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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-278

Filed: 6 February 2018

Ashe County, No. 16 CVS 211

PHYLLIS V. PARSONS, Plaintiff

v.

DONALD JOE PARSONS, JR., individually, and as Administrator of THE ESTATE OF DONALD JOE PARSONS, Defendants

Appeal by plaintiff from order entered 3 November 2016 by Judge John O. Craig, III in Ashe County Superior Court. Heard in the Court of Appeals 6 September 2017.

McElwee Firm, PLLC, by John M. Logsdon, for plaintiff-appellant.

Vannoy, Colvard, Triplett & Vannoy, PLLC, by Jay Vannoy and John G. Vannoy, Jr., for defendant-appellees.

CALABRIA, Judge.

Phyllis V. Parsons ("plaintiff") appeals from the trial court's order dismissing her complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). After careful review, we affirm.

I. Background

Plaintiff married her husband ("Mr. Parsons") on 9 December 2000. Both parties entered the marriage owning significant separate assets, including a 52-acre tract of property in Ashe County owned by Mr. Parsons. On 17 January 2001, plaintiff and Mr. Parsons executed a written, notarized contract ("the Post-Marriage Agreement") indicating their "desire . . . to maintain their property and assets in their respective present status as if they were unmarried[.]" As to the other party's property and assets, plaintiff and Mr. Parsons "forever relinquish[ed]": all rights to: (1) administer their spouse's estate; (2) inherit a surviving spouse's share through intestate succession; (3) take an elective life estate in lieu of a surviving spouse's share; (4) dissent from their spouse's will; and (5) claim a year's allowance in the other's estate. In addition to these terms, the Post-Marriage Agreement provided:

> It is the intention of the parties hereto that the property and assets presently owned by each shall be considered separate property of the other pursuant to the Equitable Distribution Act as provided in [N.C. Gen. Stat. §] 50-20 (and sections following) and each relinquishes all right or claim to the property of the other as provided in [N.C. Gen. Stat. §] 50-20 (and sections following).
>
> It is the intention of the parties that by this Agreement each shall possess and control their presently separate assets during the life of each and by direction to their personal representative at the death of each, as if they had never married. Should any court of competent jurisdiction be called upon to render any judgment pursuant to this Agreement, that court shall be directed by this Agreement to fulfill the intention of the parties.

The Post-Marriage Agreement was recorded in the Ashe County Register of Deeds on

29 December 2011.

In 2008, the parties decided to build their retirement home and make related improvements on the Ashe County property owned by Mr. Parsons. To achieve their goal, plaintiff and Mr. Parsons entered into an oral agreement ("the Improvements Agreement"), which would "be performed over an indefinite period of time" and included the following terms:

> a. They would each contribute one-half of the cost of constructing the Improvements including, but not limited to, a home, barn, out-buildings, roads for ingress and egress, etc.
>
> b. They each would be entitled to an interest in the Subject Property equal to the value of their respective contributions for the Improvements.
>
> c. Given his title to the Subject Property, [Mr. Parsons] agreed to provide the Plaintiff with an enforceable right (whether legal or equitable or by deed or testamentary disposition) for the value of contributions for the Improvements (the "Consideration").

Plaintiff contributed $397,872.50 from her separate property to pay for one-half of the improvement costs. However, when Mr. Parsons died intestate on 17 October 2015, plaintiff learned for the first time that he had not provided the Consideration. Plaintiff subsequently filed two Notices of Claim against Mr. Parsons's Estate, asserting that she was "entitled to either an ownership interest in the property, or alternatively, a reimbursement of her investment from the Estate." The Estate rejected both claims on 22 February 2016.

On 18 May 2016, plaintiff filed a complaint in Ashe County Superior Court against Donald Joe Parsons, Jr., individually and as administrator of his father's Estate (collectively, "defendants"). In her complaint, plaintiff sought $397,872.50 in damages and an equitable lien on the property, based on claims for (1) breach of fiduciary duty; (2) constructive fraud; (3) unjust enrichment; (4) breach of express contract; and (5) intentional or, alternatively, negligent misrepresentation. On 21 July 2016, defendants filed motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Defendants asserted various affirmative defenses as bases for dismissal, including the statute of limitations and the statute of frauds. Following a hearing, on 3 November 2016, the trial court entered an order granting defendants' motions and dismissing plaintiff's complaint in its entirety. Plaintiff appeals.

II. Analysis

"The motion to dismiss under N.C.R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Id.* On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion

to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"Contracts between husband and wife not inconsistent with public policy are valid" in North Carolina. N.C. Gen. Stat. § 52-10(a). A property settlement is a marital contract that "provides for a division of real and personal property held by the spouses. The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce." *Small v. Small*, 93 N.C. App. 614, 620, 379 S.E.2d 273, 277 (citation and quotation marks omitted), *disc. review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989). N.C. Gen. Stat. § 52-10 governs marital contracts and releases, generally, and provides, in pertinent part:

> [M]arried persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

N.C. Gen. Stat. § 52-10(a).

On appeal, plaintiff first argues that the trial court erred by determining that the Improvements Agreement contradicts the terms of the Post-Marriage Agreement and violates the parol evidence rule. We disagree.

The parol evidence rule provides that

> where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953). Plaintiff contends that the Improvements Agreement does not violate this rule because the Post-Marriage Agreement only applied to property owned by the parties on 17 January 2001, and "[n]othing . . . would prevent the parties from making a subsequent agreement to acquire property jointly." The parol evidence rule is indeed inapplicable here, but not because the rule "has no application to subsequent agreements." Rather, the rule does not apply because the Improvements Agreement is not enforceable under N.C. Gen. Stat. § 52-10(a). As stated above, "[n]o contract or release between husband and wife made during their coverture shall be valid *to affect or change any part of the real estate of either spouse . . . unless it is in writing and is acknowledged by both parties before a certifying officer*." N.C. Gen. Stat. § 52-10(a) (emphasis added). Unlike the

signed and notarized Post-Marriage Agreement, the oral Improvements Agreement fails this provision and is, therefore, unenforceable.

Furthermore, it is well established "that an oral contract to convey or to devise real property is void by reason of the statute of frauds[,]" N.C. Gen. Stat. § 22-2. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 245, 152 S.E.2d 85, 89 (1967); *see also* N.C. Gen. Stat. § 22-2 (providing, *inter alia*, that "[a]ll contracts to sell or convey any lands, tenements or hereditaments, *or any interest in or concerning them*, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith" (emphasis added)). "Upon a plea of the statute, [the contract] may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach." *Carr*, 269 N.C. at 245, 152 S.E.2d at 89.

Here, since defendants specifically pleaded the statute of frauds as an affirmative defense, "no recovery of damages for the loss of the [Improvements Agreement] can be predicated upon its breach." *Id.* Therefore, the trial court properly dismissed plaintiff's claims for (1) breach of fiduciary duty; (2) constructive fraud; (3) breach of express contract; and (4) intentional or, alternatively, negligent misrepresentation. Although asserted as distinct claims, each is predicated on Mr. Parsons's failure to provide the "Consideration," i.e., his alleged breach of the oral contract. Nevertheless, it is a "general principle that a person who has been unjustly

enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). Accordingly, plaintiff may still be entitled to recover her contributions via the equitable doctrine of unjust enrichment.

" 'Unjust enrichment' is a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Ivey v. Williams*, 74 N.C. App. 532, 534, 328 S.E.2d 837, 838-39 (1985). However, "[n]ot every enrichment of one by the voluntary act of another is unjust." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982). "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be *unjustly* enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Id.* (emphasis added) (citation and quotation marks omitted). This rule is particularly applicable where one spouse makes improvements to the other's property, "because of the presumption that the improvements constitute a gift." *Id.*; *see also id.* at 355, 289 S.E.2d at 354 (concluding that "the same presumption of gift should apply whichever spouse furnishes improvements on the other spouse's land").

"In cases not involving special relationships between the parties, the doctrine of unjust enrichment may be invoked upon a theory of an implied promise to pay."

Id. at 354 n.6, 289 S.E.2d at 353 n.6. However, "[t]he law will not imply a promise to repay the husband the sums he spent for repairing or improving his wife's property . . . ." *Id.* (citation and quotation marks omitted). Accordingly, a claim for unjust enrichment between married parties "may not be based on a mere good faith belief or an implied promise." *Ivey*, 74 N.C. App. at 535, 328 S.E.2d at 839. Under these circumstances, the improving spouse "must prove the promise[,]" rebutting the spousal-gift presumption "by clear, cogent and convincing evidence." *Wright*, 305 N.C. at 354, 289 S.E.2d at 353.

In the instant case, plaintiff's allegations specifically regarding unjust enrichment are that:

> 26. The Plaintiff conferred a benefit upon [Mr. Parsons] by paying $397,872.50 of the cost of the Improvements located on the Subject Property.
>
> 27. The Plaintiff did not pay for the Improvements gratuitously.
>
> 28. The Plaintiff made all payments <u>pursuant to an implied agreement</u> that [Mr. Parsons] would equitably or legally provide her with the Consideration. [Mr. Parsons] consciously accepted the benefit of the Plaintiff's payment for one-half the cost of the Improvements.
>
> 29. The Plaintiff is entitled to have and recover of the Estate a monetary judgment equal to the value of the Plaintiff's separate property used for the payment of Improvements on the Subject Property and to an equitable lien, or encumbrance, or charge upon the Subject Property for the amount of the judgment.

(emphasis added).

Plaintiff's allegation of "an implied agreement" with Mr. Parsons is fatal to her claim for unjust enrichment. *Ivey*, 74 N.C. App. at 535, 328 S.E.2d at 839. The complaint contains no allegations that Mr. Parsons expressly promised to convey an interest in his property to plaintiff, or to reimburse her for contributing to their shared retirement home. In her appellate brief, plaintiff "concedes that the Statute of Frauds would bar a claim asserting an interest in real property," and as a result, she "has not made such a claim." Nevertheless, without an allegation of Mr. Parsons's express promise to convey an interest in his property or repay plaintiff for her contributions, plaintiff "has no forecast of evidence allowing a recovery based on unjust enrichment. An implied promise is insufficient." *Id.*

Moreover, in unjust enrichment cases, "the focus is not on the intent of the party furnishing improvements to another's land but is, rather, on the circumstances, if any, which would render it unjust for the owner to keep the benefit of the improvements without compensating the improver." *Wright*, 305 N.C. at 353, 289 S.E.2d at 352. Here, plaintiff alleges that although she contributed nearly $400,000.00 to the improvements project from 2005-08, she did not learn that Mr. Parsons had not provided the Consideration until his death in 2015. Yet, as a party to the Post-Marriage Agreement, plaintiff knew that there was an existing notarized contract in which she had "relinquishe[d] all right or claim" to the Ashe County

property. Accordingly, plaintiff could have established a lien on the property in 2008, when the parties entered into the Improvements Agreement. At the very least, plaintiff should have insisted on amending the Post-Marriage Agreement to incorporate the Improvements Agreement *before the parties recorded the Post-Marriage Agreement in 2011.* In any event, plaintiff has had ample opportunity to recoup her contributions, and under these circumstances, it would not be "unjust for the owner to keep the benefit of the improvements without compensating the improver." *Id.*

III. Conclusion

The oral Improvements Agreement was not an enforceable contract pursuant to N.C. Gen. Stat. §§ 22-2 and 52-10(a). Furthermore, a claim for unjust enrichment between married parties may not be based on an implied agreement. For these reasons, we hold that the trial court did not err by granting defendants' motions to dismiss plaintiff's complaint.

AFFIRMED.

Judge ZACHARY concurs.

Judge MURPHY concurs in the result without separate opinion.

Report per Rule 30(e).