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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-252

Filed: 20 November 2018

Forsyth County, No. 16-CVS-3939

ROZINA WADHWANIA, M.D., Plaintiff,

v.

WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, Defendant.

Appeal by plaintiff from order entered 7 November 2017 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 17 September 2018.

Hatcher Legal, PLLC, by Nichole M. Hatcher, for plaintiff-appellant.

Constangy, Brooks, Smith & Prophete, LLP, by Kristine M. Sims and William J. McMahon, IV, for defendant-appellee.

DIETZ, Judge.

Plaintiff Rozina Wadhwanian appeals an order granting summary judgment in favor of Defendant Wake Forest University Baptist Medical Center (WFBMC) on a claim for breach of the implied covenant of good faith and fair dealing. Dr. Wadhwanian alleged that WFBMC acted in bad faith when it chose not to reappoint her to the second year of her medical residency. As explained below, the trial court

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properly determined that there were no genuine issues of material fact and that WFBMC was entitled to judgment as a matter of law. We therefore affirm the trial court's judgment.

Facts and Procedural History

In May 2015, Rozina Wadhwanian was accepted into WFBMC's pediatric neurology residency program. On 25 May 2015, she entered into a "Residency Training Program Agreement" with WFBMC, through which she was employed as a "House Officer" for a one-year term from 1 July 2015 through 30 June 2016.

Under the heading of "Responsibilities of WFBMC," the Agreement states that WFBMC "shall make best efforts to provide a residency experience to the House Officer that will be in substantial compliance with [accredited residency requirements] . . . and will make best efforts to ensure that the House Officer will have the opportunity to develop a personal program of continued professional growth with supervision and guidance from the teaching staff."

Apart from two passing references to termination, the Agreement does not explicitly address WFBMC's policies for terminating residents. However, the Agreement does list the website containing WFBMC's governing policies, and explains:

Reappointment shall be made at each Post Graduate Year Rank on an annual basis, subject to the recommendation of the Program Director[.] Recommendation for reappointment, promotion, and certificate of completion of

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the Residency Training Program shall be based upon the performance of the House Officer as documented in the written evaluations and all documents pertaining to the performance of the House Officer at his/her current rank and his/her ability to continue to master the skills and body of knowledge in the field of the Residency Training Program.

Throughout 2015, faculty, peers and staff evaluated Dr. Wadhwania's performance after each clinical rotation. The evaluations from the first six months of her residency indicated that she was below average for first-year residents on all criteria. Dr. Wadhwania received face-to-face feedback and suggestions for improvement from WFBMC staff throughout this time.

The Residency Training Program Director, Dr. Allison McBride, was notified of multiple poor evaluations for Dr. Wadhwania. On 18 November 2015, one of Dr. Wadhwania's supervising faculty emailed Dr. McBride, expressing "concerns" about Dr. Wadhwania "when it comes to patient communication and dealing with families." In the email, the faculty member stated that he and many other physicians were "nervous" about recommending Dr. Wadhwania for a second year of residency.

From late January through early February 2016, Dr. McBride was copied on a series of emails from doctors expressing their concerns about Dr. Wadhwania. One doctor complained that Dr. Wadhwania was not responding to registered nurses trying to page her about a patient needing a blood transfusion. Ultimately, an upper level resident had to step in and take care of the patient for her. The next day, the

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Associate Director of the Pediatric Residency Program met with Dr. Wadhwanian to coach her on the importance of answering pages.

At one point, Dr. Wadhwanian oversaw a baby with severe bronchiolitis. The upper level resident working with Dr. Wadhwanian asked her to contact a registered nurse to call a respiratory therapist. Instead, Dr. Wadhwanian paced back and forth in front of the nurse, who was on the phone. Again, an upper level resident stepped in for Dr. Wadhwanian, taking the patient to an intensive care unit. In another incident, Dr. Wadhwanian oversaw a patient admitted for Tylenol overdose. Instead of following the supervising physician's recommendations on the patient's chart, Dr. Wadhwanian ignored the chart and took the patient off their medication, thereby putting the patient at risk of liver failure.

In another email to Dr. McBride, one doctor complained that Dr. Wadhwanian had "issues with communication with RNs and patients; issues with following concrete instructions from sign out." She also noted that Dr. Wadhwanian's comprehensive exams on patients were grossly inaccurate. When she sat down with Dr. Wadhwanian to discuss these concerns, Dr. Wadhwanian "just responded each time with 'ok.'"

On 1 February 2016, Dr. McBride met with Dr. Wadhwanian to discuss the faculty's concerns and to give Dr. Wadhwanian her semi-annual performance evaluation. She informed Dr. Wadhwanian that, at that point, she was not on a

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trajectory toward getting a second year in the residency program. Dr. McBride suggested strategies to Dr. Wadhwanian for improvement and proposed engaging a “clinical coach” of Dr. Wadhwanian’s choosing to mentor her.

About a week later, Dr. McBride received another email from faculty expressing continued concerns with Dr. Wadhwanian’s performance. The Clinical Competency Committee agreed to change Dr. Wadhwanian’s schedule so that she would only work the day shift, which was less stressful than the night shift. The committee also paired Dr. Wadhwanian with a second-year resident to work with her, which is not common practice at the hospital.

On 16 February 2016, Dr. McBride met with Dr. Wadhwanian and her supervising resident after concerns resurfaced. Dr. McBride informed Dr. Wadhwanian that she could do patient pre-rounds on her own but that she would need to include an upper-level resident or attending physician in all major patient decisions. A condition of this new plan—which Dr. McBride summarized in an email to Dr. Wadhwanian—was that Dr. Wadhwanian could not change any medical decisions regarding any patient without first consulting the medical team and getting their permission. The next day, Dr. McBride learned that Dr. Wadhwanian had turned off a patient’s oxygen despite her medical team’s orders to the contrary. That day, Dr. Wadhwanian was placed on administrative leave.

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On 23 February 2016, Dr. McBride informed Dr. Wadhwanian that WFBMC would not be offering her a contract for a second year. Dr. McBride explained to Dr. Wadhwanian, both in person and in a letter, that her performance in the first year of residency had been consistently below average and that her faculty evaluators had not seen enough improvement to qualify her for reappointment. Dr. Wadhwanian was allowed to continue her employment for the remainder of her residency term as a non-resident in the neurology department.

On 22 June 2016, Dr. Wadhwanian sued WFBMC for breaching the implied covenant of good faith and fair dealing in relation to the Residency Training Program Agreement. WFBMC moved for summary judgment on 6 October 2017 and the trial court granted the motion on 7 November 2017. Dr. Wadhwanian timely appealed.

Analysis

I. Implied Covenant of Good Faith and Fair Dealing

Dr. Wadhwanian first challenges the entry of summary judgment on her claim for breach of the implied covenant of good faith and fair dealing. We review a trial court's entry of summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment is appropriate if there are not genuine issues of material fact and, thus, a party is entitled to judgment as a matter of law. *Id.*

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Dr. Wadhwanian argues that there are genuine issues of material fact concerning WFBMC's good faith conduct based on the hospital's failure to timely notify her of the reasons for terminating her residency and failure to work with her in good faith to overcome the shortcomings that led to termination.

Much of the parties' briefing on these issues is directed at two preliminary questions: first, whether a claimant can bring a stand-alone claim for breach of the implied covenant of good faith and fair dealing; and, second, whether Dr. Wadhwanian's position as a medical resident created the type of "special relationship" that can support such a stand-alone claim.

Our Courts have not yet resolved these questions with certainty. *See Robinson v. Deutsche Bank Nat. Tr. Co.*, No. 5:12-CV-590-F, 2013 WL 1452933, at *11 (E.D.N.C. Apr. 9, 2013). But we need not wade into the debate because, even assuming Dr. Wadhwanian could assert a claim for breach of the implied covenant of good faith and fair dealing based on a special relationship with WFBMC, the undisputed facts in the record demonstrate that the trial court properly entered summary judgment in favor of WFBMC on that claim.

Any party to an enforceable contract has the implied duty "to act in good faith and to make reasonable efforts to perform his obligations under the agreement," which includes doing "everything that the contract presupposes that he will do to accomplish its purpose." *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App.

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743, 746, 253 S.E.2d 625, 627–28 (1979). A claim for breach of this implied covenant arises when one party “wrongfully deprives” the other of some benefit “to which they were entitled,” or takes some other action for a “wrongful or unconscionable purpose.” *Dull v. Mut. Of Omaha Ins. Co.*, 85 N.C. App. 310, 318, 354 S.E.2d 752, 757 (1987).

Here, WFBMC submitted the following, undisputed evidence concerning its handling of Dr. Wadhwanian’s reappointment decision. First, the Residency Agreement states that WFBMC makes reappointment decisions on “an annual basis, subject to the recommendation of the Program Director” and bases its decision “upon the performance of the House Officer as documented in the written evaluations and all documents pertaining to the performance of the House Officer.” Faculty evaluations of Dr. Wadhwanian’s work—which Dr. Wadhwanian could access from an online resident portal—consistently showed that she was performing below average. Throughout her residency, faculty and staff reported incidents where Dr. Wadhwanian’s performance not only increased senior residents’ workloads but also, in some cases, endangered patients’ safety.

Also, multiple faculty and staff gave Dr. Wadhwanian in-person feedback throughout her residency, including the Associate Director of the Pediatric Residency Program. The Residency Training Program Director, Dr. Allison McBride, informed Dr. Wadhwanian at her semi-annual performance evaluation that she was not on track for reappointment. Dr. McBride later met with Dr. Wadhwanian multiple times to

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implement strategies for improvement, which included appointing a second-year resident to work with her and adjusting her schedule to cover less stressful shifts. Finally, when Dr. McBride informed Dr. Wadhwanian that she had not qualified for reappointment, Dr. McBride explained the reasons why during a meeting and in a letter.

Simply put, the undisputed evidence in the record demonstrates that WFBMC repeatedly notified Dr. Wadhwanian that she was performing below residency expectations and that WFBMC took a number of reasonable steps to work with Dr. Wadhwanian on improving areas where she was struggling. Nothing in the record suggests that there was any reason for WFBMC's decision to end the residency other than the issues WFBMC identified in good faith through this residency review process. Indeed, WFBMC permitted Dr. Wadhwanian to continue working for the remainder of her residency term as a non-resident in the neurology department. For these reasons, the trial court properly determined that there were no genuine issues of material fact and that Dr. Wadhwanian had not presented sufficient evidence to create a fact issue on her allegation that WFBMC acted wrongfully and in bad faith in its handling of the reappointment decision. *Weyerhaeuser Co.*, 40 N.C. App. at 746, 253 S.E.2d at 627. WFBMC therefore was entitled to summary judgment on this claim. Accordingly, we affirm the trial court's summary judgment order.

II. Breach of Contract

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Dr. Wadhwanian next argues that, although her complaint did not expressly plead a breach of contract claim, the trial court erred by failing to infer that claim from the allegations in the complaint. She argues that, under our Supreme Court's decision in *Mims v. Mims*, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim [at the summary judgment stage] if the allegations are sufficient to state a claim under some legal theory." 305 N.C. 41, 61, 286 S.E.2d 779, 792 (1982) (citations omitted). Dr. Wadhwanian contends that WFBMC breached a contractual provision requiring the hospital "to afford Dr. Wadhwanian due process" during the reappointment decision-making stage and that this claim should have survived summary judgment.

WFBMC contends that this contract argument is waived because Dr. Wadhwanian never raised it in the trial court. We do not agree that Dr. Wadhwanian never asserted a contract theory in the trial court. At the summary judgment hearing, Dr. Wadhwanian referenced *Mims*, asserted that "it's pretty clear about what – you know, that there is a breach of an agreement – being alleged a breach of contract," and then argued that, under *Mims*, "Plaintiff's incorrect choice of legal theory, however, is not fatal to [her] claim."

But we agree that the specific argument Dr. Wadhwanian asserts on appeal is waived. In the trial court, Dr. Wadhwanian argued that the court could infer a breach

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of contract claim under *Mims* as a means to rebut WFBMC's claim that she could not maintain a stand-alone claim for breach of the implied covenant of good faith and fair dealing. At no point at the summary judgment hearing—or anywhere else in the trial record—did Dr. Wadhwanian ever reference the contract language she points to on appeal to make the contractual due process argument she raises now.

On appeal from a grant of summary judgment, “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002). Thus, in many previous summary judgment cases, this Court has held that “[b]ecause Plaintiff presents a different theory on appeal than it argued at trial, this argument is not properly preserved.” *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332 (2011). This rule is particularly important in a case like this one, where Dr. Wadhwanian now seeks to raise a contract claim that not only was not argued before the trial court, but is not even expressly pleaded in the complaint. Our preservation rules require litigants to present to the trial court the legal claims and theories on which they ask the court to rely. *Id.* Because this breach of contract argument is newly raised on appeal, it is waived and we cannot consider it. Accordingly, we reject this argument and affirm the trial court's judgment.

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Conclusion

For the reasons explained above, we affirm the trial court's judgment.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).