IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-623

No. COA21-78

Filed 16 November 2021

Mecklenburg County, No. 19-CVS-19892

FUND 19-MILLER, LLC, Plaintiff,

v.

JAMES W. ISBILL, JR., and RACHEL HOPE ISBILL, Defendants.

Appeal by plaintiff from order entered 25 August 2020 by the Honorable George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 October 2021.

Hamilton Stephens Steele & Martin, PLLC, by Melanie J. Raubach and Mark R. Kutny, for Plaintiff-Appellant.

Moon Wright & Houston, PLLC, by Andrew T. Houston and Caleb Brown, for Defendants-Appellees.

CARPENTER, Judge.

¶ 1 Fund 19-Miller, LLC ("Plaintiff"), appeals from the 25 August 2020 order (the "Order") denying its Motion for Summary Judgment and granting James W. Isbill,

Jr. and Rachel Isbill's (collectively, "Defendants") Motion for Summary Judgment. After careful review, we find no error and affirm the trial court's Order.

I. Procedural and Factual Background

¶ 2 This case arises from a series of loan transactions beginning in 2005. Miller Estate, LLC, is a North Carolina limited liability company ("Miller Estate"), and James W. Isbill, Jr. ("Defendant James Isbill") is its sole member. Between 2005 and 2009, Alliance Bank & Trust Company ("Alliance Bank") made eleven loans[1] (the "2005 Loans") to Miller Estate to purchase certain real property, which Miller Estate used as rental properties. The terms of each loan were set forth in a note between Miller Estate and Alliance Bank with maturity dates ranging from 8 May 2010 to 9 September 2014 (the "Notes").

¶ 3 For the 2005 Loans, Defendant James Isbill executed a guaranty on 8 April 2005 for the benefit of Alliance Bank. Rachel Hope Isbill ("Defendant Rachel Isbill") also executed a guaranty (together with Defendant James Isbill's guaranty, the "Guaranties") on 19 May 2005 for the benefit of Alliance Bank. Both Guaranties stated Defendants would pay the "debts, liabilities and obligations of [Miller Estate]" only "when due (whether at maturity or upon acceleration) . . . ." Neither guaranty contained a maturity date.

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[1] These loans had account numbers ending in -1186, -2507, -2556, -2708, -2807, -3286, -1388, -2647, -2753, -2808, and -2508.

¶ 4 A number of "Commercial Debt Modification Agreements" were executed in connection with the Notes between mid-2008 and mid-2010. None of these agreements released the guaranty obligations, reduced the principal balance due under any of the Notes, or extended the maturity date of any Note.

¶ 5 Miller Estate filed a Chapter 11 bankruptcy reorganization case on 28 December 2010 (the "Bankruptcy Case") in the United States Bankruptcy Court for the Western District of North Carolina (the "Bankruptcy Court"). Alliance Bank was a secured creditor in the Bankruptcy Case. In late 2010 or early 2011, as part of the bankruptcy process, Alliance Bank met with Defendant James Isbill as a representative of Miller Estate to discuss the restructuring of the 2005 Loans and the management of Miller Estate's rental properties. In late 2011 and early 2012, Alliance Bank and Defendant James Isbill met regarding the repayment of the 2005 Loans, the terms of repayment, and extensions of the maturity dates. Alliance Bank agreed that the 2005 Loans would be amortized over thirty years and that they would mature in fifteen years. Alliance Bank memorialized this mutual agreement in a document dated 6 January 2012 (the "Letter"). The Letter was signed by Dan Ayscue as President for Alliance Bank, and it was signed and accepted by Defendant James Isbill for Miller Estate. The Bankruptcy Court incorporated the Letter into the reorganization and confirmed on 20 March 2012 a Chapter 11 bankruptcy plan of reorganization for Miller Estate.

¶ 6 On 12 July 2013, Plaintiff and Alliance Bank entered into a Sale and Assignment Agreement that provided for the purchase and sale of the 2005 Loans (the "Sale Agreement"). The Sale Agreement provided Plaintiff would purchase the 2005 Loans for $340,000.00. It also referenced and attached an Exhibit A listing the total balance outstanding for the 2005 Loans as $824,694.17. Defendants received notice of this purchase and assignment in August 2013.

¶ 7 Plaintiff commenced this action by filing a complaint (the "Complaint") and issuing a summons on 14 October 2019. Plaintiff sought to enforce the Guaranties made by Defendants in connection with the 2005 Loans. It maintained it is "now the legal holder of the [2005 Loans], including Notes and Guaranties," and the 2005 Loans "have reached maturity and have not been paid in full." The complaint asserted claims for: (1) breach of contract as to Defendant James Isbill, (2) unjust enrichment as to Defendant James Isbill, (3) breach of contract as to Defendant Rachel Isbill, and (4) unjust enrichment as to Defendant Rachel Isbill.

¶ 8 Plaintiff and Defendants filed cross motions for summary judgment in the case. The Honorable George C. Bell heard arguments on the motions on 20 July 2020 in Mecklenburg County Superior Court. He entered the 25 August 2020 Order denying the Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment. Plaintiff filed a timely notice of appeal on 24 September 2020.

II. Jurisdiction

¶ 9 This Court has jurisdiction to address Plaintiff's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

¶ 10 The issues on appeal are: (1) whether the trial court erred in denying Plaintiff's Motion for Summary Judgment, and (2) whether the trial court erred in granting Defendants' Motion for Summary Judgment.

IV. Standard of Review

¶ 11 In reviewing an order granting summary judgment, this Court applies a *de novo* standard of review and "view[s] the evidence in the light most favorable to the non-movant." *Macon Bank, Inc. v. Gleaner*, 240 N.C. App. 46, 49, 770 S.E.2d 114, 118 (2015) (citation omitted).

¶ 12 This Court is to "engage in a two-part analysis of whether: (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Id.* at 49, 770 S.E.2d at 118.

> 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.

Id. at 49, 770 S.E.2d at 118 (citation omitted).

V. Analysis

A. Breach of Contract

¶ 13 Plaintiff's first argument is the 2005 Loans underlying this lawsuit have not been modified such that their maturity dates have been extended to 2027; rather, it contends the 2005 Loans have retained the original maturity dates as set forth in the Notes. Defendants argue the Letter demonstrated that the maturity dates of the 2005 Loans were extended to 2027 so their Guaranties are not enforceable until 2027. Because the Guaranties state only that full payment will occur when the 2005 Loans become due, and the 2005 Loans are not due until 2027 pursuant to the parties' Letter, we agree with Defendants.

¶ 14 "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007) (citation omitted). A defendant is entitled to summary judgment where the plaintiff cannot prove "an essential element of the plaintiff's case" or "cannot produce evidence to support an essential element of his or her claim . . . ." *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 386, 675 S.E.2d 122, 128 (citation omitted), *disc. rev. denied*, 363 N.C. 580, 682 S.E.2d 206 (2009). Additionally, a defendant may show he or she is entitled to

summary judgment by "showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *Id.* at 386, 675 S.E.2d at 128 (citation omitted).

¶ 15 There is no dispute that the 2005 Loans were validly entered into, the underlying funds were received, and Defendants signed Guaranties for the 2005 Loans. Therefore, the dispute in this case is whether there was a breach of contract as to the 2005 Loans and Guaranties. *See Parker*, 182 N.C. App. at 232, 641 S.E.2d at 737. We find there was not.

¶ 16 We first acknowledge the meaning and purpose behind guaranties:

> [a] guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself liable in the first instance for such payment or performance. A guarantor's liability arises at the time of the default of the principal debtor on the obligation or obligations which the guaranty covers. A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor.

Gillespie v. De Witt, 53 N.C. App. 252, 258, 280 S.E.2d 736, 741 (citations omitted), *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981).

¶ 17 In this case, the Guaranties signed by Defendants state, "I absolutely and unconditionally guarantee the full payment of the following debts . . . when due (whether at maturity or upon acceleration)." They further state,

> I absolutely and unconditionally guarantee to you the payment and performance of each and every debt, of every type and description, that the borrower may now or at any time in the future owe you, up to the principal amount of $ UNLIMITED plus

> accrued interest, attorneys' fees and collection costs referable thereto . . . and all other amounts agreed to be paid under all agreements evidencing the debt and securing the payment of the debt.

Based on the specific language of the Guaranties, and the meaning and purpose behind guaranties in general, we find Defendants' Guaranties become enforceable only in the case of default or when payment of the 2005 Loans becomes due.

¶ 18 We next consider whether the 2005 Loans have become due, and therefore, whether the Guaranties have become enforceable. Plaintiff argues that the original loan maturity dates prevail because the Letter was not a valid modification to the 2005 Loans. Defendants argue the Letter was a valid modification extending the due dates of the 2005 Loans to 2027. If the Letter was a proper modification, there could be no breach of contract until 2027 based on the dates of maturity; if the Letter was not a proper modification, then Defendants breached the contract at the original maturity dates ranging from 8 May 2010 to 9 September 2014. We hold the Guaranties followed the due dates of the 2005 Loans, and the due dates for the 2005 Loans were validly extended until 2027 by the Letter. Thus, there can be no breach of contract on the grounds of maturity default until 2027.

¶ 19 "No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars ($50,000) shall be binding

unless the commitment is in writing and signed by the party to be bound." N.C. Gen. Stat. § 22-5 (2019). When interpreting a written agreement between two parties, our Court "determine[s] the intent of the parties by using the plain meaning of the written terms." *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (internal quotations and citations omitted). When interpreting a document that falls under the statute of frauds, like a commercial note exceeding $50,000.00, both the original document and any modification must satisfy the requirements of the statute of frauds. *Macon Bank, Inc.*, 240 N.C. App. at 50–51, 770 S.E.2d at 119; *see* N.C. Gen. Stat. § 22-5. Subsequent oral modifications of the original written documents that do not comply with the statute of frauds are "ineffectual." *Id.* at 50–51, 770 S.E.2d at 126 (citing *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984)).

¶ 20 Six of the original 2005 Loans have original balances in excess of $50,000, so these six loans fall under N.C. Gen. Stat. § 22-5, and any modification would need to satisfy the statute of frauds. *See id.* at 50–51, 770 S.E.2d at 119; N.C. Gen. Stat. § 22–5. Thus, any modification to the 2005 Loans would need to be "in writing and signed by the party to be bound." *See* N.C. Gen. Stat. § 22-5. In this case, a written letter was executed between Alliance Bank and Miller Estate, prior to the 2005 Loans being transferred to Fund 19-Miller, stating,

> [a]ll loans under the proposed Bankruptcy Plan will be payable monthly beginning on March 10, 2012 over a period of fifteen (15) years. The actual payment amount for each loan will be calculated using an amortization of thirty (30) years. For your convenience, the payment amount for each loan is shown in the spreadsheet on the next page.

¶ 21 Both Alliance Bank and Defendant James Isbill, on behalf of Miller Estate, LLC, signed this letter. The letter clearly referred to the 2005 Loans and indicated the loans would be payable over fifteen years beginning 10 March 2012. Therefore, all eleven 2005 Loans satisfied the statute of frauds, and the 2005 Loans do not become due in full until 10 March 2027.

¶ 22 Because the 2005 Loans are not due until 10 March 2027, and because the Guaranties "guarantee[d] the full payment of the [2005 Loans] . . . when due," we find the guaranty obligations do not arise until 10 March 2027 when the balance of the 2005 Loans becomes due in full. We hold the elements for breach of contract have not been met, and we affirm the trial court's ruling of summary judgment on these claims in favor of Defendants. *See Macon Bank, Inc.*, 240 N.C. App. at 49, 770 S.E.2d at 118.

¶ 23 In its brief in support of its motion for summary judgment, Plaintiff also argues on appeal that: (1) its ability to collect from Miller Estate on the amounts due on the Notes has been impacted by operation of Miller Estate's Bankruptcy Case, and (2) it should be allowed to introduce evidence of a prior judgment against

Miller Estate to prove Defendants defaulted on their obligation to pay. These arguments fail because Plaintiff cannot assert new theories not alleged in its complaint.

¶ 24 Plaintiff's complaint alleged that Defendants were liable for breach of contract based on a maturity default. No other theory of breach of contract was alleged. Litigants are unable to assert new theories of recovery that were not alleged in the complaint at summary judgment because these belated changes fail to provide "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970); *see Cloaninger v. McDevitt*, 555 F.3d 324, 336 (4th Cir. 2009) (holding that a plaintiff could not raise new claims not raised in its complaint at summary judgment "without amending his complaint"). Because Plaintiff did not allege breach of contract based on Miller Estate's bankruptcy, discharge in bankruptcy, or default based on the 2019 judgment alleged in its complaint, it was unable to allege those theories in its motion for summary judgment.

¶ 25 We affirm summary judgment in favor of Defendants on the breach of contract claim. *See Macon Bank, Inc.*, 240 N.C. App. at 49, 770 S.E.2d at 118.

B. Unjust Enrichment

¶ 26 Plaintiff does not appear to discuss or challenge the trial court's determination on its claims for unjust enrichment, so we consider that argument abandoned on appeal. *See Belk v. Belk*, 221 N.C. App. 1, 5–6, 728 S.E.2d 356, 359 (2012); N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). However, because Defendants make an argument as to these claims, we will discuss them briefly.

¶ 27 Defendants argue unjust enrichment does not apply in this case because Plaintiff seeks to recover from Defendants under express written guaranty agreements. We agree.

¶ 28 Unjust enrichment is a remedy "devised by equity to exact the return of . . . benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984). An unjust enrichment claim is grounded in implied contractual theories and "is not an appropriate remedy when there is an actual agreement between the parties." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998). It is well established that "an express contract precludes an implied contract with reference to the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citations omitted).

¶ 29 It is undisputed that Plaintiff seeks to recover from Defendants under express written guaranty agreements, so the equitable remedy of unjust enrichment is not applicable. *See Paul L. Whitfield, P.A.*, 348 N.C. at 42, 497 S.E.2d at 415. Thus, the trial court did nor err in awarding Defendant's summary judgment on those claims. *See Macon Bank, Inc.*, 240 N.C. App. at 49, 770 S.E.2d at 118.

VI. Conclusion

¶ 30 For the foregoing reasons, we affirm the trial court's Order denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment.

AFFIRMED.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).