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NO. COA11-949
NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2012

ORLANDO CAMACHO and wife,
MELISSA NAJERA,
Plaintiffs,

v.

Cumberland County
No. 09 CVS 11663

RICKY FLOWERS and wife,
DIANA FLOWERS,
Defendants.

Appeal by plaintiffs from judgment entered 14 February 2011 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 24 January 2012.

Thorp & Clarke, PA, by Sharon L. Tucker, for the plaintiffs.

The Yarborough Law Firm, P.A., by Garris Neil Yarborough and Elizabeth Prewitt Gilluly, for the defendants.

THIGPEN, Judge.

Ricky Flowers and his wife, Diana Flowers, ("Defendants") sold property, which had a history of flooding during heavy rains, to Orlando Camacho and his wife, Melissa Najera ("Plaintiffs"). On the Residential Property Disclosure Statement, Defendants represented that they did not know of any

problem with drainage; that they did not know of any flood hazard; and that they did not know of any water seepage, leakage, dampness, or standing water. On appeal, we must determine whether there exists a genuine issue of material fact as to whether Defendants committed fraud. We conclude the trial court erred by dismissing Plaintiffs' cause of action for fraud on summary judgment and reverse the trial court's order, in part.

I: Background and Procedural History

The evidence of record tends to show the following: Defendants purchased a house and property in Fayetteville, North Carolina, on 1 May 1992, and lived in the house until June 2008. During the period of time from 1992 to 2008, Defendants experienced flooding on the property numerous times. Mr. Flowers also reported to the City of Fayetteville flooding and drainage problems numerous times. On 17 September 2007, Mr. Flowers called the Mayor's office and left the following voicemail complaining about the flooding and drainage issues:

Mr. Chavonne, my name is Rick[]y Flowers. I live at [___] Jamestown Avenue in Cottonade. I have been fighting floods since we lived in this house and it has been like 15 years now. My yard is flooded again. Because what happens is drains on Yadkin Road fail, when they fail then the [four] houses that are on that side of Deland Avenue all flood.

When everything floods, it comes to the [two] drains on my yard. City people have told me that 24-inch pipe is too small to handle that much water. Yet, nothing ever happens. Well, I am flooded again. I have got as much as a foot of water coming through my front yard right now because the[y] are all flooded. You can see the high water marks on my garage door. My garage is flooded. I have the back door to it open so the water can run out. My back yard is one big pool. It all goes into a drain and [the] poor guy that lives down below me probably has a swimming pool in his yard. It is really, really aggravating. I would think after almost 15 years, the City of Fayetteville could do something. I would certainly appreciate them to do whatever it is that they are[] going to do.

The City of Fayetteville made attempts to repair the drainage problem but did not enlarge the size of the drain pipe, even though in a work order it was noted that "the pipe size may be a bigger issue." The City completed its repairs on 27 December 2007.

On 24 July 2008, Mr. Flowers again contacted the City of Fayetteville to notify the City that, despite their earlier work on the drainage system, there had been a cave-in in his front yard. The work to correct the drainage problem was again initiated and completed on 18 November 2008. The work order was officially closed on 25 November 2008. Again, the City did not enlarge the size of the drain pipe. A City of Fayetteville

employee told Mr. Flowers the problem was corrected and the flooding issue was resolved. Mr. Flowers said he believed flooding of the property was no longer a problem.

Defendants put the property up for sale. Danny Reynolds, who lived next door to Defendants in Fayetteville, North Carolina, learned that Defendants were selling their house, and Mr. Reynolds told "several potential buyers who came to look at his house about the flooding problems[.]" Mr. Reynolds said "[Mr.] Flowers confronted me and told me to stop telling potential buyers about the flooding problems at his property."

Plaintiffs purchased the property located in Fayetteville, North Carolina, from Defendants on 12 June 2009. On the Residential Property Disclosure Statement, Defendants represented that they did not know of any "problem (malfunction or defect)" with "DRAINAGE, GRADING OR SOIL STABILITY OF LOT[.]" Defendants also represented that they did not "know of any . . . FLOOD HAZARD[,]" and that they did not know of any "problem (malfunction or defect)" with regard to "WATER SEEPAGE, LEAKAGE, DAMPNESS OR STANDING WATER in the basement, crawl space or slab[.]"

On 3 July 2009, after Plaintiffs had purchased the property and moved into the house, the property flooded during a heavy

rain. Water flowed into the garage, damaging the contents of numerous packed boxes, furniture and personal items, which Plaintiffs had temporarily stored in the garage. Plaintiffs dug a trench around the yard and built a dam to guide the flow of the water away from the garage and house. Plaintiffs' yard and the brick pathway leading to the house were damaged.

On 9 December 2009, Plaintiffs filed a complaint against Defendants alleging causes of action for fraud and unjust enrichment. On 27 January 2011, Defendants filed a motion for summary judgment. On 14 February 2011, the trial court entered an order granting Defendants' motion for summary judgment and dismissing Plaintiffs' complaint with prejudice. From this order Plaintiffs appeal.

II: Standard of Review

Summary judgment is properly granted "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).

A defendant may show entitlement to summary judgment by: (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through

discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

Carcano v. JBSS, LLC, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009) (quotation omitted). When considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009).

"An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Carcano*, 200 N.C. App. at 166, 684 S.E.2d at 46. (citation omitted). "We review a trial court's order granting or denying summary judgment *de novo*." *Craig*, 363 N.C. at 337, 678 S.E.2d at 354. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (quotation omitted). Our review, however, "is necessarily limited to whether the trial court's conclusions as to the[] questions of law were correct ones." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

A: Fraud

In their sole argument on appeal, Plaintiffs contend the trial court erred by granting Defendants' motion for summary judgment as to their cause of action for fraud. We agree.

"The essential elements of actionable fraud are: (1) [f]alse 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." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 744, 600 S.E.2d 492, 498 (2004) (quotations omitted). "Additionally, plaintiff's reliance on any misrepresentations must be reasonable." *Id.* (citation omitted).

With respect to the purchase of property, [r]eliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations.

RD&J Props., 165 N.C. App. at 746, 600 S.E.2d at 499 (quotation omitted). "[W]hether reliance on a party's alleged misrepresentation was reasonable generally is a question of fact

for the jury." *Massey v. Duke Univ.*, 130 N.C. App. 461, 466, 503 S.E.2d 155, 159 (1998) (citation omitted). "It is only in exceptional cases that the issue of reasonable reliance on an alleged misrepresentation may be decided by summary judgment." *Id.* (citation omitted).

In reviewing whether there is any issue of material fact, we have reviewed the record, pleadings, exhibits, depositions and affidavits of the parties. In this case, the parties forecast the following evidence: Mr. Flowers reported flooding problems over a period of several years to the City of Fayetteville. Mr. Flowers admitted in his affidavit that "[i]n the past[,] we had experienced problems with flooding on the Property on several occasions." Mr. Flowers explained in his deposition that "the really heavy rain[s]" caused the flooding; however, during "the normal rains, everything is fine." Mr. Camacho testified that after he and his wife purchased the property and the property flooded, he called the City of Fayetteville. A representative of the City told him "there had been a history of flooding problems at the property[.]" In fact, the representative named Mr. Flowers, and told Mr. Camacho "we are well aware of the problems at [___] Jamestown" due to Mr. Flowers' complaints. In one such complaint, Mr. Flowers

stated in a voicemail to the Mayor of Fayetteville that "City people have told me that 24-inch pipe is too small to handle that much water." When Mr. Flowers was asked in his deposition whether the City of Fayetteville ever "actually repaired a 24-inch drain pipe[,] " Mr. Flowers responded, "No, they did not[.]" Moreover, when asked specifically, "you were aware that the [C]ity [of Fayetteville] never fixed the size of the drain pipe[,] " Mr. Flowers responded, "That's true."

After Defendants put their house up for sale, Mr. Flowers also told his neighbor, Mr. Reynolds "to stop telling potential buyers about the flooding problems at his property."

On the Residential Property Disclosure Statement, Defendants represented that they did not know of any "problem (malfunction or defect)" with "DRAINAGE, GRADING OR SOIL STABILITY OF LOT[.]" Defendants also represented that they did not "know of any . . . FLOOD HAZARD[,] " and that they did not know of any "problem (malfunction or defect)" with regard to "WATER SEEPAGE, LEAKAGE, DAMPNESS OR STANDING WATER in the basement, crawl space or slab[.]" Mr. Camacho stated in his deposition that he believed Defendants' representations in the Residential Property Disclosure Statement were truthful, and

that he relied on those representations when he and his wife purchased the property.

We believe, contrary to Defendants' assertions on appeal, that the foregoing evidence creates a genuine issue of material fact as to whether Defendants made a false representation or concealment of a material fact with the intent to deceive Plaintiffs.

The evidence further shows that prior to purchasing the property Plaintiffs made an investigation of the property, including an inspection. Plaintiffs hired Ling Property Inspections, which reported that the drainage at the property was acceptable. As part of Mr. Camacho's investigation, he also asked whether a drain pipe went under the house, due to concerns that the drain pipe could create a structural problem, and Mr. Camacho was told that the drain pipe did not go under the house. Mr. Camacho also visited the property during a steady rain, and noted that, during that rain, the water was flowing normally to the drain on the street curb; there was no indication, during that rain, of any drainage problems. We believe this evidence is sufficient to create a genuine issue of material fact as to the reasonableness of Plaintiffs' reliance on Defendants' representations on the Residential Property Disclosure

Statement, in that Plaintiffs may not have been able to discover the truth about the property's condition by exercise of reasonable diligence.

Lastly, we recognize there is other evidence of record, contrary to the foregoing, which shows that after the City of Fayetteville completed work to correct the drainage problem on 18 November 2008, Defendants believed the problem was corrected. Mr. Flowers averred that "[a]fter I was told by the representative of the City that the flooding issue was resolved, I believed the flooding/drainage issue was no longer a problem."

The evidence in this case is conflicting. On one hand, there is evidence that Defendants were told and believed the flooding problem was corrected by the work of the City of Fayetteville. On the other hand, there is evidence that Defendants experienced, multiple times, flooding on the property; that Defendants knew the 24-inch drain pipe, which was too small for the flow of water, had never been replaced by the City of Fayetteville; that Defendants knew the flooding only occurred when rain was heavy; and that Defendants told their neighbor not to reveal to potential buyers the flooding history of the property. We believe the forecast of the evidence in this case is sufficient to create a genuine issue of material

fact on each element of fraud stemming from Defendants' concealment of the flooding history of the property on the Residential Property Disclosure Statement. The conflicts in the evidence should be resolved by a jury, and we therefore conclude that summary judgment was not proper on this issue. We reverse this portion of the trial court's order and remand the case to the trial court for a jury trial on the issue of whether Defendants committed fraud.

B: Unjust Enrichment

Plaintiffs have not presented an argument in their brief regarding the trial court's order granting Defendants' motion for summary judgment with regard to Plaintiffs' cause of action for unjust enrichment. As such, we conclude Plaintiffs have abandoned this issue. See N.C. R. App. P. 28(b)(6) (2012) (stating, "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). We therefore affirm this portion of the trial court's order on summary judgment.

AFFIRMED, in part; REVERSED and REMANDED, in part.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).