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NO. COA13-57
NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2013

THOMAS A. RIDER and LINDA R.
RIDER,
Plaintiffs,

v.

Henderson County
No. 11-CVS-88

RON ADERHOLD, RAD CONSTRUCTION
MANAGEMENT, INC., BOSTON/SOUTH
INVESTMENTS, INC., and FIRST
CITIZENS BANK AND TRUST COMPANY,
Defendants.

Appeal by plaintiffs from order entered 9 July 2012 by
Judge Bradley B. Letts in Henderson County Superior Court.
Heard in the Court of Appeals 8 May 2013.

*Karolyi-Reynolds, PLLC, by James O. Reynolds, for
plaintiffs-appellants.*

*Ward and Smith, P.A., by Joseph A. Schouten, for defendant-
appellee.*

HUNTER, Robert C., Judge.

Plaintiffs appeal from the order entered 9 July 2012
granting partial summary judgment in favor of defendant First
Citizens Bank & Trust Company with respect to plaintiffs' claims
of breach of contract, breach of fiduciary duty, unfair or

deceptive practices or acts ("UDPA"), and fraud. After careful review, we affirm the trial court's order.

Background

On or about 29 April 2009, plaintiffs Thomas and Linda Rider (individually "Tom" and "Linda" or collectively "plaintiffs") applied to defendant First Citizens Bank & Trust Company ("First Citizens") for a construction loan to build a home in Henderson County, North Carolina. Plaintiffs met with Alicia Hearne ("Hearne"), a mortgage loan officer with First Citizens, and Gary Jones ("Jones"), a retail market executive with First Citizens. Plaintiffs and First Citizens entered into a construction loan agreement ("loan agreement") on 8 September 2009. Tom testified that Jones told him that he would be his "ears and eyes" on the project.

Plaintiffs entered into a contract with Greenstone Builders, Inc. ("Greenstone") to build their home. Greenstone began work on plaintiffs' home in January 2010. At some point, Greenstone informed plaintiffs that it would be unable to complete the work based on unrelated financial issues. During this meeting, Tom met with defendant Ron Aderhold ("Aderhold"), who was the general contractor for defendant RAD Construction ("RAD"). Aderhold offered to take over the construction project

from Greenstone and allow the principal of Greenstone, Rick Dwyer, to be a consultant on the project. Plaintiffs agreed and entered into a construction agreement with RAD. First Citizens was informed of the new construction contract. Tom testified that Aderhold represented himself to be an unlimited licensed contractor in North Carolina. However, he never asked to see Aderhold's license. Plaintiffs allege that RAD actually operated using a contractor's license issued in the name of defendant Boston/South Investments, Inc. ("Boston/South").

After RAD began construction, First Citizens made the following disbursements to RAD: (1) \$18,900 on 31 March 2010; (2) \$40,950 on 14 May 2010; (3) \$44,100 on 3 June 2010; (4) \$25,200 on 20 July 2010; (5) \$31,500 on 19 August 2010; (6) \$25,200 on 15 September 2010; (7) \$6,000 on 6 October 2010; and (8) \$34,650 on 8 October 2010. The draw made on 8 October is the basis for plaintiffs' remaining breach of contract claim against First Citizens that was not dismissed at the summary judgment stage.

On 18 January 2011, plaintiffs filed a complaint against defendants alleging seven causes of action. Plaintiffs amended their complaint on 1 February 2011, asserting the following claims: (1) breach of contract against RAD, Aderhold, and

Boston/South; (2) breach of fiduciary duty against all defendants; (3) fraud against all defendants; (4) breach of contract against First Citizens; (5) conversion and trespass to chattels against Aderhold and RAD; (6) UDPA against all defendants; and (7) declaratory judgment against First Citizens.

On 17 February 2011, First Citizens moved for summary judgment. The matter came on for hearing on 29 May 2012. On 9 July 2012, the trial court granted First Citizens's motion for summary judgment on all claims except plaintiffs' breach of contract claim related to the 8 October 2010 draw for \$34,650. Plaintiffs filed their notice of appeal on 9 August 2012.

Plaintiffs' Notice of Appeal

Initially, we must address the untimeliness of plaintiffs' appeal. A party must file and serve its notice of appeal "within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure." N.C. R. App. P. 3(c) (2012). Here, the trial court's order was entered 9 July and served on the parties within three days, as evidenced by First Citizens's certificate of service indicating it faxed the order to plaintiffs on 11 July. Therefore, plaintiffs had until 8 August, 30 days later, to file their

notice of appeal. Here, plaintiffs' notice of appeal, filed 9 August, was untimely and subjects their appeal to dismissal. However, this Court will exercise its discretion and grant *certiorari* to review plaintiffs' claims on their merits, pursuant to N.C. R. App. P. 21 (2012).

Grounds For Appellate Review

We note that since the trial court's order did not dispose of the entire case in controversy, it is interlocutory. See *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). Although interlocutory orders are not usually immediately appealable, see *id.*, our Rules of Civil Procedure allow a trial court to certify that its order is a "final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay" for an appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). "Although not binding on this Court, we afford a trial court's Rule 54(b) certification great deference on appeal." *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 9, 652 S.E.2d 284, 291 (2007). Here, the trial court certified the order,

stating that "there is no just reason for delaying entry of final judgment on said claims pending the disposition of other claims for relief involved in this action[.]" Given the trial court's certification and the fact that the order in question finally resolves a number of plaintiffs' claims, we address the merits of this interlocutory appeal.

Arguments

Plaintiffs first argue that the trial court erred in granting partial summary judgment with regard to their breach of contract, breach of fiduciary duty, and UDPA claims because they have raised substantial questions of fact. We disagree.

"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) (internal quotation marks omitted).

"A claim for breach of fiduciary duty requires the existence of a fiduciary duty." *Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002). "A fiduciary duty arises 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." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 60, 418 S.E.2d 694, 699 (1992) (internal quotation marks omitted). "[A]n ordinary debtor-creditor relationship generally does not give rise to such a 'special confidence': the mere existence of a debtor-creditor relationship between the parties does not create a fiduciary relationship." *Id.* Parties to a contract "generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C." *Id.*

Here, the record does not reveal that any relationship existed between plaintiffs and First Citizens beyond that of debtor-creditor. Although plaintiffs allege that they based their decision to enter into the contract in part on the assurances of Jones that he would be their "eyes and ears" on the project, the record does not reveal any facts suggesting that plaintiffs placed any special confidence in First Citizens that would give rise to a fiduciary duty.

Moreover, while plaintiffs characterize the loan agreement as "pregnant with ambiguity," we find nothing ambiguous in the loan agreement's statements regarding the relationship between the parties. The plain language of the loan agreement

specifically states that First Citizens had no fiduciary or other special relationship with plaintiffs. Other provisions in the loan agreement similarly limit the relationship to that of lender-borrower: "the [b]orrower may not rely upon the appraisals or inspections made by, on behalf of, or for the benefit of the [l]ender"; "[the] appraisals and inspections do not constitute any assurances or representations to the [b]orrower"; and "[t]he relationship between the [l]ender and the [b]orrower is solely that of lender and borrower." Accordingly, plaintiffs have failed to establish that First Citizens owed them a fiduciary duty, and the trial court properly granted partial summary judgment with regard to this claim.

Next, with regard to their breach of contract claim, it seems that plaintiffs are arguing that First Citizens had a duty to ensure that RAD's work was done "in a first-class, good and workman-like manner" prior to making any disbursement. By disbursing money to RAD, an unlicensed contractor, plaintiffs contend that First Citizens breached its contractual duties. We disagree.

"A lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a

party." *Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268, 551 S.E.2d 920, 922 (2001). The loan agreement in the present case specifically states that: "[t]he [l]ender may disburse construction advances upon the request and at the direction of (i) the [b]orrower, . . . or (iv) any person designated or authorized by the [b]orrower." Moreover, the loan agreement goes on to say that "[u]nless the [b]orrower gives written instruction to the [l]ender to the contrary, the [l]ender is authorized, in its discretion, to disburse construction advances directly to any [b]orrower, to the account of any [b]orrower, to any [b]orrower and any contractor, subcontractor or provider of materials or supplies."

At his deposition, Tom testified that he did not tell First Citizens to withhold any disbursement to RAD with regard to any of the draws that served as the basis for claims dismissed in summary judgment.¹ Moreover, Tom admitted that he directed First Citizens in writing to make disbursements on 31 March, 13 May, 20 July, 19 August, and 6 October. With regard to the draws on 3 June and 15 September, Tom testified that although he did not

¹ In fact, we note that the only time plaintiffs told First Citizens not to make a disbursement to RAD was with regard to the 8 October draw of \$34,650, and this draw serves as the basis for plaintiffs' remaining breach of contract claim against First Citizens, which was not dismissed at summary judgment.

specifically direct First Citizens to make them, he had not communicated to First Citizens that he did not want them made.

Here, plaintiffs presented no evidence that First Citizens breached its contractual duties concerning the disbursements. First Citizens was permitted to make the disbursements, in its discretion, unless plaintiffs gave written instructions to the contrary. With regard to five of the payments, Tom specifically stated that he gave written instructions to First Citizens to make the disbursements. For the 3 June and 15 September disbursements, while Tom did not explicitly tell First Citizens to make them, he never instructed First Citizens to withhold payment. Based on the terms of the agreement, First Citizens was authorized to make those disbursements even without explicit instructions to do so. Thus, plaintiffs failed to forecast evidence that First Citizens breached any of the terms of the loan agreement, and summary judgment was proper on this claim.

Next, with regard to the UDPA claim, plaintiffs do not specifically state what acts or practices First Citizens engaged in that serve as the basis for their claim. Presumably, First Citizens's disbursement of the funds to RAD constitutes the unfair or deceptive act. However, as discussed above, First Citizens was authorized to make all of the disbursements to RAD

under the terms of the loan agreement. A bank exercising its rights under a loan agreement does not engage in a deceptive or unfair practice. See *Wachovia Bank & Trust Co., N.A. v. Carrington Dev. Associates*, 119 N.C. App. 480, 487, 459 S.E.2d 17, 21 (1995). Moreover, even if First Citizens had breached its contractual duties, "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." *Thompson*, 107 N.C. App. at 62, 418 S.E.2d at 700. "[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Id.* Here, plaintiffs' claim relies solely on an alleged breach of contract and includes no facts that establish the existence of aggravating circumstances. Accordingly, summary judgment was proper as to plaintiffs' UDPA claim.

Finally, plaintiffs argue that the trial court erred in granting partial summary judgment as to their fraud claim. Specifically, plaintiffs seem to contend that because Judge James U. Downs denied First Citizens's motion to dismiss their fraud claim on 19 April 2011, Judge Letts was precluded from subsequently allowing First Citizens's motion for summary judgment. Plaintiffs' argument is without merit. "[T]he denial of a motion to dismiss made under Rule 12(b)(6) does not prevent

the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56." *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256 (1978). Thus, simply because the motion to dismiss was previously denied, the trial court was not precluded from entering partial summary judgment in favor of First Citizens later in the proceedings.

Moreover, we note that plaintiffs' claim fails as a matter of law. Plaintiffs' claim for fraud is premised on their contention that First Citizens failed to inform them that RAD did not have a general contractors license but was, instead, operating under Boston/South's license. "[T]he following essential elements of actionable fraud are well established: (1) False 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." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). If "the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the

true facts by exercise of reasonable diligence.” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 59, 554 S.E.2d 840, 846 (2001). Here, plaintiffs could have discovered RAD did not have a contractors license from North Carolina—Tom testified that he could have requested a copy of RAD’s contractors license, but never did. Moreover, plaintiffs have failed to plead that they were somehow denied the opportunity to investigate or that they could not have learned the true facts by reasonable diligence. Accordingly, the trial court properly granted summary judgment as to this claim.

Conclusion

Based on the foregoing reasons, we affirm the trial court’s order granting partial summary judgment in favor of First Citizens.

AFFIRMED.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).