IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1288

Filed: 4 December 2018

Mecklenburg County, No. 14-CVS-3030

SHALLOTTE PARTNERS, LLC, Plaintiff,

v.

BERKADIA COMMERCIAL MORTGAGE, LLC, and SAMET CORPORATION, Defendants.

Appeal by Plaintiff from orders entered 9 August 2017 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2018.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., for the Plaintiff-Appellant.

Troutman Sanders LLP, by D. Kyle Deak, for Defendant-Appellee Berkadia Commercial Mortgage, LLC.

Sparrow Dennis & Medlin PA, by J. Michael Thomas, Donald G. Sparrow, and Peyton D. Mansure, for Defendant-Appellee Samet Corporation.

DILLON, Judge.

This matter was commenced by the owner of a failed apartment project (the "Project") in Brunswick County against both its general contractor and its lender. Plaintiff Shallotte Partners, LLC, was the developer/owner of the Project. Plaintiff

hired Defendant Samet Corporation ("Samet") to serve as the general contractor for the Project. Plaintiff contracted with Defendant Berkadia Commercial Mortgage, LLC ("Berkadia")[1], to provide financing for the Project. In 2012, during construction, Plaintiff defaulted on its loan and subsequently lost the Project in foreclosure.

Plaintiff commenced this action against Berkadia and Samet (together, "Defendants") seeking damages for its losses incurred in the failed Project. This present appeal is the second to our Court. In this appeal, Plaintiff seeks review of the trial court's orders granting summary judgment to Defendants on Plaintiff's claims. After careful review of the record, we affirm.

I. Background

This matter is before us on appeal for the second time. The following background is offered for an understanding of the issues involved in the current appeal. Further background information can be found in this Court's prior opinion. *See Shallotte Partners, LLC, v. Berkadia Commercial Mortg., LLC*, 242 N.C. App. 252, 775 S.E.2d 926 (2015) (unpublished).

In August 2008, Plaintiff contracted with Berkadia to provide a loan (the "HUD Loan") insured by the Department of Housing and Urban Development ("HUD") to finance its construction of the Project. Plaintiff was eventually approved for a HUD Loan in the amount of $14,555,700. Plaintiff closed on the HUD Loan in July 2010.

[1] Plaintiff's initial contract was with Capmark Finance, Inc. Berkadia later purchased Capmark and assumed all of its rights and duties under the contract.

Also in July 2010, Plaintiff hired Samet as its general contractor for the Project. The initial completion date for the Project was September 2011. However, the Project was slowed for various reasons. For instance, in December 2010, the State fined Plaintiff $180,297 because some of the Project buildings were being constructed on wetlands without proper authorization. Also, in August 2011, an outbreak of mold was discovered among the completed apartment structures and Samet's building supplies. Plaintiff had been pre-leasing the apartments, but many of the future tenants were lost after discovery of the mold.

In March 2012, Plaintiff sued Samet in another action, alleging a number of claims. Plaintiff and Samet underwent mediation and settled the case, each signing a Memorandum of Settlement Terms.

Plaintiff experienced cash flow issues during the Project's construction and sought an increase in the amount of the HUD Loan. HUD, though, ultimately refused to agree to a loan increase. In June 2012, Plaintiff failed to make its monthly HUD Loan payment and continued to miss loan payments. In March 2014, in response to continued default by Plaintiff, Berkadia foreclosed on the unfinished Project, purchasing the Project for $16,635,548.

Around the time of the foreclosure in early 2014, Plaintiff commenced this present action against Defendants, alleging a number of causes of action. In mid-2017, after the matter had been remanded following the first appeal to our Court,

Berkadia and Samet each moved for summary judgment on all of Plaintiff's remaining claims. On 9 August 2017, the trial court granted summary judgment to Berkadia and Samet in separate orders. Plaintiff appeals both orders.

II. Analysis

Plaintiff challenges the trial court's grant of summary judgment to both Berkadia and Samet, contending that the evidence before the trial court created genuine issues of material fact. We review the grant of summary judgment *de novo*, to determine whether the materials before the trial court presented "no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Kimberley v. N.C. Dep't of Revenue*, ___ N.C. ___, ___, 814 S.E.2d 43, 47 (2018) (citing N.C. R. Civ. P. 56(c)).

A. Claims Against Berkadia

Plaintiff first contends that the trial court erred by granting summary judgment to Berkadia. Specifically, Plaintiff claims in its brief that Berkadia's actions in procuring HUD approval for the loan (1) were in breach of a fiduciary duty that Berkadia owned to Plaintiff, (2) were in breach of Plaintiff's contract with Berkadia to provide financing for the Project, and (3) constituted negligence. Plaintiff's claims against Berkadia stem primarily from Berkadia's failure to include certain costs in the HUD Loan application, resulting in a smaller approved loan

amount. For the reasons below, we conclude that the trial court properly granted summary judgment in favor of Berkadia on Plaintiff's remaining claims.

First, we agree with Berkadia's contention that Plaintiff failed to bring the current action, commenced in 2014, within the applicable statute of limitations period.

Berkadia and Plaintiff agree that Plaintiff's claims were subject to a three-year statute of limitations.[2] Plaintiff argues that the statute did not begin to run until 2012, when it claims to have discovered Berkadia's wrongdoing. However, the HUD Loan closed in July 2010, more than three years before this present action was commenced.

In our opinion from the prior appeal in this action, we noted that the accrual of a cause of action may be extended where the action complained of constitutes a "continuing wrong." *Shallotte Partners*, 242 N.C. App. at *11, 775 S.E.2d at ___. Nonetheless, Plaintiff has made no argument on appeal that Berkadia's actions in 2009 and 2010 during the loan application process constituted a continuing wrong. Rather, Plaintiff only argues that its claims did not accrue until it discovered in Berkadia's actions, or lack thereof, in 2012.

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[2] The statute of limitations for breach of contract is three years. N.C. Gen. Stat. § 1-52(1) (2017). Our Supreme Court has reasoned that actions requesting damages for a breach of a fiduciary duty stem from their underlying contractual relationships, and are therefore subject to the same three-year statute of limitations. *Tyson v. N.C. Nat'l Bank*, 305 N.C. 136, 141-42, 286 S.E.2d 561, 564-65 (1982). And negligence claims must generally be brought within three years. N.C. Gen. Stat. § 1-52(5).

"The statute of limitations begins to run when the claimant knew or, by due diligence, should have known of the facts constituting the basis for the claim." *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332 (1995) (internal citation omitted). As our Supreme Court has said:

> A man should not be allowed to close his eyes to facts readily observable by ordinary attention and maintain for its own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish.

Peacock v. Barnes, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906).

Here, we conclude that there is no issue of material fact that Plaintiff either knew or should have known that Berkadia had not included impact fees or certain other costs when determining the Project costs that would be financed. For instance, the evidence is uncontradicted that Berkadia notified Plaintiff by email in 2009 that it would not be including the impact fees in the loan request. The evidence is uncontradicted that Plaintiff's representatives signed a HUD form showing which costs were being financed. And the evidence is uncontradicted that when the loan closed in 2010, Plaintiff, a sophisticated business, knew the amount it was borrowing compared to its entire budgeted costs. Therefore, we conclude that Plaintiff's claims against Berkadia are time-barred.

Alternatively, we conclude that summary judgment was appropriate because Plaintiff has failed to put forth evidence to create a genuine issue of material fact that any alleged wrongdoing on the part of Berkadia *proximately caused* Plaintiff's damages.

Plaintiff alleged that it was damaged by Berkadia's failure to include approximately $873,000 in impact fees in the HUD application. However, Plaintiff defaulted on the HUD Loan in 2012, due to construction-related issues, well before impact fees would have been owed. As Berkadia notes in its brief, Plaintiff admits in its complaint that its default pre-dated any issue with the payment of impact fees.

Plaintiff responds that it was damaged because the amount approved by HUD would have increased by $636,800 had the impact fees been included in the application, which would have provided it with more money to weather its short-term cash flow issues in 2012. But there is no evidence that HUD would have allowed money loaned for impact fees to be used to fund cost overruns or debt service.

Plaintiff further responds that it was somehow Berkadia's obligation to investigate whether there may be a wetlands fee which should have been included as part of the costs. However, this fee of $187,297 was not known until after the loan closed when the State discovered that Plaintiff was building in a wetlands area. We do not see how it was Berkadia's duty, as the lender, to Plaintiff, as the owner/developer, to be on alert that Plaintiff may be building in a wetlands area, and

therefore may incur additional costs.[3] Therefore, we conclude that Plaintiff has failed to create a genuine issue of material fact that any wrongdoing by Berkadia was a proximate cause of Plaintiff's damages.

B. Claims Against Samet

Plaintiff also contends that the trial court improperly granted summary judgment to Samet. In particular, Plaintiff argues that the Memorandum of Settlement Terms (the "Memorandum") between Plaintiff and Samet from their prior litigation did not constitute a binding contract between the parties because material terms were "indefinite or left open for future agreement." Samet, though, contends that the Memorandum's terms were definite enough to form a binding contract and that, therefore, the Memorandum now bars a majority of Plaintiff's claims. For the reasons below, we agree with Samet and hold that the Memorandum contains sufficient terms to bind each party's release of claims regarding the Project.

Settlement of claims is favored by North Carolina law. *See Rowe v. Rowe,* 305 N.C. 177, 186, 287 S.E.2d 840, 846 (1982). Nonetheless, settlement agreements are contracts governed by the general principles of contract law and must evidence a

[3] Plaintiff makes other arguments concerning proximate cause. For instance, Plaintiff suggests that it may have decided not to close the HUD Loan had it known that the impact fees were not being financed. However, this suggestion ignores the fact that Plaintiff knew its budget and knew how much was being financed when it closed the HUD Loan. That is, Plaintiff knew, or should have known, that some costs that it might have previously thought would be financed were, in fact, not being financed.

meeting of minds between the parties as to all[4] terms. *See Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). "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." *Boyce v. McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974).

Here, Plaintiff states that the Memorandum's terms are indefinite, in that the following provisions were "indefinite or left open for future agreement:"

> 2. The parties agree to prepare a global wrap-up change order of all previous change orders, for an additional payment to Samet . . . . The payment of this sum shall resolve all approved and disputed COs of the parties.
> . . .
> 5. Samet will transfer its membership interest in SP (consisting of ½ of 1%) for no further consideration, at the final endorsement of the apartment complex by HUD.
> . . .
> 7. The parties will execute a mutual global release of all claims arising from the contract for construction, performance of the work, the "side agreement" of the parties and any other matter involving the subject of the litigation.

Plaintiff relies on our Supreme Court's holding in *Chappell v. Roth* for its assertion that the Memorandum did not contain sufficient terms because it references an additional, "mutual global release" to be drafted at a later time. In *Chappell*, the parties agreed in a settlement agreement that the "[d]efendant [would] pay $20,000 [to the plaintiff] in exchange for . . . [a] full and complete release, mutually agreeable

[4] We note that a contract may still survive if the parties do not agree on an immaterial term. *See MacKay v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967).

to both parties." *Chappell*, 353 N.C. at 691, 548 S.E.2d at 499-500. When the release was drafted, the parties were unable to agree on its terms and the plaintiff moved the court to enforce the settlement agreement. *Id.* The Supreme Court held that the completion of the release was "part of the consideration, and hence, material to the settlement agreement[,]" and, absent the release, "the settlement agreement did not constitute a valid, enforceable contract." *Id.* at 693, 548 S.E.2d at 500.

However, we find *Chappell* distinguishable from the case at hand. The settlement agreement in *Chappell* contained a single provision, composing the entirety of the document: that the defendant would pay plaintiff $20,000 in exchange for a "full and complete release." Transcript of Record at 23, *Chappell*, 353 N.C. at 691, 548 S.E.2d at 499-500. No further terms were listed in the agreement, and the completion of the release constituted all contractual consideration contemplated in exchange for Defendant's $20,000. The parties' failure to complete the release amounted to a collapse of the entire settlement agreement. Here, however, the Memorandum was a more thoroughly contemplated document.

Also, unlike the agreement in *Chappell*, the language of the contested provisions themselves are also sufficiently descriptive. The terms of the "global wrap-up change order" to be drafted were established; per the language of the Memorandum, it was to be composed of all prior change orders in exchange for an additional sum. The terms of the "mutual global release" are similarly described

within the Memorandum as including "all claims arising from the contract for construction, performance of the work, the 'side agreement' of the parties and any other matter involving the subject of the litigation." *See Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 104, 577 S.E.2d 712, 716 (2003) (holding that, where a memorandum of settlement called for the execution of additional documents that were never created, the memorandum was a binding contract because it contained essential terms). Here, the items to be released were included in the Memorandum and never contested, while the parties in *Chappell* contested terms found solely in the drafted release.

Further, each party's conduct following the Memorandum indicated their intent to be bound by it. "The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made even though a document was contemplated and has never been executed." *N.C. Nat'l Bank v. Wallens*, 26 N.C. App. 580, 584, 217 S.E.2d 12, 15 (1975) (citation omitted). Plaintiff followed its obligation not to attend the nine-month inspection of the Project, and each party filed a dismissal of the pending lawsuit. And the record contains e-mails between Plaintiff, Samet, and their respective attorneys referencing proper execution of the Memorandum and the parties' representations to third party contractors that the matter had been settled. The Memorandum constitutes a binding contractual agreement.

We conclude that the Memorandum bars all of Plaintiff's claims against Samet except for Plaintiff's claim based on Samet's alleged breach of the Memorandum itself. Specifically, the Memorandum provides that the parties, collectively, release "all claims arising from the contract for construction, performance of the work, the 'side agreement' of the parties and any other matter involving the subject of the litigation." Therefore, summary judgment was proper as to Plaintiff's other claims based on the Memorandum.

The one claim not barred by the Memorandum is, again, Plaintiff's claim that Samet has breached its duty under the Memorandum itself. Plaintiff claims that Samet breached the Memorandum in two respects, which we address in turn.

First, Plaintiff claims that Samet breached its duty to pay funds to a third party before the HUD Loan was closed out. Under the terms of the Memorandum, Plaintiff was to pay roughly $320,000 to Samet, "at or before closeout of the loan and after Samet . . . paid the contract claim of [a third party]." It is true that, though the claim was eventually paid, Samet failed to pay the third party before closeout of the HUD Loan. However, the Memorandum did not require for Samet to pay third party claims by a certain time, just that Samet would not be allowed to receive its final payment from Plaintiff until Samet paid all these claims. However, Plaintiff never made its final payment to Samet. In any event, the evidence shows that Samet did eventually pay the third party claims.

Second, Plaintiff claims that Samet breached its duty to comply with all HUD requests following the nine-month inspection of the Project. Samet's duty to adhere to HUD's requests and requirements following HUD's inspections served to ensure that Plaintiff could pass the final closeout on the HUD Loan. However, the evidence is uncontradicted that Plaintiff no longer owned the property at the time any performance by Samet was due. The foreclosure had already taken place, and Plaintiff therefore cannot show injury with respect to Samet's performance or lack thereof.

Lastly, we note that Plaintiff makes an argument that genuine issues of fact existed regarding Samet's commission of unfair and deceptive trade practices ("UDTP"). However, this claim was no longer before the trial court at the summary judgment hearing.

In our prior decision in this case, this Court noted that Plaintiff did not raise any arguments regarding the trial court's dismissal of its UDTP claim against Samet, and that challenges were therefore abandoned:

> While the trial court also dismissed Shallotte's claim for unfair trade practices, Shallotte has failed to offer any substantive argument in its brief as to why the dismissal of that claim was improper. Therefore, we deem any challenge to the trial court's dismissal of that claim to be abandoned for purposes of the present appeal. See N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *see also Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161

> (2013) ("Plaintiff makes no argument on appeal that the trial court erred in granting summary judgment in favor of defendants with regards to his claims of public stigmatization and negligence. These arguments are deemed abandoned.").

Shallotte Partners, 242 N.C. App. 252, 775 S.E.2d 926, at *3 n. 3. Nevertheless, Plaintiff asserts that the trial court erred by granting summary judgment as to its claim for UDTP. We hold that this claim was dismissed by the trial court's order on Samet's 12(b)(6) motion to dismiss, that Plaintiff did not properly appeal that dismissal, and that the UDTP claim was not before the trial court in its determination on summary judgment.

III. Conclusion

We hold that the trial court did not err by granting summary judgment to both Defendants. Therefore, we affirm the trial court's orders.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).