IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-868

Filed: 1 September 2020

Buncombe County, No. 16 CVS 3435

FIRST BANK, successor to Asheville Savings Bank, S.S.B., Plaintiff

v.

MARK D. LATELL, DEANNA J. LATELL, JOSHUA B. BURDETTE, MANDI S. BURDETTE, FRANK A. LATELL, KATHLEEN LATELL, SCOTT A. LATELL, ADELE H. LATELL, now known as ADELE H. PHARES, WILLIAM E. BURDETTE JR., also known as WILLIAM E. BURDETTE, DEBBI L. BURDETTE, TINA DEWOLFE-STAFSTROM, also known as TINA DEWOLFESTAFSTROM and TINA DEWOLFE STAFSTROM, SCOTT STAFSTROM, DEVELOPMENT & PROPERTY CONSULTANTS, INC., also known as DEVELOPMENT & PROPERTY CONSULTANTS INC, and BURDETTE HOLDINGS, LLC, Defendants

Appeal by Defendants from Order entered 10 April 2019 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 4 March 2020.

*Long, Parker, Payne, Anderson & McClellan, P.A., by Thomas K. McClellan and Ronald K. Payne, for plaintiff-appellee.*

*Johnston, Allison & Hord, P.A., by Martin L. White and Scott R. Miller, for defendants-appellants.*

HAMPSON, Judge.

## Factual and Procedural Background

Mark D. Latell, Deanna J. Latell, Joshua B. Burdette, Mandi S. Burdette, Frank A. Latell, Kathleen Latell, Scott A. Latell, Adele H. Latell, now known as Adele H. Phares, William E. Burdette Jr., also known as William E. Burdette, Debbi L. Burdette, Tina DeWolfe-Stafstrom, also known as Tina DeWolfeStafstrom and Tina DeWolfe Stafstrom, Scott Stafstrom, (individual Defendants) and Development & Property Consultants, Inc., also known as Development & Property Consultants, Inc, and Burdette Holdings, LLC (corporate Defendants) (collectively, Defendants) appeal from an Order granting Summary Judgment in favor of First Bank (Plaintiff) on (I) Plaintiff's claims seeking to enforce Commercial Guaranty Agreements against Defendants and (II) on Defendants' counterclaims against Plaintiff. The Record reflects the following:

On 8 August 2008, Asheville Savings Bank, S.S.B. (Asheville Savings) made a $7,750,000.00 loan to French Broad Place, LLC (FBP) to finance construction of a mixed-use development project in Brevard, North Carolina, known as French Broad Place. FBP evidenced the loan by executing a Promissory Note (Note). The Note provided a maturity date of 8 August 2010, on which FBP was to "pay th[e] loan in one payment of all outstanding principal plus all accrued unpaid interest[.]" The Note also provided for "regular monthly payments of all accrued unpaid interest" beginning on 8 September 2008. Also on 8 August 2008, Defendants each executed a "Commercial Guaranty" (Guaranty Agreements) "absolutely and unconditionally"

guaranteeing payment of the loan by FBP. Each of the Guaranty Agreements contained identical terms and provided "[t]his is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the indebtedness . . . ." The Guaranty Agreements also provided:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness which is not barred by any applicable statutes of limitations[.]

On 23 January 2009, pursuant to a properly executed Change in Terms Agreement, the principal amount of FBP's Note was increased to $8,475,801.00. In accordance with the increased balance, all Defendants executed new Guaranty Agreements, identical to the first Guaranty Agreements but reflecting the increased balance of the Note. The Change in Terms Agreement did not alter the Note's date of maturity.

Relevant to this appeal, in March 2010, FBP filed a voluntary petition for bankruptcy protection under Chapter 11 of the United States Code. FBP's bankruptcy action was dismissed by the United States Bankruptcy Court for the Western District of North Carolina on 12 December 2011. On 28 December 2011, FBP filed suit against Asheville Savings alleging breach of contract, unfair trade practices, and breach of fiduciary duty. *French Broad Place, LLC v. Asheville Sav.*

*Bank, S.S.B.*, 259 N.C. App. 769, 774, 816 S.E.2d 886, 891 (2018). Asheville Savings filed a counterclaim against FBP seeking payment of the Note in full. *Id.* On 30 January 2017, the trial court entered an order granting summary judgment in favor of Asheville Savings against FBP on FBP's claims and Asheville Savings' counterclaims. *Id.* at 774, 816 S.E.2d at 891. FBP appealed, and this Court affirmed the trial court's grant of summary judgment. *Id.* at 790-91, 816 S.E.2d at 901.

While the prior bankruptcy litigation involving FBP was pending, on 5 August 2016, Asheville Savings filed a Complaint initiating the present action against Defendants to enforce the Guaranty Agreements. Plaintiff alleged as of the date of filing of Plaintiff's Complaint, Defendants owed $10,163,917.65 in principal and interest from the Note. Plaintiff alleged it sought to recover the amount due from FBP but FBP refused to pay. Plaintiff thus sought recovery from Defendants, pursuant to their respective Guaranty Agreements, for the balance of the Note, interest accrued thereon beginning on 6 August 2016, and reasonable attorneys' fees at fifteen percent of the outstanding balance.

On or about 7 October 2016, Defendants answered Plaintiff's Complaint. Defendants asserted the defenses of discharge by prior breach, offset, unclean hands, and estoppel. Defendants also filed counterclaims against Plaintiff, alleging Plaintiff engaged in fraud, negligent misrepresentation, and unfair trade practices. On 16 December 2016, Plaintiff replied to Defendants' counterclaims. Plaintiff denied

Defendants' allegations and moved to dismiss Defendants' counterclaims. Plaintiff also asserted Defendants' claims were barred by the relevant statutes of limitations, the statute of frauds, the doctrine of laches, contributory negligence, and by reasonable reliance.

On 11 January 2019, Plaintiff moved for Summary Judgment on its claims and on Defendants' counterclaims. On 11 March 2019, the trial court entered an Order allowing Plaintiff to substitute for Asheville Savings on the basis Asheville Savings had merged into Plaintiff effective 1 October 2017 in which Plaintiff acquired all of Asheville Savings assets. The trial court heard Plaintiff's Motion for Summary Judgment the same day.

At this hearing, Defendants contended Plaintiff's claims on the Guaranty Agreements were time-barred because they were not filed within three years of the date of any alleged breach of the Guaranty Agreements. In response, Plaintiff contended its claim was timely because the Guaranty Agreements contained a waiver of defenses based on the statute of limitations as long as the underlying debt, evidenced by the Note, remained enforceable. In light of the waiver, Plaintiff further argued the applicable statute of limitations on the Note was the six-year limitation period under N.C. Gen. Stat. § 25-3-118. Plaintiff contended the Note came due as of the maturity date on 8 August 2010, and thus, Plaintiff's 5 August 2016 Complaint was timely filed.

In addition, Plaintiff argued Defendants counterclaims for fraud, negligent misrepresentation, unfair trade practices, and breach of fiduciary duty were all barred by the respective statutes of limitations and also under the theory of *res judicata* arising from FBP's prior lawsuit against Asheville Savings. Defendants contended its counterclaims were not barred by the statutes of limitations because they did not discover the alleged fraud until 2015. In the alternative, Defendants contended the date of the alleged fraud was a factual issue that could not be resolved at summary judgment.

On 10 April 2019, the trial court entered an Order Granting Summary Judgment in Favor of Plaintiff (Order) on both Plaintiff's claims against Defendants and Defendants' counterclaims against Plaintiff. Defendants timely filed Notice of Appeal on 7 May 2019.

## Issues

There are two primary issues on appeal: Whether the trial court (I) properly granted summary judgment in favor of Plaintiff on its claims to enforce the Guaranty Agreements and (II) properly granted summary judgment in favor of Plaintiff on Defendants' counterclaims. Additionally, Defendants challenge, and Plaintiff concedes, it was not entitled to a separate award of attorneys' fees in the present action.

## Standard of Review

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. §1A-1, Rule 56(c) (2019). A grant of summary judgment "is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012) (citations and quotation marks omitted).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). When ruling on a motion for summary judgment, all inferences of fact "must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation and quotation marks omitted).

## Analysis

### I. Summary Judgment of Plaintiff's Claims

On appeal, Defendants' only argument that the trial court erred in granting Summary Judgment to Plaintiff is based on their contention Plaintiff's claim to enforce the Guaranty Agreements was barred by the statute of limitations. Indeed, Defendants, on this basis, assert the trial court should have instead granted Summary Judgment in their favor on Plaintiff's breach of contract claim.

*A. Statute of Limitations*

Defendants argue Plaintiff's claims to enforce the Guaranty Agreements were time-barred by the three-year statute of limitations applied to common law actions for breach of contract. N.C. Gen. Stat. § 1-52(1) (2019). As a general proposition, Defendants are correct the three-year statute of limitations contained in Section 1-52(1) applies to both guaranty and surety agreements.

We recognize in North Carolina,

> the obligation of the guarantor and that of the maker [of a note], while often coextensive are, nonetheless, separate and distinct. A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction. . . . *A guaranty is an obligation in contract*, and irrespective of the status of the note, may be enforced in contract.

*Emerald Portfolio, LLC v. Outer Banks/Kinnakeet Assocs., LLC*, 249 N.C. App. 246, 251-52, 790 S.E.2d 721, 725 (2016) (emphasis added) (citation and quotation marks omitted) (first alteration in original). Furthermore, we have held contracts in guaranty and surety are both contracts subject to Section 1-52(1). *Compare Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 364, 344 S.E.2d 302, 304 (1986)

(applying Section 1-52 to "[a]n action on a *guaranty* not under seal" (emphasis added)) *with Adams v. Bass*, 88 N.C. App. 599, 601, 346 S.E.2d 194, 195 (1988) ("It has been repeatedly held that a suit on a *surety contract* is controlled by the three-year statute of limitations[.]" (emphasis added)). Under Section 1-52(1) the statute of limitations "[u]pon a contract, obligation or liability arising out of a contract, express or implied," is three years. N.C. Gen. Stat. § 1-52(1). "If the guaranty of payment is absolute," like the Guaranty Agreements here, "the right to sue upon the guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity." *Advertising, Inc., v. Peace*, 43 N.C. App. 534, 536, 259 S.E.2d 359, 360 (1979).

Here, the underlying Note matured on 8 August 2010. Plaintiff did not file the current action until 5 August 2016. Thus, Defendants contend Plaintiff's Complaint in this case was filed well after the statute of limitations had expired on their claims to enforce the Guaranty Agreements. Plaintiff, however, points to the language of the Guaranty Agreements arguing Defendants waived this statute of limitations defense. Instead, Plaintiff counters, under the Guaranty Agreements, as long as Plaintiff could assert a claim for FBP's underlying debt as evidenced by the Note, Plaintiff could still assert claims arising from the Guaranty Agreements. As such, Plaintiff argues the applicable statute of limitations is found in Section 25-3-118, adopted from the Uniform Commercial Code, providing "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced

within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." N.C. Gen. Stat. § 25-3-118 (2019). Therefore, we turn to the language of the Guaranty Agreements to determine whether Defendants waived the three-year statute of limitations.

*B. Waiver*

North Carolina courts have long held parties to a contract may waive potential defenses based upon any statutes of limitations. *See Franklin v. Franks*, 205 N.C. 96, 97-98, 170 S.E. 113, 114 (1933) ("The general rule is that a party may either by agreement or conduct estop himself from pleading the statute of limitations as a defense to an obligation."); *see also Musarra v. Bock*, 200 N.C. App. 780, 784, 684 S.E.2d 741, 744 (2009). Here, the Guaranty Agreements included an express waiver provision, providing:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness which is not barred by any applicable statutes of limitations, . . . In addition to the waivers set forth above, Guarantor expressly waives, to the extent permitted by North Carolina law, all of Guarantor's rights under (1) North Carolina General Statutes Sections 26-7 through Section 26-9, or any similar or subsequent law, . . .

Defendants contend the waiver "is a qualified waiver subject to a condition precedent" that "only occurs in the event a Defendant asserts a right or defense based

on suretyship or impairment of collateral" and the statute of limitations defense in Section 1-52 is not "based on suretyship[.]"[1] We disagree and conclude Defendants' statute of limitations defense is "based on suretyship" and therefore was waived pursuant to the express language of the Guaranty Agreements.

Our Supreme Court has recognized the close relationship between agreements in guaranty and surety, noting such "labels are used interchangeably[.]" *Trust Co. v. Creasy*, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980). "While both kinds of promises are forms of security, they differ in the nature of the promisor's liability." *Id.* Because the distinction between the two is often quite technical, *see id.* at 52-53, 269 S.E.2d at 122-23, the "label" of the agreements "is not determinative of its character"; instead, the "substance, not the form, of a transaction [is] controlling." *Id.* at 53, 269 S.E.2d at 123. Moreover, under the Uniform Commercial Code as adopted in North Carolina, the term " 'Surety' includes a guarantor or other secondary obligor." N.C. Gen. Stat. § 25-1-201(39) (2019).

Here, it appears the substance of the transaction contained in the Guaranty Agreements sounds more in surety than guaranty. *See Trust Co.*, 301 N.C. at 52, 269 S.E.2d at 122 ("A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance. A surety is a person who is

[1] Neither party contends the statute of limitations defense arises from "impairment of collateral." Thus, our analysis is limited to whether the defense is "based on suretyship."

primarily liable for the payment of the debt or the performance of the obligation of another." (citation omitted)) The express terms of the Guaranty Agreements created co-liability between Defendants and FBP, and further provided Plaintiff was not required to exhaust any remedies against FBP before proceeding against Defendants.[2] The contractual relationship created by parties and any statute of limitations defense arising from such relationship is a defense "based on suretyship." Indeed, our conclusion is further supported by the application of Section 1-52 to surety agreements and guaranty agreements alike. *See Georgia-Pacific Corp.*, 81 N.C. App. at 364, 344 S.E.2d at 304; *Adams*, 88 N.C. App. at 601, 364 S.E.2d at 195. Regardless of whether the Guaranty Agreements are classified as a guaranty or surety agreement, the statute of limitations defense asserted by Defendants arises from a contract securing the underlying debt of FBP, thus creating a suretyship between the parties. *See* N.C. Gen. Stat. § 25-1-201(39).

Defendants cite Chapter 26 of our General Statutes—titled "Suretyship"—and argue because the statute of limitations is not contained therein the statute of limitations defense is not a defense "based on suretyship." Defendants' argument is unpersuasive. Section (E) of the Guaranty Agreements' waiver expressly waives a statute of limitations defense while there is outstanding indebtedness on the underlying note. Separately, the Guaranty Agreements recognize Chapter 26 and

[2] In briefing to this Court, Defendants appear to accept the Guaranty Agreements are, in fact, surety agreements.

waive the defenses "in Sections 26-7 through 26-9." Thus, Defendants' argument the Guaranty Agreements' waiver is limited to Chapter 26 is at odds with the express language of those waivers.[3]

Although not controlling, the Georgia Supreme Court's opinion in *York v. RES-GA LJY, LLC*, is instructive. 300 Ga. 869, 874, 799 S.E.2d 235, 240 (2017). In *York*, the guarantors argued—under an identical waiver to the one presently at issue—"the [w]aiver d[id] not encompass just any defense in law and equity, but only those 'rights or defenses based on suretyship or impairment of collateral[.]' " *Id.* at 871, 799 S.E.2d at 238. The guarantors cited specific statutory provisions for "surety defenses" and contended the waiver's language was referencing those specific provisions, thereby excluding waiver of their proffered defense under a different, anti-deficiency statute. *Id.* at 873-74, 799 S.E.2d 239-40. The *York* court concluded the language "based on suretyship or impairment of collateral" did not operate to exclude defenses that were expressly included in the waiver provision that were not express statutory surety defenses under the Georgia code. *Id.* The *York* court then held the "explicit inclusion of rights and defenses under 'one action' and 'anti-deficiency' laws confirm[ed] that the [w]aiver include[d] a defense under [Georgia's anti-deficiency statute,]" *id.* at 873, 799 S.E.2d at 240, and further noted the guarantors "offer[ed] no compelling argument or authority" that the specific statutory surety defenses were the "only

[3] The Guaranty Agreements also expressly waive rights under Sections 25-3-605, 25-9-501, and 25-9-504, which are notably not contained in Chapter 26.

rights and defenses that can constitute 'rights or defenses based on suretyship[.]' " *Id.* at 873, 799 S.E.2d at 239.

In the present case, we conclude Defendants' assertion of a statute of limitations defense to enforcement of the Guaranty Agreements is "based on" the surety relationship between the parties as established by the Guaranty Agreements, and further, waiver of "rights or defenses based on suretyship" is not limited to those rights or defenses articulated in Chapter 26 of our General Statutes. Thus, Defendants waived the statute of limitations in accordance with the Guaranty Agreements while there was outstanding indebtedness on the Note and until the six-year statute of limitations on enforcement of the Note expired. *See* N.C. Gen. Stat. § 25-3-118.

*C. Application of the Six-Year Statute of Limitations*

Defendants argue, in the event we conclude the three-year statute of limitations was waived under the Guaranty Agreements, the six-year statute of limitations as applied to the Note still bars Plaintiff's claim because Plaintiff accelerated payment of the Note in the bankruptcy proceeding and therefore the date the Note was due in full was 25 March 2010 and not the 8 August 2010 date of maturity. To support their argument, Defendants moved this Court to take judicial notice of filings made in the related bankruptcy proceeding—specifically a "Proof of Claim," which they argue indicates Plaintiff accelerated the Note and rendered it due

in full on 25 March 2010.[4] Plaintiff contends the Proof of Claim filed in that litigation was merely a statement of the debt owed and that it had not exercised the option to accelerate payment of the Note, which renders the 8 August 2010 maturity date the operative date for calculating the six-year statute of limitations.

Regardless, our Supreme Court "has long held that 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 [on appeal].' " *State v. Sharp*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). In asserting their argument pertaining to Plaintiff's acceleration of the Note in brief, Defendants seek to present a new argument on appeal. Indeed, careful review of the Record and transcript from the summary judgment hearing reveals Defendants did not raise any argument regarding acceleration of the Note before the trial court. Instead, on appeal Defendants sought to amend the Record to include evidence not before the trial court, which this Court denied. Now, Defendants' Motion for Judicial Notice similarly addresses this argument and again seeks to have this Court consider evidence not presented before

[4] Defendants moved this Court twice seeking to add exhibits to the Record: Contemporaneous with their principal brief Defendants filed a Motion to Amend the Record on Appeal, which this Court denied on 5 November 2019. Then, in conjunction with their reply brief on 21 January 2020, Defendants filed a Motion for Judicial Notice seeking again to have this Court consider evidence related to the bankruptcy proceeding. Plaintiff opposes Defendants' Motion for Judicial Notice on the basis the exhibit Defendants seek to present to this Court was not before the trial court at the underlying summary judgment proceeding.

the trial court at the summary judgment hearing. It is well established that parties may not present a new argument on appeal. *See id.* Defendants' Motion for Judicial Notice is denied.

Thus, the Record before us—and before the trial court—contains no evidence Plaintiff, in fact, accelerated payment on the Note prior to the 8 August 2010 maturity date. Plaintiff's 5 August 2016 Complaint was not barred by the six-year statute of limitations. Accordingly, on the Record before us, Defendants have not established, as a matter of law, any defense to the Guaranty Agreements justifying Summary Judgment in their favor on Plaintiff's Complaint and, further, have not demonstrated the existence of any factual disputes that would render Summary Judgment in favor of Plaintiff on its claims to enforce the Guaranty Agreements improper. Consequently, the trial court's grant of Summary Judgment in favor of Plaintiff on Plaintiff's claims is affirmed.

II. Summary Judgment of Defendants' Counterclaims

Defendants next contend the trial court erred by granting Summary Judgment in favor of Plaintiff on Defendants' counterclaims alleging Plaintiff engaged in fraud and unfair trade practices.[5] Plaintiff argues the trial court properly granted summary judgment on Defendants' counterclaims and contends both of Defendants' challenged counterclaims are barred by the doctrine of *res judicata* under this Court's

[5] On appeal, Defendants do not argue Summary Judgment on their claim of negligent misrepresentation was improper.

earlier decision in *French Broad Place, LLC*, and, alternatively, the relevant statutes of limitations. Defendants disagreed, contending *res judicata* does not apply because they asserted different claims and the parties are not the same, and further the claims are not barred by any statutes of limitations because the conduct forming the basis of Defendants' counterclaims was not discovered until 2015.

Defendants also argue this Court may not consider Plaintiff's response to their counterclaims because the response was not verified. Defendants cite caselaw stating "the trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999). However, "this Court has repeatedly held that a party's failure to object to materials submitted to a trial court, which do not comply with the requirements of Rule 56, waives that party's objection." *French Broad Place, LLC*, 259 N.C. App. at 780, 816 S.E.2d at 894 (citation omitted). Thus, where Defendants failed to object to the trial court's consideration of the unverified reply at the hearing, they may not challenge it now on appeal.

*A. Fraud*

In the present action, Defendants allege Plaintiff "willfully and knowingly engaged in fraudulent conduct and made misrepresentations concerning material facts, to wit, that it would finance the construction of the Project through the waterfall financing structure it proposed for the Take-Out Loans . . . ."

"[T]he following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). "[T]o defeat summary judgment, the non-movant must set forth specific facts; he cannot simply rely on the same allegations he made in his complaint or answer." *Lexington State Bank v. Miller*, 137 N.C. App. 748, 752-53, 529 S.E.2d 454, 456 (2000). Here, after careful review of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[,]" N.C. Gen. Stat. §1A-1, Rule 56(c), we conclude Defendants have not set forth specific facts to establish a claim for actionable fraud.

As the basis for their claim, Defendants allege "the Bank never intended to provide the financing" as agreed to under the Note. However, Defendants have not forecast any evidence or specific facts that if taken as true establishes a dispute of material fact as to whether Plaintiff falsely represented or concealed a material fact regarding its intent (or lack thereof) to provide previously agreed upon funding to Defendants. This is further evidenced in Defendants' response to Plaintiff's statute of limitations defense.[6] Defendants argue the allegedly fraudulent conduct was not

[6] The statute of limitations for a claim based on fraud is three years, N.C. Gen. Stat. 1-52(9) (2019), and "accrues when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of due diligence, such facts should have been discovered." *Shepherd v. Shepherd*, 57 N.C.

discovered until 2015, rendering their claim timely—yet in asserting that argument, Defendants still fail to identify any specific conduct by Plaintiff that would raise a factual question as to the existence of fraud and thereby defeat Plaintiff's Motion for Summary Judgment. Moreover, Defendants point to no evidence contained in the Record supporting their assertion they did not discover the alleged fraud until 2015.[7] Instead, in their brief to this Court, Defendants' argument relies upon the same allegations asserted in their Answer and Counterclaim and again at the summary judgment hearing. Consequently, the trial court did not err in granting summary judgment for Plaintiff on Defendants' counterclaim for fraud.[8]

*B. Unfair Trade Practices*

Defendants also alleged Plaintiff "willfully engaged in unfair and deceptive acts and practices that offend public policy and were immoral, unethical, oppressive, unscrupulous, and substantially injurious to [Defendants]" and that the conduct affected commerce. "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2019). "[T]o establish a *prima facie* claim for unfair trade

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App. 680, 682, 292 S.E.2d 169, 170 (1982). Plaintiff argues Defendants' fraud claim began accruing in 2011, when the litigation in *French Broad Place, LLC*, commenced. For purposes of this appeal, however, we do not reach this question.

[7] Rather Defendants cite only a section of the argument before the trial court in which their trial counsel made this same assertion but also did not actually point to any evidence before the trial court to support it.

[8] Because of our resolution of this issue, we do not reach the question of whether *res judicata* bars Defendants' fraud counterclaim.

practices, a [claimant] must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the [claimant]." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

> [A]n unfair act or practice is one in which a party engages in conduct which amounts to an inequitable assertion of its power or position. Furthermore, an act is unfair or deceptive under N.C. Gen. Stat. § 75-1.1 if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers.

*S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 607, 659 S.E.2d 442, 448 (2008) (alteration in original) (citation and quotation marks omitted). Whether an act "constitute[s] an unfair or deceptive trade practice" is a question of law for the court. *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 748, 600 S.E.2d 492, 501 (2004).

Defendants argue on appeal Plaintiff committed "unfair trade practices by (1) committing fraud regarding its intent to perform the financing and/or breaching its duty to disclose, (2) violating North Carolina public policy regarding anti-deficiency litigation, and (3) taking inconsistent positions in litigation in order to damage the Defendants." Defendants allege the same conduct constituting fraud for its claim of common-law fraud also supports a violation of Section 75-1.1. Having already determined Defendants have not forecast any evidence Plaintiff engaged in fraud and concluded the trial court's grant of summary judgment in favor of Plaintiff on the

fraud claim was proper, we similarly conclude here Defendants have not demonstrated Plaintiff engaged in fraudulent conduct in violation of N.C. Gen. Stat. § 75-1.1.

Defendants next argue Plaintiff engaged in "unfair or deceptive trade practices" when it "violated North Carolina public policy regarding anti-deficiency litigation." However, at the summary judgment hearing Defendants conceded this case "doesn't fit nicely into the anti-deficiency statute[.]" Now on appeal, Defendants again have not cited to the existence of any evidence in the Record establishing Plaintiff violated North Carolina's anti-deficiency statutes. Without any evidence of an alleged violation of North Carolina's anti-deficiency statutes, Defendants' argument such conduct constituted unfair or deceptive business practices is therefore insufficient to withstand summary judgment.

Last, Defendants contend Plaintiff took inconsistent positions in litigation with regard to the application of statutes of limitations in order to damage Defendants. Defendants not only do not cite any specific, "inconsistent" positions by Plaintiff but also do not argue how such positions were taken "in order to damage" Defendants. Defendants further cite no authority indicating such action, if true, would constitute "unfair or deceptive trade practices." Defendants have not, therefore, demonstrated any dispute of material fact that would render summary judgment improper. Thus, we affirm the trial court's grant of summary judgment in favor of Plaintiff on

Defendants' claim of unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1.

III. Attorneys' Fees

Defendants argue, and Plaintiff concedes, it abandoned its claim for attorneys' fees concerning the underlying litigation. However, in their reply brief, Defendants further argue Plaintiff is not entitled to recoup from Defendants the award of attorneys' fees awarded in the prior litigation on the original Note as part of any judgment entered in this case because Plaintiff did not comply with the notice requirements set out in N.C. Gen. Stat. § 6-21.2. Defendants did not raise this argument in their principal brief. "[U]nder Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015). Defendants therefore may not present this argument for the first time in their reply brief.

**Conclusion**

Accordingly, for the foregoing reasons, the trial court's grant of Summary Judgment in favor of Plaintiff on all claims and counterclaims is affirmed.

AFFIRMED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).