IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-377

Filed: 5 April 2016

Onslow County, No. 12 CVS 4956

GRAPHIC ARTS MUTUAL INSURANCE COMPANY and DAVID ELTON REGISTER, Plaintiffs,

v.

NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONER'S LIABILITY AND PROPERTY POOL, MARILYN SINGH, INDIVIDUALLY AND SABRINA MARIE SINGH, A MINOR, BY AND THROUGH HER GAL MARILYN SINGH, SANDERS GARAGE OF JACKSONVILLE, INC., and ONSLOW UNITED TRANSIT SYSTEM, INC., Defendants.

Appeal by plaintiff from orders entered 7 March 2014 and 15 October 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 22 October 2015.

Clawson and Staubes, PLLC, by Andrew J. Santaniello, for plaintiff-appellant Graphic Arts Mutual Insurance Company.

Scudder Law PLLC, by Sharon Scudder, for defendant-appellees North Carolina Association of County Commissioner's Liability and Property Pool and Onslow United Transit System, Inc.

McCULLOUGH, Judge.

Graphic Arts Mutual Insurance Company appeals from a summary judgment order entered in favor of the North Carolina Association of County Commissioner's Liability and Property Pool and Onslow United Transit System, Inc. and from an

order entering damages for a breach of contract. For the reasons stated herein, we affirm the orders of the trial court.

I. Background

On 27 December 2012, plaintiffs Graphic Arts Mutual Insurance Company ("Graphic Arts") and David Elton Register ("Register") filed a "Complaint for Declaratory Judgment" against North Carolina Association of County Commissioner's Liability and Property Pool ("the Pool"), Marilyn Singh, individually and Sabrina Marie Singh, a minor, by and through her GAL Marilyn Singh (the "Singhs"), Sanders Garage of Jacksonville, Inc. ("Sanders Garage") and Onslow United Transit System, Inc. ("OUTS").

Plaintiffs alleged as follows: Graphic Arts issued a commercial auto coverage insurance policy to Sanders Garage during the period of 1 January 2009 through 1 January 2010. On or about 7 July 2009, OUTS was the owner of a Ford van and OUTS took the Ford van to Sanders Garage for service. The Pool issued an insurance policy to OUTS, which included Business Auto Coverage. On 7 July 2009, Register, an employee of Sanders Garage, was test driving the Ford van owned by OUTS, as part of the auto repair service Sanders Garage was performing. Register was operating the Ford van southbound on US Highway 17, towards its intersection with an exit ramp from US Highway 24. The Singhs, who were in another vehicle operated by Marilyn Singh, approached the same intersection. A collision between the vehicles

operated by Register and Marilyn Singh occurred. As a result of the collision, the Singhs claimed to have suffered personal injuries and instituted a personal injury action in Onslow County Superior Court against Register, OUTS, and Sanders Garage. The Singhs alleged that Register was negligent while an employee of either Sanders Garage or OUTS and that one or both were responsible for his actions under the *respondeat superior* doctrine. A demand was made upon Graphic Arts and the Pool to provide indemnification and a defense in the underlying personal injury action to Register, OUTS, and/or Sanders Garage. Graphic Arts voluntarily paid the Singhs $3,723.22 for property damage.

Plaintiffs sought a determination of "whether the Pool policy provides coverage and a duty to defend Register, Sanders Garage, and/or OUTS from the personal injury action filed by the Singhs." If the Pool policy does provide coverage and a duty to defend, plaintiffs further sought a determination as to the amount of liability coverage owed under the Pool policy. Plaintiffs also requested that if the court found that both policies of Graphic Arts and the Pool provide indemnification and a duty to defend Register, Sanders Garage, and OUTS in the Singhs' personal injury suit, that the trial court make a determination as to the "rights, duties, and responsibilities of each carrier, specifically as to which policy provides the primary duty to defend and provide indemnification." Plaintiffs alleged that they were entitled to a judgment declaring that the Pool policy provided the primary duty to indemnify and provide a

defense as to Register, Sanders Garage, and/or OUTS for the underlying personal injury action brought by the Singhs. Graphic Arts alleged that they had paid monies and incurred expenses, costs, and fees due to the Pool's wrongful refusal to perform its duty as primary liability carrier and that, as such, Graphic Arts was entitled to a judgment against Pool reimbursing it for those monies paid, fees, costs, and attorneys' fees.

On 8 March 2013, the Pool and OUTS (hereinafter referred to as "defendants") filed an "Answer and Counterclaim." Defendants advanced counterclaims for declaratory judgment and breach of contract.

On 2 January 2014, plaintiffs filed a motion for summary judgment on all claims and counterclaims pending in the case.

On 28 December 2013, defendants filed a motion for summary judgment, seeking entry of summary judgment in their favor for the breach of contract counterclaim against Graphic Arts and seeking summary judgment in favor of defendants on the primary claim for declaratory judgment regarding coverage. In their motion, defendants alleged the following as to the breach of contract counterclaim: Graphic Arts administers claims through Utica National Insurance ("Utica"), who acts on behalf of Graphic Arts and the insured, Sanders Garage. Scott Rose, an employee and agent of Utica, was acting on behalf of Utica, Graphic Arts, and Sanders Garage during April and May 2012. Pool utilizes Sedgwick Claims

Management Services, Inc. ("Sedgwick") as a third-party administrator. Laura Heckman, a claims examiner employed by Sedgwick, was acting on behalf of defendants at all relevant times. On 8 May 2012, Mr. Rose sent an email to Ms. Heckman stating that he had reviewed the policies and concluded that the Pool and Utica "share defense costs 6% and 94%, respectively" and to "apply the same ratios to that portion of any settlement and/or award assessed against these two defendants." On 17 May 2012, Ms. Heckman accepted this offer on behalf of the Pool and this agreement constituted an enforceable contract. On 16 July 2012, Utica sent a letter to Sedgwick, revoking and breaching the contract between the adjusters.

On 7 March 2014, the trial court entered an "Order Granting Summary Judgment" as to breach of contract in favor of defendants. The trial court made the following findings of fact:

> 1. After considering applicable case law, the deposition transcripts, submissions and arguments of counsel, the Court finds as a matter of law that a contract was formed between the parties, [Graphic Arts]/Utica and [the Pool], through the actions of agents acting on their behalf and with authority to so act; and
>
> 2. That on or about [] May 8, 2012, Scott Rose, on behalf of Plaintiff Graphic Arts/Utica, sent correspondence to Laura Heckman of the Defendant Pool/Sedgwick and made an offer that Plaintiff would like to resolve the coverage issue. Scott Rose explained that he had examined the policies and offered to resolve the matter as follows: "Accordingly, it seems most equitable, that the Pool and Utica share defense costs 6% and 94%, respectively, and that we agree to apply the same ratios

to that portion of any settlement and/or award assessed against those two defendants;" and

3. That on May 17, 2012, Ms. Heckman accepted this offer by correspondence on behalf of the Defendants without varying the terms of the offer; and

4. That after considering applicable case law, the deposition transcripts, submissions and arguments of counsel, the Court finds that the contract formed was supported by sufficient consideration and had sufficient certainty, and that no viable defenses to contract could be proven by Plaintiffs as a matter of law; and

5. After considering applicable case law, the deposition transcripts, submissions and arguments of counsel, the Court finds that plaintiff Graphic Arts Mutual Insurance Company/Utica breached the contract in sending the letter dated July 16, 2012, refusing to abide by the 94%/6% split, and by filing this declaratory judgment action; and

6. Given that the underlying personal injury case is continuing and is also before this Court, filed as 12 CVS 1252, the parties are to abide by an enforcement of the contract and the 94%/6% split of all reasonable defense costs expended by either insurer in defending the underlying personal injury case, and to split any judgment or settlement in favor of Marilyn or Sabrina Singh in the same 94%/6% ratio up to their policy limits; and

7. That the damages to the NCACC Pool resulting from this breach of contract by Utica will be determined in a bench trial or hearing as ordered by this Court; and

8. In granting this motion, the Court does not reach and need not reach the declaratory judgment action because this Order resolves the coverage dispute.

> 9. Pursuant to N.C. Gen. Stat. § 1-277 this order does not constitute a final judgment necessitating an immediate appeal[.]
>
> IT IS, THEREFORE, ORDERED that [the Pool] and [OUTS]'s Motion for Summary Judgment is granted, and plaintiff's claims against defendants are dismissed with prejudice.

On 15 October 2014, the trial court entered an "Order Entering Damages for Breach of Contract" and entered the following findings of fact, in pertinent part:

> 1. The terms of the contract are that [Graphic Arts/Utica] and [the Pool] share defense costs 94% and 6%, respectively, and that they share in the same ratio the payment of any settlement and/or award assessed against the two defendants. [Graphic Arts/Utica] hired New Bern Attorney Scott Hart to defend Mr. Register and Sanders Garage. The personal injury and property damage claims of [the Singhs] have been settled. Graphic Arts/Utica has paid the settlement amounts, and the [Pool] has paid to Graphic Arts its six percent share of those amounts. Graphic Arts/Utica has paid in full the legal fees billed by Attorney Scott Hart. The [Pool] has not paid its 6% pro rata share of his bill and is responsible for $1,429.29.
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> 2. The amended complaint, captioned, *Marilyn Singh and Sabrina Marie Singh, a minor, by and through her Guardian Ad Litem, Marilyn Singh v. David Elton Register and Onslow United Transit System, Inc., and Sanders Garage of Jacksonville, Inc.*, sought damages for personal injuries and was filed on April 27, 2012 [Onslow County file number 12 CvS 1252]. On May 8, 2012 Scott Rose on behalf of [Graphic Arts] sent his proposal to resolve the coverage issue to Laura Heckman of [the Pool]. Heckman accepted the proposal on May 17, 2012.

3. On July 16, 2012 Rose wrote Heckman revoking the agreement reached between the parties as to coverage and defense costs. Henry W. Gorham of the law firm of Teague, Campbell, Dennis & Gorham had been hired to represent [the Pool] and its insured, [OUTS]. Service of the summons and complaint on [OUTS] was accepted by Gorham on May 18, 2012 and its answer was filed on June 15, 2012. Sanders Garage filed its answer on August 13, 2012. Discovery proceeded as the case moved to a trial. The case was reported settled during mediation on February 27, 2014. On May 19, 2014 the minor settlement was approved by the court. As a result of the breach, the defendants, instead of paying six percent of defense costs, had to continue to pay Gorham for his legal representation.

4. Gorham's legal fees since the date of breach on July 16, 2012 until the personal injury case was concluded and settled totaled $19,091.08.

5. On December 27, 2012 [Graphic Arts] filed the above captioned action for a declaration judgment as to the rights, obligations and liabilities of Graphic Arts and [the Pool] under the insurance policies issued to Register, Sanders Garage and [OUTS] which had been the subject of the previous agreement.

6. As a result of the filing of the declaratory judgment action, on February 9, 2013, attorney Sharon G. Scudder of Scudder Law, PLLC filed a notice of appearance on behalf of the defendants, [the Pool and OUTS]. On March 8, 2013 the defendants filed an answer and counterclaim also seeking a declaratory judgment.

7. On December 30, 2013 the defendants filed a motion for summary judgment. On January 2, 2014 the plaintiffs filed a similar motion for summary judgment. These motions came on to be heard before the undersigned on January 13, 2014. By order entered March 7, 2014,

summary judgment on the contract issue was granted in favor of the defendants. The coverage issue raised by the declaratory judgment action was not reached.

8. As a result of the breach and the necessity to defend the plaintiff's declaratory judgment action and prosecute the defendants' declaratory judgment action, the attorney fees paid by the defendant for attorney Sharon G. Scudder's representation between January 18, 2013 and July 30, 2014 totaled $35,178.00 for 213.2 hours of legal work billed at a rate of $165.00 per hour. Scudder has submitted to the court an itemized bill for the time spent working on this case. The plaintiff agreed that the hourly rate charged by attorney Scudder was reasonable. The court finds that the attorney fees paid by the defendants for representation in the declaratory judgment action to be reasonable. The defendant also paid their attorney $1,612.68 in out-of-pocket expenses and court costs which the court finds to be reasonable.

The trial court also made the following conclusions of law:

1. As a result of the breach of contract, the defendants are entitled to the pecuniary difference between its position upon breach of the contract and what it would have been, had the contract been performed. At the time the contract was entered into, attorney fees and costs were reasonably foreseeable by the plaintiff as a result of its breach.

2. The defendant is entitled to recover from the plaintiff attorney fees and expenses in the amount of $19,091.08 paid by the defendants to attorney Henry Gorham for his representation in [Singh's personal injury action].

3. The defendant is also entitled to recover attorney fees and expenses in the total amount of $36,000.68 paid to attorney Sharon Scudder for her representation and out-of-pocket expenses in this captioned case.

> 4. Plaintiffs are entitled to a set-off of $1,429.29 for the defendant's 6% share of the defense invoices submitted by attorney Scott Hart.
>
> It is therefore ordered that the defendant, [the Pool] recover from [Graphic Arts] the sum of $53,662.47 plus interest from the date of this judgment.

On 12 November 2014, Graphic Arts entered notice of appeal from the 7 March 2014 summary judgment order and the 15 October 2014 "Order Entering Damages for Breach of Contract."

II. Standard of Review

"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) (citation omitted). "[T]he record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 202, 468 S.E.2d 846, 849 (1996) (citation omitted). "However, the party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

III. Discussion

Graphic Arts presents four issues on appeal. Graphic Arts argues that the trial court erred (A) by finding a contract existed between Graphic Arts and Pool; (B) by finding that Graphic Arts breached a non-existent contract; (C) by denying Graphic Arts' motion for summary judgment; and (D) in the alternative, in calculating the amount of damages owed.

A. Contract Formation

Graphic Arts contends that the trial court erred by entering summary judgment in favor of defendants, finding that a contract was formed between Graphic Arts/Utica and the Pool. We disagree.

First, Graphic Arts argues that there were essential terms missing from the 8 May 2012 and 17 May 2012 e-mails exchanged between Mr. Rose and Ms. Heckman and that the e-mails were "merely a proposal to negotiate." Graphic Arts asserts that the following terms were essential and missing from the e-mails: how strategic decisions will be made; who will take the lead in decision-making and negotiations; and how the two carriers will resolve disputes. In addition, Graphic Arts argues that there was no mention of a shared defense of OUTS.

> [A] contract is an agreement, upon sufficient consideration, to do or not to do a particular thing. The contract may be express or implied, executed or executory, [and] results from the concurrence of minds of two or more persons . . . [I]ts legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree.

Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 522, 613 S.E.2d 274, 278 (2005) (citations and quotation marks omitted).

To form a valid contract, there must be an offer and an acceptance of that offer "in its exact terms." *Chaisson v. Simpson*, 195 N.C. App. 463, 475, 673 S.E.2d 149, 159 (2009). "As a general matter, a contract must be sufficiently definite in order that a court may enforce it." *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991).

> The law generally does not dictate the contract terms to which parties may agree but does require that in order to constitute a valid and enforceable contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite. . . . [A] contract will not be held unenforceable because of uncertainty if the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to a reasonable certainty.

Brawley v. Brawley, 87 N.C. App. 545, 549, 361 S.E.2d 759, 762 (1987) (internal citations omitted).

In the present case, Mr. Scott Rose, a litigation specialist for Graphic Arts' parent company, Utica, sent an e-mail to Ms. Laura Heckman on 8 May 2012. Ms. Heckman was a claims examiner for Sedgwick and worked solely on the claims of Pool. The 8 May 2012 e-mail stated as follows:

> I have reviewed the policies and conclude that, as to defendants Register and Sanders Garage (who was recently added per the attached Amended Complaint), the Pool's coverage is primary up to state minimum limits of $30,000 per person and $60,000 per accident. Utica's $1,000,000 per accident coverage is probably also primary. *Accordingly, it seems most equitable, that the Pool and Utica share defense costs 6% and 94%, respectively, and that we agree to apply the same ratios to that portion of any settlement and/or award assessed against those two defendants.*
>
> Utica intends to hire New Bern Attorney Scott Hart to defend Mr. Register and Sanders Garage. Utica will pay his bill in full (subject to the usual legal bill review process) and have the Pool reimburse us for its 6% share.
>
> Let me know if this is agreeable.

(emphasis added). On 17 May 2012, Ms. Heckman responded, "Sorry for the delay in response. We have had an opportunity to review the coverage and agree with your assessment below. We are still waiting on [OUTS] to receive service."

From the foregoing evidence, it is evident that Mr. Rose's 8 May 2012 e-mail constituted an offer to share defense costs as to Register and Sanders Garage, which was accepted in its exact terms by Ms. Heckman on 17 May 2012. Both parties agreed that Pool and Utica would share defense costs 6% and 94%, respectively, and that the same ratios would be applied to any portion of the settlement and/or award assessed against Register and Sanders Garage. Furthermore, Steven Sobolik, a claims manager with Utica and Mr. Rose's supervisor, conceded that there was an offer and acceptance by testifying to the following:

> Q. Do you dispute that [Mr.] Rose made the offer to [Ms. Heckman] and through her to Sedgewick and [the Pool] that this dispute should be handled by an agreed to split of [94] percent 6 percent?
>
> A. No.
>
> Q. Do you dispute that she accepted that?
>
> A. No.
>
> Q. So it's your position that you guys just decided you made an error and you wanted to renege?
>
> A. I decided that we made an error and the right thing to do was to correct the error.

There is no indication that these e-mails were merely proposals to negotiate, subject to definitive agreements to be executed subsequently. As such, the evidence clearly establishes that a contract was formed between the parties, Graphic Arts/Utica and the Pool, through the actions of agents acting on their behalf.

In reference to Graphic Arts' arguments on appeal that essential terms were missing from the e-mails, we hold that any uncertainty to terms and the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract. Mr. Sobolik testified that agreements between insurance companies to split coverage in a case "are made all of the time[.]" Ms. Heckman testified she and Mr. Scott had not specifically discussed a strategy or how to make decisions about settlement, mediation, etc. However, Ms. Heckman testified that based on her experience, there have been similar agreements

with other insurance companies and "where the adjustor for another insurer has voluntarily assumed more than 90 percent of the responsibility" it was "typical that they would drive the bus[.]" Ms. Heckman testified that she forwarded Mr. Rose's e-mail to defense counsel for the Pool and OUTS, stating that "we basically wanted them to take a back seat, based on the percentages of handling." She did not have "any indication otherwise from [Mr. Rose] that things were not moving forward in the case." The writing itself shows its completeness. Therefore, any uncertainty as to how strategic decisions would be made, who would take the lead, and how the parties would resolve disputes were able to be determined from the contract terms, in light of the surrounding circumstances.

Graphic Arts also argues that missing from the alleged contract was any discussion of the shared defense of OUTS. Graphic Arts contends that because Ms. Heckman believed OUTS would be defended under the alleged agreement and because Mr. Rose had no intention of defending OUTS, this amounted to a "failure of the meeting of the minds on an essential term." Graphic Arts' argument, however, rests on the assumption that an agreement as to the defense of OUTS is characterized as an essential term.

We disagree that a discussion of the defense of OUTS constituted an essential term to the binding contract that Graphic Arts/Utica would share the defense costs of Sanders Garage and Register with the Pool according to a 94%/6% split. The

contract was sufficiently definite so that a court could enforce it and the essential terms of this contract were definite within themselves or capable of being made definite.

Next, Graphic Arts argues that no contract was formed because there was no consideration for the alleged contract. Graphic Arts maintains that neither Mr. Rose nor Ms. Heckman were "agreeing to undertake a further obligation."

Generally,

> "consideration" in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of *some benefit or advantage to the promisor, or some loss or detriment to the promisee*. It has been held that there is consideration if the promisee, in return for the promise, *does anything legal which he is not bound to do*, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.

Penley v. Penley, 314 N.C. 1, 14, 332 S.E.2d 51, 59 (1985) (citations and quotation marks omitted) (emphasis in original). "Undoubtedly, a forbearance to exercise legal rights is a sufficient consideration for a promise made on account of it in the general law of contracts." *Myers v. Allsbrook*, 229 N.C. 786, 790, 51 S.E.2d 629, 631-32 (1949).

In the present case, Mr. Rose sent an e-mail to Ms. Heckman on 25 April 2012, prior to the formation of the contract, and stated that "[w]e can get each other's policies in discovery, in the underlying case or in a [declaratory judgment action]. I though [SIC] we could explore the issue informally first. I am prepared to provide a

copy of Utica's policy if you are." Mr. Rose also testified to the circumstances surrounding his offer to Ms. Heckman:

> Q. What process of analysis did you go through before you proposed that to [Ms. Heckman?]
>
> A. Well, I reviewed our policy, and I can't remember if I had gotten her policy or just an excerpt from it, but I read the excerpt or a portion of or all of her policy and compared the two, and I think I did a little bit of legal research and reviewed some case law and reviewed the claim file and, you know, the facts of the accident, and pondered, thought.
>
> . . . .
>
> Q. And then you made the determination to make this offer that you guys would split it 6/94?
>
> A. Yes.
>
> Q. Why would you make an offer to go ahead and settle this and to -- what would have been the strategic reason, the benefit to Utica of making this email proposal?
>
> A. Well, I was trying to be expedient.

It is clear that the consideration in the contract before us was the forbearance to exercise legal rights. Graphic Arts, through its representative Mr. Rose, contemplated the option of filing a declaratory judgment action in order to settle the coverage issue. However, through his offer to Ms. Heckman and acceptance by Ms. Heckman, both parties were able to avoid a potential dispute over coverage, thereby expediting the process and saving defense costs. As such, we reject Graphic Arts' argument that there was an absence of consideration for this contract.

Lastly, Graphic Arts asserts that no contract was formed because there was a mutual mistake as to an essential element of the alleged contract. Graphic Arts argues that both Mr. Rose and Ms. Heckman were under the "mistaken assumption that both carriers provided primary liability coverage under the circumstances."

"A mutual mistake of fact is a mistake common to both parties and by reason of it each has done what neither intended." *N.C. Monroe Constr. Co. v. State*, 155 N.C. App. 320, 330, 574 S.E.2d 482, 489 (2002) (citation and quotation marks omitted). "[I]t is well established that the existence of a mutual mistake as to a material fact comprising the essence of the agreement will provide grounds to rescind a contract." *Taylor v. Gore*, 161 N.C. App. 300, 304, 588 S.E.2d 51, 54-55 (2003) (citation and quotation marks omitted). "However, a party who assumes the risk of mistake regarding certain facts may not seek to rescind a contract merely because the facts were not as he had hoped." *Deans v. Layton*, 89 N.C. App. 358, 363, 366 S.E.2d 560, 564 (1988).

In the case *sub judice*, the trial court did not reach the issue of coverage advanced by the declaratory judgment action because it found that a contract was formed between Graphic Arts/Utica and the Pool. Although Graphic Arts argues that there was a mutual mistake in the contract, the Pool disagrees, thereby negating the contention that the alleged mistake is "mutual." Ms. Heckman, representing the Pool, testified as follows:

> Q. . . . [W]hen you responded to the email from [Mr. Rose] accepting his 94/6 percent proposal -- I'll just call it that in shorthand -- did you think he was interpreting the policies correctly at that time?
>
> A. I did.
>
> Q. Do you still have that belief?
>
> A. I do.

Mr. Rose testified that he "rescind[ed]" his agreement with the Pool by a letter dated 16 July 2012 and that Ms. Heckman never gave any indication that she had a misunderstanding of Graphic Arts' policy or that she had made the "same mistake that [Mr. Rose] made[.]" As previously stated, Mr. Rose testified that before making the offer to Ms. Heckman, he reviewed either all or a portion of the Pool's policy, conducted legal research, reviewed the claim, and then made a determination for a 94%/6% split. He cannot now seek to unilaterally rescind the contract based on a theory of mutual mistake.

Therefore, we find that the trial court did not err by entering summary judgment in favor of defendants, finding that a contract was formed between Graphic Arts/Utica and the Pool through the actions of agents acting on their behalf and with authority to so act.

B. Breach of Contract

In their second issue on appeal, Graphic Arts argues that the trial court erred by entering summary judgment in favor of defendants, finding that Graphic Arts

breached a non-existent contract. Because we have previously held that the trial court did not err by finding that a contract was formed between Graphic Arts/Utica and the Pool, we will focus our analysis on whether the trial court erred by finding that Graphic Arts/Utica breached the contract.

In the 7 March 2014 "Order Granting Summary Judgment," the trial court found that Graphic Arts/Utica "breached the contract in sending the letter dated July 16, 2012, refusing to abide by the 94%/6% split, and by filing this declaratory judgment action[.]"

Our review of the record demonstrates that Mr. Rose testified that after holding a conversation with Mr. Sobolik, they made the decision to "rescind" the original arrangement with the Pool. It is undisputed that on 16 July 2012, Mr. Rose, on behalf of Graphic Arts/Utica, sent a letter to Ms. Heckman refusing to abide by the 94%/6% split. The letter stated as follows, in pertinent part:

> Utica has revisited the coverage issues relating to the referenced suit. To the extent inconsistent therewith, this letter supersedes and replaces all prior coverage and defense related communications and agreements, which are hereby revoked and rescinded.

Thereafter, on 27 December 2012, Graphic Arts filed a complaint for declaratory judgment against defendants.

Based on the foregoing, there are no genuine issues of material fact in dispute regarding the breach by Graphic Arts/Utica. Accordingly, we hold that the trial court

did not err by entering summary judgment in favor of defendants, finding that Graphic Arts/Utica breached the contract.

C. Graphic Arts' Motion for Summary Judgment

In its next argument, Graphic Arts contends that the trial court erred by denying its motion for summary judgment filed on 2 January 2014. However, we do not reach the merits of this argument because the trial court did not address or adjudicate Graphic Arts and Register's motion for summary judgment. In order to properly preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion" and the complaining party must also "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. Rule 10(a)(1) (2016). Our Court will not consider arguments based upon matters not adjudicated by the trial court.

D. Damages

As an alternative argument, Graphic Arts asserts that the trial court erred in calculating the damages for breach of contract. Specifically, Graphic Arts argues that the trial court erred by awarding damages to the Pool for its defense of OUTS in the underlying personal injury suit instituted by the Singhs. This argument has no merit.

"The general rule in measuring damages is that the injured party may recover all of the damages which were *foreseeable* at the time of the contract as a probable

result of the breach either because they were a *natural* result or because they were a *contemplated* result of the breach." *Quate v. Caudle*, 95 N.C. App. 80, 87, 381 S.E.2d 842, 846 (1989) (citation and quotation marks omitted) (emphasis in original).

In its 15 October 2014 "Order Entering Damages for Breach of Contract," the trial court found Graphic Arts/Utica and the Pool had contracted to share defense costs according to a 94%/6% split and to apply the same ratio to any settlement and/or award assessed against Sanders Garage and Register. The trial court found that Graphic Arts/Utica hired attorney Scott Hart to defend Sanders Garage and Register. After the personal injury claims of the Singhs had been settled, Graphic Arts/Utica had paid the settlement amounts and the Pool had paid its 6% share of those amounts. Graphic Arts/Utica had also paid the full legal fees billed to attorney Scott Hart and the trial court found that because the Pool had not paid its 6% share of Scott Hart's bill, the Pool was responsible for $1,429.29. The trial court also found that due to Graphic Arts' breach on 16 July 2012:

> Henry W. Gorham of the law firm of Teague, Campbell, Dennis & Gorham had been hired to represent the [Pool] and its insured, [OUTS]. Service of the summons and complaint on [OUTS] was accepted by Gorham on May 18, 2012 and its answer was filed on June 15, 2012. Sanders Garage filed its answer on August 13, 2012. Discovery proceeded as the case moved to a trial. The case was reported settled during mediation on February 27, 2014. On May 19, 2014 the minor settlement was approved by the court. As a result of the breach, the defendants, instead of paying six percent of defense costs, had to continue to pay Gorham for his legal representation.

Gorham's legal fees since the date of breach on 16 July 2012 and until the Singhs' personal injury case was settled and concluded was determined to be $19,091.08. In addition, because Graphic Arts filed the complaint for declaratory judgment on 27 December 2012, the Pool hired attorney Sharon G. Scudder of Scudder Law, PLLC, who filed a notice of appearance on behalf of the Pool and OUTS. The trial court found that:

> As a result of the breach and the necessity to defend the plaintiff's declaratory judgment action and prosecute the defendants' declaratory judgment action, the attorney fees paid by the defendant for attorney Sharon G. Scudder's representation between January 18, 2013 and July 30, 2014 totaled $35,178.00 for 213.2 hours of legal work billed at a rate of $165.00 per hour.

The trial court concluded that due to the breach of contract, defendants were "entitled to the pecuniary difference between its position upon breach of the contract and what it would have been, had the contract been performed. At the time the contract was entered into, attorney fees and costs were reasonably foreseeable by the plaintiff as a result of its breach." We agree with the trial court.

At the time the contract was made between Graphic Arts/Utica and the Pool, it was reasonable to expect that, as a result of Graphic Arts' breach, the Pool would be required to hire separate counsel to represent the legal needs of the Pool and its insured, OUTS. The legal fees incurred by the Pool necessary to represent its needs, as well as the needs of its insured, in defending itself in the underlying personal

injury action and the declaratory judgment action initiated by Graphic Arts was foreseeable as a natural and contemplated result of making the contract. Thus, we hold that the trial court did not err in its 15 October 2014 order entering damages for breach of contract.

AFFIRMED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).