IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-615

Filed: 30 December 2016

Mecklenburg County, No. 15 CVS 16825

THE CHERRY COMMUNITY ORGANIZATION, a North Carolina non-profit corporation, Plaintiff,

v.

STONEHUNT, LLC, a North Carolina limited liability company, Defendant.

Appeal by plaintiff from order entered 10 February 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2016.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Scott A. Miskimon, Kerry A. Shad, and J. Mitchell Armbruster, for plaintiff-appellant.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges and June K. Allison, for defendant-appellee.

BRYANT, Judge.

Where an alleged breach of contract arising out of a failure to pay occurred on 18 August 2005 and plaintiff's complaint was filed 10 September 2015, and where plaintiff's handwritten cancellation of a deed of trust was a valid novation, this breach of contract claim is barred by the statute of limitations, the trial court correctly dismissed this claim, and we affirm. But where the trial court failed to recognize the

terms of a document inextricably related to the contract, it erred in dismissing plaintiff's claim for breach of contract arising out of defendant's failure to build affordable and disabled housing, and we reverse. Lastly, where plaintiff's UDTP claim does not fail where plaintiff's breach of contract claims failed, and plaintiff has pled that defendant made continuous violations of the UDTPA, the trial court erred as a matter of law in dismissing this claim, and we reverse.

In the late 1970s, a group of residents in the Cherry Neighborhood south of downtown Charlotte, North Carolina, founded The Cherry Community Organization ("plaintiff"), in order to rehabilitate the neighborhood and enforce housing code regulations. With government funding, plaintiff purchased various houses from the City of Charlotte for approximately $1,400,000.00 and hired contractors to rehabilitate them. By 2004, plaintiff owned approximately seventy-four units of affordable housing and rented those units to more than sixty low-income tenants at below-market rates.

In October 2003, Stoney Sellars and Anthony Hunt formed StoneHunt, LLC ("defendant").[1] On 28 December 2004, plaintiff and defendant signed a document ("the Letter of Agreement"), which included the following language: "We propose to purchase the aforementioned properties from the Cherry Community Organization for ~~NINE HUNDRED SEVEN THOUSAND, FIVE HUNDRED DOLLARS~~ [. . .]

[1] StoneHunt, LLC, the defendant in this matter, is not to be confused with StoneHunt Development, LLC, a non-existent entity.

~~$907,500.00~~." The struck-through portion of the text was initialed and a new amount, $1,107,500.00, was handwritten in the margin. The Letter of Agreement also included the following:

> We have received a copy of the Cherry Community Organization tenant ledger dated October 2004. When this development plan is completed StoneHunt, LLC will provide 100% replacement of the currently occupied senior housing units; 55% of the disabled and 41% affordable housing units. It is our understanding that currently the Cherry Community has 59 occupied units of which 8 homes and a vacant lot will remain owned and occupied by the Cherry Community Association.
>
> | | Current | Proposed | % of Units |
> |---|---|---|---|
> | Senior Citizen | 21 | 21 | 100% |
> | Disabled Housing Units | 11 | 6 | 55% |
> | Affordable Housing Units | 27 | 11 | 41% |
> | **Total** | **59** | **38** | |
>
> **Please keep in mind that this is a minimal commitment on the part of StoneHunt, LLC in order to proceed with the land acquisition process.*

The same day, the parties signed under seal a document entitled "Agreement for Purchase and Sale of Real Property" (the "Agreement for Purchase"), through which defendant purchased ten parcels of real property consisting of approximately eight acres located in the Cherry Neighborhood. The Agreement for Purchase included the following language:

> New Loan: The buyer must be able to obtain the loan, if any, referenced in section 1(b)(ii). Buyer must be able to obtain a firm commitment for this loan on or before ~~March~~ 30, 2005, effective through the day of closing. Buyer agrees

> to use its best efforts to secure such commitment and to advise Seller immediately upon receipt of lender's decision.

The word "March" was struck through and replaced with the typed word "June" and initialed by both parties.[2] The Agreement for Purchase included a reference to an attached addendum; however, neither party was able to produce the contents of the addendum to the trial court. It also included a "merger clause," stating that the Agreement for Purchase was the "entire agreement."

Thereafter, Sellars signed and executed a promissory note (the "Note") dated 18 August 2005 in favor of plaintiff for the principal sum of $935,483.38; however, Sellars signed on behalf of StoneHunt Development, LLC, rather than on behalf of defendant. *See supra* note 1. The amount of $170,094.89 ($154,094.89 + $16,000.00 (deposit retained by plaintiff)) was also paid to plaintiff at that time. The Note stated,

> It is understood and agreed that additional amounts may be advanced by the holder hereby as provided in the instruments, if any, securing this Note and such advances will be added to the principal of this Note and will accrue interest at the above specified rate of interest from the date of advance until paid. The principal and interest shall be due and payable as follows: One payment of all remaining principle [sic], interest and late fees, if any, due and payable on August 18, 2006.
>
> . . .
>
> This Note is to be governed and construed in accordance with the laws of the State of North Carolina. This Note is given in consideration for the balance of purchase money,

[2] Phyllis D. Lynch signed on behalf of plaintiff and Stoney D. Sellars signed on behalf of defendant.

> and is secured by a Purchase Money Deed of Trust secured by various parcels described in said security instrument which is a 1st lien upon the property therein described.

At the closing, which occurred on or about 16 or 18 August 2005, plaintiff delivered a deed for plaintiff's land in which StoneHunt Development, LLC, not defendant StoneHunt, LLC, was mistakenly identified as the grantee ("the 2005 Deed").

At defendant's request, plaintiff executed and delivered a deed dated 29 June 2006, captioned "Correction Deed to Correct Name of Grantee," in which the name on the 2005 Deed was changed from StoneHunt Development, LLC to defendant StoneHunt, LLC ("the Correction Deed"). The Correction Deed also noted as follows: "**NOTE**: The original deed was recorded August 18, 2005 in Book 19220 at Page 219, indicating "Stonehunt Development, LLC" as Grantee. There is no Stonehunt Development, LLC and the Grantee in said prior deed should have read as shown herein below."

On 29 June 2006, defendant paid off the Note by check issued to plaintiff in the amount of $724,769.46, which included the notation "Loan Payoff." Plaintiff accepted the check. The deed of trust was re-recorded on 30 June 2006, with the following handwritten notation: "The Note secured by this deed of trust having been paid in full and satisfied the 29th day of June 2006 this D/T is hereby cancelled. The Cherry Community Organization, /s/ Phyllis Lynch, President."

On 10 September 2015, plaintiff filed its complaint, obtained a summons, and filed a notice of lis pendens concerning land owned by defendant. Plaintiff sought a partial rescission of two deeds (the 2005 Deed and the Correction Deed), specific performance of a written agreement for the development of affordable and disabled housing, and money damages, including the recovery of more than $200,000, which plaintiff contends is the remaining principal amount of the purchase price.

On 9 November 2015, defendant served a Rule 12(b)(6) motion to dismiss plaintiff's claims for breach of contract and unfair or deceptive trade practices ("UDTP") based on the statute of limitations. On 7 January 2016, plaintiff amended its complaint as of right. Thereafter, a hearing was held on defendant's motion to dismiss, and on 10 February 2016, the Honorable Hugh B. Lewis entered an order granting defendant's motion. Plaintiff appeals.

On appeal, plaintiff contends the trial court erred in dismissing plaintiff's (I) breach of contract claim for failure to pay based on the statute of limitations, (II) affordable housing development breach of contract claim, (III) claim for the unpaid balance left on the purchase price by reason of a purported novation; and (IV) unfair or deceptive trade practices claim. Because plaintiff's issues I and III are interdependent, we address them together.

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (citing *Sutton v. Duke*, 227 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true." *Id.* (citing *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1976)). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Id.* (citation omitted). Thus, "[r]esolution of evidentiary conflicts is . . . not within the scope of the Rule." *Id.*

When considering a motion to dismiss, "[t]he court must construe the complaint liberally and 'should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.' " *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003) (quoting *Block v. Cnty. of Person*, 141 N.C. App. 273, 277–78, 540 S.E.2d 415, 419 (2000)). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.*[3]

I & III

Plaintiff first contends the trial court erred in dismissing its contract claim where the complaint alleged facts showing defendant's breach of contract, that the

[3] Because each of plaintiff's issues on appeal challenges the trial court's grant of defendant's motion to dismiss pursuant to Rule 12(b)(6), the standard of review is the same for issues I–IV.

contract was under seal, and that plaintiff sued within the ten-year limitations period. While the trial court agreed that the ten-year statute of limitations applied, [R. at 227], plaintiff argues its complaint was timely filed within that period based on plaintiff's argument that its cause of action did not accrue until 29 June 2006, as opposed to 18 August 2005. We disagree with plaintiff's argument.

Plaintiff also argues the trial court erred in dismissing its claim for the unpaid balance left on the purchase price by reason of a purported novation. Specifically, plaintiff contends the trial court erred in finding a novation as a matter of law on a motion to dismiss as the trial court failed to treat plaintiff's allegations in the complaint as true, which allegations show defendant failed to pay the full purchase price for plaintiff's land. Again, we disagree.

> A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (quoting *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

The statute of limitations for a breach of contract claim is ten years if the contract is a "sealed instrument or an instrument of conveyance of an interest in real property[.]" N.C. Gen. Stat. § 1-47(2) (2015). Here, the trial court concluded as a

matter of law that "[t]he 10 year statute of limitations applies because the parties signed The Agreement for Purchase and Sale of Real Property was [sic] under seal." Plaintiff does not dispute this conclusion, but rather argues that the ten-year statute of limitations expired on 29 June 2016 based on defendants' alleged failure to pay the full purchase price on 29 June 2006, the date on which defendant made what plaintiff contends was only a "partial payment" of the purchase price. If plaintiff is to be believed, an expiration date of 29 June 2016 would render plaintiff's complaint—originally filed 10 September 2015—not barred by the statute of limitations.

On the other hand, defendant argues the payment made to plaintiff in the amount of $724,769.46 on 29 June 2006 was not intended to be a partial payment, but rather was intended as a final payment, as reflected in the notation "Loan Payoff" on the check, as well as, *inter alia*, plaintiff writing on the deed of trust that it had "been paid in full and satisfied the 29th day of June, 2006[.]" To accept defendant's argument would mean the statute of limitations began to run on 18 August 2005, the date of closing, rendering plaintiff's cause of action time-barred by the statute of limitations. Thus, the question ultimately turns on whether defendant's payment on 29 June 2006 is characterized as a partial or final payment.

"Partial payment, *intended to acknowledge the underlying debt*, will . . . toll the statute of limitations on the original cause of action." *Am. Multimedia, Inc. v. Freedom Distrib., Inc.*, 95 N.C. App. 750, 753, 84 S.E.2d 32, 34 (1989) (emphasis

added); *see Pickett v. Rigsbee*, 252 N.C. 200, 204, 113 S.E.2d 323, 326–27 (1960) (holding that partial payments made on six notes "kept each of the[] instruments alive" for purposes of tolling the statute of limitations) ("The statute begins to run on the date the promise is broken. A new promise to pay fixes a new date from which the statute runs, but such a promise, to be binding, must be in writing. A payment made before the obligation is barred has the same legal effect as a written promise." (citations omitted)). In other words, in order for a partial payment on a debt to restart the statute of limitations, the parties must demonstrate an intention for the payment to be partial:

> A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. Such a payment is given this effect on the theory that it amounts to a voluntary acknowledgement of the existence of the debt. From this acknowledgement the law implies a new promise to pay the balance.

Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 505, 238 S.E.2d 607, 612 (1977) (citations omitted).

In the instant case, no facts have been pled which would suggest that defendant intended its 29 June 2006 payment as only a partial payment. To the contrary, the payment explicitly stated that it was for "Loan Payoff" and defendant never acknowledged that additional payments were due or would be forthcoming.

There are also no facts pled which would suggest plaintiff believed it had only received partial payment at that time. In fact, the opposite is true; upon receipt of the check for $724,769.46, plaintiff promptly cancelled the deed of trust and explicitly wrote thereon the following: "*The Note secured by this deed of trust having been paid in full and satisfied the 29th day of June 2006, this D/T is hereby cancelled*." (Emphasis added). The trial court concluded as a matter of law that this writing "[met] the requisites of a no[v]ation."[4] Plaintiff argues that the record before the trial court did not support its conclusion that there was a novation as a matter of law.

"Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished . . . [n]ovation implies the extinguishment of one obligation by the substitution of another." *Bowles v. BCJ Trucking Servs., Inc.*, 172 N.C. App. 149, 153–54, 615 S.E.2d 724, 727 (2005) (alterations in original) (quoting *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 367–68 (1959)).

> The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract. . . . Ordinarily . . . in order to constitute a novation the transaction must have been so intended by the parties.

Anthony Marano Co. v. Jones, 165 N.C. App. 266, 269, 598 S.E.2d 393, 395 (2004) (alterations in original) (quoting *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 368)

[4] The trial court's Conclusion of Law No. 5 stated as follows: "The above action meets the requisites of a *notation*." (Emphasis added). We assume this is scrivener's error.

(affirming the trial court's finding of the absence of a novation where the execution of a note was a restatement and acknowledgement of an earlier debt and where the parties did not intend to extinguish that earlier debt). A party may ratify a novation by taking some action to acquiesce to it. *Bank of Am., N.A. v. Rice*, 230 N.C. App. 450, 458–59, 750 S.E.2d 205, 211 (2013) (citing *Westport 85 Ltd. P'ship v. Casto*, 117 N.C. App. 198, 204–05, 450 S.E.2d 505, 510 (1994)). Furthermore,

> [i]n all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same.

N.C. Gen. Stat. § 1-540 (2015).

In the instant case, defendant's check to plaintiff for $724,769.46 was $210,713.92 less than the remaining principal amount defendant owed according to the Note. The check also explicitly stated that it was for "Loan Payoff" and, upon receipt of the check, plaintiff promptly cancelled the deed of trust and explicitly wrote thereon the following: "*The Note secured by this deed of trust having been paid in full and satisfied the 29th day of June 2006, this D/T is hereby cancelled*." (Emphasis added). The pleadings, therefore, indicate that plaintiff is entitled to no relief on this claim, where the pleadings indicate that plaintiff "accepted . . . a less amount than that demanded or claimed to be due, in satisfaction" of the Note secured by the deed of trust. *See id.*

Based on all of the foregoing, where closing of the sale occurred on 18 August 2005 and defendant did not pay the full purchase price on this date, any claimed breach of the Agreement for Purchase with respect to payment occurred on 18 August 2005. Additionally, the trial court correctly concluded as a matter of law that plaintiff's handwritten cancellation of the deed of trust was a valid novation. Thus, the ten-year statute of limitations expired on 18 August 2015, and this portion of plaintiff's complaint filed 10 September 2015 is therefore time-barred. Accordingly, the trial court did not err in granting defendant's motion to dismiss plaintiff's breach of contract claim alleging a failure to pay, and plaintiff's argument is overruled.

II

Plaintiff next contends the trial court erred in dismissing its affordable housing development claims where it incorrectly concluded that defendant was not obligated to build the affordable and disabled housing units specified in the contract. Specifically, plaintiff argues the trial court erred in concluding "the four corners" of the contract did not include such obligations and by dismissing plaintiff's claims under the alleged misapprehension that defendant could not be held to its obligations in the Letter of Agreement because they were not incorporated by reference in the Agreement for Purchase. We agree.

As a threshold matter, plaintiff contends the statute of limitations for this breach of contract claim did not begin to run until defendant announced to plaintiff

on 30 December 2013 that it had no intention of developing the affordable housing units it had promised to build and, therefore, the statute of limitations does not expire as to this claim until 20 December 2023. Because "the period of the statutes of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues[,]" *Housecalls Home Health Care, Inc. v. State, Dep't of Health & Human Servs.*, 200 N.C. App. 66, 70, 682 S.E.2d 741, 744 (2009) (quoting *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 63 (2005)), we agree.

"Contemporaneously signed writings may be incorporated together to divine the meaning and purpose of the contractual whole." *Zinn v. Walker*, 87 N.C. App. 325, 332, 361 S.E.2d 314, 318 (1987) (citation omitted). "Moreover, the parties' intentions which are controlling in contract construction, may be construed from the terms of the writings and the parties' conduct." *Id.* (citations omitted); *see Am. Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 377, 88 S.E.2d 233, 238 (1955) ("[I]nstruments executed at the same time, by the same parties, for the same purpose and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument." (citation omitted)); *Perry v. S. Sur. Co.*, 190 N.C. 284, 291, 129 S.E. 721, 724 (1925) ("When two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together." (citations omitted)).

In *Zinn*, this Court held that an agreement, contemporaneously signed with an offer to purchase, became incorporated into the same to comprise the overall contract, despite a merger clause in the offer to purchase. 87 N.C. App. at 334, 361 S.E.2d at 319. This Court reasoned that

> [w]here giving effect to the merger clause would frustrate and distort the parties' true intentions and understanding regarding the contract, the clause will not be enforced: '. . . to permit the standardized language in the printed forms, . . . to nullify the clearly understood and expressed intent of the contracting parties would lead to a patently absurd and unjust result. . . .'"

Id. at 333, 361 S.E.2d at 318–19 (alterations in original) (quoting *Loving Co. v. Latham*, 20 N.C. App. 318, 329–30, 201 S.E.2d 516, 524 (1974)); *see also id.* at 334, 361 S.E.2d at 319 ("When . . . the parties' conduct indicates their intentions to include collateral agreements or writings despite the existence of the merger clause and the parol evidence is not markedly different, if at all, from the written contract, the parties' intentions should prevail." (citation omitted)).

Here, the trial court concluded that "[t]he defendant cannot be held accountable for perceived obligations that are not found in the four corners of the Agreement for Purchase and Sale of Real Property." Thus, the trial court determined the Letter of Agreement was not a part of the "four corners" of the contract, despite the fact that both the Letter of Agreement and Agreement for Purchase were signed by both parties on the same date (28 December 2004), and both documents involve

the same transaction—the sale of plaintiff's land to defendant. Further, the Letter of Agreement and Agreement for Purchase were faxed on 27 July 2005 (weeks before closing) as one, unitary document. While the Agreement for Purchase contains a merger clause, "giving effect to [it] would frustrate and distort the parties' true intentions and understanding regarding the contract[.]" *Zinn*, 87 N.C. App. at 333, 361 S.E.2d at 318. Thus, where, as here, the parties' intentions exist also in the Letter of Agreement, the merger clause will not be enforced. *See id.* As such, the trial court erred as a matter of law when it failed to recognize the terms in the Letter of Agreement and, as a result, erred in dismissing plaintiff's claim for breach of contract arising out of defendant's failure to build affordable and disabled housing.

At oral argument the parties, particularly defendant, strongly argued that much of what had been promised had in fact been done by defendants and, therefore, there was no breach of contract. However, because the legal arguments centered on the whole agreement (or lack thereof), and because we have determined the agreement is a contract, the claims as stated in the pleadings—while yet to be tested at trial—state a claim sufficient to survive a Rule 12(b)(6) motion to dismiss.

IV

Lastly, plaintiff argues the trial court erroneously concluded that because plaintiff could not prevail on its breach of contract claims, its UDTP claim also failed. Plaintiff contends that its UDTP claim was valid under either defendant's or the trial

court's theory as plaintiff alleges defendant continuously violated North Carolina's Unfair or Deceptive trade Practices Act ("UDTPA"). We agree.

The trial court made the following relevant conclusion of law: "6. The Unfair or Deceptive Trade Practices Act Claim fails since neither of the claims failing to pay the agreed upon purchase price or the obligations to construct Senior Citizen Units, Disabled Housing Units and Affordable Housing Units are available to the plaintiff." "However, it is well-recognized that actions for unfair or deceptive practices are distinct from actions for breach of contract." *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998) (citation omitted). Even where the statute of limitations bars a claim for breach of contract, a plaintiff may still maintain a UDTP action. *See Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 250–51, 628 S.E.2d 427, 429–30 (2006) (citation omitted) (reversing dismissal of UDTP claim even though contract claim was time barred). The elements of a UDTP claim include an unfair or deceptive act or practice. *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005) (citation omitted). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious . . . ." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citation omitted).

Accordingly, the trial court erred as a matter of law in concluding that plaintiff's UDTP claim fails based on its conclusion that plaintiff's other breach of

contract claims fail. Because we disagree with the trial court's conclusion that plaintiff's claim for breach of contract for defendant's failure to meet its obligation to construct senior citizen, disabled housing, and affordable housing units fails, we reverse the trial court on its ruling as to the UDTP claim.

Defendant nevertheless argues that plaintiff's UDTP claim is barred by its four-year statute of limitations. *See* N.C. Gen. Stat. § 75-16.2 (2015). However, continuous violations of the act constitute separate offenses such that each new violation triggers a new cause of action and a new limitations period. N.C. Gen. Stat. § 75-8 (2015) ("[A]fter the first violation . . . each week that the violation . . . shall continue shall be a separate offense."). Thus, in the instant case, plaintiff's UDTP claim would be barred by the four-year statute of limitations only if there was no violation occurring after 10 September 2011, as plaintiff filed suit on 10 September 2015. Here, plaintiff alleges that defendant continuously violated the UDTP after 10 September 2011.

If a UDTP claim is based on deception, "a plaintiff need not show fraud, bad faith, or actual deception. Instead, it is sufficient if a plaintiff shows that a defendant's acts possessed the tendency or capacity to mislead or created the likelihood of deception." *RD & J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 748, 600 S.E.2d 492, 500–01 (2004) (citing *Chastain v. Wall*, 78 N.C. App. 350, 356, 337 S.E.2d 150, 153 (1985)). Whether an act or practice is unfair or deceptive

is to be determined by all the facts and circumstances. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 (citation omitted).

"In ruling on the motion [to dismiss] *the allegations of the complaint must be viewed as admitted*, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (emphasis added) (citation omitted). Plaintiff makes the following relevant allegations in its complaint regarding UDTP:

> 137. In 2008, [defendant] indicated to the City of Charlotte that [defendant] would build at least 11 affordable townhome units at The Grove at Cherry.
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> 138. In 2008, [defendant] indicated to [plaintiff] that all [plaintiff] tenants would receive replacement housing such that there would be no displacement.
>
> . . .
>
> 140. When asked about when the affordable housing units would be started, Sellars and Hunt indicated to [plaintiff] and others that [defendant] wanted to first finish Cherry Gardens. After the Great Recession had started in late 2008, [defendant] blamed the economy for delays in starting the next phases of the development, and [defendant] told [plaintiff] that once the economy picked back up [defendant] would start the affordable housing units and bring displaced residents back to Cherry.
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> 141. [Defendant] had a sign erected in the Neighborhood that fronted onto Cecil Street and placed near the intersection of Luther Street and King's Drive (the "Sign"), and which advertised The Grove at Cherry, stating that it

was coming in 2008.

142. [Defendant] updated the Sign by advertising that The Grove at Cherry would be coming in 2011.

143. The Sign remained standing, displaying [defendant's] City-approved plan for the Grove at Cherry, through at least the filing of [plaintiff's] complaint in September 2015.

144. Continuously through 2012 and 2013, [defendant] used the Sign to falsely and/or deceptively represent to the public and to [plaintiff] that [defendant] intended to build The Grove at Cherry, including City-approved affordable housing units.

145. Continuously through 2012 and 2013, [defendant] used the Sign to lull [plaintiff] into believing that [defendant] intended to build The Grove at Cherry, including City-approved affordable housing units.

. . .

154. Between 2012 and 2015, [defendant] evicted or displaced low-income tenants from affordable housing units that [defendant] purchased from [plaintiff].

. . .

160. In 2013–2015, [defendant] demolished affordable housing units that [defendant] had purchased from [plaintiff] and which, prior to their demolition, had provided affordable housing to low-income tenants.

. . .

162. After [defendant] demolished affordable housing units on [plaintiff's] Land in 2013–2015, [defendant] failed to build substitute affordable housing in their place.

163. [Defendant's] eviction and/or displacement of tenants

> and/or demolition of affordable housing units on [plaintiff's] Land was done in order to allow [defendant] to make more money than it would make by fulfilling the Contract and developing replacement affordable and disabled housing units on [plaintiff's] Land.
>
> 164. Despite its repeated promises to build affordable housing—and repeated assurances that low-income tenants would not be displaced from the Neighborhood—in late December 2013/early 2014, [defendant] finally revealed to [plaintiff] and the public its true intentions: [defendant] was reversing course and dropping the City-approved affordable housing from the development of [plaintiff's] land.
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> 165. On or about December 30, 2013, in a telephone conversation between [defendant's] manager Hunt and plaintiff's representative Sylvia Bittle-Patton, [plaintiff] received the first notice of [defendant's] new plan to build single-family homes instead of townhomes with affordable housing units.
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> . . .
>
> 205. Since [defendant] acquired [plaintiff's] Land, [defendant] solicited and obtained [plaintiff's] support for the redevelopment of the Neighborhood into a mixed-use development with affordable housing plus senior apartments, but [defendant] has either broken its promises to [plaintiff] or never intended to keep them, and instead [defendant] evicted or otherwise displaced low-income tenants form their long time residences, tore down affordable housing units, and sold [plaintiff's] Land for a substantial profit, all for the benefit of [defendant] and Sellars and to the detriment of [plaintiff] and the long-time residents of the Neighborhood.

In sum, plaintiff alleges that from late 2011 through 2015, defendant continuously violated the UDTPA. Viewing plaintiff's allegations as admitted, *see*

Stanback, 297 N.C. at 185, 254 S.E.2d at 615, the trial court erred in dismissing plaintiff's UDTP claim as it is not barred by the statute of limitations, *see Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C. App. 767, 771–72, 460 S.E.2d 361, 364–65 (1995) (applying General Statutes § 75-8 and affirming denial of defendant's motion to dismiss based on statute of limitations where plaintiff alleged continuous violations of the UDTPA).

In conclusion, where the trial court correctly concluded as a matter of law that plaintiff's handwritten cancellation of the deed of trust was a valid novation, and where any claimed breach with respect to payment occurred on 18 August 2005 and plaintiff's complaint was filed 10 September 2015, this breach of contract claim is barred by the statute of limitations, and we affirm. But where the trial court erred as a matter of law when it failed to recognize the terms in the Letter of Agreement which was signed and executed the same day as the Agreement for Purchase, it erred in dismissing plaintiff's claim for breach of contract arising out of defendant's failure to build affordable and disabled housing, and we reverse. And lastly, where the trial court erred as a matter of law in stating plaintiff's UDTP claim failed where plaintiff's breach of contract claims failed, and plaintiff has pled that defendant has made continuous violations of the UDTPA, this claim is not time-barred, and we reverse.

AFFIRMED IN PART; REVERSED IN PART.

Chief Judge MCGEE and Judge ENOCHS concur.

Report per Rule 30(e).