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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-531

Filed: 26 March 2019

Halifax County, No. 15 CVS 752

HALIFAX COUNTY, Plaintiff,

v.

EMPIRE FOODS, INC., Defendant.

Appeal by defendant from orders entered 3 July 2017 by Judge Beecher R. Gray and 16 January 2018 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 16 October 2018.

Halifax County Attorney M. Glynn Rollins, Jr., for plaintiff-appellee.

Austin Law Firm, PLLC, by John S. Austin, for defendant-appellant.

BRYANT, Judge.

Where the remedy imposed on defendant Empire Foods for breach of contract was a remedy available pursuant to the terms of the contract, we affirm the trial court's grant of summary judgment in favor of plaintiff Halifax County. Where the trial court did not abuse its discretion by denying defendant Empire Foods' motion to

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dismiss plaintiff Halifax County's complaint for failure to prosecute its claims, we affirm the trial court's order.

On 18 August 2015, plaintiff Halifax County filed a complaint in Halifax County Superior Court against defendant Empire Foods. Plaintiff Halifax County claimed that defendant Empire Foods breached a contract—the Performance Agreement—and sought recovery pursuant to the agreement's terms for relief.

On 29 April 2011, pursuant to General Statutes, section 158-7.1 ("Local development"), plaintiff and defendant entered into an Economic Development Agreement to establish a food processing plant (the Facility) in Halifax County. "In consideration, [plaintiff] agreed to provide certain incentives and other assistance to [defendant], including but not limited to the pursuit of grant funding . . . for infrastructure development in connection with the Facility." On 13 May 2011, the Rural Economic Development Center agreed to provide \$1,000,000.00 in grant funding to plaintiff Halifax County—the Grant Agreement—for the installation of 44,640 feet of sewer line, a pump station, and the necessary appurtenances to support defendant Empire Foods' operations. As a condition of the Grant Agreement, plaintiff and defendant were required to enter into another contract—the Performance Agreement—wherein defendant would agree to create 100 new, full-time jobs at the Facility by 13 May 2013. In accordance with the Grant Agreement, plaintiff and

defendant executed the Performance Agreement to secure funding for the sewer installation.

On 11 July 2013, plaintiff and the Rural Economic Development Center amended the Grant Agreement in order to extend defendant's deadline for job creation from 13 May 2013 to 13 May 2015. However, as of 13 May 2015, defendant had failed to locate a food processing operation in Halifax County and failed to create 100 new, full-time jobs as required by the Performance Agreement.

Plaintiff claimed that pursuant to the Performance Agreement, defendant "[wa]s required to repay the grant funds to [plaintiff], for redistribution back to the [Rural Economic Development Center] (or its successor in interest)." On 22 October 2015, defendant filed an answer denying the claim. On 3 May 2017, defendant filed a motion to compel and motion to dismiss for failure to prosecute: Plaintiff had taken no steps to prosecute its action in over a year and failed to respond to defendant's interrogatories or request for documents. On 29 June 2017, the Honorable Beecher R. Gray, Judge presiding in Halifax County Superior Court, issued an order to compel plaintiff to produce interrogatories and all documents requested. Judge Gray also denied defendant's motion to dismiss plaintiff's complaint.

On 28 December 2017, defendant filed a motion for summary judgment and separately, a motion to compel, a motion for sanctions, and a motion to dismiss. Plaintiff also filed a motion for summary judgment.

On 16 January 2017, Cy A. Grant, Judge presiding in Halifax County Superior Court, entered an order in which the court granted summary judgment in favor of plaintiff. The court ordered that plaintiff recover \$786,669.00 from defendant. The court denied defendant's motion for summary judgment. Defendant appeals.

On appeal, defendant questions whether the trial court erred by (I) denying Empire's motion for summary judgment (entered by Judge Grant) and (II) failing to dismiss plaintiff's claims for failure to prosecute its complaint (entered by Judge Gray).

I

Defendant argues that the trial court erred by granting summary judgment in favor of plaintiff. (A) Defendant contends that the controlling agreement between the parties was the Economic Development Agreement and that agreement did not provide for repayment of grant funds as a remedy for breach of contract. (B) Defendant also contends that the relevant damages provision was an unenforceable penalty. We disagree.

Contract interpretation is a question of law reviewed de novo. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

A. Breach of Contract

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“The court’s primary purpose in construing a contract is to ascertain the intention of the parties.” *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 52, 535 S.E.2d 388, 393 (2000) (citations omitted). “It has often been said that in actions for breach of contract, the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made.” *Troitino v. Goodman*, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945) (citations omitted).

Plaintiff and defendant entered into the Economic Development Agreement pursuant to General Statutes, section 158-7.1 (“Local development”).

(a) Each county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises . . . in the county[.] . . .

(b) A county or city may undertake the following specific economic development activities. . . .

. . . .

(6) A county . . . may provide for or assist in the extension of . . . sewer lines to industrial properties or facilities . . .

N.C. Gen. Stat. § 158-7.1(a), (b)(6) (2015).

Economic Development Agreement

Pursuant to the Economic Development Agreement between plaintiff and defendant, plaintiff agreed to erect a 35,000 square foot facility suitable to serve defendant’s operations. Plaintiff agreed to enter into a lease and option to purchase

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agreement for twenty acres of land in the Halifax Township on which to erect the facility. Plaintiff agreed to convey to defendant by General Warranty Deed a thirty-five and one-quarter acre land tract in Halifax Corporate Park, acknowledged and agreed by the parties to have a fair market value of \$303,500.00 at the time of conveyance, for a cost of \$1.00 “and other valuable consideration.” Plaintiff also agreed to pursue funding from “the North Carolina Rural Center, the Golden Leaf Foundation, United States Department of Agriculture (USDA) and other appropriate organizations and governmental agencies to assist with . . . *infrastructure development*, and other activities to support the Company’s operations.” (emphasis added).

Defendant agreed to create and maintain 200 new full-time jobs at the constructed facility as well as create a taxable investment of \$2,500,000.00 in equipment at the Facility within five years of the Economic Development Agreement execution date.

[I]f [defendant] fail[ed] to satisfy any requirement of this Agreement, including the failure to achieve the targeted job creation or investment goals . . . , [plaintiff] shall have the rights set forth in the Lease Agreement and the Option to Purchase Agreement, which shall constitute the County’s sole and exclusive remedies for [defendant’s] failure to satisfy the requirements set forth in this Agreement.

Grant Agreement

To obtain funding for infrastructure development in support of defendant's operations, plaintiff entered into a Grant Agreement with the Rural Economic Development Center. Plaintiff agreed to develop, perform, and complete the food technology project sewer extension.

1. Scope of Program/Other Agreements

....

(b) The parties acknowledge that the funds provided [by the Rural Economic Development Center] hereunder have been provided in order to facilitate the creation of jobs in the [Halifax County] community, and are subject to return to the [Rural Economic Development Center] if such jobs are not created and maintained.”

....

4. Funding

(a) Subject to the reduction described below, the [Rural Economic Development Center] grants to [plaintiff] the amount of \$1,000,000.00, which is the total amount of this Agreement for expenditures related to the Project.

....

(c) In the event that the costs of the Project are less than the costs projected . . . the grant shall be reduced on a pro rata basis with other project funding.

Per the Grant Agreement, plaintiff agreed to enter into a Performance Agreement with defendant.

Performance Agreement

In accordance with the Grant Agreement, plaintiff and defendant executed the Performance Agreement. The parties agree to “develop, perform, and complete the work . . . described in the proposal entitled **plaintiff Halifax County Sewer Line Upgrade Project – Phase II** as approved by the [Rural Economic Development Center].”

2. [Plaintiff] hereby agrees to use \$1,000,000 to fund the [Sewer Line Upgrade Project]. The parties acknowledge that this amount will be repayable only in the event the business fails to achieve certain job creation goals *In the event such job creation goals are not achieved, [defendant], agrees to pay to [plaintiff] for redistribution back to the [Rural Economic Development Center], the amount [determined in part by the number of jobs created as compared to the stated job creation goals as] set forth in paragraph 5 below.*

. . . .

3. Job Creation. [Defendant] hereby agrees to create 100 new jobs within two years from the date of the contract execution with the [Rural Economic Development Center].^[1] [Defendant] hereby acknowledges that the funding by the [Rural Economic Development Center] and [plaintiff] is predicated upon this covenant by [defendant], that failure to achieve this objective will constitute a material default under the terms of this Agreement, and that any such failure shall require [defendant]

¹ The Grant Agreement was amended on 11 July 2013 wherein Empire Foods’ deadline for the creation of 100 new full-time jobs was extended from 13 May 2013 to 13 May 2015, and the amount of the grant for the sewer infrastructure grant was modified from \$1,000,000.00 to the amount expended to construct the sewer installation, \$786,669.00.

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to repay all or a portion of the support provided by [plaintiff] pursuant to the provisions of paragraph 5 below. . . .

. . . .

5. Repayment. If [defendant] fails to create the required number of Jobs by the second anniversary of the date of contract execution with the [Rural Economic Development Center] . . . [defendant] shall repay to [plaintiff], for redistribution back to the [Rural Economic Development Center], an amount equal to the product of (i) \$10,0000 [sic] and (ii) the . . . [100] Jobs required to be created . . . minus . . . (A) the number of Jobs in existence on the date verified that is within two years from the date of contract execution with the [Rural Economic Development Center]

(emphasis added).²

From the record, it seems clear that plaintiff agreed to expend up to \$1,000,000.00 in grant funds from the Rural Economic Development Center to install a sewer infrastructure to support defendant's operations, and defendant agreed to create 100 new jobs in Halifax County within two years (by 13 May 2013, and then amended to be within four years, by 13 May 2015) of entering into the Performance Agreement. The agreement also specified a remedy in the event that defendant failed to create 100 new jobs: defendant would repay plaintiff a calculated portion of the

² Using the agreed-upon formula provided in the Performance Agreement for calculating the amount Empire Foods would repay plaintiff Halifax County for redistribution to the Rural Economic Development Center in the instance no jobs were created, yields \$1,000,000.00 ($\$10,000.00 \times (100 - 0)$), the initial amount the Rural Economic Development Center granted to plaintiff Halifax County to construct phase II of the plaintiff Halifax County Sewer Line Upgrade Project.

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funds granted to construct the sewer installation, and plaintiff would redistribute those repaid funds to the Rural Economic Development Center (or its successor in interest).

Plaintiff completed the sewer infrastructure in October 2012, “with an expenditure of \$786,669.00 in Rural Center grant funds.” However, defendant failed to create any jobs in Halifax County. Now, plaintiff seeks relief for breach of contract in the amount of \$786,669.00.

Defendant contends that plaintiff’s relief for breach of contract is limited by the remedy set forth in the Economic Development Agreement, the first agreement. The Economic Development Agreement states that in the event defendant fails to satisfy its job creation goals (200 new full-time jobs within five years of the execution date), plaintiff could recover *only* under the terms of the property lease agreement and option to purchase agreement for the twenty acres leased for the benefit of defendant. Pursuant to the Performance Agreement, if defendant failed to meet its job creation goals (100 new jobs within two years of the execution date), defendant would repay funds granted by the Rural Economic Development Center to plaintiff for redistribution to the Rural Economic Development Center.

The intention of the parties seems clear: where defendant breached the terms of the Economic Development Agreement (securing real estate transactions with plaintiff), plaintiff could recover only under the property lease agreement and option

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to purchase agreement; where defendant breached the terms of the Performance Agreement (securing infrastructure development funding provided by the Rural Economic Development Center), defendant would repay grant funds expended by the Rural Economic Development Center. *See Troitino*, 225 N.C. at 412, 35 S.E.2d at 281; *Foreclosure of Azalea Garden Bd. & Care*, 140 N.C. App. at 52, 535 S.E.2d at 393. We hold the remedy for breach of contract set forth in the Performance Agreement is not in conflict with or limited by the remedy set forth in the Economic Development Agreement. Thus, defendant's argument that recovery of funds pursuant to the Performance Agreement is not an available remedy is overruled.

B. Damages

Defendant contends that the damages provision under the Performance Agreement, section 5,³ was an unenforceable penalty.

³ Pursuant to the Performance Agreement, Empire Foods agreed to repay funds granted by the Rural Economic Development Center according to the following formula:

If [Empire Foods] fails to create the required number of Jobs by the second anniversary of the date of contract execution with the [Rural Economic Development Center], or if [Empire Foods] has created such Jobs by such date, but has not maintained that total number of Jobs until the date that is 6 months following the job verification date . . . , [Empire Foods] shall repay to [plaintiff Halifax County], for redistribution back to the [Rural Economic Development Center], an amount equal to the product of (i) \$10,0000 [sic] and (ii) the number of Jobs required to be created [(100)], minus the lesser of (A) the number of Jobs in existence on the date verified that is within two years from the date of contract execution with the [Rural Economic Development Center], and (B) the number of Jobs in existence and verified at the date that is six months following the creation of the minimum number of jobs required.

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Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs.

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968) (citation omitted).

A *penalty* is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security . . . to insure that the person injured shall collect his actual damages.

Liquidated damages may be collected; a penalty will not be enforced.

City of Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966) (citations omitted).

In deciding whether the sum fixed by the contract as the measure of a recovery, if there is a breach, should be regarded as a penalty or as liquidated damages, the court will look at the nature of the contract, and its words, and try to ascertain the intentions of the parties; and also will consider that the parties, being informed as to the facts and circumstances, are better able than any one [sic] else to determine what would be a fair and reasonable compensation for a breach; but the courts have been greatly influenced by the fact that in almost all the cases the damages are uncertain and very difficult to estimate.

Knutton, 273 N.C. at 361, 160 S.E.2d at 34–35 (citation omitted).

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Pursuant to the Grant Agreement between plaintiff and the Rural Economic Development Center, the Rural Economic Development Center

was organized for the purpose of stimulating and supporting economic development in the rural areas of North Carolina.

. . . .

. . . The parties acknowledge that the funds provided [to plaintiff] hereunder have been provided in order to facilitate the creation of jobs in the community, and are subject to return to the [Rural Economic Development Center] if such jobs are not created and maintained.

Pursuant to the Performance Agreement (between plaintiff and defendant) entered in accordance with the Grant Agreement to secure grant funding from the Rural Economic Development Center for a sewer installation, where defendant failed to meet its job creation target, a formula was provided to determine the amount of grant funding defendant would repay to plaintiff for redistribution to the Rural Economic Development Center.

The intentions of the parties entering into the Performance Agreement are clear, *see* subsection (A), *supra*. The Rural Economic Development Center provided grant funding for an infrastructure development project in order to stimulate and support economic development in Halifax County. To secure that funding, provided to plaintiff, defendant agreed to create 100 jobs within Halifax County before 13 May 2015. It is unclear how to quantify damages in the event of defendant's breach of

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contract. But, the parties were capable of determining for themselves what would be a reasonable compensation for the Rural Economic Development Center due to defendant's breach of contract. Plaintiff and defendant agreed to a formula which would yield a dollar amount of grant funding defendant would ultimately repay to the Rural Economic Development Center. The refund amount was dependent on the number of jobs created and the job creation target (i.e., it was not a fixed number). We hold the calculated damages are liquidated damages, not an unenforceable penalty, and thus collectible. *See Knutton*, 273 N.C. at 361, 160 S.E.2d at 34.

For the reasons stated in subsections (A) and (B), defendant's arguments are overruled, and we affirm Judge Grant's 16 January 2018 order granting summary judgment in favor of plaintiff.

II

Next, defendant argues that the trial court erred by denying its motion to dismiss plaintiff's complaint for failure to prosecute. Defendant contends that it was prejudiced by plaintiff's delays with discovery and advancing the case. We disagree.

Dismissal of an action pursuant to our Rules of Civil Procedure, Rule 41(b) ("Involuntary dismissal"), is in the discretion of the trial court. *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E.2d 13, 15 (1981). "Where a ruling of a trial court is discretionary, the court may be reversed for abuse of discretion only upon a showing

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that its actions are manifestly unsupported by reason.” *Eakes v. Eakes*, 194 N.C. App. 303, 309, 669 S.E.2d 891, 895 (2008) (citation omitted).

[M]ere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence [,] but instead is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion.

Id. (alteration in original) (citation omitted). However, “[c]ourts are, and should be, primarily concerned with trial of cases on their merits.” *Jones*, 52 N.C. App. at 505, 279 S.E.2d at 15.

On 3 May 2017, defendant filed a motion to compel and motion to dismiss for failure to prosecute. Defendant asserted that plaintiff had not been diligent in prosecuting the case, to the prejudice of defendant. Defendant was served with plaintiff’s complaint on 21 August 2015. Plaintiff then failed to prosecute its case for over a year. On 12 September 2016, defendant served plaintiff with interrogatories and a request for production of documents. As of 3 May 2017, plaintiff had not responded to defendant’s requests. To the trial court, defendant stated that it “has made every reasonable attempt to resolve this discovery dispute without the Court’s assistance; however, [plaintiff] refuses to produce responses and documents discoverable under Rule 26.”

With counsel for both parties present, the matter was heard on 22 May 2017 in Superior Court before the Honorable Beecher R. Gray, Judge presiding. On 29

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June 2017, Judge Gray entered an order to compel plaintiff to “produce interrogatories and all documents requested within fourteen days.” Moreover, the court ordered that plaintiff pay defendant \$1,500.00 for attorney fees. In a second order entered the same day, the court concluded that “after hearing argument from counsel after reviewing the record, affidavit and the materials submitted in support of the Motion,” defendant’s motion to dismiss the action for failure to prosecute would be denied.

While defendant asserts it has been prejudiced by plaintiff’s delay in responding to interrogatories or producing documents, it fails to establish that Judge Gray’s denial of its motion to dismiss amounts to an abuse of discretion. Accordingly, defendant’s argument is overruled. Therefore, the orders of Judge Gray (3 July 2017) and Judge Grant (16 January 2018) are

AFFIRMED.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).

Judge Davis concurred in this opinion prior to 25 March 2019.