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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-707

No. COA21-243

Filed 21 December 2021

Mecklenburg County, No. 19 CVS 6471

GRANITE CONTRACTING, LLC, Plaintiff,

v.

CARLTON GROUP, INC., d/b/a CARLTON SCALE, Defendant.

Appeal by defendant from order entered 29 April 2020 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2021.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, for plaintiff-appellee.

Carruthers & Roth, P.A., by Kevin A. Rust and Rachel S. Decker; Obermayer Rebmann Maxwell & Hippel, PLLC, by Andrew J. Horowitz, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Carlton Group, Inc. ("defendant") appeals from the trial court's order denying defendant's Motion for Judgment Notwithstanding the Verdict or In the Alternative For a New Trial. Defendant contends the trial court erred in declining to find that

the parties entered into an agreement that included limitations of liability and damages. For the following reasons, we affirm the trial court.

I. Background

¶ 2 In July 2015, Granite Contracting, LLC ("plaintiff") began discussions with defendant to move a truck scale from Latta, South Carolina to Concord, North Carolina. The primary points of contact were Steve Cosper ("Cosper"), president for plaintiff, and Kevin Maloney ("Maloney"), defendant's operations salesman and manager. Throughout August 2015, Cosper and Maloney exchanged emails addressing project specifications, including plaintiff's plan to potentially extend the existing scale from sixty feet to eighty feet in length.

¶ 3 On 11 December 2015, Maloney emailed Cosper a formal quote for extending the scale. The first three pages of the quote described pricing for necessary weighing and installation equipment as well as estimated freight costs, with a total estimated cost of $24,014.00. The quote provided that pricing was "good for 30 days" from the date of the quote, with payment terms of a twenty five percent down payment due at the time of order and the remaining balance due thirty days from delivery. The third page included Maloney's contact information.

¶ 4 The remaining four pages of the quote consisted of "Terms and Conditions" but did not include any specific information pertaining to the project. The terms and conditions included a complete waiver of consequential damages and damages for

calibration errors, a limitation of liability clause which limited recovery to the contract price, and a requirement that any claims arising from the work performed under the quote be brought within one year.

¶ 5 Maloney sent a revised quote on 16 December 2015 which included the cost of installation and moving the scale, for a total cost of $29,919.00. The added section for installation was the only change from the original quote. After receiving the revised quote, Cosper emailed Maloney to thank him for his "help." Cosper requested that Maloney send him an invoice, which Maloney sent on 4 January 2016. Cosper replied: "Perfect. Thanks for your help Kevin. We will get it entered as of 2015 and get you a check whenever you need it. Let's stay in touch on the schedule so it will be ready to set into place as soon as we can get ready on our end." At trial, Cosper testified that he did not think that plaintiff had ever actually paid the 4 January invoice.

¶ 6 Cosper and Maloney continued to swap drawings and discuss project specifications throughout 2016. On 23 March 2016, defendant sent an invoice to plaintiff for a down payment of $7,480.00. On 5 April 2016, Maloney went to the asphalt plant in Latta to "pick up the components, the electronic component, the brain of the scales," and placed the components in storage. Plaintiff eventually agreed to extend the scale, and defendant performed the installation, extension, and calibration of the scale in October 2016. On 21 November 2016, defendant sent plaintiff an

invoice for the completed work, with a total due of $25,824.52. Plaintiff sent a check for the balance on 22 December 2016.

¶ 7 Not long after the Concord asphalt plant opened, plaintiff determined that "the plant was financially not performing well." Plaintiff learned that the scales were "exactly ten percent off[,]" and were calibrated to display metric tons, rather than U.S. tons. Cosper testified that plaintiff was "giving every [tenth] ton free."

¶ 8 Plaintiff filed a complaint on 4 April 2019, alleging that defendant had negligently designed, installed, calibrated, and certified the scale at the Concord plant. Defendant filed an answer and affirmative defenses on 30 May 2019.

¶ 9 A jury trial began on 9 March 2020 in Mecklenburg County Superior Court, Judge Trosch presiding. Prior to opening statements, the trial court read into the record a list of certain facts "agreed or stipulated" by both parties. The sixth stipulated fact was that "in October of 2016, Carlton Scale was contracted by Granite Contracting to assist with the relocation, installation, and calibration of an existing truck scale."

¶ 10 In addition to his previously discussed testimony, Cosper testified that he had read the first two pages of the quote but did not read the portion of the quote that included the "Terms and Conditions." Cosper testified that "[a]nything past the quote's not pertinent. It's a quote. It's not a contract. It's a quote."

¶ 11 At the close of plaintiff's case, defendant made a motion for directed verdict,

arguing the economic loss rule and that Cosper "received the contract terms and conditions as part of a proposal." The trial court denied defendant's motion for directed verdict, reasoning that "this needs to go to the jury."

¶ 12 At the close of defendant's case, defendant renewed its motion for directed verdict. Plaintiff also made a motion for directed verdict on the issues of breach of contract and negligence. The trial court denied both motions.

¶ 13 At the close of all evidence, plaintiff renewed its motions per Rule 50, and defendant renewed its motion for directed verdict. The trial court again denied both parties' motions.

¶ 14 The jury returned a verdict on 13 March 2020, answering that plaintiff was damaged by the negligence of defendant, that plaintiff was contributorily negligent, that defendant breached the parties' contract by nonperformance, and that the contract was not subject to a limitation of liability and damages. The jury awarded damages of $579,400.00, reduced by $191,200.00 due to plaintiff's "unreasonable failure to avoid or minimize its injuries[,]" for a net award of $388,200.00. The trial court entered judgment on 2 April 2020.

¶ 15 On 9 April 2020, defendant filed a Motion for Judgment Notwithstanding the Verdict, or In the Alternative For a New Trial. The trial court denied defendant's motion by order filed 29 April 2020.

¶ 16 Defendant filed written notice of appeal on 29 April 2020 and filed an amended

notice of appeal 1 May 2020.

II. Discussion

¶ 17 Defendant contends the trial court's denial of defendant's motion should be reversed because the jury's verdict is internally inconsistent. Defendant argues that the jury's finding that defendant breached the parties' contract by non-performance but that the contract was not subject to a limitation of liability and damages is "inherently paradoxical." We disagree.

¶ 18 "The standard of review of a denial of a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury." *Boggess v. Spencer*, 173 N.C. App. 614, 618, 620 S.E.2d 10, 13 (2005) (citation omitted).

¶ 19 " 'Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact.' " *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911 (1998) (quoting *Snyder v. Freeman,* 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980)). "It is essential to the formation of any contract that there be 'mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.' " *Id.*, 495 S.E.2d at 911-12 (citation omitted). "Mutual assent is normally established by an offer by one party and an acceptance by the other, which offer and acceptance are essential elements of a contract." *Id.*, 495 S.E.2d at 912.

¶ 20 "Any material fact that has been in controversy between the parties may be

established by stipulation." *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004) (citation omitted). "A stipulation need not follow any particular form, but its terms must be sufficiently definite and certain as to form a basis for judicial decision, and it is essential that the parties or those representing them assent to the stipulation." *Id.* (citation omitted). "The effect of a stipulation by the parties withdraws a particular fact from the realm of dispute." *Id.* (citation omitted).

¶ 21 Defendant's brief places significant emphasis on Cosper's admission that he had only read the first two pages of the quote. Defendant's arguments, however, fail to address whether there was mutual assent or a meeting of the minds between the parties, instead appearing to assume that the December 2015 quote constituted a contract and focusing on why plaintiff should be bound by the quote. Although the descriptions and price estimates included in the quotes appear to largely conform with the work that was ultimately performed, our review of the Record shows that the parties continued to negotiate various details of the project between December 2015 and October 2016. Additionally, plaintiff did not sign any documents that would serve to bind the parties in contract. Considering the evidence in a light most favorable to plaintiff, defendant has failed to show that plaintiff assented to the December 2015 quote.

¶ 22 More importantly, defendant does not address the stipulation both parties

agreed to at trial that "in October of 2016, [defendant] was contracted by [plaintiff] to assist with the relocation, installation, and calibration of an existing scale." Both parties agreed to the stipulation at the outset of trial. This stipulation, which has not been challenged by defendant at any stage of the proceedings, establishes that the contract at issue was formed in October 2016 at the time of performance. Because the question of the date of contracting is settled by the stipulation and therefore "withdraw[n] . . . from the realm of dispute," defendant's remaining arguments regarding the enforceability of the December 2015 quote are overruled.

III. Conclusion

¶ 23 For the foregoing reasons, we affirm the trial court's denial of defendant's motion.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).