NO. COA11-1241
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

VALU-LODGE OF GREENVILLE, INC., a Georgia corporation, D I OF CANDLER, INC. (f/k/a Days Inn of Candler, Inc.), a North Carolina corporation, DEBORAH LYNN HARRELL, and SCOTT HARRELL,
Plaintiffs,

v.

Buncombe County
No. 10 CV 05701

BRANCH BANKING AND TRUST COMPANY (a/k/a BB&T), a North Carolina corporation, and RAINTREE REALTY AND CONSTRUCTION, INC., a North Carolina corporation,
Defendants.

Appeal by plaintiffs from order entered 13 June 2011 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 7 March 2012.

Law Offices of George E. Butler II, LLC, by George E. Butler II, for Plaintiffs-Appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for Defendants-Appellees.

THIGPEN, Judge.

Valu-Lodge of Greenville, Inc. ("Valu-Lodge"), D I of Candler, Inc. ("Days Inn"), Deborah Lynn Harrell, and Scott Harrell ("the Harrells") (together, "Plaintiffs") appeal from an order granting summary judgment in favor of Branch Banking and Trust Company ("BB&T"), and Raintree Realty & Construction, Inc. (together, "Defendants"). For the reasons stated herein, we affirm.

In September 2004, Days Inn approached BB&T about purchasing a motel and restaurant with funding from a BB&T loan, supported federally by the Small Business Administration ("SBA").[1] Through negotiations, both parties agreed to Plaintiffs receiving a ninty-day interim loan of $1,317,500.00 from BB&T, contingent upon Plaintiffs' participation in the SBA 504 loan program, which would provide funding in the amount of $557,000.00 pursuant to a 20-year debenture. The parties planned for the interim loan from BB&T to be dispersed to Plaintiffs, and once the funding from the SBA debenture sale was received by BB&T, $542,500.00 of the $557,000.00 would be applied to the loan to reduce the principal amount to

[1]Valu-Lodge became the successor-in-interest to Days Inn by virtue of a General Warranty Deed dated 10 April 2006. The Harrells gave personal guarantees to BB&T, guaranteeing payment of the BB&T loan to Days Inn and to all other indebtedness of Days Inn "whether now existing or hereafter arising."

$775,000.00. The loan from BB&T was finalized in October 2004, and funding from the SBA debenture was received by BB&T in May 2005. The $557,000.00 from the SBA debenture reduced the principal on the loan as agreed.[2]

The parties arranged that for the first 90 days of the loan, Plaintiffs would repay $10,997.99 per month to BB&T to reduce the outstanding principal and interest on the BB&T loan. The crux of the issue in this case is whether – upon BB&T's receipt of the funding from the SBA debenture, and the resultant reduction of the outstanding principal loan amount – BB&T should have *automatically* re-amortized the loan, resulting in a reduction of Plaintiffs' monthly payments to $6,469.35. According to Plaintiffs, during the credit application process they believed the reduction in monthly payments would automatically occur when the SBA funding was received. However, the actual loan agreement stated that the loan "may be converted to a permanent loan upon the completion of the debenture sale by SBA." Defendants contend that under the language of the loan

[2]The attorney for BB&T, Mr. Albert Sneed, explained the arrangement to the trial court in the following way: "There was an SBA loan, and the way those work is they make a second-mortgage loan, the bank makes a first mortgage loan, the SBA comes along later and funds[,] and the money goes to the first mortgage. So you have a first mortgage to the bank and a second mortgage to the SBA."

agreement, Plaintiffs were required to request the reduction in monthly payments in order to receive them.

Plaintiffs did not request a reduction in the amount of the monthly payment, and the amount was not automatically reduced by BB&T. Plaintiffs continued to pay the monthly payment of $10,997.99 for 51 months after the funding from the SBA debenture was received by BB&T. These payments, Plaintiffs contend, amounted to an "overpayment" of $230,960.64.

In the fall of 2009, Plaintiffs discovered the "overpayment" and brought it to BB&T's attention, requesting that the monthly payment be reduced and the overpayment be refunded. BB&T declined to refund the overpayment but agreed to reduce the monthly payments. The parties agreed to a Note Modification Agreement on 6 October 2009 lowering Plaintiffs' monthly payments to $6,469.35.

Plaintiffs defaulted on the BB&T loan, and Defendants foreclosed on Plaintiffs' property. Plaintiffs filed a complaint, seeking declaratory relief, and alleging breach of contract and unfair and deceptive trade practices concerning the original note. Plaintiffs also alleged mutual mistake, actionable unilateral mistake, and duress warranting rescission of the amended note. Defendants filed a motion for summary

judgment on 28 April 2011, and the trial court entered a summary judgment order on 8 June 2011 granting Defendants' motion. Plaintiffs filed a notice of appeal on 12 July 2011.

I. Standard of Review

We review a trial court's order granting or denying summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). 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) (2011). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Id.* (citation omitted).

II.

Plaintiffs' first argument on appeal is that the trial court erred in granting summary judgment for Defendants on "due process and other procedural grounds." We hold that the arguments contained in this section of Plaintiffs' brief are meritless.

Plaintiffs first contend the trial court erred by entering a summary judgment order "purported[ly]" based on Defendants' counterclaims and affidavits, rather than on the argument presented by Defendants in their motion for summary judgment. This argument is misplaced for several reasons. First, our review of the summary judgment order reveals that the trial court did not specify any legal or uncontested factual basis for the order allowing Defendants' motion; nor was it required to. This is because the proper basis for a trial court's decision to allow a motion for summary judgment is always the following: "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[.]" *Hindman v. Appalachian State University*, __ N.C. App. __, __, 723 S.E.2d 579, 580 (2012) (citation and quotation omitted).[3]

[3]A trial court may elaborate on the legal basis for its

Moreover, although the movant has the burden of proof, our review is not limited to whether the movant met this burden based entirely upon the argument contained in the movant's motion for summary judgment; rather, we reiterate that the trial court may consider, and this Court reviews *de novo*, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[.]" *Id.* Lastly, this Court has held that where the trial court's order does not state the legal basis for its ruling, "if the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wein II, LLC v. Porter*, 198 N.C. App. 472, 478, 683 S.E.2d 707, 712 (2009) (citation and quotation omitted).

Plaintiffs next make the following argument:

> [T]he instant Motion for Summary Judgment, given its completely open-ended "needle in a haystack" character, cannot be the basis for an award of summary judgment because it would be violative of the notice

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allowance of a summary judgment motion. *See, e.g., Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 722 (1998) (reviewing an order in which the trial court "granted partial summary judgment on the basis of governmental immunity"). However, a statement of the legal basis for a trial court's summary judgment decision is not a requirement. *See Hindman*, __ N.C. App. at __, 723 S.E.2d at 580 (affirming an order allowing the defendants' motion for summary judgment even though "the order does not state the basis for any of [the trial court's] rulings").

> requirements and "due process" norms that are implicit in Rule 56 and the referenced appellate rulings.

This argument is also without merit. Although Plaintiffs cite as authority the "referenced appellate rulings[,]" it is not clear to which rulings Plaintiffs refer, and although Plaintiffs repeatedly reference "due process" and "notice[,]" Plaintiffs cite no authority supporting any procedural due process argument. Because Plaintiffs have failed to cite any authority or make any reasonable argument for the proposition that the nature of the trial court's order in this case infringes upon Plaintiffs' procedural due process rights, this issue is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2012) ("Issues . . . in support of which no reason or argument is stated, will be taken as abandoned").

Plaintiffs refer to the order as "open-ended" and as having a "needle in a haystack character[.]" This argument evinces a misunderstanding of the nature of a summary judgment order. "[T]he enumeration of findings of fact . . . is technically unnecessary and generally inadvisable in summary judgment cases[.]" *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citation omitted). "Summary judgment should be entered only where there is no genuine issue as to any material

fact[;] [i]f findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975). Moreover, we repeat, a trial court is not required to state the legal or uncontested factual basis for its decision to allow a summary judgment motion in its order. *See Hindman*, __ N.C. App. at __, 723 S.E.2d at 580; *see also Porter*, 198 N.C. App. at 478, 683 S.E.2d at 712.

III.

In Plaintiffs' second argument, they contend the trial court erred in granting summary judgment in favor of Defendants with respect to their counterclaim, which sought recovery of the money due to them from Plaintiffs' default on the initial loan. We disagree.

Plaintiffs specifically challenge Defendants' compliance with N.C. Gen. Stat. § 1A-1, Rule 56(e), with regard to Defendants' submission of the affidavit of Mr. Bryan Saxon, a Regional Credit Officer with BB&T. Rule 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen.

Stat. § 1A-1, Rule 56(e). Plaintiffs argue that because Mr. Saxon was not "personally involved with the actual transaction" associated with the initial BB&T loan matter, and because his knowledge stems only from reading the related documents, he cannot serve as the affiant in this case. Plaintiffs also contend that the affidavit contains "legal conclusions," which are not admissible when determining a motion for summary judgment. *See Strickland v. Doe*, 156 N.C. App. 292, 296, 577 S.E.2d 124, 129 (2003) (stating that "an affiant's legal conclusions, as opposed to facts as would be admissible in evidence, are not to be considered by the trial court on a motion for summary judgment") (citation and quotation omitted).

This Court is unaware of any case – and Plaintiffs have not provided one – that suggests that an affiant must, as Plaintiffs argue in their brief, be "personally involved with the actual transaction" in order to provide an affidavit satisfying the personal knowledge requirement of Rule 56. To the contrary, the necessary personal knowledge may be garnered from the review of documents. *See In re Yopp*, __ N.C. App. __, __, 720 S.E.2d 769, 772 (2011) (concluding that an affidavit complied with Rule 56(e) and was based upon personal knowledge when the affiant based his affirmations "on the documents he had reviewed").

Moreover, although Plaintiffs state that Mr. Saxon's affidavit is "rife with legal conclusions[,]" the only example given by Plaintiffs in their brief of such a legal conclusion is Mr. Saxon's affirmation that "[t]he customer never sees the Credit Approval Report[.]" Whether the customer sees or does not see the credit approval report is not a legal conclusion. As Plaintiffs' argument on this issue is based on generalities and unsupported by the actual contents of the affidavit, we believe Plaintiffs have failed to present any argument on this issue, and, thus, have abandoned it. *See* N.C. R. App. P. 28(b)(6) ("Issues . . . in support of which no reason or argument is stated, will be taken as abandoned"); *see also James v. Charlotte-Mecklenburg County Bd. of Educ.*, __ N.C. App. __, __, __ S.E.2d __, __ (2012) (COA 11-1376) (stating that the petitioner's brief did not contain any "specific" argument concerning the opposing party's grounds for dismissal, but rather, presented the argument "in conclusory fashion" without "reason or authority[,]" and holding that the foregoing was "insufficient to preserve this argument for appellate review, and . . . deeming the issue abandoned").

In addition to Mr. Saxon's affidavit, Defendants also submitted to the trial court all relevant loan documents

detailing Defendants' loan to Plaintiffs, Plaintiffs' guaranty of the loan, and Plaintiffs' subsequent default. These documents show that there is no genuine issue of material fact concerning Defendants' counterclaim. Even assuming *arguendo* Plaintiffs' argument as to Defendants' affidavit has merit, Rule 56 does not require affidavits be filed at all. Because Defendants provided enough evidence to meet their burden for summary judgment without considering the affidavit, the issue of whether the affidavit complied with Rule 56(e) is not determinative of the question of whether summary judgment concerning Defendants' counterclaim was proper. Defendants provided enough evidence to meet their burden for summary judgment without considering the affidavit, *see* N.C. R. Civ. P. 56(a), so summary judgment was properly granted to Defendants on their counterclaim.

IV.

Plaintiffs' next argument is that the trial court erred in granting Defendants' motion for summary judgment on Plaintiffs' claims. Plaintiffs raised numerous claims at trial and upon appeal, namely breach of contract, mutual mistake, duress, and fraud. The central issue with respect to each claim is whether

the loan should have been automatically re-amortized to the lower amount, or only at the request of Plaintiffs.

A. Breach of Contract

In order to prevail on a breach of contract claim, Plaintiffs must establish the "(1) existence of a valid contract and (2) breach of the terms of [the] contract." ***Poor v. Hill***, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). Neither party contests that a valid contract is present in this case. However, the parties disagree as to whether Defendants breached that contract. Specifically, Plaintiffs contend that re-amortization of the loan should have been automatically completed, and that BB&T's failure to do so amounted to a breach of contract. Since none of the loan documents contain a specific reference to automatic re-amortization, Plaintiffs contend that the loan documents in question did not constitute a complete integration, that other documents should be included within the loan documents, and that these documents should not be construed as a "loan agreement." Specifically, Plaintiffs wish to use parol testimony to show that the Credit Approval Report ("CAR") and the Third-Party Lender agreement should be considered additional loan documents

that prove automatic re-amortization was agreed upon by both parties during loan negotiations.

"It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent." *Craig v. Kessing*, 297 N.C. 32, 34, 253 S.E.2d 264, 265 (1979) (citation omitted). "This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction." *Id.* at 35, 253 S.E.2d at 265. However, where it is shown that the writing is not a full integration of the terms of the contract the terms not included in the writing may then be shown by parol evidence. *See Vestal v. Vestal*, 49 N.C. App 263, 266, 271 S.E.2d 306, 308 (1980).

Our Supreme Court has held, "[p]romissory notes are not generally subject to the parol evidence rule to the same extent as other contracts . . . [so] it is rather common for a promissory note to be intended as only a partial integration of the agreement . . . and parol evidence as between the original parties may well be admissible so far as it is not inconsistent

with the express terms of the note." *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 308, 230 S.E.2d 375, 378-379 (1976).

Viewing the evidence in a light most favorable to the non-moving Plaintiffs in the present case, it appears that the agreement between Plaintiffs and Defendants was not a complete integration. The promissory note does not contain a complete merger clause, but instead contains a reference to "other agreements." The Loan Commitment Letter also contains language in it explicitly stating the letter is an "outline." Defendants, in their own brief, concede that five documents comprise the "loan documents," which are the Commitment letter, the Promissory Note, the Deed of Trust, the Guaranties, and the Security agreement. Thus it appears that the loan agreement between the Plaintiffs and Defendants was a partial integration.

i. Contemporaneously Executed Written Instruments

Given that the loan agreement is a partial integration, Plaintiffs next argue that the CAR and the Third Party Lender agreement demonstrate that re-amortization of the loan should have been automatic. We disagree.

When using parol evidence to determine the intent of contracting parties, "[a]ll contemporaneously executed written

instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (citations omitted). Both parties concede that the CAR was an internal document only seen by BB&T. The *Yates* court stated written instruments *between the parties* may be construed together. *See id.* The CAR was not between the parties; rather, it was a unilateral document executed solely for BB&T's internal use.

Plaintiffs cite *Yates* as authority for the proposition that this Court should consider the CAR and the Third Party Lender Agreement, arguing that "[u]ndisputed circumstances surrounding the execution of the written documents may be considered by the court in construing the written contract, insofar as these circumstances cast light upon the intent of the parties as to the meaning of the written words." *Id.* at 641, 170 S.E.2d at 482. Further, Plaintiffs state that our Supreme Court has set out eight exceptions to the parol evidence rule in North Carolina, one of which allows parol evidence for the purpose of "showing mode of payment and discharge as contemplated by the parties, other than that specified in the instrument."

Jefferson Standard Life Ins. Co. v. Morehead, 209 N.C. 174, 176, 183 S.E. 606, 607 (1936).

Even assuming ***arguendo*** that the CAR should be used as parol evidence to demonstrate that automatic re-amortization was contemplated we still find Plaintiffs' argument without merit because the CAR does not create a genuine issue of material fact as to automatic re-amortization. The phrase Plaintiffs point to in the CAR is a hand-written notation stating "90 days interest only converting to permanent loan at reduced amount of $775,000." There is also a second hand-written statement which states that "interim loan for 90 days on $1,317,500 will convert to permanent after SBA debentures are sold and loan paid down to $775,000." Nothing in either sentence states that re-amortization or conversion will be "automatic."

As for the Third Party Lender Agreement, we are again not persuaded that this document creates a genuine issue of material fact as to automatic re-amortization. Plaintiffs contend that since the loan repayment period had to be 10 years, it required the loan to be automatically re-amortized; otherwise, the loan would be repaid faster than 10 years. This contention misapprehends what the Third Party Lender Agreement provides, which is that Plaintiffs would have at least 10 years to pay off

the loan. At a rate of $10,997.99 per month, Plaintiffs were simply reducing the length of time it would take to repay the loan. Early repayment does not constitute a modification to the ten year term of this loan.

ii. Affidavits

Plaintiffs next argue several affidavits demonstrate that re-amortization of the loan should have been automatic. All of the BB&T loan documents, except the SBA Authorization for Debenture Guarantee, are silent on the issue of prepayment.[4] Parol evidence is traditionally allowed to supplement a Promissory Note. Plaintiffs specifically reference the affidavits from banking and lending officials involved in the matter, Mr. Saxon and Mr. Robert Kendrick, to support their argument that Plaintiffs' prepayment violated the parties' agreement for a ten year term on the BB&T loan.

The affidavit of Mr. Saxon is mischaracterized by Plaintiffs. As Plaintiffs quote Mr. Saxon, it would seem that automatic re-amortization should have occurred so as to avoid

[4]The SBA Authorization for Debenture Guarantee contains a prepayment premium clause applying to the note in favor of the Asheville-Buncombe Development Corporation and assigned to the SBA, but not to the BB&T loan. The Asheville-Buncombe Development Corporation was the Certified Development Company ("CDC") that served as the SBA's community-based partner for providing the 504 Loan.

prepayment. However, our reading of the affidavit shows that the contemplation of re-amortization is discussed under the hypothetical that the borrower had already requested the re-amortization, as Defendants contend was required to re-amortize the loan. Therefore, Mr. Saxon's affidavit does not support Plaintiffs' argument.

The affidavit of Mr. Kendrick, the President and CEO of Avista Business Development Corporation, which was the company that underwrote BB&T's SBA 504 Participation Loan, appears on its face to corroborate Plaintiffs' contentions. However, upon closer inspection, Mr. Kendrick's affidavit does not create a genuine issue of material fact. The affidavit states that the BB&T loan documents and the SBA Authorization for Debenture Guarantee, "squarely contemplate" the following:

> [T]hat the $1,317,500[.00] interim convertible loan from BB&T to the Borrower would automatically convert to a permanent loan of $775,000[.00] upon the funding of the SBA-guaranteed 504 loan and be re-amortized based on 15 years w/ 10-year balloon at payment based on 8.5% amort. rate so as to be compliant with Section B.3.b(5) of the SBA Authorization for Debenture Guarantee.

(citation and quotation omitted). The BB&T loan documents, however, *are* in compliance with the SBA Authorization for Debenture Guarantee. The section of the SBA Authorization for

Debenture Guarantee Mr. Kendrick references in his affidavit states the following: "The Third Party Lender's note and loan documents must not . . . have a term less than, or require a balloon payment prior to, ten years." The Third Party Lender Agreement provides that "[t]he Third Party Lender confirm[] that the note and all other documents executed in connection with the Third Party Lender Loan . . . have a term of at least, and do not require a balloon payment prior to, ten years[.]" Our review of the record shows that all of the other BB&T loan documents are also in compliance with the SBA requirement in the SBA Authorization for Debenture Guarantee regarding the ten year term requirement. We reiterate that early repayment does not constitute a modification to the ten year term of this loan.

As such, neither Mr. Kendrick's affidavit nor the other parol evidence referenced by Plaintiffs on appeal creates a genuine issue of material fact as to Plaintiffs' breach of contract claim.

B. Mutual Mistake

Plaintiffs' next argument is that the loan agreement was the result of mutual mistake. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one

party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Apple Tree Ridge Neighborhood Ass'n v. Grandfather Mt. Heights Property Owners Corp.*, 206 N.C. App. 278, 283, 697 S.E.2d 468, 472 (2010) (citation omitted).

> [A] [claim] may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus. . . . Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement . . . or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 60, 344 S.E.2d 68, 71 (1986) (citation omitted). Plaintiffs' argument for mutual mistake is that BB&T made a mistake by not automatically re-amortizing the loan and Plaintiffs made the mistake of continuing to pay the higher loan payments. However, since this Court has already determined that BB&T was not required to re-amortize the loan, there is no mutual mistake. Plaintiffs' argument that the loan agreement should be reformed to reflect the original intent of the parties is also in error because none

of the evidence presented by Plaintiffs supports the contention that both parties initially intended for the loan to automatically re-amortize.[5]

As for the unilateral mistake argument, Plaintiffs do not argue that it was the result of fraud, but rather point to *Howell v. Waters*, which states that "[t]he mistake of one party is sufficient to avoid a contract when the other party had reason to know of the mistake or caused the mistake." 82 N.C. App. 481, 487-88, 347 S.E.2d 65, 69 (1986) (citation omitted). This argument fails because, as previously discussed, BB&T did not have reason to know of Plaintiffs' mistake for fifty-one months.

C. Duress and Fraud

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[5]We note that Plaintiffs provided the affidavit of Mr. Melton Harrel as evidence of mutual mistake. Mr. Harrel's affidavit contains a number of legal conclusions, including the following: "To the extent that a provision for automatic 'conversion' and re-amortization was required, then I can assure you based on my conversations with Mr. Mason, who is also not a lawyer, that the omission of that provision by the draftsman of the Promissory Note was a mutual mistake." *See In re Yopp*, __ N.C. App. at __, 720 S.E.2d at 772 ("statements in affidavits as to opinion, belief, or conclusions of law are of no effect") (citation and quotation omitted). Moreover, although Mr. Harrel stated in his affidavit, "I categorically deny having any conversations with Mr. Mason in which he ever indicated or suggested that the re-amortization of the loan in question would not be automatic[,]" (emphasis in original) Mr. Harrel does not affirm in any part of his affidavit that he ever had a conversation with Mr. Mason in which the parties agreed that the re-amortization *would* be automatic.

After discovering their prepayment on the loan, Plaintiffs asked BB&T for a revised payment schedule, and Plaintiffs ultimately signed an Amended Note to reflect the new agreement. In their final argument, Plaintiffs ask this Court to rescind the Amended Note on the basis of duress and fraud. We decline to do so.

"Duress exists when a person, by an unlawful or wrongful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Reynolds v. Reynolds,* 114 N.C. App. 393, 398-99, 442 S.E.2d 133, 136 (1994) (citation and quotation omitted). "An act is wrongful if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Id.* at 399, 442 S.E.2d at 136. "Generally, actions taken by a person voluntarily will not be said to be given under duress." *Id.*

Duress is not present here. Plaintiffs voluntarily entered into this agreement. Plaintiffs had other options when they entered into the Amended Note, and so they could have adopted other courses of action. In addition, there was no wrongful act by BB&T. BB&T simply abided by the contractual terms and agreed to reduce the loan payment when Plaintiffs so requested.

Likewise, fraud does not exist here. "The essential elements of fraud are: (1) False representation or concealment of a past or existing 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." *Hardin v. KCS Int'l, Inc.* 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009). On this record, it does not appear that BB&T tried to deceive or intended to deceive Plaintiffs on any matters with the Amended Note.

Having addressed all of Plaintiffs' arguments and determined that the trial court did not err by granting summary judgment, this Court declines to address the arguments presented by Defendants. For the reasons stated herein, the decision of the trial court is AFFIRMED.

AFFIRMED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).