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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-590

Filed: 2 February 2016

Durham County, No. 13 CVS 3675

VICTOR HOWARD, Plaintiff,

v.

PATRICIA E. CHAMBERS, MATTOCKS ENTERPRISES, INC.; STEVE N. MATTOCKS, individually, JASON L. PANCIERA, individually; and CAWTHORNE, MOSS & PANCIERA, P.C., Defendants.

Appeal by plaintiff from order entered 15 December 2014 by Judge Henry W. Height, Jr. in Durham County Superior Court. Heard in the Court of Appeals 5 November 2015.

Victor Howard, pro se, plaintiff-appellant.

The McClanahan Law Firm, PLLC, by Doug McClanahan for defendants-appellees Mattocks and Mattocks Enterprises, Inc.

Warren Shackelford Attorneys, PLLC, by R. Keith Shackelford for defendants-appellees Panciera and Cawthorne, Moss & Panciera, P.C.

DIETZ, Judge.

Plaintiff Victor Howard appeals the grant of summary judgment dismissing his claims against Defendants. In 2012, Howard leased property in Durham with the option to buy. He later learned that, nearly a decade earlier, Defendants discovered that the home on the property was roughly 10 feet from the property line, well short

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of Durham County's 25-foot setback requirement. Based on survey filings and other acts by Defendants that Howard alleges were fraudulent, the Durham City-County Planning Department issued a certificate of compliance for the property. Howard sued Defendants, alleging fraud, civil conspiracy, and unfair and deceptive trade practices.

We affirm the trial court's grant of summary judgment. Howard failed to forecast any evidence showing that Defendants misrepresented or concealed anything from him, that they had any intent to deceive, or that Howard relied on any alleged misrepresentations to his detriment. Accordingly, the trial court properly concluded that Defendants were entitled to summary judgment.

Facts and Procedural History

On 1 October 2002, Defendant Patricia Chambers purchased a parcel of land in Durham known as Lot 3. Chambers later contracted with Defendants Steve Mattocks and Mattocks Enterprises, Inc., to build a home on Lot 3. Mattocks asked Defendant Cawthorne, Moss & Panciera, P.C. to perform a survey on the land. Through this survey, Cawthorne, Mattocks, and Chambers discovered that the "northeast corner of the foundation was set back only 10.4 feet from the property line," well below the Durham County Zoning Code requirement of 25 feet.

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On 24 March 2003, Mattocks wrote the Durham City-County Inspections Department stating that land from the adjoining lot would need to be conveyed to Chambers in order for the house to meet the county setback requirement.

Although no property was conveyed to Lot 3 to address the problem, on 12 January 2004, Cawthorne submitted the final survey of Lot 3 to the Planning Department that erroneously showed the lot in compliance with the setback requirement. The next day, Cawthorne submitted a revised survey to the Planning Department with a dotted line representing the existing property line and a solid line representing the proposed property line. The additional triangular parcel was not actually conveyed at the time the revised survey was submitted, but the property passed all inspections.

On 14 June 2012, Plaintiff Victor Howard entered into a lease agreement with Chambers for Lot 3. The agreement included an option to purchase the property. On 4 April 2013, in preparation to purchase Lot 3, Howard hired Cawthorne to survey the land. Upon completion of the survey, Cawthorne informed Howard that no property from the adjoining lot was ever conveyed to Lot 3 and that the setback was still 10.2 feet, which did not comply with the setback requirement. On 20 May 2013, Howard exercised his option on Lot 3 and contracted to buy the property from Chambers. On 13 July 2013, during the contract's due diligence period, Howard

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cancelled the contract because Chambers could not convey marketable title to the property due to the setback issue.

On 16 July 2013, Howard sued Defendants, alleging fraud, civil conspiracy, and unfair and deceptive trade practices. Howard settled with Chambers. The remaining Defendants moved for summary judgment. After a hearing, the trial court granted Defendants' motions and entered judgment in their favor. Howard timely filed a *pro se* notice of appeal.

Analysis

Howard challenges the trial court's grant of summary judgment in Defendants' favor. Summary judgment is appropriate if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Howard v. Jackson*, 120 N.C. App. 243, 246, 461 S.E.2d 793, 796 (1995). This Court reviews a trial court's grant of summary judgment *de novo*. *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006).

I. Fraud

Howard first argues that the trial court erred in granting summary judgment on his fraud claim. The elements of fraud are: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive; and (5) resulting in damage to the

injured party. *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 277, 715 S.E.2d 541, 549 (2011).

Here, the only allegedly false statements identified by Howard concern a survey performed on Lot 3 in 2003 and 2004, nearly a decade before Howard contracted to lease Lot 3 with the option to buy. To constitute fraud, a false representation must have been intended to deceive the aggrieved party, and the aggrieved party must have had reasonably relied on the representation. *Id.* Moreover, reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence. *Id.* at 274, 715 S.E.2d at 548. Howard cannot prove a fraud claim based on alleged decade-old misrepresentations about Lot 3 because those representations were not directed at him and were not made with the intent to deceive him. Accordingly, the trial court did not err in granting summary judgment on Howard's fraud claim.

II. Civil Conspiracy

Howard next challenges the trial court's grant of summary judgment on his civil conspiracy claim. Civil conspiracy requires a showing of an overt act committed by one or more conspirators pursuant to a common agreement and in furtherance of the common objective to commit an unlawful act. *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 773 (1966). Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create

more than suspicion or conjecture to justify submission of the issue to a jury. *Henderson v. LeBauer*, 101 N.C. App. 255, 261, 399 S.E.2d 142, 145 (1991).

Here, Howard did not forecast any admissible evidence of an agreement between the parties. His claim is based entirely on speculation and conjecture. Accordingly, the trial court properly granted summary judgment on Howard's civil conspiracy claim.

III. Unfair and Deceptive Trade Practices

“To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.” *Mitchell v. Linville*, 148 N.C. App. 71, 73-74, 557 S.E.2d 620, 623 (2001) (citation omitted). While a deceptive trade practice is one that has the capacity or tendency to deceive the average customer, a practice is unfair “when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980).

Howard did not present any evidence that Defendants' preparation of the surveys, and other, related conduct, were unfair or deceptive, as opposed to merely mistaken. Because Howard failed to show that Defendants made any misrepresentations to him intending to deceive, or improperly concealed any

information from him, the trial court properly granted Defendants' motions for summary judgment on the unfair and deceptive trade practices claim.

IV. Constitutional Violations

Howard also claims that the trial court violated his due process and equal protection rights when it relied on "the blatantly false statements" of the defense attorneys at the summary judgment hearing. We find no indication in the record that counsel for Defendants misstated anything to the trial court and certainly nothing so improper that it amounted to a constitutional violation. Accordingly, we reject Howard's argument.

Conclusion

We affirm the trial court's order of summary judgment.

AFFIRMED.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).