

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA14-465
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

EAST CAROLINA UNIVERSITY
FOUNDATION, INC.,

Plaintiff,

v.

Forsyth County
No. 13 CVS 6135

FIRST CITIZENS BANK & TRUST
COMPANY, EXECUTOR OF THE ESTATE OF
M. LOUISE THOMAS and as TRUSTEE OF
THE M. LOUISE THOMAS REVOCABLE
TRUST,

Defendants.

Appeal by plaintiff from order entered 13 January 2014 by
Judge Robert F. Johnson in Forsyth County Superior Court. Heard
in the Court of Appeals 24 September 2014.

*Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe and
Mark R. Sigmon, for plaintiff-appellant.*

*Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K.
Edward Greene, Benjamin N. Thompson, and Lee M. Whitman,
for defendant-appellee.*

STEELMAN, Judge.

Where plaintiff's complaint, viewed as admitted, stated a
claim for breach of contract, the trial court erred in granting

defendant's motion to dismiss with respect to that claim. Where plaintiff's complaint, viewed as admitted, did not allege sufficient facts to support claims for a completed gift or an express trust, the trial court did not err in dismissing those claims.

I. Factual and Procedural Background

In 2011, M. Louise Thomas (Thomas), a graduate of East Carolina University, entered into discussions with the East Carolina University Foundation, Inc. (plaintiff) to establish an endowment for scholarships and other programs. Thomas expressed the intent to create and fund the endowment in the amount of \$1,190,000, the funds to be obtained from the sale of some of Thomas' real property located in Southern Pines, North Carolina. In November of 2012, Thomas met with plaintiff's representatives to discuss the formation of the endowment, and on 8 January 2013, she spoke on the telephone with Dr. Richard R. Eakin (Dr. Eakin), one of plaintiff's representatives, concerning the designations of funds from the sale of her property. Dr. Eakin memorialized this conversation, and Thomas subsequently acknowledged that Dr. Eakin had made accurate designations regarding the endowment.

Plaintiff's representatives planned to meet with Thomas on 14 February 2013 at Thomas' home to pick up the check from the proceeds of the sale of Thomas' real property. However, on 9 February, Thomas fell and broke her leg. She was hospitalized, and on 17 February 2013, died in the hospital.

First Citizens Bank & Trust Company (defendant) was named executor of Thomas' estate by her last will and testament. Defendant also served as trustee of the M. Louise Thomas Revocable Trust, a revocable living trust under North Carolina law. On 30 May 2013, plaintiff filed a claim against the estate. On 3 July 2013, defendant denied plaintiff's claim.

On 1 October 2013, plaintiff filed a complaint in the Superior Court of Forsyth County, alleging the facts stated above. The complaint further alleged (1) that defendants, in failing to honor Thomas' intent, breached the contract between Thomas and plaintiff; (2) that alternatively, Thomas had intended to designate the proceeds of the sale as a gift to plaintiff; and (3) that alternatively, defendant, as Thomas' executor and trustee, held the monies in express trust for the benefit of plaintiff. Plaintiff therefore sought to recover \$1,190,000 from Thomas' estate.

On 27 November 2013, defendants filed a motion to dismiss these claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging (1) that there was no meeting of the minds to form an enforceable agreement; (2) that no completed gift existed, because Thomas' check was never delivered to plaintiff; and (3) that no trust was created, because the proceeds of the sale were retained by Thomas in her name, and never conveyed to any other party.

On 13 January 2014, the trial court granted defendant's motion to dismiss.

Plaintiff appeals.

II. Standard of Review

"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).

"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. Breach of Contract

In its first argument, plaintiff contends that the trial court erred in granting defendant's motion to dismiss as to plaintiff's claim for breach of contract. We agree.

In its complaint, plaintiff contended (1) that Thomas intended to sell the real property; (2) that Thomas intended to use the proceeds of this sale to fund an endowment with plaintiff; (3) that Thomas communicated these intentions to plaintiff; (4) that in exchange for her donation, the endowment would be designated in accordance with Thomas' instructions; (5) that Thomas agreed orally to the provisions of the agreement; (6) that Thomas sold the real estate in Southern Pines; (7) that Thomas had invited representatives of plaintiff to her home to receive the check for the endowment in person; (8) that, due to injury, Thomas postponed the meeting; and (9) that, due to her untimely death, Thomas was ultimately unable to deliver payment to plaintiff. Plaintiff alleged that Thomas' conduct manifested an intent to deliver the proceeds of the sale to plaintiff, and that defendant, as Thomas' executor and trustee, had an

obligation to give effect to that intent. Specifically, plaintiff contended that it and Thomas had "entered into an enforceable contract with clear and unambiguous terms for a charitable pledge with sufficient consideration, which was [Thomas'] designation of the use of the scholarship funds and other programs and naming of Endowment as the 'M. Louise Thomas ECU Honors College Scholarship Endowment'." Plaintiff contended that, "[b]ut for her death, Thomas would have fulfilled the terms of the Endowment Agreement[,]" and that defendant "breached the terms of the Endowment Agreement by failing to pay" the agreed amount.

"A contract is an agreement, upon sufficient consideration, to do or not do a particular thing." *Williams v. Jones*, 322 N.C. 42, 48, 366 S.E.2d 433, 437-38 (1988) (citations and quotations omitted). An implied contract is a contract which arises "where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998). An implied contract, if it satisfies the same requirements as an express contract, "is as valid and enforceable as an express contract." *Id.* Except where forbidden by the Statute of Frauds or the parol evidence

rule, a contract may be written, oral, or a combination of the two. See e.g. *Tar River Cable TV, Inc. v. Standard Theatre Supply Co.*, 62 N.C. App. 61, 65, 302 S.E.2d 458, 460 (1983) (holding that a contract not required to be in writing "may be partly written and partly oral"). The object of contract construction is to ascertain the intent of the parties. *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 90 (2009).

In the instant case, plaintiff's complaint alleged that Thomas pledged \$1,190,000 to plaintiff in exchange for plaintiff's promise to designate the monies as per Thomas' instructions, and that this constituted an enforceable contract with unambiguous terms for a charitable pledge based upon sufficient consideration.

Our Supreme Court has held that an exchange of a pledge and a promise to designate funds as directed constitutes sufficient consideration to support a contract. See *Rutherford College, Inc. v. Payne*, 209 N.C. 792, 797, 184 S.E. 827, 830 (1936). Further, even if we were to accept defendant's contention that there was no meeting of the minds with regard to the alleged agreement, that matter is for the trier of fact to decide, not for the trial court to address on a motion to dismiss. See

Northington v. Michelotti, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (holding that "[w]hether mutual assent has been established and whether a contract was intended between the parties are questions for the trier of fact").

We hold that the allegations in plaintiff's complaint, if taken as true, show Thomas' offer to exchange monies for the designation of an endowment per her instructions, show plaintiff's acceptance of this offer, show steps taken by both Thomas and plaintiff towards the memorialization of this agreement, and show the failure of defendant, acting as plaintiff's trustee and executor, to consummate the agreement between Thomas and plaintiff. We therefore hold that the allegations in plaintiff's complaint, if taken as true, support a claim for breach of contract, and that the trial court erred in granting defendant's motion to dismiss with respect to that claim. We vacate the order of the trial court granting defendant's motion to dismiss as to the breach of contract claim, and remand to the trial court for further proceedings.

IV. Completed Gift

In its second argument, plaintiff contends that the trial court erred in granting defendant's motion to dismiss with

respect to plaintiff's claim based upon a completed gift. We disagree.

As an alternative to its claim for breach of contract, plaintiff claimed in its complaint that Thomas' written correspondence and oral communications "exhibited donative intent to make a gift to the Foundation[,] " that Thomas (and subsequently defendant) held the proceeds from the sale "as trustee for the Foundation[,] " and that this constituted a completed gift, "because Thomas had the intent to give the proceeds to the Foundation, and the proceeds had been constructively delivered to the Foundation."

In North Carolina, a gift is complete and irrevocable if two things exist: (1) donative intent, and (2) actual or constructive delivery that divests the donor of all right, title, and control over the property given. *Sinclair v. Travis*, 231 N.C. 345, 352, 57 S.E.2d 394, 399 (1950). Actual delivery is not essential; constructive delivery will be held sufficient if made with the intent of transferring title, but there must be some unequivocal act. *Id.*

In the instant case, even assuming *arguendo* that there was sufficient evidence of donative intent, there was insufficient evidence of actual or constructive delivery divesting Thomas of

any right to the proceeds. At all times, the proceeds of the sale remained within Thomas' control and in her name. As such, we hold that the trial court did not err in granting defendants' motion to dismiss with respect to plaintiff's alternative claim for completed gift.

This argument is without merit.

V. Express Trust

In its third argument, plaintiff contends that the trial court erred in granting defendant's motion to dismiss with respect to plaintiff's claim based upon an express trust. We disagree.

As an alternative to its claims for breach of contract and completed gift, plaintiff claimed in its complaint that "Thomas held the proceeds [of the sale] as trustee for the Foundation[,]" that Thomas had expressed an intent to have the proceeds benefit the Foundation, and that, "[b]ecause Thomas manifested her intent to deliver the proceeds over to the Foundation, Thomas created an express trust for the benefit of the Foundation as she was a fiduciary with respect to the proceeds[.]"

Under the North Carolina Uniform Trust Code and common law, an express trust exists when one person gives property to

another person for the benefit of a third person. See e.g. *Ellis v. Vespoint*, 102 N.C. App. 739, 742, 403 S.E.2d 542, 544 (1991). To establish the existence of a trust, there must be "(1) sufficient words or circumstances showing that the settlor intended to create a trust, (2) definite trust property, (3) an ascertained beneficiary, and (4) a promise by a trustee to hold the trust property in trust for the beneficiary at or before acquiring the legal title to the trust property." *Id.*

In the instant case, even assuming *arguendo* that plaintiff's complaint sufficiently alleged a definite trust property (the proceeds from the sale) and an ascertained beneficiary (plaintiff), plaintiff's complaint does not sufficiently allege words or circumstances showing Thomas' intent to create a trust. At best, the complaint illustrates Thomas' donative intent; nowhere, however, does it allege that Thomas entrusted the proceeds of the sale to another party for the benefit of plaintiff. Nor does the complaint demonstrate a promise by any trustee, be it Thomas or other defendants, to hold the property in trust for the benefit of plaintiff. Accordingly, we hold that the trial court did not err in granting defendants' motion to dismiss with respect to plaintiff's alternative claim for express trust.

This argument is without merit.

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).