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NO. COA13-391
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

BECK ELECTRIC, LLC,
Plaintiff

v.

Mecklenburg County
No. 12 CVS 606

NEIGHBORING CONCEPTS, PLLC,
a/k/a URBAN CONCEPTS, LLC; and
AME CONSULTING ENGINEERS, PC,
Defendants

Appeal by plaintiff from order entered 14 November 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2013.

Cowley Law Firm, by Jorge Cowley, for plaintiff-appellant.

Helms, Henderson & Associates, P.A., by H. Parks Helms, for defendant-appellee Neighboring Concepts, PLLC.

Smith, Currie & Hancock LLP, by Rolly L. Chambers, for defendant-appellee AME Consulting Engineers, PC.

CALABRIA, Judge.

Beck Electric, LLC ("plaintiff") appeals from the trial court's order granting summary judgment in favor of Neighboring Concepts, PLLC ("Neighboring Concepts") and AME Consulting

Engineers, PC ("AME") (collectively "defendants"). We affirm in part and reverse and remand in part.

I. Background

On 22 August 2008, general contractor Edison Foard Construction Services, Inc. ("Edison Foard") entered into a contract with plaintiff under which plaintiff would complete all electrical work for the construction of the Revolution Regional Sports and Learning Academy ("the project") in Charlotte, North Carolina. Neighboring Concepts was the architect/engineer for the project and hired AME to design the project's electrical plans and specifications ("the plans").

The plans designed by AME and adopted by Neighboring Concepts called for the installation of thirty fluorescent lighting fixtures ("the fixtures") that were to be "surface mounted" directly to the bottom cord of the trusses of the Academy. In October 2009, plaintiff installed these fixtures, utilizing one of four lighting fixture choices approved by the plans.

Prior to installation of the fixtures, plaintiff allegedly gave notice to Edison Foard that the fixtures could not be surface mounted in accordance with its contract. Specifically, the manufacturer's instructions for the selected fixtures stated

that they could not be surface mounted, but instead required three inches of space between the fixtures and the mounting surface. Nonetheless, plaintiff was instructed to install the fixtures consistent with the plans. Plaintiff completed its work in November 2009 and received \$585,747.89 in compensation from Edison Foard.

In December 2009, the fixtures installed by plaintiff began to malfunction. The problem was investigated by multiple parties, including plaintiff, and it was eventually determined that the fixtures should not have been surface mounted. Plaintiff claimed that this improper installation resulted from following the plans it received from defendants. Defendants, in contrast, claimed that the improper installation was due to plaintiff's failure to follow the manufacturer's directions for the fixtures, as required by its sub-contract. Edison Foard directed plaintiff to prepare to reinstall the fixtures with the proper clearance, but plaintiff refused to do so. Edison Foard then contracted with another electrical company to reinstall the fixtures for \$11,900.69.

On 9 January 2012, plaintiff initiated an action against defendants and Edison Foard in Mecklenburg County Superior Court. Plaintiff's complaint included claims for negligence and

unfair and deceptive practices against all defendants, as well as a breach of contract claim against Edison Foard. After responsive pleadings were filed, plaintiff voluntarily dismissed its claims against Edison Foard. Defendants then each filed motions for summary judgment as to plaintiff's remaining claims. After a hearing on the motions, the trial court entered an order granting summary judgment in favor of defendants on 14 November 2012. Plaintiff appeals.

II. Summary Judgment

Plaintiff argues that the trial court erred by granting summary judgment in favor of defendants. We agree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Summary judgment in favor of a defendant is appropriate if the defendant "(1) [proves] that an essential element of the plaintiff's case is non-existent, or (2) [shows] through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or

(3) [shows] that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995) (internal quotation and citation omitted).

A. Unfair and Deceptive Practices

Initially, we note that plaintiff's arguments in its brief only relate to its negligence claim. Plaintiff makes no arguments regarding its unfair and deceptive practices claim, and thus, that portion of the trial court's order remains undisturbed. Therefore, we must only determine whether the trial court properly granted summary judgment in favor of defendants on plaintiff's claim for negligence.

B. Negligence

Even in the absence of privity of contract, a design professional such as an architect or engineer "may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of [the design professional's] common law duty of due care in the performance of his contract with the owner." *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584 (1979). The design professional would be liable to a subcontractor such as plaintiff for "the

negligent breach of a common law duty of care flowing from the parties' working relationship." *Id.*

"To establish a *prima facie* case of professional negligence a plaintiff must show (1) the nature of [defendant]'s profession; (2) [defendant]'s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to [plaintiff]." *Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 615, 621 S.E.2d 217, 221 (2005) (internal quotations and citation omitted). In the instant case, plaintiff alleged that defendants, who were licensed design professionals, had a duty "to design the electrical portion of the project correctly and completely, without errors or omissions[.]" Plaintiff further alleged that defendants breached this duty by providing defective plans which required the fixtures to be surface mounted, contrary to the fixture manufacturer's instructions and the North Carolina Building Code. Finally, plaintiff alleged that defendants' breach resulted in plaintiff incurring damages related to researching the problems with the fixtures which were caused by the improper mounting. In order to oppose defendants' summary judgment motion, plaintiff supported these allegations with affidavits

from engineer Kim Reitterer ("Reitterer") and James Becker ("Becker"), who was plaintiff's manager.

1. Duty and Breach

The North Carolina Building Code "specifically set[s] the standard of care in respect to the installing of the electrical system of a building and the electric wiring of buildings for lighting or for other purposes" *Drum v. Bisaner*, 252 N.C. 305, 309, 113 S.E.2d 560, 563 (1960) (internal quotation and citation omitted). In the instant case, Becker averred that plaintiff installed the malfunctioning fixtures consistent with the plans provided by electrical engineer AME pursuant to AME's contract with project architect Neighboring Concepts. Reitterer averred that she was designated as an expert for plaintiff. She further averred that the plans designed by AME required the fixtures at issue to be surface mounted in violation of the manufacturer's instructions, the North Carolina Building Code, and the National Electrical Code. These affidavits, when taken in the light most favorable to plaintiff, were sufficient to establish defendants' duty to plaintiff as design professionals and that defendants breached that duty by providing plaintiff with electrical fixture plans which, when followed, did not conform to the North Carolina Building Code.

2. Proximate Cause and Damages

"Our Supreme Court has held that damages in a tort action include compensation 'for all pecuniary losses sustained . . . which are the natural and probable result of the wrongful act and which . . . are shown with reasonable certainty by the evidence.'" *BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C. App. 52, 60, 564 S.E.2d 891, 897 (2002) (quoting *Champs Convenience Stores v. United Chem. Co.*, 329 N.C. 446, 462, 406 S.E.2d 856, 865 (1991)).

In the instant case, Becker averred that plaintiff specifically questioned whether to install the fixtures in direct contact with the ceiling beam and was still instructed to do so. After the fixtures malfunctioned, plaintiff was instructed by Edison Foard to "check the light fixtures and replace components in attempts to fix the problem." Based upon these instructions, plaintiff spent a significant amount of time and money attempting to determine the cause of the problem, which was eventually determined to be the improper surface mounting of the fixtures. Taking this evidence in the light most favorable to plaintiff, plaintiff has forecasted sufficient evidence to establish that defendants' breach, the

furnishing of incorrect electrical plans, resulted in a compensable injury to plaintiff.

AME contends that plaintiff's evidence of purported damages should not be considered as a matter of law because plaintiff did not, ultimately, correct the defective fixtures. AME argues that only "costs actually incurred by a contractor or subcontractor to correct a defective engineering design are compensable," and that, because plaintiff did not actually perform any repairs, plaintiff's research did nothing to actually correct the defective design. However, AME does not explain why the fact that plaintiff did not complete the actual repairs renders plaintiff's attempt to diagnose the problem, a necessary first step prior to undertaking any repairs, something other than a preliminary cost incurred to correct defendants' defective plans. Since Becker's affidavit specifically averred that the costs incurred by plaintiff were for "researching the issue as to why the light fixtures were malfunctioning," which plaintiff's other evidence attributes to defendants' faulty plans, it is for the jury to determine whether these costs are actually compensable as a "natural and probable result of the wrongful" design. *Id.*

Neighboring Concepts contends that plaintiff failed to establish that its purported damages were proximately caused by its defective plans. Specifically, Neighboring Concepts argues that "there is no evidence supporting the foreseeability of investigative costs and 118 hours of research constituting [plaintiff]'s claim" because plaintiff "was not requested or directed by Neighboring Concepts to investigate the cause of the malfunction." However, the fact that Neighboring Concepts, as project architect, did not directly ask plaintiff, a subcontractor, to investigate the cause of the fixture malfunction does not mean that these investigative costs were not a "natural and probable result of the wrongful" design as a matter of law. *Id.* To the contrary, plaintiff presented evidence that it was specifically asked by Edison Foard, the contractor, to research the problems which resulted from defendants' faulty plans. It is thus for the jury to determine whether any or all of plaintiff's alleged damages, if compensable, were proximately caused by defendants' plans. See *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 71, 376 S.E.2d 425, 429 (1989) ("Proximate cause is ordinarily a question for the jury.").

3. Contributory Negligence

Finally, Neighboring Concepts argues that the trial court properly granted summary judgment in its favor because plaintiff was contributorily negligent. Specifically, Neighboring Concepts contends that plaintiff's installation of the fixtures contrary to the manufacturer's instructions constituted contributory negligence as a matter of law. Neighboring Concepts is mistaken.

Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains. To establish contributory negligence, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.

Shelton v. Steelcase, Inc., 197 N.C. App. 404, 424, 677 S.E.2d 485, 499 (2009) (internal quotations and citations omitted). Like the issue of proximate cause, "the issue of contributory negligence is ordinarily a question for the jury rather than an issue decided as a matter of law." *Hill v. Williams*, 144 N.C. App. 45, 56, 547 S.E.2d 472, 479 (2001). However, summary judgment as to this issue is appropriate when "the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached . . ." *Nicholson v.*

American Safety Util. Corp., 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997).

In the instant case, Becker specifically averred that he raised the issue of whether to mount the fixtures contrary to the manufacturer's installation instructions and was instructed to proceed consistent with the plans. Only then did plaintiff proceed to improperly mount the fixtures. Thus, in the light most favorable to plaintiff, the evidence demonstrates that plaintiff could not have mounted the fixtures consistent with the manufacturer's instructions without refusing to adhere to the plans, thereby risking litigation for breaching its contract. Since the only reason plaintiff improperly installed the fixtures was that it was ordered to do so by defendants, we cannot say that the evidence presented establishes plaintiff's negligence "so clearly that no other reasonable conclusion may be reached" *Id.* Accordingly, the issue should be determined by a jury.

Ultimately, plaintiff presented a sufficient forecast of evidence to establish its claim for professional negligence against defendants and to surmount the affirmative defense of contributory negligence. Therefore, the trial court erred in granting summary judgment in favor of defendants as to

plaintiff's negligence claim. That portion of the trial court's order is reversed and remanded for a jury trial on the issues of negligence and contributory negligence.

III. Conclusion

Plaintiff did not raise any arguments regarding the portion of the trial court's order which granted summary judgment in favor of defendants on the issue of unfair and deceptive practices. Accordingly, that portion of the trial court's order is affirmed. Plaintiff presented a sufficient forecast of evidence which, when considered in the light most favorable to it, establishes a claim for professional negligence against defendants. Consequently, the portion of the trial court's order that granted summary judgment in favor of defendants on plaintiff's negligence claim is reversed and remanded for trial on the issues of defendants' negligence and plaintiff's contributory negligence.

Affirmed in part, reversed and remanded in part.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).