IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-913

Filed: 15 November 2016

Hoke County, No. 14 CVS 000319

JUDY CLICK, JEC HEALTHCARE MANAGEMENT, INC., and JUDKEN CLICK HOLDINGS, LLC, Plaintiffs,

v.

JOHN LEANDRO, KATHY LEANDRO, S&R HEALTHCARE, INC., and RAETUC HOLDINGS, LLC, Defendants.

Appeal by plaintiffs from order entered 14 May 2015 by Judge Gale M. Adams in Superior Court, Hoke County. Heard in the Court of Appeals 22 February 2016.

Blanco Tackabery & Matamoros, P.A., by Peter J. Juran, for plaintiff-appellants.

McCoy Wiggins Cleveland & McLean, PLLC, by Richard M. Wiggins, for defendant-appellees.

STROUD, Judge.

Plaintiffs appeal a trial court order granting summary judgment on five of their six causes of action. For the following reasons, we affirm the trial court's granting of summary judgment in favor of defendants on all of plaintiffs' claims, except unjust enrichment, for which we reverse and remand.

I. Background

Plaintiffs' claims arise from several rather poorly drafted contracts, alleged oral agreements, and alleged modifications to agreements regarding the operation and potential sale and purchase by plaintiffs of a retirement facility owned by defendant RAETUC Holdings, LLC ("Raetuc"). Essentially, plaintiffs allege a long-standing business relationship between plaintiff Judy Click and defendants Leandro. The Leandros were having financial difficulties with defendant Raetuc in keeping the Open Arms Retirement Center ("retirement facility") in operation, and plaintiff Click agreed to assist them financially in return for an interest in the business. Ultimately plaintiff Click became the operator of the facility through her business, plaintiff JEC Healthcare Management, Inc. ("JEC"), with an alleged plan to purchase the retirement facility and the real property upon which it was located from defendant Raetuc.

The parties executed several documents to memorialize this plan, including three promissory notes which are not at issue on appeal. To make a very long story short, the complaint and other documents considered upon summary judgment show that plaintiff Click assumed responsibilities as operator of the retirement facility and paid considerable amounts of money to defendants, with the understanding that these payments would be credited toward the eventual consummation of the purchase of the retirement facility and real property. Defendants do not dispute that plaintiff Click paid considerable sums of money to them but dispute the purpose of those

payments and that plaintiffs are entitled to enforcement of any of the alleged agreements or any recovery other than payment of the promissory notes.

In May of 2014, plaintiffs filed a lawsuit alleging claims for

> (1) specific performance against defendant Raetuc "to fulfill the Asset Sale Agreement and close on the sale of the real property[;]"
>
> (2) imposition of an equitable/constructive trust on the real property that is the subject of the specific performance claim;
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> (3) unjust enrichment, in the alternative, if specific performance is not granted, "to recover the fair value of the goods, services, and monetary advances to" defendants[;]
>
> (4) breaches of contract as to the Asset Sale Agreement for the real property, the three promissory notes, the Asset Sale Agreement for goodwill and intangibles, "advance payments of $10,000 per month from January 2012 to May 2014[,]" and other unspecified advance payments;
>
> (5) fraud; and
>
> (6) unfair and deceptive trade practices.

Plaintiffs' complaint was not verified, although plaintiff Click later filed a detailed verified affidavit regarding the claims.

On 30 July 2014, defendants answered plaintiffs' complaint denying the substantive allegations of plaintiffs' complaint other than the execution of the promissory notes. Defendants made additional allegations raising their defenses, acknowledging the execution of the Asset Sale Agreement on 1 December 2011 but alleged "[t]hat the terms and conditions of the Purported Agreement are so indefinite that they are incapable of being enforced by the Court." Defendants also alleged that

even if the Asset Sale Agreement was an enforceable contract, it was terminated by its own terms on 1 June 2012, since the closing was to occur on or before that date, but it did not occur. Defendants alleged that

> Defendant, John Leandro, and [(sic)] conversation with Plaintiff Click stated that the HUD loan would not provide a path to closing in accordance with the Asset Sales Agreement and that he was going to send a formal notice of terminating the Asset Sales Agreement and the Leandros formally terminated the Purported Agreement by sending a letter to Plaintiff Click.

On 25 September 2014, plaintiff Click filed a motion for summary judgment regarding the three promissory notes which defendants had not contested. On 5 January 2015, defendants filed a motion for partial summary judgment as to all claims except those regarding the promissory notes. The trial court granted summary judgment in favor of plaintiffs against defendants on the three promissory notes and ordered defendants to pay the sums set forth in the notes. The trial court granted summary judgment in favor of defendants on plaintiffs' remaining claims, thus dismissing the remainder of the lawsuit; plaintiffs appeal.

II. Summary Judgment

> Summary judgment is proper "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.G.S. § 1A–1, Rule 56(c) (2000). A summary judgment motion should be granted when, based upon the pleadings and supporting materials, the trial court determines that only

> questions of law, not fact, are to be decided. However, when there are factual disputes which are material to the disposition of the case, summary judgment may not be used. An issue of material fact is one which may constitute a legal defense or is of such a nature as to affect the result of the action or is so essential that the party against whom it is resolved may not prevail; an issue is genuine if it can be supported by substantial evidence.

Rawls & Assocs. v. Hurst, 144 N.C. App. 286, 289, 550 S.E.2d 219, 222 (2001) (citations and quotation marks omitted).

A. Specific Performance

Plaintiffs first contend that the trial court erred in granting summary judgment in favor of defendants on their claim for specific performance of the Asset Sale Agreement for the sale of the real property.

As to the sale of the real property, the Asset Sale Agreement entered into on 1 December 2011, provided in pertinent part as follows:

> **ARTICLE III - PURCHASE PRICE**
>
> 3.1 **Purchase Price.** It is agreed that the value of the Company, RAETUC Holdings is Five Million Seven Hundred and [F]ifty Thousand Dollars $5,750,000.00. Decrease by the current debt of Three Million Eight Hundred Thousand ($3,800,000.00) million results in shareholders' equity of One Million Nine Hundred Fifty Thousand Dollars[] ($1,950,000.00) Purchaser has claim on 10% of shareholder equity. Purchaser shall pay Sellers One Million Seven Hundred Fifty Five Thousand Dollars ($1,750,000.00) for their interest in the company. Purchaser shall also arrange for the current debt to be retired.

. . . .

3.4 **Payment of Purchase Price.**

(a) At Closing. At closing Purchaser shall enter into a new loan agreement for Four Million Three Hundred Thousand Dollars $4,300,000.00 million dollars with a lender of their choice and deliver to Seller a certified check of Two Hundred Thousand Dollars ($200,000). Additionally, Purchaser shall execute a Seller Financing note for One Million Five Hundred Fifty Thousand Dollars ($1,550,000.00), *terms and conditions to be determined and agreed to prior to the closing*.

ARTICLE IV CLOSING

4.1 **Closing Date.** The Closing shall be consummated at such date and time as the parties shall mutually agree; provided, however the conditions set forth in Articles IX and X must be satisfied or waived; and further provided, *however, the Closing shall occur on or before June 1, 2012 unless mutually extended by the parties.* The date upon which the Closing occurs is sometimes referred to herein as the "**Closing Date.**"

. . . .

11.2 Termination. Notwithstanding anything contained in this Agreement to the contrary, this Agreement may be terminated at any time prior to the Closing Date: (a) by the mutual consent of the Parties; (b) by Buyer, on the one hand, *or Seller, on the other hand, if the Closing shall not have occurred on or before January 31, 2011*; (c) by Buyer, in the event of any material breach by Seller of any of its agreements, representations or warranties contained herein, provided, that such breach (i) shall not have been remedied within fifteen (15) days after receipt by Seller of a written notice from Buyer specifying the breach and requesting that such breach be remedied or (ii) is incapable of being cured, (d) by Seller, in the event of any material breach by Buyer of any of Buyer's

agreements, representations or warranties contained herein, provided, that such breach (i) shall not have been remedied within fifteen (15) days after receipt by Buyer of a written notice from Seller specifying the breach and requesting that such breach be remedied or (ii) is incapable of being cured; or (e) by Buyer prior to the end of the Inspection Period as set forth in Section 7.2(b) above. This Agreement may be terminated under Section 11.2(b), (c), (d) or (e) by the delivery by the terminating Party of notice of termination to the other Parties. In the event that this Agreement shall be terminated pursuant to this Section 11.2, all further obligations of the Parties under this Agreement shall be terminated without further liability of any party to the other, provided that nothing herein shall relieve any Party from liability for its breach of this Agreement.

. . . .

12.4 Entire Agreement Amendments; Interpretation. *This Agreement, together with the Schedules and the Buyer Ancillary Agreements and the Seller Ancillary Agreements, which are hereby incorporated herein by reference, contain the entire understanding of the Parties with regard to the purchase and sale of the Assets, and supersede all prior agreements, understandings or letters of intent with regard to such subject matter between or among any of the Parties. Subject to Section 12.8(a), this Agreement shall not be amended, modified or supplemented except by a written instrument signed by the Parties.* Article titles and headings to sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. Unless expressly stated to the contrary, any reference herein to an Exhibit or Schedule shall refer to an Exhibit or Schedule attached hereto, and any reference herein to a Section or Article shall refer to a Section or Article hereof. Wherever possible, each provision hereof shall be interpreted in such manner as to be effective and valid under applicable Laws, but in case any one or more

> of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision shall be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provisions hereof, unless such a construction would be unreasonable. *With regard to all dates and time periods referred to in this Agreement, time is of the essence.* If the terms of any of the Schedules, Buyer Ancillary Agreements or Seller Ancillary Agreements conflict with the terms of this Agreement, the terms of this Agreement shall control.
>
> **12.5 Waivers.** Any term or provision of this Agreement may be waived, or the time for its performance may be extended, by the Party entitled to the benefit thereof only in a writing signed by such Party. The failure of any Party to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of any Party thereafter to enforce each and every, such provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach.

(Bolding and underlining in original.) (Italics added.)

Even accepting plaintiffs' allegations as true, their claim for specific performance of the Asset Sale Agreement must fail as a matter of law for several reasons. First, the parties did not agree to a specific purchase price in the Asset Sale Agreement; they did engage in negotiations regarding the purchase price, but even assuming plaintiffs' claims about those allegations are true, they are irrelevant under the terms of the agreement. Plaintiffs argue on appeal that the parties all understood that the price would be determined later:

> At the time of signing of the REASA, both Click and Leandro knew and agreed that the listed purchase price for the building ($5,750,000) would have to be adjusted, depending on the appraisal JEC received, and the structure of the financing. (R.p. 117) John Leandro agreed at the time, and confirmed to Click later, that he agreed that the purchase price would be adjusted downward to reflect the actual value. (R.p. 118) The parties exchanged e-mails in which they discussed and agreed to the modified price. (R.pp. 125, 147) All of the discussions and correspondence after that point were premised on the expectation that the purchase price would be $5,208,489.00, as reflected in a later e-mail exchange and the revised REASA. (R.pp. 118, 125, 132, 147)) Leandro confirmed in writing that this price was acceptable. (R.p. 147)[.]

By the argument that the parties "knew and agreed that the listed purchase price . . . would have to be adjusted," plaintiffs acknowledge that the agreement was so indefinite as to be an "agreement to agree" and agreements to agree are not enforceable:

> *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974), is the definitive decision on agreements to agree. "A contract to enter into a future contract must specify all its material and essential terms." *Id.* at 734, 208 S.E.2d at 695. "If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Id.*

Housing, Inc. v. Weaver, 305 N.C. 428, 444, 290 S.E.2d 642, 652 (1982). The Asset Sale Agreement does not establish the purchase price, nor does it establish a "mode agreed on by which" the price may be set. *Id.*

Plaintiffs argue that the parties' subsequent negotiations and emails established a price, but again the Asset Sale Agreement defeats this argument. By the agreement's own terms, it could be amended only in writing: "Subject to Section 12.8(a), this Agreement shall not be amended, modified or supplemented except by a written instrument signed by the Parties."[1] The emails or negotiations alleged by plaintiffs regarding the purchase price never resulted in a written, executed modification to the agreement. As the Asset Sale Agreement is not an enforceable contract, plaintiffs were not entitled to specific performance. This argument is overruled.

B. Unjust Enrichment

Plaintiffs contend that defendants have been unjustly enriched by the funds plaintiff Click paid in reliance upon the Asset Sale Agreement and other alleged contracts entered. Defendants contend that plaintiff Click has already "received the benefits" of her payments to them through the court-mandated payment of the promissory notes and the "intangible" benefits of operating the retirement facility. Our Court has recently explained that

> [u]njust enrichment is a claim in quasi contract or a contract implied in law. The doctrine has been described as the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to

[1] The Asset Sale Agreement does not contain any Section 12.8(a); the last Section is 12.7.

> account therefor. It is a general principle underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself or herself at the expense of another.
>
> However, this Court has recognized that, the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. There must be some added ingredients to invoke the unjust enrichment doctrine. Indeed, as we recently explained, there are five elements to a *prima facie* claim for unjust enrichment:
>
> > First, one party must confer a benefit upon the other party. Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. Third, the benefit must not be gratuitous. Fourth, the benefit must be measurable. Last, the defendant must have consciously accepted the benefit.

Butler v. Butler, 239 N.C. App. 1, 7, 768 S.E.2d 332, 336 (2015) (citations, quotation marks, ellipses, and brackets omitted).

Most of plaintiffs' argument focuses on a Down Payment Agreement that defendants disavow since it was not signed by them. But if payments were made under the unsigned Down Payment Agreement as alleged by plaintiffs, then plaintiffs would have made a proper claim for unjust enrichment. *See id.* According to plaintiffs, they paid a total of $694,205.92 and allege that they are entitled to recoup most of this amount; the promissory notes together total only $191,562.51. There is a genuine question of material fact as to the purpose of the payments which plaintiffs

made and defendants accepted, beyond the amounts of the promissory notes. Even if some of the payments were for other purposes as claimed by defendants, there is a question of material fact whether a portion of the payments was for the purpose claimed by plaintiffs and if plaintiffs have recouped the benefits for the alleged payments in other "intangible" ways. Since there are genuine issues of material fact on this claim, we conclude that the trial court erred in granting summary judgment as to plaintiffs' claim for unjust enrichment. *See generally Rawls & Assocs.*, 144 N.C. App. at 289, 550 S.E.2d at 222.

C. Breach of Contracts

Plaintiffs actually do not specifically raise their breaches of contract claim on appeal. However, we have already determined that the Asset Sale Agreement was not a valid contract, and the trial court has ordered defendants to pay under the three promissory notes. All that remains are "[a]dvance payments[,]" but plaintiffs direct us to no contract regarding these payments. Thus there is no further breach of contract claim for us to address, although we recognize some of the these payments may be encompassed in plaintiffs' remaining claim for unjust enrichment.

D. Fraud

Plaintiffs claim that defendants committed fraud by representing that the sale of the real property would go through while continuing to take payments based upon that intention, and therefore the trial court erred in granting summary judgment on

this claim in favor of defendants. Defendants contend that plaintiffs failed to make any real allegations of fraud.

> The essential elements of fraud are: (1) False representation or concealment of a past or existing material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. A claim for fraud may be based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose.

Hardin v. KCS Int'l., Inc., 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009) (citations, quotation marks, and brackets omitted). Plaintiffs failed to plead or show any "false representation" by defendants. *See id.* While plaintiffs contend defendants promised to sell the real property, plaintiffs have made no allegations that at the time defendants made these statements they were not true; instead, the complaint as pled indicates that defendants decided to terminate the transaction at a later time. In other words, defendants changed their minds, and that is not fraud. Therefore, this argument is overruled.

E. Unfair and Deceptive Trade Practices

Plaintiffs contend that the trial court erred in granting summary judgment on their claim of unfair and deceptive trade practices. Plaintiffs' entire argument hinges on defendants' alleged breach of contract. "Simple breach of contract or failure to pay a debt do not qualify as unfair or deceptive acts, but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies."

Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998). In this case, plaintiffs have failed to show a breach of contract, and we need not consider whether there was any evidence of egregious or aggravating circumstances. Accordingly, the trial court did not err in granting summary judgment in favor of defendants on this claim.

F. Imposition of an Equitable/Constructive Trust

Plaintiffs argue that the trial court should have imposed an equitable/constructive trust upon the real property because otherwise defendants would "retain the hundreds of thousands of dollars paid and accepted[.]"

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Rhue v. Rhue, 189 N.C. App. 299, 305, 658 S.E.2d 52, 57–58 (2008) (citation omitted). All of plaintiffs' claims based upon fraud or any other wrongdoing in refusing to sell the real property were properly dismissed at summary judgment. Plaintiffs have not shown any sort of fiduciary duty owed to them by defendants. Plaintiffs cannot prevail on a claim for imposition of an equitable/constructive trust upon the real property. This argument is overruled.

III. Conclusion

For the foregoing reasons, we affirm the trial court's granting of summary judgment in favor of defendants on all claims except unjust enrichment, and as to this claim we reverse and remand for further proceedings.

AFFIRMED in part; REVERSED and REMANDED in part.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).