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NO. COA12-681
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

EDWARD DOLAN, d/b/a DOLAN
HOMEPLACE ASSOCIATES,
Plaintiff-Appellant,

v.

Durham County
No. 11 CVS 4843

DICKSON PROPERTIES, INC.,
Defendant-Appellee.

Appeal by Plaintiff from order entered 20 January 2012 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 23 October 2012.

Bachman & Swanson, PLLC, by Glen D. Bachman and Tonja R. Mettlach, for Plaintiff-Appellant.

The Kuhn Law Firm, PLLC, by Benjamin R. Kuhn and Lemuel D. Whitsett, V, for Defendant-Appellee.

McGEE, Judge.

Edward Dolan, d/b/a Dolan Homeplace Associates (Plaintiff), owns four rental properties (the properties) in Fayetteville. Dickson Properties, Inc. (Defendant) is a property management company based in Wake County. It appears that Plaintiff, at some time before 13 September 2011, hired Defendant to manage

the properties. Plaintiff became dissatisfied with Defendant's management of the properties, and filed the complaint in this matter on 13 September 2011. Relevant portions of Plaintiff's complaint follow:

4. That Defendant Dickson was contracted by Dolan to manage his rental property and that Dickson was the property manager of the rental property at all times relevant hereto.

5. That at all times relevant hereto Defendant Dickson charged Plaintiff Dolan 8% commission on all rents collected for the rental property as a fee for managing the rental property.

FIRST CLAIM FOR RELIEF
BREACH OF CONTRACT

. . . .

7. . . . Defendant Dickson had a duty under its contract with Plaintiff Dolan to conduct routine property inspections on the rental property to assess the need for repairs and maintenance which it failed to do.

8. That as a result of Dickson's failure to conduct routine inspections on the rental property, the property fell into a state of disrepair requiring the need for further major repairs which could have been avoided had Defendant Dickson performed under its contract with Plaintiff Dolan.

9. The Defendant Dickson also had a contractual duty with Plaintiff Dolan to negotiate and manage contracted services on behalf of Plaintiff Dolan which the Defendant did negligently constituting breach of contract.

10. That as a result of Defendant Dickson's failure to properly oversee and manage contracted services on behalf of Plaintiff Dolan, faulty repairs were made to the rental property which now require major repairs to remedy.

11. That as a direct and proximate result of Defendant Dickson's breach of contract, Plaintiff Dolan sustained substantial financial loss and damages to his rental property including lost rental income and the need for major repairs in excess of \$10,000.

SECOND CLAIM FOR RELIEF
UNFAIR AND DECEPTIVE TRADE PRACTICES

. . . .

13. That Defendant Dickson engaged in unfair and deceptive trade practices in violation of N.C.G.S. § 75-1 et seq, in that Dickson:

a. Willfully neglected to perform routine inspections of the rental property, with an intent to deceive Plaintiff so that it could continue to collect rental commissions, which did in fact deceive Plaintiff who continued paying commissions on the rental property.

b. Advised Plaintiff that it had been routinely inspecting the rental property and that it was not in need of repairs when in fact it had not been conducting routine inspections of the property and the rental property did need routine maintenance and repair, with the intent to deceive Plaintiff Dolan, which in fact did deceive Plaintiff.

14. That as a result of Defendant Dickson's unfair and deceptive trade practices

Plaintiff Dolan suffered damages in excess of \$10,000.00.

15. That Plaintiff is entitled to recover treble damages and attorney's fees pursuant to N.C.G.S. § 75-16 and 16.1.

Plaintiff requested a jury trial and prayed that he recover judgment from Defendant for breach of contract; treble damages based upon unfair and deceptive trade practices; and that he be awarded costs and attorney's fees. The alleged contract was not attached to Plaintiff's complaint.

Defendant responded by filing a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 5 October 2011, claiming Plaintiff had failed to state any viable claim for relief. Defendant's motion was heard on 12 January 2012, and the trial court granted Defendant's motion, dismissing Plaintiff's complaint by order entered 20 January 2012. Plaintiff appeals.

I.

The issues on appeal are whether: (1) the trial court erred in dismissing Plaintiff's claim for breach of contract, and (2) the trial court erred in dismissing Plaintiff's claim for unfair and deceptive trade practices.

II.

Defendant's motion to dismiss was based upon Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

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).

Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (citation omitted). "[T]he complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (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).

III.

First, Plaintiff argues that his complaint stated a sufficient claim for breach of contract to survive Defendant's motion to dismiss. We agree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

McLamb v. T.P. Inc., 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation omitted).

In his complaint, Plaintiff alleged:

That Defendant . . . was contracted by [Plaintiff] to manage his rental property and that . . . at all times relevant hereto Defendant . . . charged Plaintiff . . . 8% commission on all rents collected for the rental property as a fee for managing the rental property[;] . . . [that] Defendant . . . had a duty under its contract with Plaintiff . . . to conduct routine property inspections on the rental property to assess the need for repairs and maintenance which it failed to do[,] [and] . . . as a result of [Defendant's] failure to conduct routine inspections on the rental property, the property fell into a state of disrepair requiring the need for further major repairs which could have been avoided had Defendant . . . performed under its contract with Plaintiff[.]

These portions of Plaintiff's complaint alleged both the existence of a valid contract and a breach of the terms of that contract. *McLamb*, 173 N.C. App. at 588, 619 S.E.2d at 580; see also *Tucker v. Fayetteville State Univ.*, __ N.C. App. __, 711 S.E.2d 530 (2011) (unpublished opinion). This was sufficient to survive Defendant's motion to dismiss with respect to Plaintiff's claim for breach of contract. We reverse this portion of the trial court's order, and remand for further proceedings.

IV.

Second, Plaintiff argues that the trial court erred in dismissing its claim for unfair and deceptive trade practices. We disagree.

The elements of a claim for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 are: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." Thus, "[r]ecovery according to [N.C. Gen. Stat. § 75-1.1 and 75-16] is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.'"

McLamb, 173 N.C. App. at 593, 619 S.E.2d at 582 (citations omitted).

"[I]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." The plaintiff must show "substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages." It is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations."

Eastover Ridge, L.L.C. v. Metric Constructors, Inc., 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (2000) (citations omitted).

Reviewing the allegations in Plaintiff's complaint included above, we hold that Plaintiff's complaint does not allege any "substantial aggravating circumstances attending" the alleged breach of contract sufficient to sustain a claim for unfair and deceptive trade practices. *Id.* The trial court did not err in dismissing this claim.

Affirmed in part, reversed and remanded in part.

Judges BRYANT and THIGPEN concur.

Report per Rule 30(e).