NO. COA14-273

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

COMMSCOPE CREDIT UNION,
Plaintiff,

v. Catawba County
No. 12 CVS 3021

BUTLER & BURKE, LLP, a North Carolina Limited Liability Partnership,
Defendant and Third-Party Plaintiff,

v.

BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL HOLLAR, JOE CRESIMORE, MARK HONEYCUTT, ROSE SIPE, TODD POPE, JASON CUSHING, and SCOTT SAUNDERS,
Third-Party Defendants.

Appeal by Plaintiff from order entered 26 September 2013 by Judge Richard L. Doughton in Catawba County Superior Court.

Heard in the Court of Appeals 27 August 2014.

Patrick, Harper & Dixon, LLP, by Michael J. Barnett and L. Oliver Noble, Jr., and Carlton Law PLLC, by Alfred P. Carlton, Jr., for Plaintiff.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for Defendant and Third-Party Plaintiff.

No brief for Third-Party Defendants.

STEPHENS, Judge.

Factual and Procedural Background

Plaintiff Commscope Credit Union is a North Carolina chartered credit union which retained Defendant Butler & Burke, LLP, a certified public accountant firm, in 2001 to provide professional independent audit services. Defendant represented to Plaintiff that it had special expertise in providing auditing services to credit unions and other nonprofit entities. Defendant's engagement letters between 2001 and 2010 asserted that it would, *inter alia*,

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Each year from 2001 to 2009, Plaintiff's general manger, Mark Honeycutt, failed to file with the Internal Revenue Service ("IRS") a Form 990, Return of Organization Exempt From Income Tax Returns[1] ("the tax forms"). In the course of its audits,

[1] No copy of a Form 990 is included in the record on appeal, but we take judicial notice that this lengthy, multi-page form requires tax-exempt entities to provide detailed information

Defendant never requested copies of the tax forms, and, as a result, did not discover Plaintiff's failure to file them. In April 2010, the IRS notified Plaintiff of its filing deficiency and later informed Plaintiff that a penalty of $424,000 had been assessed against it. The penalty was subsequently reduced to $374,200.

On 8 November 2012, Plaintiff filed a complaint in Catawba County Superior Court against Defendant alleging claims for breach of contract, negligence, breach of fiduciary trust, and professional malpractice.[2] On 28 January 2013, Defendant answered, asserting several affirmative defenses. Defendant filed a third-party complaint on 25 February 2013 against various individuals who had been directors, officers, and supervisory committee members of Plaintiff.[3] That complaint

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about their governance, assets, revenue, and expenses, and depending on their specific organizational structure and activities, additional tax schedules may be required to be filed as well. *See* http://www.irs.gov/pub/irs-pdf/f990.pdf (last visited 22 October 2014).

[2] On 27 February 2013, the Chief Justice designated the matter as a complex business case and assigned the Honorable Richard L. Doughton to preside over it.

[3] Among the third-party defendants was Honeycutt, the general manager for Plaintiff who was alleged to have had the responsibility to the file the tax forms and to have failed to do so.

included claims for contribution, indemnity, negligent misrepresentation, and fraud. The third-party defendants answered and asserted various affirmative defenses. Three of the third-party defendants moved to dismiss pursuant to Rule of Civil Procedure 12(b)(6). On 6 June 2013, Defendant moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and 12(c). On 26 September 2013, the trial court granted Defendant's motion and dismissed the case. This action rendered the third-party defendants' motion to dismiss moot, and the trial court did not consider or rule on that motion. From the order granting Defendant's motion to dismiss, Plaintiff appeals.

Discussion

Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and on the pleadings pursuant to Rule 12(c). We agree.

I. Standards of review

> When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. The court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not

> prove any set of facts to support his claim which would entitle him to relief.

Sharp v. CSX Transp., Inc., 160 N.C. App. 241, 243, 584 S.E.2d 888, 889 (2003) (citations and internal quotation marks omitted). "When the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, however, the motion will be granted and the action dismissed." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) (citation omitted).

"A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted *unless the movant clearly establishes that no material issue of fact remains to be resolved* and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted; emphasis added).

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review *de novo* a trial court's grant of a motion to dismiss under both Rule 12(b)(6) and 12(c). *Id.*; *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, __ N.C. App. __, __, 752 S.E.2d 661, 663-64 (2013).

II. Breach of fiduciary duty

In its motion to dismiss, Defendant argued that Plaintiff had failed to allege facts or circumstances that, if true, would show the existence of a fiduciary duty Defendant owed to Plaintiff. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Harrold v. Dowd*, 149 N.C. App. 777, 783, 561 S.E.2d 914, 919 (2002) (citation omitted). In this State, fiduciary relationships may arise as a matter of law because of the nature of the relationship, "such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). However, "[o]nly when one party figuratively holds all the cards — all the financial power or technical information, for example — have North Carolina courts found that the special circumstance of a

fiduciary relationship has arisen." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347-48 (4th Cir. 1998) (internal quotation marks omitted). Thus, our courts have declined to find the existence of a fiduciary relationship between "mutually interdependent businesses," such as a distributor and a manufacturer, or a retailer and its main supplier. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990).

Even where a fiduciary relationship does not arise as a matter of law, such a relationship does exist

> 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. It extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Harrold, 149 N.C. App. at 784, 561 S.E.2d at 919 (citations, internal quotation marks, and brackets omitted). For example, in *Harrold*, this Court concluded that no fiduciary relationship existed between a pair of optometrists and an accounting firm hired "to advise them on business opportunities, including mergers and acquisitions." *Id.* at 779, 561 S.E.2d at 917. However, the Court went on to contrast this situation with one

in which the accountant defendants "had done accounting . . . and had prepared tax filings" such that they "obviously had acquired a special confidence in preparing tax documents for the trusts, corporations, and individual plaintiffs." *Id.* at 784, 561 S.E.2d at 919 (discussing *Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997)). Thus, while this Court in *Harrold* was correct in stating that no North Carolina case has held that an accounting firm and its clients are *per se* in a fiduciary relationship, that case did not concern accountants and their *audit clients*. That is, in *Harrold*, the accounting firm was not providing auditing or accounting services to its clients, but rather was acting as a consultant on mergers and acquisitions. *Id.* at 779, 561 S.E.2d at 917. In *Smith*, on the other hand, where the accountants were providing accounting and tax-related services, a fiduciary relationship *did* exist. 127 N.C. App. at 10, 487 S.E.2d at 813. We would observe that, in using its specially trained professionals to perform comprehensive audits for credit unions, accounting firms such as Defendant would appear "to hold all the . . . technical information . . . ." *Broussard*, 155 F.3d at 348. In our view, the relationship between Plaintiff and Defendant appears much more like that between "attorney and

client, broker and principal," *see Abbitt*, 201 N.C. at 598, 160 S.E. at 906, than that between "mutually interdependent businesses," like distributors and manufacturers, or retailers and suppliers. *See Tin Originals, Inc.*, 98 N.C. App. at 666, 391 S.E.2d at 833.

More importantly, even if the relationship between an accounting firm and its audit clients is not a fiduciary one as a matter of law, Plaintiff's complaint alleges that Defendant pledged to

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

In assuring Plaintiff that it had the expertise to review financial statements to identify "errors [and] fraud[,]" even by Plaintiff's own management and employees, Defendant sought and received "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." *See Harrold*, 149 N.C. App. at 784, 561 S.E.2d at 919. We conclude that, in the light most favorable to Plaintiff, the allegations

of the complaint are sufficient to state a claim for breach of fiduciary duty. Accordingly, the trial court erred in dismissing Plaintiff's claim.

III. Plaintiff's remaining claims

As for Plaintiff's claims for breach of contract, negligence, and professional malpractice, Defendant moved to dismiss under the doctrines of (1) *in pari delicto* and (2) contributory negligence, as well as upon contentions that these claims are (3) barred by the explicit terms of Defendant's engagement letter. We are not persuaded.

A. In pari delicto

"The common law defense by which [Defendant] seek[s] to shield [itself] from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [*defendentis*] or 'in a case of *equal or mutual fault* the condition of the party in possession [or defending] is the better one.'" *See Skinner*, 314 N.C. at 270, 333 S.E.2d at 239 (citation and ellipsis omitted). "Our courts have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same

matter whereof he complains." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). Our Supreme Court has observed "that the *in pari delicto* defense traditionally has been *narrowly limited* to situations in which the plaintiff was *equally at fault* with the defendant." *Skinner*, 314 N.C. at 272, 333 S.E.2d at 240 (emphasis in original); *see also Cauble v. Trexler*, 227 N.C. 307, 313, 42 S.E.2d 77, 81-82 (1947) (noting that where "the parties are to some extent involved in the illegality, — in some degree affected with the unlawful taint, — but are not *in pari delicto*, — that is, both have not, with *the same knowledge, willingness, and wrongful intent* engaged in the transaction, or *the undertakings of each are not equally blameworthy*, — a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent") (citation and internal quotation marks omitted; emphasis added).

The courts of our State have not yet addressed the applicability of *in pari delicto* as a defense by accountants to the malpractice-related claims of their auditing clients, but, in *Whiteheart*, this Court considered the doctrine's

applicability as a defense in legal malpractice cases. There, the plaintiff, who was in the business of billboard advertising,

> sent a letter to his various competitors "alerting" them about Ms. Payne. In this letter, [the] plaintiff asserted that Ms. Payne was a "lease jumper" and that she and her business practices were unprofessional, unethical, and despicable. [The p]laintiff also referred to Ms. Payne personally in additional derogatory terms. Although [the] plaintiff's attorney, Betty Waller ("[the] defendant"), reviewed the letter before it was sent, she failed to advise [the] plaintiff of the potential liability that could result from sending such a *per se* defamatory document.

199 N.C. App. at 282, 681 S.E.2d at 420. After Ms. Payne and another entity successfully sued the plaintiff and received judgments totaling over $700,000, the plaintiff sued Betty Waller and her law firm "for legal malpractice, seeking to recover damages sufficient to cover the judgments" against him. *Id.* at 283, 681 S.E.2d at 421. This Court noted that the successful tort cases against the plaintiff had "establish[ed] as a matter of law [the plaintiff's] *intentional wrongdoing*" in sending the letters. *Id.* at 284, 681 S.E.2d at 421 (emphasis added). This Court also cited the reasoning of other state courts in cases where the doctrine was applied to bar claims against attorneys when their clients had knowingly engaged in intentional wrongdoing:

> *Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274 (Iowa 1996) (plaintiffs' malpractice claim dismissed because they acted *in pari delicto* with defendant law firm in *knowingly making false statements in affidavits* submitted to Patent and Trademark Office); *Evans v. Cameron*, 121 Wis. 2d 421, 360 N.W.2d 25 (1985) (plaintiff's malpractice action barred by defense of *in pari delicto* where the client *lied under oath* in a bankruptcy proceeding about transferring money to her mother, even though she claimed her testimony was based upon the advice of her attorney); *Robins v. Lasky*, 123 Ill. App.3d 194, 201-02, 462 N.E.2d 774, 779, 78 Ill. Dec. 655 (1984) (plaintiff's malpractice action barred by defense of *in pari delicto* when he followed defendant attorneys' advice to relocate and establish his permanent residence in another state *in order to avoid service of process* in Illinois).

Id. at 285, 681 S.E.2d at 422 (emphasis added). Noting with approval that "some courts have distinguished between *wrongdoing* that would be obvious to the plaintiff and legal matters so complex that a client could follow an attorney's advice, do wrong[,] and still maintain suit on the basis of not being equally at fault[,]" the panel in *Whiteheart* held that such fine distinctions were not necessary in that case because the plaintiff had engaged in intentional wrongdoing, to wit, knowingly lying in an affidavit filed in the courts of our State and knowingly spreading lies about Ms. Payne among the business

community in an effort to harm her. *Id.* at 285-86, 681 S.E.2d at 422-23 (citation and internal quotation marks omitted).

Here, Defendant urges that the doctrine applies because the action of Honeycutt, Plaintiff's general manager, in failing to file the tax forms (1) may be imputed to Plaintiff and (2) was an equal and mutual wrong to any negligence, breach of contract, or malpractice in Defendant's auditing process and procedures. However, unlike in *Whiteheart* or the other cases cited *supra*, nothing in Plaintiff's complaint establishes that Honeycutt's failure to file the tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that Honeycutt's alleged failure was not excusable conduct.[4]

[4] We note that a copy of the complaint filed by Plaintiff against Honeycutt in a separate legal action alleges, *inter alia*, both negligence and fraud in connection with his failure to file the tax forms. This complaint, however, appears in the record on appeal as an attachment to Defendant's response to Plaintiff's motion for exceptional case designation and assignment of this matter to the North Carolina Business Court and was not part of Plaintiff's complaint for consideration under Rule 12(b)(6) nor part of the pleadings before the trial court in considering Defendant's motion to dismiss under Rule 12(c). In any event, even were it part of the pleadings properly before and considered by the trial court in deciding Defendant's motion to dismiss, the alternate allegations in Plaintiff's complaint against Honeycutt standing alone would not support the application of *in pari delicto* as a defense by Defendant against Plaintiff.

Nor do the allegations in the complaint establish as a matter of law that Honeycutt's failure to file the tax forms may be imputed to Plaintiff.

> As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (citation omitted), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In addition,

> [w]here the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply.

Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 482, 124 S.E.2d 365, 368 (1962) (citation and internal quotation marks omitted).

Here, the complaint certainly does not establish that Plaintiff expressly authorized Honeycutt's failure to file the tax forms nor that it ratified this omission after the fact. To

the extent any inference is raised by the facts alleged in Plaintiff's complaint, it would be that Honeycutt's failure to file the tax forms did *not* further Plaintiff's business, and Honeycutt's conduct raises a clear presumption that he would *not* communicate the situation to Plaintiff. If Plaintiff was exempt from paying taxes by the filing of the tax forms and if the failure to file the forms has resulted in a nearly $400,000 penalty assessment, Honeycutt's conduct not only did not further Plaintiff's business, it actively harmed Plaintiff. In sum, at the present stage of the case, Defendant is not entitled to a dismissal of Plaintiff's breach of contract, malpractice, and negligence claims on the basis of *in pari delicto*.

B. Contributory negligence

Defendant also moved to dismiss based upon an argument that Plaintiff's claims were barred by its own contributory negligence, as imputed from Honeycutt's failure to file the tax forms and his lies and omissions to Defendant and others about Plaintiff's tax compliance.

> Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint,

> but presupposes or concedes such negligence by him. *Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint*.

Jackson v. McBride, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (citations, internal quotation marks, and emphasis omitted). Contributory negligence will act as a complete defense to malpractice claims against accountants. *See Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997). However, in considering the propriety of submission of the issue of contributory negligence to the jury, our Supreme Court has observed:

> The allegation in an answer that the [tort] was caused by [the plaintiff's] own negligence and not by any negligence of the defendant is not a sufficient plea of contributory negligence. For the same reason, evidence by the defendant to the effect that the plaintiff was injured not by the negligence of the defendant, as alleged in the complaint, but by the plaintiff's own negligence, as alleged in the answer, would not justify the submission to the jury of an issue of contributory negligence.

Jackson, 270 N.C. at 372, 154 S.E.2d at 471-72 (citation and internal quotation marks omitted; emphasis omitted).

Plaintiff cites *Smith* for the proposition that contributory negligence is inapplicable given the facts here. That case held

that, "[i]n an action by a principal against an agent, the agent cannot impute his own negligence to the principal. Where the negligence of two agents concurs to cause injury to the principal, the agents cannot impute the negligence of the fellow agent to bar recovery." 127 N.C. App. at 14, 487 S.E.2d at 816 (citations omitted). Plaintiff fails to cite the next sentence in that opinion: "However, if either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to [the] plaintiff." *Id.* (citation omitted). The allegations of Plaintiff's complaint, taken as true, establish *prima facie* that Defendant is an independent contractor. *See Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 345, 601 S.E.2d 915, 923 (2004) ("An independent contractor . . . is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.") (citations and internal quotation marks omitted).

However, we agree with Plaintiff's assertion that the doctrine of contributory negligence is inapplicable here, albeit for a much simpler reason. As noted *supra*, nothing in the pleadings establishes either that Honeycutt's failure to file

the tax returns was (1) negligent rather than intentional wrongdoing or excusable conduct or (2) imputed to Plaintiff as a matter of law. Further, Defendant's answer simply alleges that any harm to Plaintiff "was caused by [Plaintiff's] own negligence and not by any negligence of [D]efendant [which] is not a sufficient plea of contributory negligence." *See Jackson*, 270 N.C. at 372, 154 S.E.2d at 472.

C. Terms of the engagement letter

In its motion to dismiss, Defendant also argued that Plaintiff's claims were barred as attempts "to hold [D]efendant[] liable for matters which the parties expressly agreed [P]laintiff was responsible." We disagree.

> A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. If the meaning of the contract is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 191 N.C. App. 163, 165-66, 662 S.E.2d 20, 22 (citations, internal

quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 29 (2008).

The engagement letters sent by Defendant to Plaintiff each year used substantially identical language in describing Plaintiff's responsibilities:

> Management is responsible for making all management decisions and performing all management functions; . . . . for establishing and maintaining internal controls, including monitoring ongoing activities; . . . . for making all financial records and related information available to us and for the accuracy and completeness of that information[;] and . . . . for identifying and ensuring that the credit union complies with applicable laws and regulations.

However, as noted *supra*, in the same letters, Defendant explicitly took on the responsibility to

> plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff].

Thus, the plain language of the engagement letters appears to give the parties overlapping, if not conflicting, responsibilities for the very types of situations, actions, and

omissions as lie at the heart of this case. This "writing leaves it uncertain as to what the agreement was" and when "the intention of the parties is unclear. . ., interpretation of the contract is for the jury." *See id.* at 165, 662 S.E.2d at 22. Plaintiff and Defendant have made conflicting arguments about what various administrative code sections and standard auditing procedures require with respect to the duties of an auditor and its client, but, on the pleadings, and in the absence of expert testimony or *any* other evidence, we cannot evaluate their contentions.

In sum, Plaintiff has stated its claims sufficiently to withstand Defendant's motion to dismiss, Defendant has not established any affirmative defenses which would entitle it to dismissal, and Defendant has failed to "clearly establish[] that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *See B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted). Accordingly, the trial court erred in granting Defendant's motion to dismiss, and the order so doing is

REVERSED.

Judges CALABRIA and ELMORE concur.