IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-436

Filed 3 October 2023

Wake County, No. 21 CVS 12685

YUYING ZHANG, Plaintiff,

v.

TONY TOMASSO REALI, Defendant.

Appeal by plaintiff from judgment entered 5 December 2022 by Judge Lindsay R. Davis, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 September 2023.

Yuying Zhang, Pro se, for plaintiff-appellant.

Stam Law Firm, PLLC, by R. Daniel Gibson, for defendant-appellee.

ARROWOOD, Judge.

Yuying Zhang ("plaintiff") appeals from judgment entered by the trial court in favor of Tony Tomasso Reali ("defendant"). For the following reasons, we affirm.

I. Background

The matter came on for trial in Wake County Superior Court on 14 November 2022, Judge Davis sitting without a jury. The evidence presented tended to show the following facts.

On or about 23 September 2019, plaintiff presented defendant with a written

offer to buy his property located at 6901 West Lake Anne Drive, Raleigh, NC 27512 ("the property"). A valid contract for the property was formed on 26 September 2019 when defendant accepted plaintiff's offer to buy the property for $250,000.00. A week earlier, the property had been appraised and valued at $289,000.00. The contract required plaintiff to deposit in escrow $3,000.00, which the plaintiff timely paid. The contract also provided that the due diligence period would end on 31 October 2019, that the settlement date would be 29 November 2019,[1] and that "[a]ll changes, additions or deletions [to the contract] . . . be in writing and signed by all parties." As relevant to the transaction's closing, paragraph 13 of the contract—titled "Delay in Settlement/Closing"—reads:

> Absent agreement to the contrary in this Contract . . . if a party is unable to complete Settlement by the Settlement Date but intends to complete the transaction and is acting in good faith and with reasonable diligence to proceed to Settlement ("Delaying Party"), and if the other party is ready, willing and able to complete Settlement on the Settlement Date ("Non-Delaying Party") then the Delaying Party shall give as much notice as possible to the Non-Delaying Party and closing attorney and shall be entitled to a delay in Settlement. If the parties fail to complete Settlement and Closing within fourteen (14) days of the Settlement Date . . . or to otherwise extend the Settlement Date by written agreement, then the Delaying Party shall be in breach and the Non-Delaying Party may terminate this Contract and shall be entitled to enforce any remedies available to such party under this Contract for the breach.

[1] The contract included a "time being of the essence" clause for the due diligence period but did not include one for the settlement date.

On 30 September 2019, plaintiff's closing attorney, Yuanyue Mu ("Mr. Mu"), directed his paralegal to email defendant a document titled "Request for Seller's Information." The email stated that the information requested was necessary to "close on time[.]"

Plaintiff had an inspection of the property completed on 5 October 2019, which found multiple issues with the property as well as recommendations for repairs. On 9 October 2019, plaintiff sent a text message to defendant stating that the inspection found "major issues" and requested that the defendant "repair [the property's] roof, skylight, rotten slidings (sic) and fix the appliance issues[.]" In response, defendant acknowledged the issues with the property but told plaintiff, "that is where you're getting compensated on the price of the house." Plaintiff replied that she "only expected the window/code violation issue," and that she "didn't expect . . . so many other repairs needed[.]"

On 11 October 2019, plaintiff had the property's septic system evaluated by a licensed inspector. Although the inspection report revealed that "the septic system was not fully evaluated at the time of the inspection[,]" the inspector noted various "[a]dverse inspection observations" and maintenance suggestions. On 14 October 2019, plaintiff sent a copy of the septic system inspection report to defendant. Plaintiff and defendant engaged in the following text conversations on 23 October 2019:

Plaintiff: Hi Tony, what is the status on septic repair

> estimates etc? The inspection company told me that this is a material fact which you will have to disclose when you sell the property in the future. So you will need to fix it anyway, sooner or later.
>
> Defendant: I thought the situation over[.] I am not going to sell the house to you under market value and make all the repairs, however septic goes I might be willing to split the cost of repairs
>
> . . . .
>
> Plaintiff: You confirmed to me the septic tank was good before we moved forward.[2] I am not asking you to fix issues found from the house inspection. But the septic tank should be fixed as you said it was good but actually it has major issues.
>
> Defendant: You[ ] [w]ere trying to buy house under valued so [I] am out $450 dollars so do [you] want to work through or threaten me. I am not a septic expert as far as I know the system was working and yes at some point I will have it fixed[.]
>
> Plaintiff: At least you get useful information about the house, I spent the money for nothing … What is the estimate of repair? Did you have that done?

On 25 October 2019, plaintiff sent defendant an agreement to amend the contract. Plaintiff testified that the proposed agreement modified the contract to

[2] On 26 September 2019, after plaintiff had signed the contract, defendant texted plaintiff "contract signed septic system working[.]" Defendant testified that he sent this text after hearing from his tenant, Otis Rodgers ("Mr. Rodgers"), that the septic system was working.

have plaintiff and defendant share the cost of repairs to the septic system. Absent the modification, the contract did not provide for conditions related to the property's septic system. Defendant attempted to access the agreement electronically on 16 January 2020 but never accepted or signed the agreement. Between 28 and 31 October 2019, plaintiff sent the following text messages to defendant:

> Plaintiff: Hi Tony, will you fix the septic tank and have it pass inspection? If you are, can we put it in writing? We can close after that septic tank is repaired. If you are not willing to repair it and not willing to extend the contract deadlines, I will terminate the contract on or before Oct 31 so I can get the $3K earnest money back. Sorry its such a large unexpected expense for you. The house needs a lot of repair too (HVAC, hot water heater and roof are near its end). You would have more expensive repairs coming soon if you hold it. Bathrooms are in bad shape too . . .
>
> Plaintiff: I called the environmental service yesterday and they told me you have 30 days to fix the septic tank, or there will be fines and they will take you to court. Since the government is enforcing this, I will move forward with the purchase. We will close as soon as the septic tank is fixed and passed the inspection.
>
> Plaintiff: The closing attorney is Law Office of Yuanyue Mu, PLLC 901 Kildaire Farm [R]d. Suite D5 Cary, NC 27511 Phone: 919 650 2488 Email: mulaw@mulawsolutions.com[.]

According to the record, after 31 October 2019, neither plaintiff nor defendant sent text messages to the other.

Around June 2020, defendant contacted Mr. Mu, requesting that Mr. Mu release the $3,000.00 earnest money to plaintiff. Then, around 27 July 2020, defendant signed and delivered a contract cancellation agreement to Mr. Rodgers, which Mr. Rodgers gave to plaintiff. On 7 June 2021, about eighteen months after the contract's closing date, Mr. Mu sent defendant a letter, which demanded "closing of [the real estate] transaction as provided by the Contract[.]" Between 31 October 2019 and 7 June 2021, plaintiff testified that she tried to communicate with defendant by phone, email, and by visiting the property multiple times for the purpose of closing. When visiting the property around "February, early March of 2020," plaintiff testified that she spoke with Mr. Rodgers "[t]o pass message[s] to defendant."

On 7 December 2022 Judge Davis entered judgment which contained relevant findings of fact as follows:

> 8. Defendant did not accept responsibility for repair of the septic system prior to closing.
>
> 9. Repair of the septic system by Defendant was not a condition to closing.
>
> 10. On or about October 31, 2019, Plaintiff communicated with Defendant by text message that she had been informed by "the environmental service" (apparently, the county health department), that Defendant had 30 days to "fix the septic tank" or face fines and be taken to court.
>
> 11. In the same message, Plaintiff informed Defendant that "[s]ince the government is enforcing this, I will

> move forward with the purchase [and] will close as soon as the septic tank is fixed and passed inspection."
>
> 12. This statement purports to add a condition to closing that is not within the terms of the parties' contract.
>
> 13. No closing occurred on November 29, 2019, or at any time thereafter (including the "grace period" provided in para. 13 of the Contract).
>
> 14. Plaintiff did not communicate to Defendant that she was ready and willing to close the purchase of the Property in accordance with the terms of the Contract, either on November 29, 2019 or within a reasonable time thereafter.
>
> 15. Plaintiff was the Delaying Party and was in breach of contract.
>
> 16. Defendant terminated the contract based on Plaintiff's failure and refusal to close in accordance with the terms of the Contract.
>
> 17. In such event, the Contract provides that the earnest money is to be delivered to Defendant.

Based on these findings, the trial court made the following relevant conclusions of law:

> 4. Plaintiff repudiated the contract by attempting to add a condition to closing that is not within the terms of the Contract.
>
> 5. Defendant did not breach the Contract.
>
> 6. Plaintiff breached the Contract by failing to close on November 29, 2019, or within a reasonable time thereafter.
>
> 7. Plaintiff is not entitled to judgment in any respect alleged in her complaint.

8. Defendant is entitled to the earnest money deposited with the Clerk.

Plaintiff filed and served a notice of appeal on 3 January 2023.

II. Discussion

On appeal, plaintiff argues that the trial court erred in its findings of fact and conclusions of law. Specifically, plaintiff contends that the trial court erred in (1) concluding that plaintiff repudiated the contract, (2) finding that defendant terminated the contract, (3) concluding that defendant did not breach the contract, (4) finding that plaintiff was the "Delaying Party" who breached the contract, and (5) concluding that defendant is entitled to $3,000.00 earnest money. We address each argument in turn.

A. Standard of Review

"We review an order entered by a trial court sitting without a jury to determine whether competent evidence supports the findings, whether the findings support the conclusions, and whether the conclusions support the judgment." *Carolina Mulching Co. LLC v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 244-45, 846 S.E.2d 540, 544 (2020) (citation omitted). "Unchallenged findings of fact are presumed correct and are binding on appeal." *Id.* at 245, 846 S.E.2d at 544 (citation and quotation marks omitted). "The trial court's findings of fact, even if challenged, shall not be disturbed if there is evidence to support those findings, but its conclusions of law are reviewable de novo." *Id.* (citation omitted). "Under a *de novo* review, the

court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation and quotation marks omitted).

B. Plaintiff's Repudiation of the Contract

Plaintiff first contends the trial court erred in concluding that plaintiff repudiated the contract by seeking to add a condition to closing that was not within the terms of the contract. We disagree.

"Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties." *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (citation omitted). "When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises." *Id.* (citation omitted). "[I]f a party to [a] contract states that he cannot perform except on some condition which goes outside the terms of his contract then the statement will constitute a repudiation." *Id.* at 511, 358 S.E.2d at 569 (citations omitted).

In *Millis Constr. Co.*, the plaintiff told the defendant during a meeting that he "would be unable to complete the contract unless he received retainage on [a particular] building[.]" *Id.* Because the terms of the contract did not entitle the plaintiff to be paid retainage at that time, this Court ruled that "there was sufficient evidence . . . that the plaintiff's statements during the . . . meeting constituted a repudiation." *Id.* at 510, 358 S.E.2d at 569.

Here, like in *Millis Constr. Co.*, plaintiff attempted to add a new term to the contract. On 28 October 2019, plaintiff asked defendant if he was willing to "fix the septic tank" and requested that such condition be put "in writing[.]" Further, plaintiff testified that—after defendant said he "might be willing to split the cost of repairs"—plaintiff "sent him a contract modification" with the condition included. There is no evidence that defendant agreed to this modification. Then, on 31 October 2019, plaintiff told defendant that she would "move forward with the purchase [and] . . . close as soon as the septic tank is fixed and passed the inspection." Thus, like in *Millis Constr. Co.*, plaintiff asserted that her performance to the contract turned on—at the least—the defendant's partial payment of repairs. Although plaintiff contends that a repaired septic system was part of the transaction, the executed contract provided no such terms and required that any "changes, additions or deletions [to it] . . . be in writing and signed by all parties." Plaintiff's 31 October 2019 statement thus repudiated the contract.

Plaintiff further argues that even if she had repudiated the contract, the contract was never breached because defendant did not treat her statement as a repudiation. This Court has stated that "breach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party." *Profile Invs. No. 25, LLC v. Ammons E. Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d 232, 236 (2010) (citing *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)); *N.C. Farm Bureau Mut. Ins. Co. v. Hull*, 251

N.C. App. 429, 439, 795 S.E.2d 420, 426 (2016) (Tyson, J., concurring in part and dissenting in part) (citations omitted), *rev'd*, 370 N.C. 486, 809 S.E.2d 565 (2018) (adopting the dissenting opinion). However, these cases are distinguishable because there the non-repudiating party conveyed its desire to proceed with the contract after the alleged repudiation. *See Profile Invs. No. 25, LLC*, 207 N.C. App. at 241, 700 S.E.2d at 238 ("[A]fter receipt of the letter 'repudiating' the contract, [plaintiff] sent a letter . . . demanding that [defendant] proceed with the contract[.]"); *Hull*, 251 N.C. App. at 439, 795 S.E.2d at 426 ("[Plaintiff] allowed Defendants to retain the tender of the UIM benefits[.]").

In contrast in the case *sub judice*, defendant never affirmed that he wanted to proceed with the contract as stipulated by plaintiff's 31 October 2019 statement. Instead, the evidence shows just the opposite. Defendant testified that he communicated to the plaintiff that the agreement was "terminated when she refused to close without condition." Mr. Rodgers, while serving as an intermediary between plaintiff and defendant, testified that defendant asked him to relay to plaintiff that "if [plaintiff] was not willing to [close per the contract] . . . the deal was off[.]" The closing attorney, Mr. Mu, testified that when defendant contacted him to release the earnest money to plaintiff around June 2020, Mr. Mu understood that request as defendant "want[ing] to terminate th[e] contract." Lastly, around 27 July 2020, plaintiff received an agreement to cancel the contract signed by defendant. Given all the foregoing reasons, we find the trial court did not err in concluding that plaintiff

repudiated the contract.

C. Defendant's Termination of the Contract

Plaintiff next contends that the trial court erred in finding that defendant terminated the contract. In her brief, plaintiff states that "[d]efendant did not provide evidence showing that [he] terminated the contract" and that "the evidence showed [d]efendant only made a firm decision not to sell to the [p]laintiff in spring 2021, influenced by the changes in the housing market." We disagree.

As discussed above, competent evidence in the record supports the finding that defendant terminated the contract. Therefore, the trial court did not err in finding that defendant terminated the contract.

D. Defendant's Lack of Contract Breach

Plaintiff also argues that the trial court erred in concluding that defendant did not breach the contract. We disagree.

Plaintiff contends that defendant breached the contract by failing to perform under the contract in accordance with paragraph 8(a) regarding "Evidence of Title and Payoff Statement(s)" and paragraph 8(g) regarding "Good Title, Legal Access[.]" Paragraphs 8(a) and 8(g) provide the following:

> (a) Evidence of Title and Payoff Statement(s): Seller agrees to use best efforts to deliver to Buyer as soon as reasonably possible after the Effective Date, copies of all title information in possession of or available to Seller, including but not limited to: title insurance policies, attorney's opinions on title, surveys, covenants, deeds, notes and deeds of trust, leases, and easements

> relating to the Property.
>
> . . . .
>
> (g) Good Title, Legal Access: Seller shall execute and deliver a GENERAL WARRANTY DEED for the Property in recordable form no later than Settlement . . . .

"The doctrine of anticipatory [repudiation] is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party." *Dixon v. Kinser*, 54 N.C. App. 94, 101, 282 S.E.2d 529, 534 (1981) (citations omitted); *see also Millis Constr. Co.*, 86 N.C. App. at 511, 358 S.E.2d at 569 ("The effect of breach by anticipatory repudiation is to relieve the non-repudiating party from further performance under the contract.").

Here, plaintiff repudiated the contract on 31 October 2019 when she told the defendant that her performance turned on a new condition to the contract. At that point, defendant's obligations under the contract—e.g., performing under paragraphs 8(a) and 8(g)—ceased because those obligations were contingent upon plaintiff being willing and able to perform under the contract. Because she was not, this argument fails.

Plaintiff also argues that defendant breached the following contract provisions: (1) paragraph 8(b) regarding "Authorization to Disclose Information"; (2) paragraph

8(e) regarding "Affidavit and Indemnification Agreement"; and (3) paragraph 8(f) regarding "Designation of Lien Agent, Payment and Satisfaction of Liens." Lastly, plaintiff argues that defendant breached "the covenant of good faith and fair dealing[.]"

"As a general rule, a party may not make one argument on an issue at the trial level and then make a new and different argument as to that same issue on appeal." *Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 381, 756 S.E.2d 788, 794 (2014) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State v. Davis*, 207 N.C. App. 359, 363, 700 S.E.2d 85, 88 (2010) (explaining that "where a theory argued on a[n] appeal was not raised before the trial court the argument is deemed waived on appeal." (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005))). Therefore, "the contention argued on appeal must have been raised, argued, and ruled on in the trial court." *Rolan*, 233 N.C. App. at 381, 756 S.E.2d at 795 (citation omitted).

Here, the additional theories of breach that plaintiff alleges in her brief were not argued at trial. In fact, the only theory raised in plaintiff's Amended Complaint was that by "refus[ing] to convey to [p]laintiff the Property as required by the Agreement[,]" defendant breached the contract. Thus, plaintiff's theories of breach regarding paragraphs 8(b), 8(e), and 8(f) are not properly before us.

As for plaintiff's claim that defendant violated the covenant of good faith and fair dealing, plaintiff only states that defendant "neglect[ed] plaintiff, refus[ed] to

communicate with her directly, and refuse[d] to sell the Property." Plaintiff presents no legal argument or further explanation for this contention in her brief. Accordingly, this issue also is not properly before the court. N.C.R. App. P. 28(b)(6) (2023) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

E. Plaintiff as the Delaying Party who Breached the Contract

Plaintiff further contends the trial court erred in finding that plaintiff was the delaying party who breached the contract. Specifically, plaintiff contends that she "was always ready, willing, and able to close" under the contract "within a reasonable timeframe following the original settlement date." We disagree.

Absent a time-is-of-the-essence clause, "the law generally allows the parties [to a real estate contract] a reasonable time after the date set for closing to complete performance." *Fletcher v. Jones*, 314 N.C. 389, 393, 333 S.E.2d 731, 734 (1985) (citation omitted). "[W]hen time is not of the essence, the date selected for closing can be viewed as an approximation of what the parties regard as a reasonable time under the circumstances of the sale." *Id.* at 393-94, 333 S.E.2d at 735 (internal quotation marks and citation omitted).

Here, the contract includes a "time-being-of-the-essence" clause for the due diligence period, but it does not provide one for the settlement date. However, paragraph 13 of the contract states, "[if] the parties fail to complete Settlement and Closing within fourteen (14) days of the Settlement Date . . . or otherwise extend the

Settlement Date by written agreement, then the Delaying Party shall be in breach[.]" Because both plaintiff and defendant agreed to the contract's terms, and no extension was agreed upon in writing, 13 December 2019—i.e., fourteen days after the settlement date—is "an approximation of what [plaintiff and defendant] regard[ed] as a reasonable time" to complete performance. *Id.*

Plaintiff points to her "persistent[ ] attempt[ ] to finalize the closing by visiting the property multiple times[.]" Specifically, after 31 October 2019, plaintiff testified that she tried to close by contacting defendant through phone, email, and Mr. Rodgers. However, plaintiff provides no evidence she would close under the contract's term—i.e., without condition—during direct or indirect communications with defendant until the 7 June 2021 letter sent by Mr. Mu—almost one year after she received the cancellation agreement from defendant. In fact, when asked if plaintiff had "ever give[n] [him] a message to give to [defendant] that she would close, no conditions[,]" Mr. Rodgers testified that "[t]here was always conditions involved." Accordingly, because the record fails to show plaintiff was willing and able to close under the contract's terms within a reasonable time after the settlement date, the trial court did not err in finding that plaintiff was the delaying party who breached the contract.

F. Earnest Money

Finally, Plaintiff argues—assuming plaintiff repudiated the contract on 31 October 2019—the trial court erred in concluding that defendant was entitled to

$3,000.00 earnest money. To support this contention, plaintiff cites paragraph 4(f) of the contract:

> Buyer shall have the right to terminate this Contract for any reason or no reason, by delivering to Seller written notice of termination (the "Termination Notice") during the Due Diligence Period (or any agreed-upon written extension of the Due Diligence Period), TIME BEING OF THE ESSENCE. If Buyer timely delivers the Termination Notice, this Contract shall be terminated and the Earnest Money Deposit shall be refunded to Buyer.

Plaintiff argues that if the contract was repudiated on 31 October 2019 (also the date due diligence ended), then it was also "terminated on that day," which under paragraph 4(f), entitles her to a refund of the earnest money. We disagree.

Although plaintiff repudiated the contract on 31 October 2019, the contract was not terminated until defendant terminated it. *See Profile Invs. No. 25, LLC*, 207 N.C. App.at 237, 700 S.E.2d at 236 ("[B]reach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party." (citing *Edwards*, 173 N.C. at 44, 91 S.E. at 585)).

Plaintiff also provides no evidence that she terminated the contract during the due diligence period. On 28 October 2019, plaintiff told defendant that if he was "not willing to repair [the septic system] and not willing to extend the contract deadlines, [she would] terminate the contract on or before [31 October 2019] so [she could] get the [$3,000.00] earnest money back." However, plaintiff never terminated the

contract by 31 October 2019; rather, on that date, she told defendant, "[w]e will close as soon as the septic tank is fixed and pass[es] inspection."

Paragraph 1(e) of the contract states that "[i]n the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach[.]" Accordingly, the trial court did not err in concluding that defendant was entitled to the earnest money.

III. Conclusion

For the foregoing reasons, because the trial court made no errors in its findings of fact or conclusions of law, we affirm the trial court's judgment.

AFFIRMED.

Judges DILLON and GORE concur.

Report per Rule 30(e).