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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-741

Filed 12 September 2023

Durham County, Nos. 21 CVS 1383, 21 CVS 1387

MONTESSORI SCHOOL OF DURHAM, Plaintiff,

v.

DANIEL FUCHS and DIKLA FUCHS, Defendants,

and

MONTESSORI SCHOOL OF DURHAM, Plaintiff,

v.

PHILIP A. DAYE and KATHLEEN TEDFORD, Defendants.

Appeal by Defendants from order entered 17 March 2022 by Judge Brian C. Wilks in Durham County Superior Court. Heard in the Court of Appeals 7 February 2023.

Bryant & Lewis, P.A., by David O. Lewis, for Plaintiff-Appellee.

P.M. Dubbeling, PLLC, by Paul M. Dubbeling, for Defendants-Appellants.

CARPENTER, Judge.

Phillip A. Daye and Kathleen Tedford ("Defendant-Daye/Tedford"), and Daniel Fuchs and Dikla Fuchs ("Defendant-Fuchs") (collectively, "Defendant-Parents") appeal the trial court's order granting summary judgment to Montessori School of Durham ("Plaintiff").

I. Factual and Procedural Background

Plaintiff is a nonprofit educational facility located in Durham. Plaintiff offers several programs including: before school; after school; summer; toddler (children aged 18 months to 3 years); early childhood and kindergarten (children aged 3 to 5 years); and elementary (grades 1 to 6). Defendant-Parents each contracted with Plaintiff in 2019 and 2020 to enroll their children at Plaintiff's facility. Defendant-Parents signed written agreements ("Tuition Agreements") for the 2019–2020 and 2020–2021 academic terms. Plaintiff's Tuition Agreements provided, in relevant part:

> Parent(s)/Guardian(s) understand that they are obligated to pay the full year's tuition, and that no reduction or credit will be granted if a pupil is withdrawn unless the withdrawal is made at the specific request of the school for reasons other than non-payment of tuition. In the event Parent(s)/Guardian(s) do not send or cease sending their child to school, the entire unpaid balance of tuition is immediately due and payable, regardless of payment option chosen.

By early March 2020, the COVID-19 virus was spreading across the United States. On 14 March 2020, pursuant to emergency directive authority, Governor Roy Cooper issued Executive Order 117 decreeing, in relevant part, that "all public schools

close" from 16 March 2020 to 29 May 2020. As a result, Plaintiff did not offer in-person instruction but provided remote learning during this period. Moreover, Plaintiff did not provide its summer program in 2020 but did offer in-person instruction during fall 2020 and spring 2021.

In June 2020, Defendant-Parents notified Plaintiff that they would not be sending their children to school for the 2020-2021 academic year. In response, Plaintiff's Head of School, Tammy Squires, reiterated Defendant-Parents' payment obligations under the Tuition Agreements.

On 19 January 2021, Plaintiff filed two breach-of-contract complaints: one against Defendant-Daye/Tedford and another against Defendant-Fuchs. In these complaints, Plaintiff alleged Defendant-Parents did not pay the amounts specified in the Tuition Agreements. During pre-hearing discovery, Defendant-Parents requested further financial information from Plaintiff in an attempt to assess Plaintiff's claim for damages. Plaintiff did not provide this information and filed a protective order to prevent its disclosure.

On 27 January 2022, Plaintiff filed motions for summary judgment. Along with their motions, Plaintiff filed affidavits of Squires. Squires's affidavits corroborate Plaintiff's claims that Defendant-Parents agreed to pay the amount stipulated in the Tuition Agreements, regardless of attendance, and Plaintiff suffered damages as set forth in the respective agreements. Thereafter, Plaintiff filed a second protective order, and Defendant-Parents filed a motion to compel. On 9 March 2022,

the trial court held a summary-judgment hearing and consolidated the two cases. As the hearing concluded, the following exchange occurred with respect to the pending discovery motions:

> **The Court**: I know that we've never really addressed the motion to compel and protective order.
> **[Defendant-Parents' counsel]**: Yes, sir
> **The Court**: . . .I think they kind of flow from the ruling of the Court and if we - - if we are ruled that it's not granted then we'll have to check. . . and put those matters back on as soon as possible so we try to get a resolution of those issues and go from there. So everything kind of flows from the ruling[.]

Thereafter, the trial court granted summary judgment against Defendant-Daye/Tedford in the amount of $34,001.92 together with attorney's fees, and against Defendant-Fuchs in the amount of $48,721.78 together with attorney's fees. Defendant-Parents timely filed written notice of appeal.

II. Jurisdiction

The trial court's order is a final judgment, and jurisdiction therefore lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court: (1) erred by granting summary judgment for Plaintiff; and (2) abused its discretion by granting summary judgment before ruling on Defendant-Parents' motion to compel.

IV. Analysis

A. Affirmative Defenses

First, Defendant-Parents contend the trial court erred because Defendant-Parents pleaded a prima facie affirmative defense of frustration of purpose. Additionally, Defendant-Parents contend genuine issues of material fact remain regarding Plaintiff's damages. In response, Plaintiff argues Defendant-Parents' frustration-of-purpose defense is unsupported by the record. Furthermore, Plaintiff maintains summary judgment was properly granted because the Tuition Agreements establish the measure of damages in the event of a breach.

"Our standard of review from summary judgement is de novo . . . ." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "'Under a *de novo* review, this [C]ourt considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Rule 56(c) of the North Carolina Rules of Civil Procedure allows a party to obtain summary judgment upon demonstrating that "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 they are "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). "This burden may be met 'by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.'" *Id.* at 681, 565 S.E.2d at 146 (quoting *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). When reviewing evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988). "With regard to an affirmative defense, summary judgment is appropriate if the movant 'establishes that the non-movant cannot prevail on at least one of the elements in his affirmative defense.'" *Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.,* 192 N.C. App. 419, 428, 665 S.E.2d 518, 524 (2008) (quoting *Bunn Lake Prop. Owner's Ass'n, Inc. v. Setzer*, 149 N.C. App. 289, 294–95, 560 S.E.2d 576 (2002)).

Here, Defendant-Parents do not dispute the existence of valid contracts or their breach of their respective contracts. Rather, Defendant-Parents argue genuine issues of material fact remain as to whether Defendant-Parents have a valid excuse for non-

performance and whether Plaintiff suffered any damages as a result of Defendant-Parents' non-performance.

"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." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). In breach-of-contract actions, "the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made." *Troitino v. Goodman,* 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945). A party to a contract who has been injured by a breach of the contract is entitled to be placed in the same financial position as if the contract had been performed. *Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 365, 111 S.E.2d 606, 612 (1959). "Under the fundamental principle of freedom of contract, the parties to a contract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach, and the courts will generally enforce such an agreement . . . ." *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 130–31, 641 S.E.2d 711, 713 (2007) (citations omitted).

North Carolina recognizes frustration of purpose as a defense to a breach of contract action. *See Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 217, 141 S.E.2d 292, 293–94 (1965) (noting the frustration-of-purpose doctrine is "recognized by this Court"). "Essentially the doctrine of frustration of purpose requires proof that: (1) there was an implied condition in the contract that a changed condition would excuse

performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 79, 715 S.E.2d 273, 284 (2011) (citing *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 602, 574 S.E.2d 688, 691 (2002)).

In our review of binding and persuasive case law on this issue, two cases were particularly instructive: *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981) and *Critzos v. Marquis*, 256 Md. App. 684, 287 A.3d 1281 (2023).

Brenner is our leading case regarding the enforceability of a private, early education tuition contract containing a nonrefundable tuition provision. In *Brenner*, the plaintiff-father contracted with the defendant-school and paid tuition to secure his incoming fourth-grader's enrollment for the 1978–79 school year. *Brenner*, 302 N.C. at 211–12, 274 S.E.2d at 209–10. The contract provided tuition was "payable in advance of the first day of school, no portion refundable." *Id.* at 212, 274 S.E.2d at 210. Thereafter, the plaintiff-father's ex-wife, who had custody of the child, refused to allow the child to attend the school at any point that term. *Id.* at 214, 274 S.E.2d at 211.

In ruling for the defendant-school and remanding for a new trial, our Supreme Court noted frustration of purpose did not apply in plaintiff-father's favor for two reasons: (1) "[t]here was no substantial destruction of the value of the contract" because the school performed to the extent it was able by preparing to teach the child,

reserving and holding open a space for the child, and neither party breached the contract; and (2) taking an expansive view of the foreseeability of the frustrating event, "the possibility that the child may not attend was foreseeable" and anticipated by the nonrefundable tuition provision, which "allocate[d] to plaintiff the risk that the child will not attend." *Id.* at 212, 274 S.E.2d at 210.

Therefore, when "the doctrine of frustration of purpose does not apply and the terms of the contract are clear and unambiguous, the courts are bound to enforce [the contract] as written." *Id.* at 212–13, 274 S.E.2d at 210. The *Brenner* Court further explained its holding "is consistent with prior cases in this jurisdiction which state that a contract providing for the nonrefundable payment of tuition is enforceable as written, regardless of the nonattendance of the pupil, where the failure to attend is not caused by some fault on the part of the school." *Id.* at 213, 274 S.E.2d at 210.

Next, we turn to *Critzos v. Marquis* for a timely discussion of frustration events arising out of the COVID-19 pandemic and resulting state-level executive orders. 256 Md. App. 684, 287 A.3d 1281 (2023). In 2015, the parties in *Critzos* executed a contract whereby the defendants leased commercial real estate from the plaintiff to establish a pub. *Critzos*, 256 Md. App. at 688, 287 A.3d at 1284. The defendants opened Chesapeake Brewing Company in Annapolis and operated without issue until the onset of the pandemic. *Id.* at 688–89, 287 A.3d at 1284. On 12 March 2020, Governor Hogan "issued an executive order requiring that bars and restaurants close by 5:00 p.m." *Id.* at 689, 287 A.3d at 1284. The executive order permitted food

establishments to continue carry-out, drive-through, and delivery operations, subject to social distancing protocols. *Id.* at 689, 287 A.3d at 1284. In April 2020, defendants began negotiating with the plaintiff for a rent abatement "in light of the COVID-19 health emergency and [their] inability to operate the brewery and restaurant as usual." *Id.* at 689, 287 A.3d at 1284. The parties were unable to reach an agreement; the defendants vacated the premises on 3 May 2020, and the plaintiff filed a breach action on 27 May 2020. *Id.* at 689–90, 287 A.3d at 1284. On 29 May 2020, restrictions were relaxed to allow food and beverage service for outdoor seating, and on 12 June 2020, indoor dining was authorized at no more than fifty-percent capacity. *Id.* at 689, 287 A.3d at 1284.

The trial court ruled for the defendants, and the plaintiff appealed one issue of first impression regarding "whether [defendants] presented sufficient evidence to establish the affirmative defenses of frustration of purpose and legal impossibility" in the context of the COVID-19 pandemic. *Id.* at 692, 287 A.3d at 1286–87; *see Brenner*, 302 N.C. at 211, 274 S.E.2d at 209 (Although "frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under [frustration,] performance remains possible, but is excused whenever a fortuitous event supervenes to cause a . . . practically total destruction of the expected value of the performance."). Due to the lack of binding authority on point, the court surveyed related cases from multiple states, including Illinois, Massachusetts, Connecticut, and a Prohibition-era case

from Maryland, to establish guardrails for its analysis. *See Critzos,* 256 Md. App. at 695–99, 287 A.3d at 1288–90. In each case, the court examined the purpose of the contract and the extent each tenant or impacted party could perform without breaching the contract or violating executive orders. *See id.* at 695–99, 287 A.3d at 1288–90.

After acknowledging the pandemic undeniably "challenged [defendants'] ability to operate a financially viable business[,]" the court reasoned, "[e]conomic challenges . . . do not themselves establish the affirmative defenses of frustration of purpose or legal impossibility." *Id.* at 700, 287 A.3d at 1291. Although executive orders frustrated the defendants' ability to serve customers and likely made profitable operation *factually* impossible, the court rejected both affirmative defenses because the restrictions "did not order a complete shutdown of [the defendants'] business." *Id.* at 701, 287 A.3d at 1291.

With these principles in mind, we turn to Defendant-Parents' arguments on appeal. Defendant-Parents first contend issues of material fact remain as to the applicability of their frustration of purpose defense. Defendant-Parents claim the express terms of the contract provide "Plaintiff was required to provide daily, in-person, hours-long childcare for their children." Under normal circumstances, this may have been Defendant-Parents' primary anticipated benefit of the bargain, but the plain language of the Tuition Agreements does not bind the school to perform as Defendant-Parents describe. The Tuition Agreements mention "afternoon care" and

a "pick-up" time, but do not expressly require Plaintiff to provide daily, in-person education.

Defendant-Parents maintain Plaintiff did not provide the services for which the parties contracted, and the Tuition Agreements did not allocate the risk of a pandemic-related closure. We are inclined to agree that COVID-19 was not a reasonably foreseeable event, and the Tuition Agreements do not explicitly mention a pandemic-related closure. It is equally true that the Tuition Agreements allocated the risk of nonattendance to Defendant-Parents by holding them liable for the full tuition amount, even if their child or children did not attend Plaintiff's facility. The Tuition Agreements provide "the entire unpaid balance of the tuition [was] immediately due and payable," even if Defendant-Parents "[did] not send or cease sending their child" to Plaintiff's facility. Therefore, this provision in the Tuition Agreements demonstrates the risk of non-attendance was both contemplated by the parties and allocated in the contracts. *See Brenner,* 302 N.C. at 212, 274 S.E.2d at 210; *Troitino,* 225 N.C. at 412, 35 S.E.2d at 281. Plaintiff responded to Governor Cooper's executive orders and performed to the extent permitted by law, providing remote learning content during the spring 2020 shutdown period. Based on the reasoning of *Brenner* and *Critzos*, the value of the Tuition Agreements for this period was not destroyed. Therefore, frustration of purpose does not apply to excuse Defendant-Parents' non-performance.

Moreover, Squires' affidavits and the four corners of the Tuition Agreements

constitute unrebutted evidence that Defendant-Parents "contractually promised to make tuition payments, regardless of whether their child attended." *See Faulconer*, 155 N.C. App. at 602, 574 S.E.2d at 691; *Fayetteville Publ'g Co.,* 192 N.C. App. at 428, 665 S.E.2d at 524. Thus, Plaintiff met its burden for summary judgment and established through unrebutted evidence that Defendant-Parents could not prevail on a frustration-of-purpose defense because "the parties . . . contracted in reference to the allocation of the risk involved in the frustrating event," nonattendance, and therefore, "they may not invoke the doctrine of frustration to escape their obligations." *Brenner*, 302 N.C. at 211, 274 S.E.2d at 209.

Next, Defendant-Parents contend there are issues of material fact regarding whether Plaintiff suffered compensable damages during the 2020–21 school year. Defendant-Parents contend Plaintiff did not suffer damages due to Defendant-Parents' breach because Plaintiff had the ability to enroll and receive tuition payments on behalf of subsequently enrolled students. On this point, Defendant-Parents refer us to *Brenner* for the proposition that a school cannot recover tuition payments when it has received those payments from another source.

Defendant-Parents' reading of *Brenner* is overbroad and distinguishable. The statement on which Defendant-Parents rely is found within the Court's discussion of liquidated damages and penalties. The plaintiff in *Brenner* was seeking a refund of tuition in the absence of breach, arguing the nonrefundable tuition provision was an unenforceable penalty, rather than an enforceable liquidated-damages clause. *See*

id. at 214, 274 S.E.2d at 211. In declining to answer the damages question, the Court reasoned neither party in *Brenner* had breached the contract, so the argument was not properly before it. *Id.* at 214, 274 S.E.2d at 211.

In this case, Defendant-Parents concede they breached the Tuition Agreements; however, we decline to extend the court's statement on that issue here where neither party argued nor briefed liquidated damages. The applicable rule from *Brenner*, which binds us here, is this: "a contract providing for the nonrefundable payment of tuition is enforceable as written, regardless of the nonattendance of the pupil, where failure to attend is not caused by some fault on the part of the school." *Id.* at 213, 274 S.E.2d at 210. Accordingly, Defendant-Parents' affirmative defense arguments are without merit. Because Plaintiff established through unrebutted evidence that the parties allocated the risk of nonattendance to Defendant-Parents, the trial court properly granted summary judgment in favor of Plaintiff.

B. Unresolved Discovery Motions

Defendant-Parents contend the trial court abused its discretion by granting Plaintiff's motions for summary judgment before resolving Defendant-Parents' motion to compel. Specifically, Defendant-Parents argue the information sought from their motion to compel created "material issues of fact which should have precluded summary judgment." On the other hand, Plaintiff contends the trial court did not abuse its discretion because Defendant-Parents were dilatory in discovery procedures and did not meet their burden at summary judgment.

"When reviewing a trial court's ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175 (2010). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). Nevertheless, "the trial court is not barred in every case from granting summary judgment before discovery is completed." *Evans v. Appert*, 91 N.C. App. 362, 367–68, 372 S.E.2d 94, 97 (1988). Granting "summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced." *Hamby v. Profile Prod., LLC*, 197 N.C. App. 99, 113, 676 S.E.2d 594, 603 (2009) (citing *Conover,* 297 N.C. at 512–13, 256 S.E.2d at 220–21).

Even if Plaintiff was compelled to produce the requested documents, Defendant-Parents' obligation to fully perform pursuant to the Tuition Agreements would not be excused. *Hamby*, 197 N.C. App. at 113, 676 S.E.2d at 603. Thus, the trial court's failure to first rule on the pending motion to compel did not prejudice Defendant-Parents' case. *Id.* at 113, 676 S.E.2d at 603. Accordingly, the trial court's

decision to hear the dispositive motion before the motion to compel was not manifestly unsupported by reason. *See Briley*, 348 N.C. at 547, 501 S.E.2d at 656.

V. Conclusion

In sum, the frustration-of-purpose doctrine does not apply to the present case because the risk of nonattendance was allocated by the Tuition Agreements, whose value was not substantially destroyed. *See Brenner*, 202 N.C. at 211, 274 S.E.2d 209. After conceding the existence of a valid contract and breach, Defendant-Parents failed to establish a triable excuse for nonpayment to survive summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). Furthermore, the trial court's decision to consider the motion for summary judgment before the discovery motions did not prejudice Defendant-Parents. Accordingly, we affirm the trial court's grant of summary judgment for Plaintiff and briefly remand to permit the trial court to enter a judgment for sum-certain damages in favor of Plaintiff.

AFFIRMED; REMANDED FOR ENTRY OF SUM CERTAIN DAMAGES.

Chief Judge STROUD and Judge RIGGS concur.

Report per Rule 30(e).