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NO. COA07-678

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

SCOTT HAWKS and JAMIE HAWKS,
Plaintiffs,

v.

Cabarrus County
No. 06 CVS 0010

ARSTARK & COMPANY, INC., and/or
ARSTARK AND COMPANY REALTORS
and/or CONNIE ARSTARK and A PLUS
ENTERPRISE INC. d/b/a HOUSEMASTER,
Defendants.

Court of Appeals

Appeal by plaintiffs from orders entered 11 December 2006 and
14 December 2006 by Judge W. Erwin Spainhour in Cabarrus County
Superior Court. Heard in the Court of Appeals 29 November 2007.

Slip Opinion

Christy E. Wilhelm, for plaintiffs-appellants.

*Ferguson, Scarborough & Hayes P.A., by James E. Scarborough,
for defendants-appellees Arstark & Company, Inc., Arstark and
Company Realtors, and Connie Arstark.*

*Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and
Craig D. Cannon, for defendant-appellee A Plus Enterprise Inc.
d/b/a Housemaster.*

TYSON, Judge.

Scott and Jamie Hawks (collectively, "plaintiffs") appeal from
orders, which granted: (1) Arstark & Company, Inc., and/or Arstark
& Company Realtors, and/or Connie Arstark's (collectively,
"Arstark") motion for summary judgment and (2) A Plus Enterprises,

Inc. d/b/a Housemaster Home Inspectors LLC's ("Housemaster") motion for judgment on the pleadings and attorney fees. We affirm.

I. Background

On 31 January 2003, plaintiffs entered into a contract with Arstark to represent them as a buyer's agent regarding the purchase of a residence in Concord, North Carolina. Prior to their purchase, plaintiffs were concerned with possible damage to the roof. Patricia Thompson ("Thompson"), the seller, had disclosed to plaintiffs that the roof had previously leaked. Water stains were also visible on the ceiling by the entrance and in the foyer.

Prior to closing, plaintiffs hired Housemaster to inspect the residence. During the inspection, Housemaster identified water damage caused by a roof leak. Thompson agreed to make repairs to the outside roof. Plaintiffs alleged Arstark spoke with them and stated the house was in excellent condition, there was only minor water damage, and she would obtain receipts for the repairs to the roof. Plaintiffs alleged they relied on Arstark to ensure the repairs had been made. Plaintiffs further alleged Thompson stated the roof had been repaired. Plaintiffs made no further effort to ascertain whether repairs to the roof had actually occurred.

After the closing, in approximately March or April 2003, plaintiffs' roof leaked. As a result, plaintiffs incurred substantial moisture damage and expended over \$20,000.00 in repair costs. Plaintiffs originally brought suit solely against the seller. This action was voluntarily dismissed after a Settlement and Mutual Release ("the release") was signed by counsel for both

parties in November 2004. Both parties were designated in the agreement as "Releasors." The release stated:

In consideration of the mutual promises herein and notice of dismissal, with prejudice, of the above captioned civil suit filed in Cabarrus County, North Carolina bearing file number set out above, and for other good and valuable consideration, *Releasors forever release, satisfy and discharge each other and their successors, assigns, and agents of and from all and any manner of action and actions, causes and causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, insurance payments, agreements, promises, damages, judgments and executions, claims and demands whatsoever, in law or in equity, which they ever had, now have, or which their successors, heirs, executors or administrators, hereinafter can, shall or may have, for, upon, or by reason of this captioned civil action and any matter, cause, or thing whatever related to this civil action.*

(Emphasis supplied).

On 3 January 2006, plaintiffs filed a verified complaint against Arstark alleging fraudulent misrepresentation, negligent misrepresentation, and breach of duty. Plaintiffs also alleged breach of duty against Housemaster. On 9 October 2006, Arstark moved for summary judgment and submitted an affidavit executed by Brenda Farmer ("Farmer"), the listing agent of the property. Farmer testified plaintiffs were aware of water stains on the inside of the residence, were present when the interior was painted, copies of the invoices for repair work were sent to plaintiffs' closing attorney, and repairs requested by plaintiffs "were done and paid for by seller."

Plaintiffs submitted an affidavit in opposition to Arstark's motion for summary judgment and asserted "the release does not release the agents of the Plaintiffs from being sued by the Plaintiffs" and "[t]hat a one year Statute of Limitation is unreasonable and against public policy" (Emphasis in original). On 11 December 2007, the trial court granted Arstark's motion and held "there is no genuine issue as to any material fact." On 14 December 2006, the trial court entered an order granting Housemaster's motion for judgment on the pleadings and for attorneys' fees. Plaintiffs appeal.

II. Issues

_____Plaintiffs argue the trial court erred by: (1) granting Arstark's motion for summary judgment and (2) granting Housemaster's motion for judgment on the pleadings and for attorneys' fees.

III. Summary Judgment

Plaintiffs argue the trial court erred by granting Arstark's motion for summary judgment. We disagree.

A. Standard of Review

Summary judgment is proper 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. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is

non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

Wilkins v. Safran, ___ N.C. App. ___, ___, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

B. Analysis

Plaintiffs argue their affidavit opposing summary judgment created a genuine issue of material fact regarding the meaning of the phrase "their . . . agents" in the release, so that summary judgment for Arstark was improper. We disagree.

This Court has repeatedly stated, "[w]hen the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (internal citations omitted), *aff'd*, 317 N.C. 330, 344 S.E.2d 788 (1986). "It must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford*

Accident & Indemnity Co. v. Hood, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted).

Arstark's motion for summary judgment, together with the supporting materials made the requisite showing necessary to require plaintiffs to establish a *prima facie* case with respect to each of their claims. Once Arstark moved for summary judgment, plaintiffs had the burden "to produce a forecast of evidence demonstrating *specific facts*, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Wilkins*, ___ N.C. App. at ___, 649 S.E.2d at 661 (emphasis supplied).

Plaintiffs' affidavit in opposition to Arstark's motion for summary judgment does not challenge or refute Farmer's testimony or the exhibits attached to her affidavit. Plaintiff's affidavit merely challenges the applicability of the provisions of the release. This issue is a question of law for the court and properly resolved on a motion for summary judgment. *Piedmont Bank & Trust Co.*, 79 N.C. App. at 240, 339 S.E.2d at 52.

Plaintiffs failed to proffer specific facts to establish a *prima facie* case for fraudulent misrepresentation, negligent misrepresentation, or breach of duty. *Id.* A mere statement in plaintiffs' affidavit that they did not intend to release Arstark, standing alone, is insufficient to raise a genuine issue of material fact. The trial court properly granted Arstark's motion for summary judgment. This assignment of error is overruled.

IV. Motion for Judgment on the Pleadings

Plaintiffs argue the trial court erred by granting Housemaster's motion for judgment on the pleadings and for attorneys' fees. We disagree.

A. Standard of Review

This Court reviews the trial court's grant of a judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted).

B. Analysis

Housemaster's Inspection Order Agreement ("agreement") contained the following condition:

4. . . . No legal action, including those alleging negligence, may be commenced against the Company after one year from the date of the inspection.

Plaintiffs signed this agreement on 3 January 2003 acknowledging they had read and understood the entire contract. Plaintiffs now argue the one-year limitation period contained in the home inspection agreement is not enforceable and violates public policy. We disagree.

Parties are free to contract as they deem appropriate in the absence of statutory proscription or a public policy violation. *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000).

It is a well-settled principle that parties may agree to a limitations period shorter than that provided by state law. The general rule has been stated, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.

Badgett v. Federal Express Corp., 378 F.Supp.2d 613, 622 (M.D.N.C. 2005) (internal citations and quotations omitted). Plaintiffs argue a one-year time period is an insufficient time to discover hidden defects. Plaintiffs cite no case law supporting this assertion. We decline to find the one-year limitation is *per se* unreasonable. Plaintiffs filed the present action against Housemasters three years after the date of inspection. Plaintiffs' claim is barred by the terms of the agreement. The trial court properly granted Housemaster's motion for judgment on the pleadings and attorney fees. This assignment of error is overruled.

V. Conclusion

The trial court properly granted Arstark's motion for summary judgment. The trial court properly granted Housemaster's motion for judgment on the pleadings and attorney fees. The trial court's orders are affirmed.

Affirmed.

Judges JACKSON and ARROWOOD concur.

Report per Rule 30(e).