NO. COA12-613
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

MAURICE L. ALCORN, JR.,
Plaintiff,

v. Pitt County
No. 11 CVS 2063

HAZEL BLAND, SUSAN NORMAN,
and LINDA HAYMES,
Defendants.

Appeal by Maurice L. Alcorn, Jr. from order entered 7 November 2011 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 10 October 2012.

Marc K. Haggard for plaintiff-appellant.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Danny D. McNally, for defendant-appellee Hazel Bland.

Graham Nuckolls Conner Law Firm, PLLC, by David W. Silver, for defendant-appellees Susan Norman and Linda Haymes.

HUNTER, JR., Robert N., Judge.

Maurice L. Alcorn, Jr. ("Plaintiff") appeals from a 23 November 2011 order dismissing his case for failure to state a claim for relief under North Carolina Rule of Civil Procedure (12)(b)(6). Upon review, we affirm the trial court's order.

I. Facts & Procedural History

In 1986, the parties co-owned a home and lot at 2613 South Wright Road in Greenville (the "Residence") as tenants-in-common. Plaintiff had one-third interest; Hazel Bland ("Bland"), Plaintiff's sister-in-law, had one-third interest; and Linda Haymes ("Haymes") and Susan Norman ("Norman"), Plaintiff's nieces, each had one-sixth interest (collectively, the "Defendants"). The parties rented the Residence, sharing the net rental income. Bland managed the Residence, paying the bills and sending the parties their share of the net rental income.

On 20 March 2011, Plaintiff asked Defendants to evict Howard Marshall, the Residence's then-current tenant, because Marshall had been delinquent in his rental payments for nearly a year. Plaintiff suggested his grandson, Breeze Alcorn ("Breeze"), as a substitute tenant. With Bland's consent, Plaintiff and Breeze notified Marshall he would be evicted unless he paid past-due rent by 1 April 2011, a deadline he did not meet. Marshall was evicted and vacated the Residence on 20 May 2011. Following the eviction, Plaintiff, at his own expense, began to make improvements to the Residence.

Subsequently, Haymes and Norman expressed a desire to sell

their one-sixth interests to either Plaintiff or Bland. Plaintiff and Breeze consulted several real estate attorneys and realtors to appraise the Residence and based upon their opinions arrived at a total value of $60,000. All parties met on 13 May 2011 to discuss the sale of Haymes' and Norman's interests. At this meeting, Haymes and Norman said each would sell her individual interest for $10,000. At this meeting, Bland said she did not want to purchase either of these interests. Plaintiff said he would purchase either Haymes' or Norman's interest. Plaintiff also announced he intended to transfer his entire interest to Breeze over several years. The record does not indicate any written final agreement was reached memorializing a sale.

On 27 May 2011 and 1 June 2011, Norman and Haymes transferred their interests to Bland without informing Plaintiff or Breeze. On 3 June 2011, Breeze called Norman with Plaintiff's offer to purchase her one-sixth interest. Norman equivocated, saying Bland had already mentioned purchasing Norman's and Haymes' interests. Norman also said Bland told her neither Plaintiff nor Breeze wanted to purchase the interests. At the end of the call, Breeze had the impression a sale to Bland was not yet final. In a second call on 7 June 2011,

Norman told Breeze she had sold her interest to Bland. Similarly, on 4 June 2011, Haymes told Breeze she intended to sell her interest to Bland. Bland recorded both transfers on 8 June 2011.

On 14 June 2011, Plaintiff transferred one-half of his interest to Breeze. These transfers transformed the percentage interests in the tenancy-in-common. As of 14 June 2011, Bland had two-thirds interest, Plaintiff had one-sixth interest, and Breeze had one-sixth interest.[1]

Plaintiff filed a complaint against Defendants on 3 August 2011 alleging: (1) constructive fraud; (2) breach of fiduciary duty and unjust enrichment; and (3) interference with prospective economic advantage. The complaint lacks any claim for actual fraud or misrepresentation. Defendants filed motions to dismiss on 2 September 2011. Plaintiff filed a memorandum opposing motions to dismiss on 14 October 2011. The trial court granted Defendants' motions on 7 November 2011. Plaintiff filed timely notice of appeal on 2 December 2011.

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[1] The record does not contain any reference to a partition proceeding being filed. *See* N.C. Gen. Stat. § 46-3 (2011) ("One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court.").

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

In considering a motion to dismiss under Rule 12(b)(6), a court examines the four corners of the complaint to determine whether or not the plaintiff has alleged sufficient facts to

establish his prima facie case. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001) ("[W]hen the complaint on its face reveals the absence of fact sufficient to make a good claim, dismissal of the claim pursuant to Rule 12(b)(6) is properly granted." (alteration in original)(citation and quotation marks omitted)). A court would construe the complaint in the light most favorable to the plaintiff in making its review, giving the plaintiff the benefit of any inferences. *See id.* at 58, 554 S.E.2d at 845.

III. Analysis

On appeal, Plaintiff argues the trial court erred by: (1) dismissing his breach of fiduciary duty and constructive fraud claims because: (i) a fiduciary relationship exists between tenants-in-common, (ii) a fiduciary relationship exists between family members, and (iii) Bland was Plaintiff's agent; (2) dismissing his fraud and misrepresentation claims; and (3) dismissing his wrongful interference with prospective advantage claim. We disagree.

At the outset of our analysis we note that in North Carolina, in order to have a legally enforceable contract to transfer an interest in land, the party seeking to enforce a sale must have a paper writing setting forth the identity of the

property to be sold, a price, and the signature of the owner of the property. N.C. Gen. Stat. § 22-2 (2011); *see also The Currituck Assocs. v. Hollowell*, 166 N.C. App. 17, 28, 601 S.E.2d 256, 264 (2004) ("Thus, the correspondence identified the parties, the purchase price, and the property to be sold. These are the essential elements of the contract." (citation and quotation marks omitted)).

We further note that in North Carolina, part performance does not take a contract out of the statute of frauds:

> Neither part payment, payment of the *whole* price, rendition of services, taking of possession by the vendee, nor the vendee's making of improvements on real property in reliance on a contract will suffice to make a contract for the sale of real property enforceable if it does not otherwise comply with the Statute of Frauds.

Webster's Real Estate Law in North Carolina § 9.11 (6th ed. 2011).

A. Constructive Fraud/Breach of Fiduciary Duty

In light of the foregoing discussion, Plaintiff first argues the trial court erred in dismissing his constructive fraud and breach of fiduciary duty claims.

In North Carolina, these theories of recovery were identical until in 1997, the Court of Appeals decided *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997),

which added the additional requirement that a constructive fraud claim contain an allegation that the defendant benefitted himself. *Id.* at 666, 488 S.E.2d at 224 ("Implicit in the requirement that a defendant [take] advantage of his position of trust to the hurt of plaintiff is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." (alteration in original)(citation and quotation marks omitted)); *see also White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) ("The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself."). The addition of this requirement did not alter the initial showing the plaintiff had to make: the existence of a fiduciary relationship or a relationship of trust and confidence. This is the predicate element of the prima facie case and is the same for both claims.

"To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White*, 166 N.C. App. at

294, 603 S.E.2d at 156 (citation omitted).

The elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship; (2) a breach of that duty; and (3) the wrongful action or inaction was the proximate cause of injury to the plaintiff. *Green v. Freeman*, __ N.C. App. __, __, __ S.E.2d __, __ (2012). For both constructive fraud and breach of fiduciary duty claims, the plaintiff bears the initial burden of proof to "allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Orr v. Calvert*, __ N.C. App. __, __, 713 S.E.2d 39, 49 (2011) (Hunter, Jr., J., dissenting), *rev'd for reasons stated in dissent*, 365 N.C. 320, 720 S.E.2d 387 (2011) (citation and quotation marks omitted).

Certain legal relationships create a rebuttable presumption that the relationship is one in which the plaintiff has put his trust and confidence in the defendant as a matter of law. Where this legal relationship exists, in any financial transaction between the parties within the scope of the relationship it creates a rebuttable presumption that the transaction was

fraudulent. When such a presumption is established, the burden of going forward shifts to the defendant.[2] The current pattern jury instructions illustrate the applicable law:

> "Did the plaintiff take advantage of a position of trust and confidence to bring about (*identify transaction*)?"
>
> On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:
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> First that a relationship of trust and confidence existed between the plaintiff and the defendant. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person's interests. (*Use where a presumptive fiduciary relationship is shown by the evidence:* In this case, members of the jury, the plaintiff and the defendant had a relationship of (*name presumptive fiduciary relationship,* e.g., *attorney and client, trustee and beneficiary, guardian and ward, agent and principal, etc.*) You are instructed that, under such circumstances, a relationship of trust and confidence

[2] These presumptive fiduciary relationships include, but are not limited to, the following: "(1) trustee and cestui que trust dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant." *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943) (citation omitted).

> existed.)
>
> And Second, that the defendant used his position of trust and confidence to bring about (identify transaction) to the detriment of the plaintiff and for the benefit of the defendant.

N.C.P.I.—Civ. 800.06 (2011) (footnotes omitted); *see also Orr*, __ N.C. App. at __, 713 S.E.2d at 49.

When a presumptive fiduciary relationship is alleged, the burden of going forward shifts to the defendant to show he or she "act[ed] openly, fairly and honestly in bringing about [the transaction]." N.C.P.I.—Civ. 800.06 (2011); *see also Collier v. Bryant*, __ N.C. App. __, __, 719 S.E.2d 70, 81 (2011) ("After the plaintiff has established a *prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an open, fair and honest manner, so that no breach of fiduciary duty occurred." (citation and internal quotation marks omitted)). "This means that the defendant must prove, by the greater weight of the evidence, that, with regard to [the transaction], the defendant made a full, open disclosure of material facts, that *he* dealt with the plaintiff fairly, without oppression, imposition or fraud, and that *he* acted honestly." N.C.P.I.—Civ. 800.06 (2011).

In the absence of a presumptive fiduciary relationship, a

fiduciary duty can still arise when "'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.'" *Green*, __ N.C. App. at __, __ S.E.2d at __ (alterations in original)(quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001)); *see also* Restatement (Second) of Torts § 874 cmt. a (1977) ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."). In this scenario, the plaintiff has the burden of proof for all elements.

In the present case, a reading of Plaintiff's theories of recovery in the light most favorable to the Plaintiff is that he had a fiduciary relationship with Defendants because: (i) they were tenants-in-common; (ii) they were family members; and (iii) Bland was his agent. Unfortunately for Plaintiff, North Carolina precedent does not support these theories.

i. Presumptive Fiduciary Relationship

Plaintiff's complaint alleges that a tenancy-in-common creates a presumptive fiduciary relationship. However our Court has previously held that tenants-in-common do not establish a presumptive fiduciary relationship. *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971) ("[A] fiduciary relationship ordinarily does not arise between tenants in common from the simple fact of their cotenancy . . . .").

In addition, Plaintiff's complaint alleges that a family relationship creates a presumptive fiduciary relationship. Our Court has held some family relationships can create a fiduciary relationship, such as between spouses in jointly held property. *See, e.g.*, *Searcy v. Searcy*, __ N.C. App. __, __, 715 S.E.2d 853, 857 (2011). However, no North Carolina court has held that such a relationship is presumptively created between in-laws. *See Benfield v. Costner*, 67 N.C. App. 444, 446, 313 S.E.2d 203, 205 (1984) ("An allegation of a 'mere family relationship' is not particular enough to establish a confidential or fiduciary relationship." (citing *Terry v. Terry*, 302 N.C. 77, 86, 273 S.E.2d 674, 679 (1981)). Consequently, neither theory of recovery is available to Plaintiff because we are bound by prior holdings of the Court of Appeals. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court

of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Plaintiff is correct that agents and principals do enjoy a presumptive fiduciary relationship. *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943); *see also Hutchins v. Dowell*, 138 N.C. App. 673, 677, 531 S.E.2d 900, 902 (2000) ("Under well-established principles of North Carolina agency law: An agent is a fiduciary with respect to matters within the scope of his agency." (citation omitted)). "An agency relationship 'arises when parties manifest consent that one shall act on behalf of the other and subject to his control.'" *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 216, 552 S.E.2d 686, 695 (2001) (quoting *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 524, 528 S.E.2d 923, 926, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 782 (2000)).

Because a presumptive fiduciary relationship is established by the agent-principal relationship, a court would then examine whether or not the disputed financial transaction is one within the "scope of the agency."

Here, Bland did act as Plaintiff's agent to rent and distribute funds for the Residence. These were matters in which

Bland could logically be said to have within the scope of her agency. Because the transaction at issue does not involve collection and distribution of rental funds, Plaintiff has failed to establish a factual predicate for this claim.

One reading of the Plaintiff's complaint is that he has alleged a claim against Bland for using her position of trust to seize a business opportunity for herself, instead of making it available to her co-tenants. However the allegations of the complaint belie this reading, because both Bland and Plaintiff had equal opportunity to deal with their co-tenants in the purchase of the interests. Put differently, there is no allegation how, as the distributor of net profits of the co-tenancy, Bland "used [her] position of trust and confidence [as Plaintiff's agent] to [act] to the detriment of the plaintiff and for the benefit of the defendant." N.C.P.I.—Civ. 800.05 (2011) (footnote omitted).

ii. Confidential relationship

Even if Plaintiff cannot allege a "presumptive" fiduciary relationship, he may still establish a prima facie case by alleging facts which create a relationship of "trust and confidence."

For tenants-in-common, "such a relationship may be created

by their conduct, as where one cotenant assumes to act for the benefit of his cotenants." *Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116 (citation and quotation marks omitted); *see also Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (holding a fiduciary relationship arises when the factual circumstances indicate "there is confidence reposed on one side, and resulting domination and influence on the other"). Because there is no presumptive fiduciary relationship, in the context of a 12(b)(6) motion Plaintiff must allege facts which will support these allegations. *See Stanback*, 297 N.C. at 85, 254 S.E.2d at 615.

In support of this reading of his complaint, Plaintiff relies on *Moore*, where this Court held a fiduciary relationship existed between tenants-in-common because the defendant created the relationship by his conduct, "as where one cotenant assumes to act for the benefits of his cotenants." *Moore*, 11 N.C. App. at 263–65, 181 S.E.2d at 115–16. However, in *Moore*, a presumptive fiduciary relationship arose when, as executor and manager of the estate, the defendant purchased for his own benefit part of the estate blocking the beneficiaries' road access. *Id.* at 265, 181 S.E.2d at 116.

Plaintiff also relies on *Cox v. Wright*, 218 N.C. 342, 11 S.E.2d 158 (1940), and *Gentry v. Gentry*, 187 N.C. 29, 121 S.E.

188 (1924), to establish a contextual finding of a confidential relationship. However these cases involve sale of the entire realty. In *Cox*, a co-tenant attempted to convey the entire realty to a third party. *See Cox*, 218 N.C. at 347, 11 S.E.2d at 159. There, our Supreme Court held "a fellowship [exists] between tenants in common" and the co-tenant breached that fellowship by conveying more than her interest. *Id.* at 349, 11 S.E.2d at 162. *Cox* is clearly factually distinct from the instant case because the transfers here by Haymes and Norman only involve intraparty transfers in the Residence from which Plaintiff suffered no diminution in his existing interest. In *Gentry*, the defendant co-tenant sold the entire realty with the other co-tenants' consent, but failed to distribute proceeds to the co-tenants. *Gentry*, 187 N.C. at 30, 121 S.E. at 189. Although in *Gentry* our Supreme Court found the facts indicated a fiduciary relationship existed, *id.*, the present case is distinct because it does not involve one co-tenant's sale of the realty for the benefit of the other co-tenants.

Plaintiff also cites *Curl v. Key*, 311 N.C. 259, 316 S.E.2d 272 (1984), to argue family members and friends have a presumptive fiduciary relationship. *Curl* involves a claim of fraudulent inducement in making a deed. *See id.* at 264, 316

S.E.2d at 275. The defendant in *Curl*, a close family friend, tricked the minor plaintiffs into signing a "peace paper" (actually the deed to their property) to allow him to expel trespassing neighbors from the land. *Id.* at 262, 316 S.E.2d at 274. There, our Supreme Court found that although there was not a presumptive legal relationship, the circumstances indicated a fiduciary relationship existed. *See id.* at 263–64, 316 S.E.2d at 275. Given factual distinctions, such as the age of the plaintiffs and the extent of fraud in the nature of the transaction, *Curl* is of no benefit to Plaintiff's theory in the present case.

Thus, Plaintiff has not alleged facts that an actionable fiduciary relationship existed between him and Defendants under any of his theories.

B. Fraud and Misrepresentation

Plaintiff next argues the trial court erred in dismissing his fraud and misrepresentation claims. Plaintiff's argument is without merit because the complaint lacks any count containing these claims.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1) (2011). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988 (2003).

Plaintiff's complaint does not raise claims of actual fraud or misrepresentation. Nothing in the record indicates Plaintiff addressed these issues at any point prior to appeal. Consequently, Plaintiff's argument is without merit and we decline to address it further.

C. Interference with Prospective Advantage

Lastly, Plaintiff argues the trial court erred in dismissing his interference with prospective advantage claim against Bland. We disagree.

"To establish tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference." *MLC Automotive,*

LLC v. Town of Southern Pines, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010) (citing *Dalton v. Camp*, 138 N.C. App. 201, 211, 531 S.E.2d 258, 265 (2000), *rev'd on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001)).

Interference is without justification if it is "malicious and wanton[.]" *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). "The word 'malicious' used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff . . . ." *Id.* at 506, 35 S.E.2d at 656. This can occur, for instance, when a defendant inhibits the "free exercise of another's trade or occupation or means of livelihood by preventing people, by force, threats or intimidation from trading with, working for, or continuing him in their employment." *Id.* (citation and quotation marks omitted).

In the instant case, Plaintiff relies on *Coleman v. Whisnant* to support his tortious interference theory. In *Coleman*, the plaintiff alleged defendants deprived him of his patent rights when they made "persistent threats of suit which caused the parties with whom he had begun negotiations and who would otherwise have contracted for license, use or manufacture,

to decline to deal with him." *Id.* at 507, 35 S.E.2d at 656. Unlike in *Coleman*, Plaintiff does not allege Bland used "force, threats or intimidation" to sway Norman and Haymes. *See id.* at 506, 35 S.E.2d at 656. Thus, there can be no actionable "malicious and wanton interference" without this allegation.

IV. Conclusion

We conclude Plaintiff has not alleged sufficient facts to support his claims. Consequently, the trial court's decision is

Affirmed.

Judge HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).