

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-503

Filed: 7 November 2017

Craven County, No. 15 CVS 1568

JEFFREY A. BRUNGARD, Plaintiff,

v.

DUSTIN CANESTORP, Defendant.

Appeal by Plaintiff from judgment entered 7 November 2016 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 18 October 2017.

*Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for Plaintiff-Appellant.*

*White & Allen, P.A., by Christopher J. Waivers and John C. Bircher, III, for Defendant-Appellee.*

HUNTER, JR., Robert N., Judge.

Jeffrey A. Brungard (“Plaintiff”) appeals trial court’s grant of directed verdict in favor of Dustin Canestorp (“Defendant”). We affirm the trial court.

**I. Factual and Procedural History**

BRUNGARD V. CANESTORP

*Opinion of the Court*

On 25 November 2015, Plaintiff filed a complaint alleging on 5 December 2011, Defendant executed and delivered a promissory note (“the Note”) to Plaintiff for \$30,000.00. Pursuant to the terms of the Note, Defendant was to pay Plaintiff the principal amount of \$30,000.00 on or before 7 December 2012, along with interest at an annual rate of 10 percent. Plaintiff, at about the time the of the Note’s execution, loaned Defendant \$30,000.00. Defendant failed to pay Plaintiff \$30,000.00 plus \$3,000.00 interest under the Note by 7 December 2012. In January 2013, Defendant made a one-time interest payment to Plaintiff in the amount of \$3,000.00.

On 5 January 2016, Defendant filed an answer to Plaintiff’s complaint. In his answer, Defendant generally denied Plaintiff’s allegations set forth in Plaintiff’s complaint. Defendant did not raise any affirmative defenses in its answer to Plaintiff’s complaint.

The case came to trial during the week of 24 October 2016 in Craven County Superior Court. The parties consented to a pre-trial order entered by the trial court on 24 October 2016. In the pre-trial order, the parties agreed the single issue to be decided at trial is “Whether Defendant owes Plaintiff under the terms of the promissory note.”

During direct examination, Plaintiff presented evidence tending to show Plaintiff loaned Defendant \$30,000.00. Plaintiff introduced an exhibit identifying a copy of the Note, which Defendant signed. The Note evidenced the \$30,000.00 loan

and showed Defendant's notarized signature. Plaintiff additionally testified he loaned \$30,000.00 to Defendant. Plaintiff introduced a copy of a cashier's check dated 7 December 2011 for \$30,000.00, which was payable to Defendant. Defendant deposited the check.

On cross-examination, Plaintiff admitted he did not issue a demand to Defendant for repayment prior to the filing of the lawsuit.

Plaintiff rested. At this point, Defendant moved for a directed verdict based on Plaintiff's failure to satisfy all the elements of an action on a promissory note, which includes a "demand" for repayment issued to Defendant.

The trial court allowed Defendant's motion for directed verdict and stated, "I don't think you can file a lawsuit before all of the elements are complete. I think at least there's got to be a request for payment." The court filed its judgment granting Defendant a directed verdict on 7 November 2016. Plaintiff timely filed notice of appeal.

## **II. Standard of Review**

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). A motion for directed verdict should be denied "unless the evidence, taken as true and viewed in the light most favorable to the plaintiff, establishes an

affirmative defense as a matter of law.” *Radford v. Keith*, 160 N.C. App. 41, 43, 584 S.E.2d 815, 817 (2003). Our review is *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008).

### III. Analysis

As an initial matter, the parties disagree whether the promissory note in this case is a negotiable instrument under Article 3 of North Carolina’s Uniform Commercial Code (“U.C.C.”).

A “negotiable instrument” is defined as:

[A]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder . . .

N.C. Gen. Stat. § 25-3-104(a)(1) (2017). Defendant contends the Note in this case was not payable “to bearer or to order,” and therefore the Note is not a negotiable instrument. We disagree.

In determining whether a promise to pay is payable to bearer or order, it is necessary to review the definitions provided under N.C. Gen. Stat. § 25-3-109. Subsection (a) of that section provides a “promise or order is payable to bearer if it: (1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment[.]” Subsection (b) states “A promise or order that is not payable to bearer is payable to

BRUNGARD V. CANESTORP

*Opinion of the Court*

order if it is payable (i) to the order of an identified person or (ii) to an identified person or order.” N.C. Gen. Stat. § 25-3-109 (2017).

The Note in this case was attached as an exhibit to the complaint and introduced as an exhibit at trial. The Note is entitled “Promissory Note” and it states:

- 1) Jeffrey Brungard shall loan Dustin Canestorp \$30,000 for a period of One year.
- 2) The loan period will be from 7 December 2011 and will be due in full 7 December 2012.
- 3) The interest for the loan will be 10% for the one year.
- 4) Dustin Canestorp will pay to Jeffrey Brungard or the respective heirs, executors, or administrators of his estate the principal and interest totaling \$33,000 on or before 7 December 2012.
- 5) Dustin Canestorp personally guarantees this note and it shall be binding upon the respective heirs, executors, and administrators of his estate.

Defendant executed the Note under seal, and the signatures are notarized.

Here, the note recites Defendant (Canestorp) “will pay to Jeffrey Brungard . . . principal and interest totaling \$33,000 on or before 7 December 2012.” We conclude the Note is payable to “an identified person” and is covered by N.C. Gen. Stat. § 25-3-109(b). We conclude the Note is a “negotiable instrument” under N.C. Gen. Stat. § 25-3-104(a)(1), and our analysis is governed by the provisions of the U.C.C.

The U.C.C. defines presentment as a “demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a

BRUNGARD V. CANESTORP

*Opinion of the Court*

party obliged to pay the instrument[.]” N.C. Gen. Stat. § 25-3-501(a) (2017).

Additionally, the U.C.C. provides for dishonor of a note:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

. . . .

(3) If the note is not payable on demand . . . the note is dishonored if it is not paid on the day it becomes payable.

N.C. Gen. Stat. § 25-3-502(a) (2017).

Presentment and dishonor are excused under the following circumstances:

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has repudiated an obligation to pay the instrument or is in insolvency proceedings or is dead, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

N.C. Gen. Stat. § 25-3-504 (2017).

BRUNGARD V. CANESTORP

*Opinion of the Court*

The promissory note in this case was “due in full” on 7 December 2012. Under the U.C.C. it is the responsibility of the holder of the Note to present the Note to the party “obliged to pay the instrument.” N.C. Gen. Stat. § 25-3-501(a). Therefore, in order for Plaintiff to collect, he had to execute presentment on the Note and demand payment. After presentment, if Defendant failed to pay Plaintiff, then Defendant has given Plaintiff notice of “dishonor.” N.C. Gen. Stat. § 25-3-502(a)(3). Looking at the terms of the Note, there is no indication presentment was “not necessary to enforce the obligation of the indorsers or the drawer.” N.C. Gen. Stat. § 25-3-504(a). Likewise, the terms of the Note do not reveal the parties intended to excuse or waive dishonor. This is because the parties failed to specify “notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument[.]” N.C. Gen. Stat. § 25-3-504(b). The record additionally does not show the existence of any other circumstances which would allow the excusal of presentment and dishonor. N.C. Gen. Stat. § 25-3-504.

Plaintiff failed to make a demand, or presentment, on the Note. Consequently, Defendant could not, and did not, give Plaintiff notice of dishonor. The parties did not waive the requirements of presentment and dishonor under the U.C.C., and therefore the trial court properly found Plaintiff failed to take the required steps to execute payment on the Note. We conclude the trial court did not err granting Defendant’s motion for a directed verdict in this case.

BRUNGARD V. CANESTORP

*Opinion of the Court*

AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).