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NO. COA06-250

NO. COA06-425

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

CABARRUS COUNTY
Plaintiff,

v.

Cabarrus County
No. 01 CVS 1722

SYSTEL BUSINESS EQUIPMENT
COMPANY, INC.,
Defendant.

Appeal by defendant from summary judgments entered 23 November 2005 by Judge W. Erwin Spainhour, and 24 January 2006 by Judge Clarence E. Horton, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 20 September 2006.

Hartsell & Williams, P.A., by Fletcher L. Hartsell, Jr., and Christy E. Wilhelm, for plaintiff-appellee.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III, and Cynthia L. Van Horne, for defendant-appellant.

LEVINSON, Judge.

In Court of Appeals Case COA 06-250 defendant, Systel Business Equipment Company, Inc. ("Systel"), appeals from summary judgment entered in favor of plaintiff, Cabarrus County. In Court of Appeals Case COA06-425 defendant appeals from summary judgment entered in favor of third party defendant Frank M. Clifton, Jr. Because these cases arise from the same lawsuit and share common

facts, we have consolidated these appeals for purposes of this opinion, and affirm both orders.

The relevant facts may be briefly summarized, and are taken in part from *Cabarrus Cty. v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 614 S.E.2d 596, *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005). “[I]n December 1999, Cabarrus County issued a request for proposed bids from companies for photocopier services. The Board of County Commissioners voted on 18 January 2000 to award the contract to Systel.” *Cabarrus Cty.*, 171 N.C. App. at 424, 614 S.E.2d at 597. On 18 July 2000 plaintiff, Cabarrus County, and Systel executed a contract for Systel to provide copier services for Cabarrus County. The contract included a “non appropriation rider” allowing Cabarrus County to terminate the contract if the county did not appropriate funds for copier services after the first year. The contract and the rider were signed by the county manager for Cabarrus County, Frank M. Clifton, Jr. (“Clifton”). “On 17 April 2001, Cabarrus County notified Systel that it was not renewing the copier contract as outlined in the Equipment Rental Agreement[.] . . . [Systel] claim[ed] that Cabarrus County remained obligated to use Systel’s services under the [contract]. Cabarrus County argued that the [contract] could not be enforced because, *inter alia*, it did not include a preaudit certificate as required by statute.” *Cabarrus Cty.*, *id.*

On 26 July 2001 Cabarrus County filed a complaint for breach of contract and declaratory judgment. Cabarrus County sought a declaration that the contract of 18 July 2000 was invalid and

unenforceable because it did not include the preaudit certificate required by N.C. Gen. Stat. § 159-28 (2005). Defendant denied the material allegations of the complaint, raised various defenses, and asserted a counterclaim against Cabarrus County for breach of contract; in its reply, Cabarrus County denied the allegations of Systel's counterclaim. On 12 December 2001 Systel filed an amendment to its Answer and Counterclaim, stating a third party complaint against Clifton and seeking recovery under N.C. Gen. Stat. § 159-28(e). By additional reply dated 13 February 2002, Cabarrus County moved for dismissal of the counterclaim against Clifton under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Thereafter the parties reached a settlement agreement, which was first approved but ultimately rejected by the Cabarrus County Board of County Commissioners. Systel's motion to compel enforcement of the settlement agreement was granted by the trial court. Cabarrus County appealed and argued that the settlement agreement was invalid and unenforceable, as it lacked a completed preaudit certificate. *Cabarrus County*, 171 N.C. App. at 424-25, 614 S.E.2d at 597. This Court agreed and held that:

'Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail.' . . . [T]he settlement agreement contained a preaudit certificate that was never executed by Cabarrus County. . . . The requirements of [N.C. Gen. Stat. §] 159-28(a) were therefore not met and thus 'there is no valid contract, and any claim . . . based upon such contract must fail.'

Id. at 425-26, 614 S.E.2d at 598 (quoting *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001)) (internal citations omitted).

On remand Cabarrus County's motion for summary judgment was granted 23 November 2004; Clifton's summary judgment motion was entered 24 January 2006. Both orders state that summary judgment is appropriate because the contract lacked a preaudit certificate. Defendant timely appealed both orders.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In the instant case, "[e]ach party based its claim upon the same sequence of events[.] . . . Neither party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that "there is no genuine issue as to any material fact" surrounding the trial court's summary judgment order. We next consider whether the trial court correctly determined that [Cabarrus County and Clifton were] "entitled to a judgment as a matter of law." *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 507 (2002) (citation omitted).

The summary judgment orders herein stated that the contract was invalid and unenforceable because it lacked a preaudit certificate. Preaudit certificates are addressed in N.C. Gen. Stat. § 159-28, which provides in pertinent part that:

- (a) . . . No [county] obligation may be incurred .
 . . . unless the budget ordinance includes an
 appropriation authorizing the obligation[.] .
 . . . If an obligation is evidenced by a
 contract or agreement requiring the payment of
 money . . . the contract[or] agreement . . .
 shall include on its face a certificate
 stating that the instrument has been
 preaudited to assure compliance with this
 subsection. The certificate, which shall be
 signed by the finance officer . . . shall take
 substantially the following form: "This
 instrument has been preaudited in the manner
 required by the Local Government Budget and
 Fiscal Control Act. (Signature of finance
 officer)." . . . An obligation incurred in
 violation of this subsection is invalid and
 may not be enforced. . . .

In the instant case, it is undisputed that neither the contract nor the non-appropriation rider included a preaudit certificate. Nonetheless, defendant makes several arguments that the contract is enforceable. We will consider these in turn.

Defendant argues first that the language of the non-appropriation rider should be treated as the equivalent of a preaudit certificate. The rider states in relevant part that Cabarrus County "has budgeted and has available for the current fiscal year sufficient funds to comply with its obligations under the Lease[.]" Defendant correctly asserts that the "purpose of the pre-audit certificate is to ensure that a town has enough funds in its budget to pay its financial obligations." *Myers v. Town of Plymouth*, 135 N.C. App. 707, 713, 522 S.E.2d 122, 126 (1999).

Defendant asserts that, as the rider declares Cabarrus County's ability to meet its contractual obligations, it should be considered a *de facto* preaudit certificate. We disagree.

N.C. Gen. Stat. § 159-28 expressly requires that the preaudit certificate "shall be signed by the finance officer" or by an authorized deputy finance officer. In the instant case, both the contract and the non-appropriation rider were signed by Clifton, Cabarrus County's county manager. Nothing in the record indicates that Clifton was the county finance officer, or even worked in the county finance department. Indeed, in his deposition Clifton stated several times that the customary practice in Cabarrus County was that after he signed a contract, it would then be submitted to the finance department for review and execution of the required preaudit certificate.

Defendant also fails to cite any cases supporting the position that language in a contractual clause or rider may be substituted for a preaudit certificate, and N.C. appellate cases have interpreted N.C. Gen. Stat. § 159-28 as strictly requiring a preaudit certificate. See, e.g., *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001) (if "plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail."). This assignment of error is overruled.

Defendant argues next that the non-appropriation rider converted the contract into "a series of contracts" and urges us to

enforce the contract as to its second and third years, even if the contract is void and unenforceable as to the first year. This would be an absurd result; moreover, the rider merely provides that Cabarrus County could terminate the contract if the county stopped funding it. We conclude the rider does not transform the contract into three separate contracts. This assignment of error is overruled.

Defendant also urges us to apply the doctrines of estoppel or ratification to the facts of this case. "In *Data General, [v. Cty. of Durham]*, 143 N.C. App. 97, 545 S.E.2d 243 (2001)], this Court rejected an identical argument:

[T]he lease agreement . . . was not a valid contract . . . as it failed to comply with the statutory requirements in N.C. Gen. Stat. § 159-28(a). [Appellant] may not recover under an equitable theory such as estoppel . . . where [Cabarrus] County has not expressly entered a valid contract. . . . [T]he preaudit certificate requirement is a matter of public record, N.C. Gen. Stat. § 159-28(a), and parties contracting with a county within this state are presumed to be aware of, and may not rely upon estoppel to circumvent, such requirements.

Finger v. Gaston County, __ N.C. App. __, __, 631 S.E.2d 171, 174 (2006) (quoting *Data General*, 143 N.C. App. at 104, 545 S.E.2d at 248) (internal citations omitted)). This assignment of error is overruled.

Defendant also appeals the order of summary judgment in favor of Clifton. Defendant contends that Clifton is liable for defendant's losses, pursuant to N.C. Gen. Stat. § 159-28(e), which provides in relevant part:

- (e) . . . If an officer or employee of a local government or public authority incurs an obligation . . . in violation of this section, he . . . [is] liable for any sums so committed or disbursed. . . .

In the instant case, because the contract lacks a required preaudit certificate, it is void and unenforceable. Accordingly, no obligation is incurred by the execution of such a contract. This assignment of error is overruled.

We conclude that the trial court did not err in entering summary judgment in favor of both Clifton and Cabarrus County, and that the orders for summary judgment should be

Affirmed.

Judges BRYANT and JACKSON concur.

Report per Rule 30(e).