IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1253

Filed: 5 July 2016

Mecklenburg County, No. 14 CVS 15968

MATTHEW NEREIM, Plaintiff,

v.

RYAN CUMMINS; CITY CHEVROLET AUTOMOTIVE COMPANY; HENDRICK LUXURY COLLISION CENTER, LLC; and NATIONAL GENERAL INSURANCE COMPANY; and each of them, Defendants.

Appeal by Plaintiff from order entered 9 September 2015 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 31 March 2016.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for Plaintiff-Appellant.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for Defendants-Appellees.

McGEE, Chief Judge.

I. *Factual Background*

A 2006 BMW automobile ("the BMW") owned by Matthew Nereim ("Plaintiff") was damaged in a collision on 4 April 2013. Plaintiff's wife ("Ms. Nereim") was operating the BMW when it was rear-ended by a vehicle driven by Ryan Cummins ("Cummins"). The BMW was taken to City Chevrolet Automotive Company ("City")

on 5 April 2013 and then, according to Plaintiff, transferred to Hendrick Luxury Collision Center, LLC ("Hendrick") (with "City," "Defendants") for repairs.[1]

Because this appeal involves the grant of Defendants' motion for summary judgment, we view the evidence in the light most favorable to Plaintiff. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party."). According to Plaintiff's evidence, Plaintiff was notified by City, at some point between 30 April 2013 and 25 May 2013, that the repairs to the BMW were complete, and Plaintiff picked up the BMW. When Plaintiff picked up the BMW, he noticed its trunk did not close the same as it had before the collision. An employee from City told Plaintiff the trunk closing issue was likely a result of over-tightening of the hinges, and that it would self-resolve with time.

When Ms. Nereim, the primary driver of the BMW, resumed use of it, she noticed additional problems with the BMW, including its being out of alignment, the rear passenger door being difficult to close, and the rear passenger door not latching properly. Ms. Nereim also noticed exposed metal on the bumper where plastic inserts should have been, and she could not use the radio and charge her phone at the same time. Ms. Nereim returned the BMW to City for further repairs a few days after it

[1] Defendants deny that Hendrick performed any repairs on the BMW. Because resolution of this factual dispute is not necessary to the result in this appeal, we do not make any holding on that issue.

was initially picked up. At some point between 10 June 2013 and 23 July 2013, City notified Ms. Nereim that additional repairs had been made and the BMW was ready to be picked up. When Ms. Nereim picked up the BMW, she observed that "the little things" had not been repaired, including continued problems with the trunk. Additionally, problems continued with the rear passenger door staying closed, which resulted on one occasion in the door opening while Ms. Nereim was driving the BMW on the interstate.

Ms. Nereim brought the BMW to Collision Safety Consultants ("CSC") on or about 31 January 2014, due to concerns about the repair work Defendants had done, and to appraise the diminished value of the BMW as a result of the 4 April 2013 collision. CSC had Pack Brothers Collision Center, Inc. ("Pack Brothers") inspect the BMW – the inspection was performed by Pack Brothers' shop manager, Brian Allen ("Allen"). Allen first performed a visual, exterior inspection of the BMW, during which he immediately noticed signs that the BMW was not properly repaired, including inconsistent gap sizes around the doors, trunk, and other areas that indicated possible unrepaired unibody damage. According to Allen, any experienced mechanic who visually inspected the BMW would have immediately seen that the repairs were not done properly. Allen continued the inspection by disassembling parts of the BMW, and he noticed additional problems. His findings included rust in multiple areas from failure to use corrosion protection and weld primer during

repairs; pen marks, used to indicate damage, that had not been cleaned off, indicating that the damage had gone unrepaired; visible "kinks and buckles;" and one area of buckling where someone tried to grind down a buckle and had ground through it when the buckle should have been repaired or replaced. In Allen's opinion, no experienced automotive technician could have performed the repairs on the BMW without knowing the repairs were faulty and incomplete. He also believed the BMW was unsafe to drive.

The BMW was towed to Hendrick on 8 April 2014 where it was re-inspected. City offered to repair the BMW under a repair warranty. However, Plaintiff refused the offer because City had twice attempted repairs and Plaintiff believed City had purposely deceived him when City had informed him the BMW was fully repaired. The BMW was towed back to Pack Brothers where it has remained since.

Plaintiff filed his complaint in this matter on 29 August 2014. Relevant to this appeal, Plaintiff asserted claims of fraud, tortious breach of contract, negligence, unfair and deceptive trade practices, and civil conspiracy against City and Hendrick. Defendants also filed claims against Cummins and his automobile insurance carrier, National General Insurance Company ("National"). The primary allegation in Plaintiff's complaint was that City and Hendrick had conspired with National to underestimate the cost of repairs, and that they had "intended these misrepresentations and omissions to deceive Plaintiff as part of Defendants' [and

National's] pattern and practice of avoiding totaling out vehicles." Stated in other terms, Plaintiff claimed that, in order to retain their status as "'approved' repair shop[s] under contract with [ ] National[,]" Defendants worked to save National money by keeping the estimated costs of repair below the threshold that would require a determination that the [BMW] was "totaled," or a complete loss.

Defendants moved for summary judgment on the claims against them, and the court granted Defendants' motion on 9 September 2015. Plaintiff appeals, arguing the trial court erred in granting summary judgment in favor of Defendants for the claims of fraud, tortious breach of contract, negligence, and unfair and deceptive trade practices.[2]

II. *Analysis*

"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. at 573, 669 S.E.2d at 576 (citations and quotation marks omitted). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

[2] Plaintiff's claims against National and Cummins were resolved prior to the hearing on Defendants' motion for summary judgment.

A. *Fraud*

In Plaintiff's first argument, he contends the trial court erred in granting summary judgment in favor of Defendants on the claim of fraud. We disagree.

Specifically, Plaintiff argues that his forecast of evidence was sufficient to support a claim of fraud based upon Defendants' alleged intentional concealment of shoddy or incomplete repairs, and Defendants' misrepresentations that the repairs were complete and had been adequately performed. Defendants argue that this specific claim of fraud was not stated with sufficient particularity in Plaintiff's complaint. "In all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2015). Our Supreme Court has stated:

> [T]his Court [has] concluded that "Rule 9(b) codifies the requirement previously existing in our State practice that *the facts relied upon to establish fraud*, duress or mistake *must be alleged*."
>
> Recognizing and reaffirming our rule that allegations of fraud must be pleaded with greater particularity, we also are aware that Rule 9(b) must be reconciled with our Rule 8 which requires a short and concise statement of claims.

Terry v. Terry, 302 N.C. 77, 84, 273 S.E.2d 674, 678 (1981) (citations omitted) (emphasis added). "[I]n pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the

fraudulent acts or representations." *Id.* at 85, 273 S.E.2d at 678. In order to successfully plead actual fraud, Plaintiff needed to have included in his complaint "a specific allegation both of the fraudulent intent and of the acts constituting the fraud." *Development Co. v. Bearden*, 227 N.C. 124, 128, 41 S.E.2d 85, 88 (1947) (citation omitted).

In Plaintiff's complaint in this case, it is clear he alleged fraud based on allegations that Defendants, along with National, intentionally underestimated the costs to repair the BMW to avoid designating it a total loss. However, on appeal, Plaintiff alleges fraud based on Defendants' alleged concealment of improper and omitted repairs. The following allegations relevant to the claim of fraud are contained in Plaintiff's complaint:

> 20. Defendant Hendrick, through [City], assured Plaintiff that [the BMW] was not totaled, and had been successfully repaired.
>
> 22. When Plaintiff picked up [the B.M.W.], he noted fit and quality issues with the repairs, but was assured that the [B.M.W.] was safe and fully repaired.
>
> 24. On January 31, 2014, CSC provided an estimate of the cost to complete repairs left incomplete by [City], to correct shoddy work by defendant [City], and to repair damage resulting from the accident that was not addressed in the estimates provided by [City] to [National] (including important safety items).
>
> 30. On March 6, 2014, in response to correspondence from [Plaintiff] through counsel, [National] acknowledged issues with the quality of the work performed to-date, but

denied the existence of safety issues, and agreed to make corrections, characterizing these corrections as "warranty" work. [National] disclaimed obligation for the costs of identifying [City's] deficiencies, storage, or costs to rent a replacement vehicle (loss of use). [City's] estimate of repairs necessary to complete the repair of [the B.M.W.] was $1,943.32.

. . . .

SECOND CAUSE OF ACTION:
FRAUD

41. The allegations of paragraphs 1-40 . . . are incorporated herein by reference and reasserted as if fully set forth herein.

42. Defendants National [ ], Hendrick, and City [ ] made material misrepresentations and omissions of material fact, including, but not limited to, the following:

(a) That [the B.M.W.] was not totaled and could be repaired and restored to precollision safety at an amount that justified repair rather than replacement;

(b) That [the B.M.W.] was not totaled and could be repaired and restored to precollision safety without triggering the 75% pre-collision cost bar that would require totaling out the [B.M.W.];

(c) Intentionally tried to hide the additional costs of repairing the [B.M.W.] once it was discovered that the [B.M.W.] was [im]properly repaired in order to avoid totaling the car by calling it "warranty work"; and

(d) In other respects to be revealed in discovery.

43. Upon information and belief, Defendants intended these misrepresentations and omissions to deceive Plaintiff

> as part of Defendants' pattern and practice of avoiding totaling out vehicles.

Plaintiff's complaint sufficiently alleged that Defendants intentionally misrepresented the amount it would cost to repair the BMW in order to perpetuate a conspiracy with National to avoid having to declare the BMW "totaled," and thus require National to pay Plaintiff the full value of the totaled vehicle. Plaintiff did not allege the facts necessary to demonstrate fraud based upon any attempt by Defendants to hide incomplete or faulty repairs, and then misrepresent the nature of the repairs, or omit disclosure of material facts. Though Plaintiff was aware at the time he filed his complaint that Allen believed Defendants had not properly repaired the BMW, and that some of those improper repairs were hidden within the structure of the BMW and, thus, not ascertainable without removing parts of the BMW, Plaintiff did not allege these facts in his complaint. Further, there are no allegations related to what Defendants received as a result of any fraudulent acts or representations related to concealment of improper repairs. *Terry*, 302 N.C. at 85, 273 S.E.2d at 678. Plaintiff drafted his complaint for fraud under a theory of underestimation of the cost to repair the BMW – he did not allege facts with sufficient particularity to also sustain a claim for fraud based on intentionally misleading Plaintiff concerning shoddy or incomplete repairs. Therefore, Defendants' motion for summary judgment was properly granted as to the fraud claim that Plaintiff now argues on appeal.

B. *Tortious Breach of Contract*

In Plaintiff's second argument, he contends the trial court erred in granting summary judgment in favor of Defendants on the claim of tortious breach of contract. We disagree.

In order to sustain a claim for tortious breach of contract, there must be – in addition to a breach of contract – an identifiable tort. "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation[.]" *Taha v. Thompson*, 120 N.C. App. 697, 705, 463 S.E.2d 553, 558 (1995) (citations and quotation marks omitted). "Aggravation includes fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, and willfulness." *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201, 528 S.E.2d 372, 377 (2000) (quotation and citations omitted).

Plaintiff contends that he has pled fraud sufficiently to serve as an aggravating factor in support of the claim of tortious breach of contract. Plaintiff again argues that Defendants' alleged fraudulent acts involved performing substandard repairs, or failing to perform necessary repairs, and then misrepresenting that work to Plaintiff. Since alleged facts necessary to sustain a claim of fraud on this basis were not pled, this claim of fraud cannot be the basis of aggravated conduct as required by *Cash*. Plaintiff also argues that aggravation could be shown by Defendants' "high degree of

negligence" in attempting to repair the BMW. However, Plaintiff's complaint did not allege negligence as a basis for the claim of tortious breach of contract. Further, we find no evidence in the record of acts sufficient to warrant a finding of the degree of negligence necessary to establish a claim for tortious breach of contract. *See Cash*, 137 N.C. App. at 201, 528 S.E.2d at 377. Therefore, the trial court did not err in granting Defendants' motion for summary judgment with regard to the claim for tortious breach of contract.

C. *Unfair and Deceptive Trade Practices*

We next address Plaintiff's fourth argument, in which he contends the trial court erred in granting summary judgment in favor of Defendants on the claim of unfair and deceptive trade practices. We disagree.

Plaintiff aruges: "For the reasons stated above, Defendants' Motion for Summary Judgment on fraud should be denied. As such, Plaintiff's ability to show fraud would meet the first requirement of unfair and deceptive trade practices." We have already rejected Plaintiff's argument concerning fraud above. Therefore, summary judgment in favor of Defendants as to the claim for unfair and deceptive trade practices was proper. In addition, "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." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citations omitted). "'[A] plaintiff must show substantial

aggravating circumstances attending the breach to recover under the Act[.]'" *Id.* As discussed above, the evidence supports a breach of contract, but not the requisite aggravating factors.

D. *Negligence of a Bailee*

Finally, Plaintiff argues the trial court erred in granting summary judgment in favor of Defendants for Plaintiff's claim of negligence. We disagree.

Plaintiff's claim for negligence was based on allegations that Defendants breached their duties to "reasonably investigate and estimate the repairs reasonably necessary to return Plaintiff's vehicle to its pre-collision condition[,]" and further breached their duties to properly repair the BMW. However, in his memorandum in opposition to Defendant's motion for summary judgment, Plaintiff argued that Defendants breached a duty based upon a bailor/bailee relationship — specifically, allegations that City or Hendrick accepted property as a bailee and returned it in a damaged condition. Plaintiff cites *Terrell v. H & N Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971), which states:

> A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition.

Id. at 312, 181 S.E.2d at 126 (quotation marks and citations omitted). "'Returned in a damaged condition,' as that phrase is used in the preceding quotation, means, of course, that the property was returned with damage which occurred while the property was in the bailee's possession." *State Auto. Mut. Ins. Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 585-86, 206 S.E.2d 210, 212 (1974). A bailee has no inherent duty to remedy any previously existing damage to property that is placed in its care. In cases where the property is delivered to the bailee in a damaged condition, the better statement of the bailee's duty is "to return [the property] in as good condition as when [the bailee] received it." *Olan Mills, Inc. of Tenn. v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 521, 160 S.E.2d 735, 738 (1968) (The plaintiff/bailor delivered small aircraft to defendant for repairs, because the defendant, the bailee, failed to properly secure the aircraft, the aircraft was severely damaged when storm winds caused it to smash into a tree. Because the defendant/bailee was responsible for additional damage that occurred to the aircraft while in its care, verdict finding the defendant/bailee negligent was proper.).

In this case there is no dispute that: Plaintiff delivered the BMW to Defendants; Defendants accepted the BMW and had possession and control of it; the BMW was delivered to Defendants in a damaged condition; and that Defendants failed to fully repair the BMW. However, there is no evidence that the BMW was in any worse condition when it left Defendants' control than when Plaintiff delivered it

to them. Therefore, Plaintiff has failed to establish a claim for negligence based on Defendants, as bailees, returning the BMW in a damaged condition. Summary judgment was properly granted in Defendants' favor.

III. *Conclusion*

The trial court properly granted summary judgment for Defendants for Plaintiff's claims of fraud, tortious breach of contract, unfair and deceptive trade practices, and negligence. We affirm.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).