NO. COA13-3

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

LORI MCKINNON MOORE and
MATTHEW SCOTT MCKINNON,
Plaintiffs,

v.

New Hanover County
No. 11 CVS 3263

G&I VI FOREST HILLS GP, LLC,
G&I VI FOREST HILLS, LP, and
BELL PARTNERS, INC.,
Defendants.

Appeal by plaintiffs from orders entered 20 August 2012 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 14 August 2013.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for plaintiffs-appellants.

McAngus Goudelock & Courie, PLLC, by Jeffrey D. Keister and Caitlin A. Carson, for defendants-appellees.

BRYANT, Judge.

Where there is no mutual assent to the additional terms of a contract between parties, no contract has been formed as to those terms. Therefore, the trial court's order granting a

motion to enforce the settlement agreement is reversed. Likewise, the order granting summary judgment based thereon is also reversed.

On 1 August 2008, plaintiffs Lori McKinnon Moore and Matthew Scott McKinnon entered into a lease for an apartment located in Wilmington, North Carolina. The apartment was owned by defendant G&I Forest Hills, L.P., and managed by defendant Bell Partners, Inc. (collectively "defendants"). That same month, plaintiffs reported a foul smell to defendants and by September plaintiffs reported experiencing numerous physical symptoms including sore throat, headaches, and gastrointestinal pain.

On 2 November 2008, plaintiffs noticed black mold growing on the HVAC vents in parts of the apartment and contacted defendants. Three days later, defendants sent two men to clean the HVAC vents and perform mold remediation. After plaintiffs requested that defendants hire cleaners certified to handle mold remediation and cleaning, defendants hired the ASAP cleaning company. On 10 November 2008, ASAP performed mold remediation and cleaning.

That same month, defendants offered plaintiffs a renewal lease for the apartment. The next month, December 2008,

plaintiffs signed the new lease agreement for the apartment, contracting to lease from 18 February 2009 to 17 April 2010.

In January 2009, plaintiffs reported water damage and black mold to defendants. Over the next few weeks, defendants sent several different contractors to the apartment to examine and repair the water damage and mold. On 22 January 2009, plaintiffs contacted the New Hanover County Health Department regarding the ongoing problem in the apartment; that same day, Air Quality Analytical, Inc. performed air quality testing at the apartment. Air Quality Analytical reported the apartment was not fit for occupation due to the presence of toxic mold. At the end of January, plaintiffs requested that defendants place them in alternate housing.

On 29 January 2009, plaintiffs met with Rebecca Lynn, community manager of Forest Hills Apartments, and Wende Marshburn-Smith, regional vice president of Bell Partners, to discuss the issues with the apartment. In early February 2009, Lynn orally offered plaintiffs a settlement in the amount of $3,944 for both plaintiffs. Shortly thereafter, on 11 February 2009, plaintiff Lori Moore hand-delivered a letter titled "Settlement Agreement" to defendants. The letter rejected defendants' settlement offer as "not a mutually satisfactory

amount" and detailed plaintiffs' injuries as a result of the mold stating "[w]e are willing to sign the waiver you requested but need fair compensation for our expenses . . . ." The final paragraph of the letter stated "[i]t is our hope that we can come to a settlement agreement with regards to the amount of settlement and avoid litigation . . . . Our total amount of settlement requested is $10,657.00. We look forward to hearing from you soon." Plaintiffs' letter did not contain any terms of waiver.

The following day, plaintiff Lori Moore sent an email to Lynn stating that one of the items quoted in the settlement letter was too high and the total amount needed to be reduced accordingly. The item in question, a bill for air quality testing, was $400 less than anticipated, decreasing the settlement amount sought by plaintiffs from $10,657 to $10,257. Lynn then discussed this offer with the management of Bell Partners and confirmed defendants would accept plaintiffs' settlement offer of $10,257.

Defendants' attorney drafted a "Settlement Agreement and Mutual Release," which contained a release of claims and confidentiality clause, and delivered it to plaintiff Lori Moore on 16 February 2009. The next day, plaintiffs moved out of the

apartment. On 2 March 2009, defendants called plaintiffs to inquire as to the settlement agreement, and plaintiffs responded they had "not made up their mind yet." A letter dated 9 March 2009 was sent to defendants advising them that the firm of Mako & Associates was representing plaintiffs.

Notwithstanding the letter of legal representation, defendants' counsel sent a letter dated 30 March 2009 enclosing a settlement check in the amount of $10,257.00 as well as another copy of the "Settlement Agreement and Mutual Release." The letter was sent to plaintiff Lori Moore, but not her attorney, and did not otherwise acknowledge that plaintiff was represented by counsel.[1] Plaintiffs turned the letter and its contents over to their counsel and, through their counsel, returned the check to defendants.

Plaintiffs filed suit against defendants on 1 August 2011.[2] On 1 May 2012, defendants filed a motion to enforce the

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[1] Counsel for defendants, in a sworn affidavit dated 28 July 2012, denied receipt of the Mako & Associates letter during the month of March 2009, and asserted he had no knowledge of plaintiffs' legal representation at the time the letter dated 1 April was drafted and sent.

[2] Plaintiffs' complaint alleged breach of contract, violation of the North Carolina Residential Rental Agreements Act, breach of the Implied Warranty of Habitability, negligence, unfair and deceptive trade practices, negligent infliction of emotional distress, and, to be pled in the alternative to negligent infliction of emotional distress, negligent misrepresentation.

settlement agreement and a motion for summary judgment. On 20 August 2012, Judge W. Allen Cobb, Jr., in New Hanover County Superior Court granted both of defendants' motions.

Plaintiffs appeal.

On appeal, plaintiffs argue that the trial court erred in granting defendants' (I) motion to enforce the settlement agreement and (II) motion for summary judgment.

I.

Plaintiffs contend that the trial court erred in granting defendants' motion to the enforce the settlement agreement. We agree.

"A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. Matters of contract interpretation are questions of law. This Court reviews questions of law *de novo*." *Powell v. City of Newton*, 200 N.C. App. 342, 344, 684 S.E.2d 55, 57—58 (2009) (citations and internal quotations omitted).

> In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is

> indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Washington v. Traffic Markings, Inc., 182 N.C. App. 691, 697, 643 S.E. 44, 48 (2007) (citation omitted). "When an offer and acceptance are relied on to make a contract, [t]he offer must be one which is intended of itself to create legal relations on acceptance." *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823 (1960) (internal quotations omitted).

In early February 2009, defendants made an initial offer in the amount of $3,944.00 to settle with plaintiffs all disputes related to the apartment. This offer to settle was rejected by plaintiffs in an email to defendants dated 11 February 2009. Plaintiffs' email noted that defendants' settlement offer was "not a mutually satisfactory amount." Plaintiffs then stated "[w]e are willing to sign the waiver[3] you requested, but need fair compensation for our expenses . . . ." The final paragraph of plaintiffs' letter stated:

> It is our hope that we can come to a settlement agreement with regards to the amount of settlement and avoid litigation.

[3] The waiver mentioned in plaintiffs' letter was discussed orally during plaintiffs' meeting with defendants in early February 2009. The record is devoid of any written waiver prior to the "Settlement Agreement and Mutual Release" sent to plaintiffs by defendants in their 16 February 2009 letter.

> Our request is for $6,255.00 to cover air testing for both dwellings and decontamination of our personal property. We also request $2,232.00 for refund of our rent-this is half of the amount originally requested. Lastly, we request a refund of our $200.00 pet deposit and $2,000.00 for hardships incurred by this incident. Our total amount of settlement requested is $10,657.00. We look forward to hearing from you soon.

This letter was then followed by an email from plaintiffs, sent 12 February 2009, which stated:

> This morning I received the bills for the 2 air sampling test[s]. One bill is $650 and one bill is $250. We originally thought the 2nd bill would be $650 as well but he has charged less for the 2nd testing. This would decrease the amount that we asked for in the letter. Would you mind forwarding these bills to the appropriate person so they can be put with the letter we hand delivered to you yesterday?

The 11 February 2009 letter from plaintiffs created both a rejection of defendants' settlement offer for $3,944.00 and a new offer to settle for $10,657.00. This offer was then modified by plaintiffs' email on 12 February 2009, which changed the proposed settlement offer from $10,657.00 to $10,257.00.

Defendants argue that they accepted plaintiffs' offer on 16 February 2009, when defendants' attorney drafted and mailed to plaintiffs a "Settlement Agreement and Mutual Release." Defendants' settlement agreement contained a check in the amount

of $10,257.00, a release of claims and a confidentiality clause. The agreement stated that by accepting defendants' settlement offer of $10,257.00, plaintiffs would grant a full and final release of all claims concerning the apartment. Plaintiffs did not cash the check and, after consulting with counsel, returned the agreement and check to defendants on 8 April 2009.

Where a contract's acceptance contains terms not present in the other party's offer, our Court has held that

> [t]o constitute a valid contract, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.

Northington v. Michelotti, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (citation and internal quotation omitted) (holding that no contract existed where one party's proposed additions to an agreement were contested by the other party).

Defendants contend that the provisions of the "Settlement Agreement and Mutual Release" were "common boilerplate provisions." These boilerplate provisions constituted a release of claims and a confidentiality clause which plaintiffs described as terms "we never agreed to." Although plaintiffs' offer of 11 February 2009 stated "[w]e are willing to sign the

waiver you requested," no terms of a waiver were included in plaintiffs' offer. Specifically, there was never any agreement, much less any discussion, that a confidentiality agreement would be part of the settlement. *See Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 831, 534 S.E.2d 653, 655 (2000) (discussing how an oral promise to settle a case necessarily includes an implied promise to "dismiss the case with prejudice and [agree to a] release of claims form"). As such, even though the release of claims provision in defendants' settlement agreement of 16 February 2009 may have been anticipated by plaintiffs, plaintiffs clearly did not anticipate defendants' confidentiality agreement.

Plaintiffs cite *Chappell v. Roth*, 353 N.C. 690, 548 S.E.2d 499 (2001), in support of the proposition that where parties did not agree as to all provisions during a settlement negotiation, these differences constituted a material term which prevented an agreement being reached.

In *Chappell*, the plaintiff and the defendant underwent mediation to reach a settlement agreement. *Id.* at 691, 548 S.E.2d at 499. As part of the settlement agreement, the plaintiff was to grant the defendant a full release of claims in exchange for compensation for damages suffered in a car

accident. *Id.* at 691, 548 S.E.2d at 499—500. The defendant sent the plaintiff a proposed release, which the plaintiff rejected. *Id.* After the defendant rejected the plaintiff's proposed changes to the settlement offer, the plaintiff sued to have the settlement agreement enforced. *Id.* at 691, 548 S.E.2d at 500. Our Supreme Court held that no contract was formed if "any portion of the proposed terms is not settled." *Id.* at 692, 548 S.E.2d at 500 (citations omitted). "[G]iven the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement." *Id.* at 692, 548 S.E.2d at 500.

Defendants argue that *Chappell* is not applicable and assert that this matter is controlled by *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 606 S.E.2d 173 (2004). In *Smith*, the plaintiff filed a complaint against the defendant after the defendant misplaced plaintiff's camera equipment. *Id.* at 488, 606 S.E.2d at 174. The plaintiff sent a letter containing settlement terms and a demand for arbitration to defendant. *Id.* The defendant accepted the plaintiff's terms and sent to the plaintiff a letter containing the plaintiff's demanded terms. *Id.* at 488, 606 S.E.2d at 175. When the plaintiff then refused to sign the settlement agreement, the

defendant filed a motion to enforce the settlement agreement which was granted by the trial court. *Id.* This Court affirmed, holding that where both parties mutually assented to the terms of a settlement agreement, a valid contract had been formed. *Id.* at 494—95, 606 S.E.2d at 178 (discussing how *Chappell* was distinguishable because *Chappell* concerned a change in material terms to a contract which were not mutually assented to by both parties). *Smith* is not applicable to the facts in the instant case. Here, there was no mutual assent to the confidentiality agreement set forth by defendants and thus no required "meeting of the minds" regarding the terms of the settlement agreement.

As defendants' purported acceptance of plaintiffs' offer with a "Settlement Agreement and Mutual Release" created a new offer rather than acceptance and thus, there was no meeting of the minds over the contract's terms, the trial court erred in granting defendants' motion to enforce the settlement agreement.

We need not address plaintiffs' second issue on appeal. As granting defendants' motion to enforce the settlement agreement was error, it was likewise error to grant defendants' motion for summary judgment.

Reversed.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).