IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-364

Filed: 18 December 2018

Mecklenburg County, No. 17-CVS-7595

CRAIG ROSEN and CAMMI ROSEN, Plaintiffs,

v.

THE CLUB AT LONGVIEW, LLC, Defendant.

Appeal by plaintiffs from order entered 25 August 2017 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 October 2018.

Myers Law Firm, PLLC, by Matthew R. Myers, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum, and Kimberly J. Kirk, for defendant-appellee.

ELMORE, Judge.

Plaintiffs Craig and Cammi Rosen (collectively, the "Rosens") appeal an order granting the defendant's, The Club at Longview, LLC (the "Club"), motion under Rule 12(b)(6) to dismiss their breach of contract, conversion, and unfair and deceptive trade practices ("UDTP") claims. On appeal, the Rosens argue the trial court erred by dismissing their claims because (1) their complaint alleged sufficient facts to

survive a Rule 12(b)(6) dismissal, and (2) it relied on a document outside their complaint to dismiss the claims, thereby converting the Club's dismissal motion into one of summary judgment and depriving them of their right to present additional evidence. We hold the trial court properly dismissed the Rosens' claims under Rule 12(b)(6) without needing to rely on the challenged document, and the Rosens waived their right to argue they were deprived of the opportunity to present additional evidence by failing to move for a continuance or request additional time when the Club presented the trial court with the challenged document. Accordingly, we affirm.

I. Background

On 25 April 2017, the Rosens sued the Club, a members-only gated residential golf course and club, asserting claims of breach of contract, conversion, and unfair and UDTP. According to their complaint, the Rosens in 2007 purchased a home in the Club's residential community, which required them to become members of the associated golf course and club, and to pay a $75,000.00 refundable membership deposit. The Rosens' "membership terms were governed by the Golf Membership Agreement and a separate series of documents called the Membership Documents[,]" which "included a set of documents titled Plan for the Offering of Memberships." The Rosens attached the Golf Membership Agreement to their complaint, but did not attach the Membership Documents, which they referenced and partially quoted in their complaint.

According to the Golf Membership Agreement, a member can be refunded their membership deposit in one of two ways. First, a member who remains for thirty years will be refunded 100% of their membership deposit upon thirty years from the execution of the Golf Membership Agreement. Second, a member who resigns prior to the thirty-year maturity date may elect to still be refunded 100% of their membership deposit at the expiration of the thirty-year maturity date, or they may elect to be refunded their membership deposit prior to the expiration of the thirty-year term. The Golf Membership Agreement provided in pertinent part:

> REPAYMENT OF MEMBERSHIP DEPOSIT. Upon approval of this Golf Membership Agreement, The Club at Longview, LLC hereby unconditionally agrees to pay to the undersigned member at The Club at Longview the sum of $75,000.00, without interest, payable in one installment on the anniversary date thirty years from the date this Golf Membership Agreement is executed by the Club (the "Maturity Date").
>
> If the undersigned member resigns prior to the maturity date, the Club shall pay to the undersigned member the refunded deposit in the amount described below within thirty days after the undersigned's resigned membership has been reissued by the Club to a successor member, who has been approved for membership and paid the required membership deposit in full to the Club, in accordance with the terms and conditions of the Membership Plan. . . . The refunded deposit shall be equal to one hundred percent (100%) of the actual membership deposit set forth above and previously paid by the undersigned member to the Club, without interest, for a Golf Membership pursuant to the Golf Membership Agreement. . . . If the undersigned member elects to be paid the refunded deposit [prior to the expiration of the

> thirty-year maturity date], then the undersigned hereby acknowledges and agrees that he/she will no longer be repaid one hundred percent of the membership deposit previously paid to the Club on the Maturity Date.
>
> The obligation to repay the membership deposit shall be limited solely to The Club at Longview, LLC and no officer, director, shareholder, partner, manager, member, agent, or affiliate of The Club at Longview, LLC shall be obligated to repay the membership deposit or any portion thereof and all claims against all such persons or entities for such membership deposit are hereby irrevocably waived. The undersigned further acknowledges and agrees that receipt of the refunded deposit shall constitute a full and unconditional release and waiver by the undersigned of any liability, claim, demand and causes of action arising under or related in any way to membership at The Club at Longview, the use of the facilities provided at The Club at Longview and the Membership Plan, including but not limited to, the repayment of one hundred percent of the membership deposit previously paid to the Club on the Maturity Date.

In 2015, the Rosens decided to sell their residence and, before marketing their home, informed Debi Blair, the Club's Director of Membership, about their decision to resign as club members and election to be refunded the membership deposit prior to the expiration of the thirty-year term. On 11 March 2015, Blair emailed a message to the Rosens to explain the process of obtaining their refund. Blair explained that once the Rosens sell their home and pay a final statement generated by the Club's accounting department, Blair would "then put in a check request for [their] initiation refund of $75,000.00[,]" which "normally takes 30 days to process[.]" Additionally, prior to the 15 June 2015 closing on the Rosens' home, an employee of the Club's

accounting department named Julie "confirmed to Plaintiff Craig Rosen that the refund of $75,000.00 would be processed and ready for pick up 30 days from the . . . closing date."

On 16 July 2015, plaintiff Cammi Rosen arrived at the Club's administrative office to pick up their membership deposit refund. Jim Sutton, the general manager of the Club, "handed her an envelope which contained a letter from Mr. Sutton and a check . . . [for] $40,000.00." The Rosens alleged that "letter . . . attempted to claim [they] were only entitled a refund of $40,000.00 instead of 100% of the refundable $75,000.00, as stated in the Golf Membership Agreement." Plaintiff Cammi Rosen was then escorted out of the Club's administrative office.

According to their complaint filed 25 April 2017, two years after receiving the $40,000.00 check, the Rosens at some later point "made demand upon [The Club] for the additional $35,000.00 owed to [them] by [The Club] pursuant to the terms of the Golf Membership Agreement and Plan For The Offering of Memberships[,]" but the Club "refused and failed to refund the additional $35,000.00[.]" Accordingly, the Rosens asserted claims of breach of contract, conversion, and UDTP against the Club, seeking to recover the remaining $35,000.00 they believed they were owed.

On 26 June 2017, the Club filed its answer and moved under North Carolina Civil Procedure Rule 12(b)(6) to dismiss all claims on the ground that the Rosens (1) waived any claim against the Club by accepting the $40,000.00 check, and (2) were

not entitled to a full membership deposit refund because they elected to be refunded the deposit before the expiration of the thirty-year maturity date. The Club further moved under Rule 12(b)(6) to dismiss the UDTP claim on the ground that "a mere breach of contract – even if intentional – does not constitute a violation of N.C. Gen. Stat. § 75-1.1, *et seq*." The Club also asserted twelve affirmative defenses, including waiver and release, accord and satisfaction, and unreasonable reliance.

To support their accord and satisfaction defense, the Club attached Sutton's 16 July 2015 letter that accompanied the $40,000.00 check given to the Rosens, which provided in pertinent part:

> This letter accompanies a check to you for the election of a refunded membership deposit. Debi Blair shared an email exchange she had with you on March 11, 2015, which regrettably contains some erroneous information. The membership refund policy is correctly clarified below:
>
> In accordance with your Membership Agreement, dated 5/30/2007 and the November, 2002 Club Membership Plan documents, your membership deposit is intended to be refundable upon the thirtieth anniversary of continuous membership in the Club. As you are resigning prior to the Maturity Date, in conjunction with the sale of your Longview residence, and as your membership has been reissued to a successor Member (J. Rice), you are entitled to a refund equal to the actual membership deposit paid by the successor member, which is $40,000. As outlined in your Membership Agreement, electing to be paid this refund prior to the maturity date confirms that you will no longer be eligible to be repaid 100% of your membership deposit upon the Maturity Date.

At the hearing on the Club's dismissal motion, the trial court considered the allegations of the Rosens' complaint and the attached Golf Membership Agreement. The Club presented to the trial court the Membership Documents, including the Plan for the Offering of Memberships, which was referenced and partially quoted in the Rosens' complaint. The Club also presented Sutton's letter that accompanied the $40,000.00 check, which the Club had attached to their answer and dismissal motion.

The Club argued first that because the Rosens elected to be paid the refund deposit before expiration of the thirty-year maturity date, under the Plan for the Offering of Memberships—which provided that "[t]he difference, if any, between the membership deposit paid to the Club by the new member and the deposit refund paid to a resigned member shall be retained by the Club"—the Rosens were only entitled a $40,000.00 refund, the amount paid by the successor member. Second, that because the Rosens accepted the $40,000.00 check, under the Golf Membership Agreement—which provided that a resigning member electing to be refunded the deposit before the expiration of the thirty-year maturity date "acknowledges and agrees that receipt of the refunded deposit shall constitute a full and unconditional release and waiver . . . of any liability, claim, demand, and causes of action arising under or related in any way to membership at The Club"—the Rosens' claims were barred under the doctrines of release or waiver. And third, that because the Rosens deposited the $40,000.00 check while knowing it was the full and final refund the

Club claimed they were due pursuant to Sutton's letter—which provided that "[a]s you are resigning prior to the Maturity Date, . . . you are entitled to a refund equal to the actual membership deposit paid by the successor member, which is $40,000" and "electing to be paid this refund prior to the maturity date confirms that you will no longer be eligible to be repaid 100% of your membership deposit upon the Maturity Date"—the Rosens' claims were barred under the doctrine of accord and satisfaction.

After the hearing, the trial court entered an order on 25 August 2017 granting the Club's motion under Rule 12(b)(6) to dismiss the Rosens' claims with prejudice. The Rosens appeal.

III. Analysis

On appeal, the Rosens assert the trial court erred by dismissing their claims because (1) their complaint alleged sufficient facts to survive the Club's Rule 12(b)(6) motion to dismiss, and (2) its improper reliance on the 16 July 2015 letter from Sutton accompanying the $40,000.00 check converted the Club's motion into one of summary judgment, thereby depriving "the Rosens of the ability to present the type of evidence which would be able to be presented at a summary judgment hearing."

A. Rule 12(b)(6) Dismissal

The Rosens first assert their complaint alleged adequate facts to survive the Club's Rule 12(b)(6) motion to dismiss their breach of contract, conversion, and UDTP claims. We disagree.

1. Review Standard

"We review *de novo* a Rule 12(b)(6) dismissal of a claim." *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 655 (2018) (citing *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010)). The scope of our review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (citations and quotation mark omitted). However, a Rule 12(b)(6) dismissal is proper where "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). That a complaint discloses facts establishing a legal accord and satisfaction of a disputed debt defeats claims for relief seeking additional recovery of that disputed debt. *Cf. Barber v. White*, 46 N.C. App. 110, 112, 264 S.E.2d 385, 386 (1980) ("Defendants would be entitled to have their motion for dismissal granted only if the evidence presented established an accord and satisfaction as a matter of law.").

2. Breach of Contract and Conversion Claims

"An accord is an agreement between the parties that discharges a contract or settles a cause of action, and a satisfaction is the execution of that agreement." *Barber*, 46 N.C. App. at 112, 264 S.E.2d at 386 (citing *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963); *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*, 4 N.C.

App. 342, 167 S.E.2d 85 (1969)). "Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood." *Zanone v. RJR Nabisco, Inc.*, 120 N.C. App. 768, 772, 463 S.E.2d 584, 587–88 (1995) (citing *Prentzas*, 260 N.C. at 103–04, 131 S.E.2d at 680–81). A party's cashing of "a check marked with some indication that it is tendered in full payment of a disputed claim, . . . [is] an accord and satisfaction as a matter of law." *Barber*, 46 N.C. App. at 112, 264 S.E.2d at 386; *In re Five Oaks Recreational Ass'n, Inc.*, 219 N.C. App. 320, 328, 724 S.E.2d 98, 103 (2012) ("*Barber* stands for the principle that cashing a check settles a disputed debt[.]"); *see also Moore v. Greene*, 237 N.C. 614, 616, 75 S.E.2d 649, 650 (1953) ("[W]hen in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept the benefit of the check so tendered and at the same time retain the right to sue for an additional amount." (citations omitted)).

Here, the Rosens' complaint disclosed the following relevant facts:

> 45. [The Rosens] . . . expect[ed] . . . receiving the $75,000.00 refund of the membership deposit from [the Club][.] . . .
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> . . . .
>
> 55. On July 16, 2015, Plaintiff Cammi Rosen went to [the

> Club's] club office to pick up the refund of the membership deposit.
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> 56. Plaintiff Cammi Rosen met with [the Club's] general manager, Jim Sutton, at the office.
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> . . . .
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> 59. . . . Mr. Sutton approached Plaintiff Cammi Rosen and handed her an envelope which contained a letter from Mr. Sutton and a check in the amount of $40,000.00.
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> 60. Plaintiff Cammi Rosen was escorted out of [the Club's] club offices by Jim Sutton.
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> 61. Jim Sutton informed Plaintiff Cammi Rosen that she would not be allowed back on [the Club's] premises.
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> 62. *The letter from Mr. Sutton attempted to claim that Plaintiffs were only entitled a refund of $40,000.00 instead of 100% of the refundable $75,000.00, as stated in the Golf Membership Agreement.*
>
> 63. [The Rosesns] have made demand upon [the Club] for the additional $35,000.00 owed to [the Rosens] by [the Club] pursuant to the terms of the Golf Membership Agreement and Plan For The Offering Of Memberships.
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> 64. [The Club] has refused and failed to refund the additional $35,000.00 to [the Rosens].

(Emphasis added.)

As reflected, the Rosens' complaint discloses facts that establish legal accord and satisfaction of the disputed refund, and thus the trial court properly granted the Club's Rule 12(b)(6) motion to dismiss the Rosens' breach of contract and attendant conversion claims. The facts of the Rosens' complaint established that there existed

a disputed debt—the Rosens' claimed they were owed the full $75,000.00 refund deposit; the Club claimed the Rosens were only owed $40,000.00—that the Club tendered the Rosens a $40,000.00 check with an accompanying letter explaining it intended the check to be the Rosens' final refund; and that the Rosens received the $40,000.00 check from the Club. And given that the Rosens filed their complaint two years later, alleging that the Club "refused and failed to refund the *additional* $35,000.00" (emphasis added), and seeking only $35,000.00 in recovery for their claims, the allegations of the Rosens' complaint establish that they cashed the $40,000.00 check. Indeed, although irrelevant to our analysis of a Rule 12(b)(6) dismissal, we note that at the hearing on defendant's motion, the trial judge directly asked, and the Rosens did not deny, that they had cashed the $40,000.00 check.

As the facts disclosed in the Rosens' complaint established a legal accord and satisfaction, the trial court properly dismissed their breach of contract claim under Rule 12(b)(6). *See, e.g.*, *Zanone*, 120 N.C. App. at 774, 463 S.E.2d at 589 (holding that a defendant's offered check with an accompanying letter explaining it was "full and final payment of [the disputed claim]" "clearly established [the defendant's] intent the . . . check be treated as an accord," and thus the plaintiff's later cashing of that check established accord and satisfaction as a matter of law). Additionally, as the Rosens' conversion claim was premised upon their being "lawfully entitled to 100% of

the refund of the membership deposit previously paid," the trial court properly dismissed that claim under Rule 12(b)(6) on the same basis.

3. UDTP

The Rosens also argue the trial court erred by dismissing their UDTP claim under Rule 12(b)(6) because their complaint alleges (1) a valid claim of conversion, which is sufficient to support a UDTP claim; (2) a valid deceptive act, as it alleges that two of the Club's employees represented to the Rosens that they would be receiving the full $75,000.00 refund; and (3) a valid unfair act, as it alleges that "the Club was in an inequitable position of power over the Rosens because the Club was in possession of the funds and that it used this position of power in an unfair manner by withholding the funds from the Rosens." As we have determined the Rosens' complaint failed to allege a valid claim for conversion, we overrule their first argument. And as the Rosens have failed to sufficiently argue, and to cite and apply applicable legal authority to support their third argument, it has been abandoned. *See* N.C. R. App. P. 28(b)(6). We turn now to their second argument.

"A claim of unfair and deceptive trade practices under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Cordaro v. Harrington Bank, FSB*, ___ N.C. App. ___, ___, 817 S.E.2d 247, 257 (2018) (quoting *Nucor Corp. v. Prudential Equity Grp., LLC*,

189 N.C. App. 731, 738, 659 S.E.2d 483, 488 (2008)). Where, as here, "a claim under section 75-1.1 stem[s] from an alleged misrepresentation . . . a plaintiff [must] demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013). "Two key elements specific to the plaintiff combine to determine detrimental reliance: (1) actual reliance and (2) *reasonable reliance*." *Id.* at 89, 747 S.E.2d at 227 (emphasis added) (citing *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 180 (1986)).

The Rosens argue the Club committed a deceptive act because two of its employees represented they would receive the full $75,000.00 refund, when the Club later refunded them only $40,000.00. In their complaint, the Rosens alleged first that Blair, the Club's Director of Membership, sent them the following email:

> As requested, I am emailing you the process of receiving your refund once you sell your home:
> When a buyer goes to contract on your home they are required to submit a membership application within five days of going to contract. They will also need to submit two letters of recommendation, digital family photo and schedule a membership interview.
> Once a buyer closes on your home, our accounting department will send you a final statement. The food & beverage minimum will be prorated at that time.
> When payment is received for your final statement, I will then put in a check request for your initiation refund of $75,000. It normally takes 30 days to process the check refund.
> Please let me know if you have any questions or need additional information. . . .

As reflected, Blair only represented that she would "put in a check request for [the Rosens'] initiation refund of $75,000.00," not that the Rosens would be receiving the full $75,000.00 refund. Accordingly, these facts fail to disclose that Blair made any false representation sufficient to support a valid UDTP claim.

Second, the Rosens' complaint alleged that Julie, an employee of the Club's accounting department, "confirmed" just prior to the 15 June 2015 closing of the Rosens' home "that the refund of $75,000.00 would be processed and ready for pick up 30 days from the . . . closing date." However, at the dismissal hearing, the Club presented to the trial court the Plan for the Offering of Memberships, which was referenced in the Rosens' complaint as the second series of documents governing the terms of their membership agreement, and thus went to the heart of their claims. Accordingly, the trial court could properly consider those documents without converting the Club's dismissal motion into one of summary judgment. *See Holton*, ___ N.C. App. at ___, 813 S.E.2d at 657 ("[A] document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be [presented] . . . by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment." (citation omitted).

The Plan for the Offering of Memberships provided in part that "[n]o person is authorized to give any information or make any representation not contained in this membership plan, and if given or made, such information or representation must not

be relied upon as having been offered by the Club." As the Rosens' complaint discloses facts, combined with the terms of the governing membership documents, establishing that the Rosens' reliance on Julie's statement would not have been reasonable, the trial court properly dismissed their UDTP claim under Rule 12(b)(6).

B. Conversion of Dismissal Motion into one of Summary Judgment

The Rosens next contend that because the trial court considered matters outside of their complaint, the Club's Rule 12(b)(6) motion was converted into a Rule 56 motion for summary judgment. Specifically, they argue "the consideration by the trial court of [Sutton's] letter deprived [them] of the ability to present the type of evidence which would be able to be presented at a summary judgment hearing."

> If, on a [Rule 12(b)(6)] motion . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2017). However, where

> a party faced with a trial court's decision to consider materials outside the pleadings in connection with a [Rule 12(b)(6)] dismissal motion . . . does "not request a continuance or additional time to produce evidence under Rule 56(f)" and "fully participates in the hearing," that party "cannot complain [on appeal] that they were denied a reasonable opportunity to present materials to the court."

Blackburn v. Carbone, 208 N.C. App. 519, 523–24, 703 S.E.2d 788, 793 (2010) (quoting *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004)).

Here, the transcript reveals that the Rosens fully participated in the hearing, and when the Club presented Sutton's letter to the trial court, the Rosens neither requested a continuance nor additional time to produce evidence. *See, e.g.*, *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 300, 672 S.E.2d 691, 693 (2009) (noting that "where non-movants fully participated in the hearing on a motion to dismiss, observed that matters beyond the pleadings were being considered, and failed to request additional time to produce evidence, reviewing courts have not been persuaded that dismissal was inappropriate." (citation omitted)). Nor have the Rosens identified on appeal what additional evidence they might have produced at a later hearing that would have allowed their claims to survive. Accordingly, we conclude the Rosens' have waived their right to advance this argument on appeal.

III. Conclusion

Notwithstanding consideration of Sutton's letter, because the allegations of the Rosens' complaint disclosed facts establishing a legal accord and satisfaction of the refund dispute, the trial court properly dismissed their breach of contract and conversion claims against the Club under Rule 12(b)(6). Additionally, because the Rosens' complaint failed to allege a valid UDTP claim, the trial court properly

dismissed that claim under Rule 12(b)(6) as well. Finally, because the Rosens failed to request a continuance or additional time to produce evidence when the Club presented Sutton's letter for the trial court's consideration, they waived their right to argue on appeal that the trial court's consideration of that letter deprived them of their right to produce additional evidence to defend against a later summary judgment motion. Accordingly, we affirm the trial court's order dismissing the Rosens' claims under Rule 12(b)(6).

AFFIRMED.

Chief Judge McGEE and CALABRIA concur.

Report per Rule 30(e).