *Roberts Co.*, 8 N.C. App. at 619, 175 S.E.2d at 293).

We are unable to distinguish *Starling* from the case *sub judice*. Both contracts required quarterly payments, which ceased when one party's expected benefits from the contract were not realized. Both defendants made an initial payment but refused to make any further payments. Both contracts also required continuing obligations from the non-breaching party — refraining from competition in *Starling* and refraining from selling its products to Costco here — which that party presumably will have to continue in order to sue for each installment payment in the future. Neither contract contained an acceleration clause. Therefore, in light of *Starling* and other North Carolina caselaw, we hold that the trial court erred in awarding plaintiff the entire amount due under the installment contract, rather than only the amounts past due. We reverse and remand to the trial court for reentry of judgment consistent with this decision.

Reversed and remanded.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).