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NO. COA11-510
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

SPANISH MOSS, LLC, ISLA DEL RIO,
LLC, MILLIMAC JOHNS ISLAND, LLC,
and MILES BUSBY
Plaintiffs

v.

Mecklenburg County
No. 10 CVS 7952

WACHOVIA k/n/a WELLS FARGO,
THIRTEEN ARROWS, LLC, STEVEN
THOLEN, PETER MASALIN, and TIMOTHY
HODGE
Defendants

Appeal by plaintiffs from order entered 23 December 2010 by
Judge Eric L. Levinson in Mecklenburg County Superior Court.
Heard in the Court of Appeals 11 October 2011.

*Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle
Price Massingale, for plaintiff-appellants.*

*Hamilton Stephens Steele & Martin, PLLC by Adam L. Horner,
for defendant-appellees.*

CALABRIA, Judge.

Spanish Moss, LLC, ("Spanish Moss") Isla Del Rio, LLC,
("Isla Del Rio") Millimac Johns Island, LLC, ("Millimac") and
Miles Busby ("Busby") (collectively "plaintiffs") appeal from an

order granting motion by Thirteen Arrows, LLC, ("Thirteen Arrows") Steven Tholen, ("Tholen") and Peter Masalin ("Masalin") (collectively "defendants") to dismiss plaintiffs' claims against defendants. Wachovia k/n/a Wells Fargo ("Wachovia") and Timothy Hodge ("Hodge") were also named as defendants in the complaint. However, since plaintiffs filed a notice of voluntary dismissal for Wachovia and Hodge, on 8 June 2011, this appeal does not include Wachovia and Hodge. We reverse.

I. Background

Prior to 29 January 2008, Masalin, Tholen and Busby were involved in various real estate and other investment opportunities including projects referred to as Kimberly Creek, Isla Del Rio, ShadeTree, and the Savannah River Project. Business was conducted through multiple corporate entities. When the parties disagreed about defendants' management of Kimberly Creek and Isla Del Rio, the parties entered into a Settlement Agreement ("the Settlement") to resolve their issues, dated 29 January 2008. The parties to the Settlement were Spanish Moss, Millimac, Busby, Thirteen Arrows, Tholen and Masalin. Isla Del Rio was not a party to the Settlement. Pursuant to the Settlement, defendants assigned all their rights and interests in Kimberly Creek and Isla Del Rio to Spanish Moss

and resigned as managing members. Similarly, plaintiffs assigned all their rights and interests in ShadeTree to Thirteen Arrows. After taking over Isla Del Rio, plaintiffs encountered numerous issues with Wachovia in their attempts to complete the project.

Plaintiffs filed a complaint against defendants alleging, *inter alia*, fraud in the inducement, breach of fiduciary duty, fraud regarding the settlement agreement, and failure to provide accounting. Defendants filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted ("12(b)(6) motion") and in the alternative, defendants alleged plaintiffs failed to state their claims with sufficient particularity pursuant to Rule 9(b). The trial court considered defendants' motion, the pleadings, arguments of counsel and other matters of record and the order granting defendants' motion to dismiss plaintiffs' complaint was filed on 23 December 2010. Plaintiffs appeal.

II. Motion to Dismiss Appeal

On 3 June 2011, defendants filed a motion to dismiss the appeal, alleging the appeal was interlocutory. Since the claims against Wachovia and Hodge were voluntarily dismissed, the court's 23 December 2010 order, granting defendants' motion to

dismiss plaintiffs' complaint, is a final order disposing of all claims remaining in the case. Therefore, plaintiffs' appeal is properly before the Court and defendants' motion to dismiss the appeal is denied. See *Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 653, 654 S.E.2d 76, 79 (2007).

III. Standard of Review

This Court reviews a Rule 12(b)(6) motion *de novo*, to determine, "whether, as a matter of law, the allegations of the complaint...are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation omitted). The allegations in the complaint must be construed liberally and a reversal is only proper "if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* at 266-67, 690 S.E.2d at 761. The complaint's material factual allegations must be taken as true. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). A court may consider documents which are "attached to and incorporated within a complaint." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). A court may also consider documents "which are the subject of a

plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Id.*

In the instant case, plaintiffs' complaint specifically referred to the Settlement and it was attached to the defendants' motion to dismiss. Therefore, the Settlement can be properly considered for purposes of defendants' motion to dismiss plaintiffs' complaint.

IV. Fraud

Plaintiffs contend that they sufficiently alleged in their complaint that defendants' fraudulent misrepresentations induced plaintiffs to agree to the Settlement. We agree.

A. Rule 9

As a preliminary matter, plaintiffs' complaint alleging fraud must comply with the requirements of Rule 9 of the North Carolina Rules of Civil Procedure: "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2011). "This requirement ensures a defendant will be informed sufficiently of the allegations brought against him, because a fraud claim may cover a broad range of actions and statements." *Hudgins v. Wagoner*, __ N.C. App. __, __, 694 S.E.2d 436, 442 (2010), *disc. review denied*, 365 N.C. 88, 706

S.E.2d 250 (2011). To meet the particularity requirement for actual fraud, the plaintiff must allege (1) time; (2) place; (3) "content of the fraudulent representation [;]" (4) "identity of the person making the representation [;]" and (5) "what was obtained as a result of the fraudulent acts or representations." *Id.* at ___, 694 S.E.2d at 442-43 (citations omitted). "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts." *Id.* at ___, 694 S.E.2d at 443 (internal quotations and citations omitted).

In the instant case, the plaintiffs' complaint alleged:

26. All of the operating agreements entered into between [Busby] and Spanish Moss and Defendants were negotiated and entered into in Charlotte, North Carolina.

118. On or about January 29, 2008, a settlement agreement was signed by and between [Busby], [Spanish Moss], [Millimac] [and defendants].

119. In order to induce [Busby] into entering into the Settlement Agreement, [defendants] and Hodge fraudulently misrepresented the amount of the management fees paid by [Wachovia] relating to the Morgan's Island Project.

122. [Defendants] and Hodge made the foregoing fraudulently [sic] misrepresentations with the intent that [Busby] would rely on them and enter into the agreement.

123. [Busby] relied to his detriment on these misrepresentations in entering into the Settlement Agreement.

128. [Busby] learned in February of 2008, that one week before the settlement agreement was finalized, a \$60,000 payment was made to [defendants] and Hodge as an advance in management fees.

Plaintiffs alleged that the events occurred in Charlotte, on about 29 January 2008, therefore, satisfying the time and place requirements. The plaintiffs satisfied the identification and content requirements by stating that defendants made the representations concerning management fees. Lastly, plaintiffs satisfied the final particularity requirement of identifying what was obtained as a result of the fraudulent action by alleging that defendants obtained an additional \$60,000. Therefore, we find that plaintiffs sufficiently plead the circumstances of fraud with particularity and have complied with the requirements of Rule 9.

B. Fraudulent Misrepresentation

The elements of actual fraud are: "(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." *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007)

(citation omitted). Fraud can be based "on an affirmative misrepresentation of a material fact...or a failure to disclose a material fact relating to a transaction which the part[y] had a duty to disclose." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (1986) (citations omitted).

Settlement agreements "are governed by general principles of contract law." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). When a contract is unambiguous, "it must be enforced as it is written" and interpreted "as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible." *Marcuson v. Clifton*, 154 N.C. App. 202, 204, 571 S.E.2d 599, 601 (2002) (internal citations omitted).

Plaintiffs allege that defendants, when executing the Settlement, made a fraudulent misrepresentation by paying themselves \$60,000 in advance management fees for January, February, and March 2008. Since the Settlement occurred in January 2008, plaintiffs contend that defendants were not entitled to receive management fees for those three months. In addition, plaintiffs claim the wording of the Settlement specifically excluded payment to defendants for management fees.

Defendants contend that the plain language of the Settlement does not support plaintiffs' argument. We disagree.

Paragraph 1.1.2 of the Settlement confirmed that, except for the Promissory Note and all guarantees and ancillary documents (the "Note"), defendants transferred their ownership interest in Isla Del Rio unencumbered. Defendants warranted and represented "that they have not in any way encumbered, sold, assigned, transferred, conveyed or otherwise disposed of their interests in Isla Del Rio . . . or any of the real or personal property owned by those entities." Pursuant to the Settlement, defendants assigned all their rights and interests in Isla Del Rio to plaintiffs. Paragraph 1.1.2 confirms that defendants held the unencumbered right to transfer its ownership interest in Isla Del Rio. Nothing in paragraph 1.1.2 requires a detailed disclosure of payments Isla Del Rio made prior to the transfer.

However, we consider the plain language of Section 1.1.4 controlling. Section 1.1.4 indicates that Schedule I was intended to "represent[] a full and complete list of all . . . parties to executory contracts or any other party that currently has, or may be due, payment from Isla Del Rio . . . for services." Defendants' names were not listed in Schedule I. Because defendants received payment for three

months of management services and they had yet to render those services, defendants were clearly "parties to [an] executory contract[.]" Thus, pursuant to the terms of Section 1.1.4, defendants should have been listed in Schedule I. We therefore hold that plaintiffs have sufficiently alleged that Section 1.1.4 amounts to a material misrepresentation.

C. Reasonable Reliance

To properly allege a claim for actual fraud, plaintiffs must also show reasonable reliance on the misrepresentation. "[A]ny reliance on the allegedly false representations must be reasonable." *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387 (citation omitted). "Reliance is not reasonable if a plaintiff fails to make any independent investigation." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002). A plaintiff must show that it was "denied the opportunity to investigate" or by reasonable diligence could not discover the truth and that "it was induced to forego additional investigation by the defendant's misrepresentations." *Id.* In *Piedmont Inst. of Pain Mgmt. v. Staton Found.*, this Court held that the parties seeking to avoid the settlement agreement "failed to exercise due diligence in uncovering the alleged fraud" when the plaintiff had the opportunity to obtain

documents supporting its fraud claim prior to the execution of the settlement agreement. 157 N.C. App. 577, 585, 581 S.E.2d 68, 73-74 (2003).

In the instant case, plaintiffs requested documentation from Wachovia in October 2007, which was never provided. At that time, plaintiffs were aware of a separate fraudulent transfer of property to Masalin and Tholen. Despite not receiving the requested information, plaintiffs executed the Settlement in January 2008. Defendants contend that the fact that plaintiffs executed the Settlement agreement despite not having received any information from Wachovia indicates that plaintiffs ceased their efforts to exercise due diligence. We disagree.

Plaintiffs sought information from Wachovia, but Wachovia was not forthcoming with that information. In an effort to settle the dispute, plaintiffs entered into the Settlement, and were provided with Schedule I, which was false and misleading. As discussed above, Section 1.1.4 and Schedule I were clear, affirmative statements concerning the executory contracts pending at the time of the Settlement. On these facts, we are persuaded that plaintiffs, having requested information from Wachovia and then received the Schedule I statement of accounts, have sufficiently alleged their reasonable reliance.

Defendants also argue that plaintiffs cannot show that their reliance was reasonable because Section 6.7 of the Settlement states that: "[t]he Parties acknowledge that they have had the opportunity to consult with legal counsel" and that the agreement was entered into "freely and voluntarily." It further states that "[i]n entering into this Agreement, no Party has *relied on any representations* or warranties of any other Party, other than the representations or warranties set forth in this Agreement." (Emphasis added). Defendants assert that "[t]hough there are myriad representations in the [Settlement], there are no representations related to the payment of management fees." Because we have concluded that Section 1.1.4 and Schedule I amounted to a misrepresentation concerning an executory contract, and that the contract in question related to the payment of advance management fees, we disagree with defendants and conclude that Section 6.7 does not defeat plaintiffs' claims.

D. Release Clause

Defendants argue that plaintiffs' claim for fraud fails due to the release clause in the Settlement. We find this argument similarly flawed. The clause purports to release defendants of all claims made by plaintiffs including those "arising out of or

relating to any acts or omissions done or occurring prior to and including the date of this Agreement." However, the release clause in the Settlement also states that "[n]othing in this Clause shall prevent the Parties from asserting or pursuing any claim to enforce the terms of this Agreement." Moreover, as we have previously held, "[a] release may be avoided upon evidence that it was executed as a result of fraud or mutual mistake." *Best v. Ford Motor Co.*, 148 N.C. App. 42, 45, 557 S.E.2d 163, 165 (2001), *aff'd*, 355 N.C. 486, 562 S.E.2d 419 (2002). In light of our foregoing conclusions, we hold that the release clause in the Settlement does not bar plaintiffs' claims.

We therefore hold that the trial court erred in granting defendants' motion to dismiss plaintiffs' claim to set aside the Settlement based on fraud.

V. Duty to Disclose

Plaintiffs allege defendants breached their fiduciary duty by concealing a material fact which they had a duty to disclose at the time the parties entered into the Settlement. Taking plaintiffs' allegations as true, Isla Del Rio was formed under Florida law, and therefore the nature of the parties' relationship is governed by Florida law. Florida statutes clearly state that managers and managing members owe duties of

loyalty and care to the LLC and all of the members of the LLC. Fla. Stat., § 608.4225(1) (2007). Therefore, we agree with plaintiffs that defendants had a fiduciary duty to the LLC and its members during the time they managed Isla Del Rio.

While Florida law determines whether or not defendants had a fiduciary duty, the Settlement included a provision to apply North Carolina law, "[t]his Agreement shall be construed according to the laws of the State of North Carolina, irrespective of its choice of law rules." This choice of law provision, combined with the fact that Busby was located in Charlotte, North Carolina and executed documents for Isla Del Rio in Charlotte, indicate that the Settlement, and whether defendants breached their fiduciary duty when entering into the Settlement, must be examined under North Carolina law. See *Corbin Russwin, Inc. v. Alexander's Hdwe., Inc.*, 147 N.C. App. 722, 725-27, 556 S.E.2d 592, 596 (2001).

Once parties are in a fiduciary relationship, a duty to disclose arises. *Harton*, 81 N.C. App. at 297, 344 S.E.2d at 119. However, when parties become adversaries, the confidential relationship ends. *Id.*; see also *Lancaster v. Lancaster*, 138 N.C. App. 459, 463, 530 S.E.2d 82, 85 (2000). In *Piedmont*, the Court found that "[a]bsent a fiduciary duty...[a] claim for

breach of fiduciary duty is untenable." *Piedmont*, 157 N.C. App. at 584, 581 S.E.2d at 73.

The termination of the parties' fiduciary relationship did not, however, relieve defendants of their duty to disclose material facts relating to their settlement negotiations. This is because there are "two remaining situations in which a duty to disclose exists [that] arise outside a fiduciary relationship, when the parties are negotiating at arm's length." *Harton*, 81 N.C. App. at 298, 344 S.E.2d at 119.

Of these two remaining situations discussed in *Harton*, the first exists "when a party has taken affirmative steps to conceal material facts from the other." *Id.* Plaintiffs contend that, here, concealment is inferred because the disbursement of the management fees occurred a mere week prior to the Settlement. We find this argument unpersuasive. However, by failing to disclose the disbursement as required by paragraph 1.1.4 of the Settlement, discussed above, we conclude defendants took affirmative steps to conceal a material fact relating to the Settlement.

Furthermore, "[a] duty to disclose in arm's length negotiations also arises where one party has knowledge of a latent defect in the subject matter of the negotiations about

which the other party is both ignorant and unable to discover through reasonable diligence." *Id.* at 298, 344 S.E.2d at 119 (concluding where wife made "no effort" to discover latent defect in the subject matter of settlement with husband, husband had no duty to disclose). Because the parties had retained counsel, they were negotiating at arm's length. Additionally, plaintiffs allege defendants, as the managing members of Isla Del Rio, knowingly caused the disbursement of management fees that had yet to be earned and failed to disclose this fact despite plaintiffs' request for disclosure. Taking plaintiffs allegations as true, we conclude this constitutes a "latent defect in the subject matter of the negotiations," *id.*, of which plaintiffs were ignorant and unable to discover despite their attempts to do so.

Thus, we conclude that despite the lack of a fiduciary relationship between the parties at the time they entered into the Settlement, defendants had a duty to disclose the disbursement of management fees. Under our standard of review of an order granting a motion to dismiss based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we conclude plaintiffs have sufficiently stated a claim for defendants' breach of a duty to disclose a material fact.

VI. Isla Del Rio

Plaintiffs allege that the trial court erred in dismissing Isla Del Rio's claims against defendants because Isla Del Rio was not a party to the Settlement. Plaintiffs' complaint contends the disbursement of management fees to defendants was made with funds belonging to Isla Del Rio. Since we have concluded that plaintiffs' allegation of fraud was sufficient to survive defendants' motion to dismiss, we also conclude that Isla Del Rio's claims should not have been dismissed.

VII. Conclusion

Plaintiffs' complaint stated a claim upon which relief could be granted with respect to their claims for fraud and breach of duty to disclose material facts. We find the plaintiffs' complaint complied with the requirements of Rule 9. We reverse the trial court's order granting defendants' motion to dismiss and remand to the trial court for further proceedings.

Reversed and remanded.

Judges McGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).