IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-810

Filed: 17 March 2015

MACON BANK, INC.,
Plaintiff,

v.

STEPHEN P. GLEANER, MARTHA K. GLEANER, and WILLIAM A. PATTERSON,
Defendants.

Macon County
No. 13 CVS 456

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-809

Filed: 17 March 2015

MACON BANK, INC.,
Plaintiff,

v.

STEPHEN P. GLEANER,
Defendant.

Macon County
No. 13 CVS 69

Appeal by defendants Stephen P. Gleaner and Martha K. Gleaner from summary judgment orders entered 12 March 2014 by Judge Bradley Letts in Superior Court, Macon County. Heard in the Court of Appeals 2 December 2014.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer and Lynn D. Moffa, for plaintiff-appellee.

David R. Payne, P.A., by David R. Payne, for defendants-appellants.

STROUD, Judge.

In this opinion, we consolidate Case Nos. 14-809 and 14-810. Stephen P. Gleaner appeals from the trial court's order granting summary judgment to Macon Bank, Inc. ("plaintiff") in Case No. 13 CVS 69, and Stephen P. Gleaner and Martha K. Gleaner ("defendants") appeal from the trial court's order granting summary judgment to Macon Bank, Inc. in Case No. 13 CVS 456. Defendants contend that the trial court erred in granting summary judgment in both cases, because they proffered some evidence of (1) the affirmative defense of accord and satisfaction; (2) plaintiff's breach of the duty of good faith and fair dealing; (3) the affirmative defense of equitable estoppel; and (4) defendants' right to offset arising from plaintiff's failure to account for lost rental income. We affirm.

I. Background

On 18 January 2002, plaintiff, Stephen Gleaner, and William Patterson, Stephen's business partner, executed a promissory note in which Stephen and Patterson borrowed $260,000 from plaintiff ("the 2002 promissory note"). Stephen and Patterson used the loan proceeds to purchase undeveloped land and a rental house in Highlands, North Carolina ("the Highlands property"). Plaintiff secured the loan by executing a deed of trust on the Highlands property.

On 20 March 2007, plaintiff, Stephen, and Patterson executed a bridge loan note in which Stephen and Patterson borrowed an additional $150,000 from plaintiff

("the 2007 promissory note"). Plaintiff secured this loan by executing another deed of trust on the Highlands property. On 11 August 2010, plaintiff, Stephen, and Martha Gleaner, Stephen's wife, agreed to a loan modification of the 2007 promissory note. On 12 August 2010, plaintiff and Stephen agreed to release Patterson from liability on the 2002 promissory note.

On or about 30 January 2013, in Case Number 13 CVS 69, plaintiff sued Stephen for a deficiency judgment on the 2002 promissory note. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note and that it had foreclosed on the Highlands property. On 3 May 2013, Stephen answered and counterclaimed for negligence, lost opportunity, and negligent non-disclosure. On 17 July 2013, plaintiff voluntarily dismissed without prejudice its action against Stephen.

On 17 July 2013, in Case Number 13 CVS 456, plaintiff sued Stephen, Martha, and Patterson for a deficiency judgment on both the 2002 and 2007 promissory notes. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note, that Stephen, Martha, and Patterson had defaulted on the 2007 promissory note, and that it had foreclosed on the Highlands property.

On 16 August 2013, Stephen moved to dismiss plaintiff's second suit, because plaintiff had improperly dismissed Stephen's counterclaims in the first suit. On or about 23 October 2013, in the first suit, plaintiff moved that the trial court vacate its voluntary dismissal and reinstate its complaint pursuant to North Carolina Rule of Civil Procedure 60(b). *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2013). On 28 October

2013, in the first suit, the trial court vacated plaintiff's voluntary dismissal and reinstated plaintiff's claim against Stephen on the 2002 promissory note. On 28 October 2013, in the second suit, the trial court granted in part Stephen's motion to dismiss and dismissed plaintiff's claim against Stephen on the 2002 promissory note, because that claim was being litigated in the first suit. But the trial court denied Stephen's motion in part and did not dismiss plaintiff's claim against Stephen, Martha, and Patterson on the 2007 promissory note. On 28 October 2013, plaintiff voluntarily dismissed without prejudice its action against Patterson.

On or about 11 December 2013, in both suits, plaintiff moved for summary judgment or judgment on the pleadings. Plaintiff proffered an affidavit in which one of its employees averred that plaintiff's complaint was true and correct. In response, Stephen proffered an affidavit in which he averred that, in late 2010 or early 2011, Caroline Huscusson, plaintiff's employee, told him to "stop making any payments on the loans" and that plaintiff "would take care of it." Stephen averred that he told Huscusson that he would give plaintiff the Highlands property "in lieu of any foreclosure or any other judgment or other losses." Stephen further averred that he "[e]ventually" gave plaintiff the keys to the rental house and heard nothing from plaintiff until one year later when he received plaintiff's notice of foreclosure. Stephen also averred that he did not lease the rental house during that year because Huscusson had said that plaintiff would be "taking care of it."

On 10 February 2014, the trial court held a hearing on plaintiff's motion. On 12 March 2014, the trial court granted summary judgment to plaintiff in both suits. In the first suit, the trial court awarded plaintiff $45,864.29 plus interest against Stephen, and in the second suit, the trial court awarded $106,605.51 plus interest against Stephen and Martha. On 20 March 2014, Stephen gave timely notice of appeal in the first suit, and Stephen and Martha gave timely notice of appeal in the second suit.

II. Standard of Review

We review a trial court's summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. rev. denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

> (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.
>
> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at ___, 736 S.E.2d at 517 (citations and quotation marks omitted). We review a trial court's interpretation of a contract *de novo*, since it is a question of law. *Harris*

v. Ray Johnson Constr. Co., 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

III. Accord and Satisfaction

Defendants contend that the trial court erred in granting summary judgment, because Stephen's affidavit constitutes some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes.[1] Defendants assert that Stephen and plaintiff orally agreed to an accord in which Stephen would give plaintiff the Highlands property in satisfaction of the outstanding debt.

> An accord and satisfaction is compounded of the two elements enumerated in the term. An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a satisfaction is the execution, or performance, of such an agreement.

In re Foreclosure of Five Oaks Recreational Ass'n, Inc., 219 N.C. App. 320, 326, 724 S.E.2d 98, 102 (2012) (quotation marks omitted).

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[1] Defendants also characterize the alleged oral modification as a compromise and settlement. The doctrines of accord and satisfaction and compromise and settlement carry the following two distinctions: (1) performance is necessary to complete an accord and satisfaction but is not necessary to complete a compromise and settlement; and (2) an accord and satisfaction may be based upon an undisputed or liquidated claim, whereas a compromise and settlement must be based upon a disputed claim. *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958). Here, defendants contend that, under the oral modification, Stephen performed by giving the Highlands property to the bank, and the parties do not dispute the amounts that defendants originally owed under the 2002 and 2007 promissory notes. Accordingly, the alleged agreement would constitute an accord and satisfaction, rather than a compromise and settlement. *See id.*, 101 S.E.2d at 676.

Plaintiff responds that the statute of frauds renders the alleged oral modification unenforceable under N.C. Gen. Stat. § 22-5 (2009). N.C. Gen. Stat. § 22-5 provides:

> No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars ($50,000) shall be binding unless the commitment is in writing and signed by the party to be bound. As used in this section, the term "commercial loan commitment" means an offer, agreement, commitment, or contract to extend credit primarily for business or commercial purposes and does not include charge or credit card accounts, personal lines of credit, overdrafts, or any other consumer account. Offers, agreements, commitments, or contracts to extend credit primarily for aquaculture, agricultural, or farming purposes are specifically exempted from the provisions of this section.

N.C. Gen. Stat. § 22-5. "When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are ineffectual." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984).

Both the 2002 and 2007 promissory notes qualify as a "commercial loan commitment" exceeding $50,000 under N.C. Gen. Stat. § 22-5. Under the 2002 promissory note, plaintiff lent $260,000 so that Stephen and his real estate business partner could purchase the undeveloped land and the rental house as an investment. *See* N.C. Gen. Stat. § 22-5. Under the 2007 promissory note, plaintiff lent $150,000 to Stephen and his real estate business partner. *See* i*d.* Defendants assert that, in late 2010 or early 2011, Stephen and plaintiff orally agreed to a modification of the 2002 and 2007 promissory notes. But because both promissory notes fall within the

statute of frauds, we hold that this alleged subsequent oral modification also falls within the statute of frauds and is thus unenforceable. *See Clifford*, 312 N.C. at 465, 323 S.E.2d at 26. Accordingly, we hold that defendant's affidavit does not constitute evidence of accord and satisfaction.[2]

IV. Equitable Estoppel

Defendants next contend that Stephen's affidavit raises the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes.

> The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. In appropriate cases, equitable estoppel may override the statute of frauds so as to enforce an otherwise unenforceable agreement. When faced with oral agreements involving real property interests, our courts have limited the application of the equitable estoppel doctrine to situations where the party seeking to invoke the statute of frauds has engaged in "plain, clear and deliberate fraud." The rationale for applying the equitable estoppel doctrine is quite obvious: A party who engages in fraud should not be permitted to shield itself from liability through the use of a statute which our legislature specifically designed to prevent fraud.

[2] Defendants also assert that plaintiff breached the duty of good faith and fair dealing implied in every contract. *See Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005). But in light of our holding that the alleged oral modification is not a valid contract, we hold that defendants have proffered no evidence that plaintiff breached the implied duty of good faith and fair dealing. Defendants also mention the legal theory of negligent non-disclosure but do not provide any supporting argument. Accordingly, we do not address this issue. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

B & F Slosman v. Sonopress, Inc., 148 N.C. App. 81, 85-86, 557 S.E.2d 176, 179-80 (2001) (citations and quotation marks omitted), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). The essential elements of actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with an intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007).

Stephen did not aver in his affidavit that plaintiff intended to deceive him and thus defendants have not proffered any evidence of actual fraud. *See id.*, 649 S.E.2d at 387. Because defendants have proffered no evidence of fraud and the alleged oral modification involves a real property interest, we hold that defendants' defense of equitable estoppel cannot override the statute of frauds. *See Slosman*, 148 N.C. App. at 85-86, 557 S.E.2d at 180. Accordingly, we hold that Stephen's affidavit does not constitute evidence supporting the application of equitable estoppel.

V. Right to Offset

Defendants further contend that Stephen's affidavit constitutes some evidence that they are entitled to an offset of the judgment amount. Defendants assert that plaintiff owes them lost rent from the date Stephen gave plaintiff the keys to the rental house to the date of foreclosure, because, as a mortgagee-in-possession, plaintiff had a duty to account for rent. Here, plaintiff secured both loans by executing deeds of trust on the Highlands property.

> North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. Thus, in North Carolina, the trustee holds legal title to the land.

Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 509, 725 S.E.2d 667, 671 (2012).

> A mortgagee after default is entitled to possession of the mortgaged premises, and, to secure possession, may maintain an action against the mortgagor. But [a] mortgagee's right to possession is only for the better security of the debt owing to him. When he takes possession he becomes liable to keep such premises in usual repair and to account for the rents and profits received, in a settlement of the mortgage debts. The rents with which a mortgagee or trustee in possession is chargeable are applicable as credits on the debt secured by the mortgage. A mortgagee has no right to possession except to assure payment of the debt or performance of other conditions of the mortgage.

Gregg v. Williamson, 246 N.C. 356, 359, 98 S.E.2d 481, 484 (1957) (citations and quotation marks omitted). A mortgagee-in-possession must pay the "highest fair rent" and becomes responsible for "all such acts or omissions as would . . . constitute claims on an ordinary tenant, because by entry and possession he makes himself 'tenant of the land[.]'" *Green v. Rodman*, 150 N.C. 145, 147, 63 S.E. 732, 734 (1909) (quotation marks omitted).

To qualify as a mortgagee-in-possession, a mortgagee must exercise "actual possession of the physical property to the exclusion of [the mortgagor]." *24th & Dodge v. Acceptance Ins. Co.*, 690 N.W.2d 769, 774 (Neb. 2005) (citing *In re Olick*, 221 B.R. 146, 156-57 (Bankr. E.D. Pa. 1998), *U.S. Fid. & Guar. v. Old Orchard Plaza*, 672 N.E.2d 876, 882 (Ill. App. Ct. 1996), and *Prince v. Brown*, 856 P.2d 589 (Okla. Civ. App. 1993)). In other words, a mortgagee must exercise more than mere constructive possession to become a mortgagee-in-possession. *Id.* A person has constructive possession when he "has the intent and capability to maintain control and dominion over [the property]" despite not having actual possession. *State v. Lakey*, 183 N.C. App. 652, 656, 645 S.E.2d 159, 161 (2007) (discussing constructive possession in a criminal law context).

In his affidavit, Stephen avers that he told Huscusson that he would give plaintiff the Highlands property and that he "[e]ventually" gave plaintiff the keys to the rental house. Although defendants arguably have proffered some evidence that plaintiff had constructive possession of the rental house upon delivery of the keys, defendants proffer no evidence that plaintiff exercised actual possession of the rental house or that they were excluded from the rental house. *See 24th & Dodge*, 690 N.W.2d at 774. Accordingly, we hold that plaintiff was not a mortgagee-in-possession and thus need not account for any lost rental income. *See id.* (holding that a mortgagee who acts upon an assignment of rents without taking actual possession of the mortgaged property had no duty to collect rents); *Peugh v. Davis*, 113 U.S. 542,

544, 28 L. Ed. 1127, 1128 (1885) (holding that a mortgagee was not liable for rent when the mortgagee's possession of the mortgaged property was merely constructive and the property was vacant and worthless).

Defendants' reliance on *Mills v. Building & Loan Assn.* is misplaced. *See* 216 N.C. 668, 671, 6 S.E.2d 549, 551 (1940). There, a mortgagor sued a mortgagee for rents and profits received *after* the mortgagee had foreclosed on the mortgaged property, had purchased the property at the foreclosure sale, and had begun possession. *Id.* at 666, 6 S.E.2d at 550. The North Carolina Supreme Court held that the foreclosure was wrongful and reversed the trial court's decision to dismiss the mortgagor's action. *Id.* at 671, 6 S.E.2d at 553. In contrast, here, defendants seek lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Accordingly, we hold that defendants have proffered no evidence that they are entitled to an offset of the judgment amount.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's orders granting summary judgment to plaintiff.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.