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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-7

No. COA20-280

Filed: 2 February 2021

Wake County, No. 19 CVS 005393

TIM GASPER, Plaintiff,

v.

BRADY TRANE SERVICE, INC, J. BRADY CONTRACTING, INC., PATRICK TONKER and JAMES BRADY, Defendants.

Appeal by plaintiff from order entered 6 November 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 12 January 2021.

*Q Byrd Law, by Quintin D. Byrd, and Monteith Law PLLC, by Charles E. Monteith, Jr., for plaintiff-appellant.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Zebulon D. Anderson and David A. Pasley, for defendants-appellees.*

TYSON, Judge.

¶ 1

Tim Gasper (“Plaintiff”) appeals from an order entered granting Brady Trane Service, Inc.’s (“BTS”); J. Brady Contracting, Inc.’s (“JBC”); Patrick Tonker’s; and James Brady’s (collectively “Defendants”) Rule 12(c) motion for judgment on the

pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019). We reverse in part and affirm in part.

### **I. Background**

¶ 2           BTS provides heating, ventilation, and air conditioning services and building solutions. JBC is a wholly-owned subsidiary of BTS, which focuses on the contracting component of BTS' business. Plaintiff began working as an energy services salesman for BTS around 21 April 2003.

¶ 3           Plaintiff's work for BTS focused on marketing and closing energy services agreements with both public and private sector entities. Plaintiff's role continued during the entire sales and contracting process. The process can be lengthy and can consume several years. It involves a number of segments, including securing selection, a competitive bidding process, an investment grade audit, and an enforceable energy service agreement, before construction can begin.

¶ 4           Plaintiff was initially employed and paid a base salary of \$60,000 annually, plus commissions based on his production and sales of projects. BTS raised Plaintiff's fixed salary to \$100,000 annually, plus a commission on sales in late 2005 or early 2006. Plaintiff's compensation was later increased to \$150,000 annually with a commission draw.

¶ 5           In August 2015, the North Carolina Department of Transportation selected and reached an agreement with BTS for a large project, including a fifteen-year

service contract. Plaintiff worked with BTS through the investment grade audit and approval steps until the North Carolina Council of State approved the energy service agreement in July 2017.

¶ 6

In early 2016, Plaintiff and BTS ended Plaintiff's salary-based compensation and agreed to an entirely commission-based compensation structure. An "Incentive Compensation Plan," was drawn by Defendants and executed by Plaintiff and BTS on 8 February 2016. The "Incentive Compensation Plan" defines and provides, *inter alia*:

REVENUE – Represents the amount recognized by the Company on its financial statements from the sale of products and services in accordance with Generally Accepted Accounting Principles.

DIRECT COSTS – Those costs for labor, materials, subcontract work and other direct costs associated with completing a project or service assignment.

GROSS MARGIN – Represents the difference resulting from the subtraction of Direct Costs from Revenue. Actual gross margin is the final gross margin recognized at the completion of the service or project work.

PAYMENT TERMS – *Commissions* unless otherwise stated *will be paid quarterly in the month following the quarter in which they were earned*. In the case of termination, only those commissions *earned* as of the date of termination will be paid, *subject to any applicable reconciliation with commission draw*.

RIGHT TO RECOVER – Any advanced but unearned commissions shall be subject to charge-back or recoupment

by the Company *if the Company fails for any reason to receive timely payment* of any revenue for sales of Company products or services attributable to a salesperson. The Company reserves the right to deduct from a salespersons' future commissions any portion of an advanced commission that is lost due to failure to collect the revenues upon which the commission advancement was based.

SUBJECTIVE DISCRETION AND/OR DISPUTE RESOLUTION – Determination of any and all subjective measures such as the percentage influence a salesperson has had upon a sale/lead will be made initially by Sales Management. Disagreements or disputes concerning any application of this discretion or any other interpretation of this commission plan shall be submitted to Jim Brady. He or his designate shall have the sole discretion to decide the issue and all decisions will be final and binding.

. . .

1. Commission Draw – The [energy services] [s]alesperson *position will be compensated on a 100% commission basis* but will also participate in Company benefits. To facilitate stability during the year, the [energy services] [s]alesperson will be *paid a commission draw based on an annual payout of \$150,000. No additional earned commission payments . . . will be made to the [energy services] [s]alesperson until the cumulative commissions earned exceed the annual draw amount.*

(emphasis supplied).

Plaintiff's performance-based compensation was to be paid with percentages ranging from 5% to 20% of the gross margin, depending on the type of contract, project, and Plaintiff's level of involvement in securing the agreement.

¶ 8 In November 2016, Plaintiff became an employee of JBC. On 14 August 2017, Plaintiff met with President of BTS and JBC, Jim Brady, and Patrick Tonker, Vice President of Energy Service and Controls for BTS. During the meeting, Plaintiff was advised he had received commission advances substantially in excess of the amount of commissions earned. Brady and Tonker proposed a solution whereby BTS would cancel the overpayment associated with his current position, if he agreed to forgo commissions and accept a different salaried position as a senior solutions engineer.

¶ 9 The senior solutions engineer's fixed salary was lower than the previously agreed upon performance based \$150,000 annual compensation. If he accepted the senior solutions engineer position, Plaintiff would forego and not be entitled to earn commissions "on any projects already in construction, guarantee, and for maintenance phase of the project." Plaintiff was advised if he did not accept this proposal, his employment would be terminated immediately.

¶ 10 Plaintiff accepted the position as a senior solutions engineer. Six weeks later on 31 October 2017, Plaintiff was informed his employment would be terminated on 17 November 2017.

¶ 11 Plaintiff filed a verified complaint asserting claims of: (1) fraudulent concealment against Tonker and Brady and (2) *quantum meruit* against BTS and JBC on 25 April 2019. Defendants filed an answer, defenses, and a counterclaim for

breach of contract. On 16 August 2019, Plaintiff filed a reply and answered Defendants' counterclaim.

¶ 12 Defendants filed a Rule 12(c) motion for judgment on the pleadings on 22 August 2019. The trial court heard arguments on Defendants' motion on 28 October 2019 and granted Defendants' motion. Plaintiff timely appealed.

## **II. Jurisdiction**

¶ 13 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(3) (2019).

## **III. Issues**

¶ 14 Plaintiff argues the trial court erred when it granted Defendants' motion for judgment on the pleadings for his claims of fraudulent concealment and *quantum meruit*.

## **IV. Standard of Review**

¶ 15 "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). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted).

¶ 16 “Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by our liberal rules of notice pleading.” *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citations and internal quotation marks omitted).

¶ 17 Allegations of fraud are rarely resolved in the pleading or summary judgment stage because resolution of the cause requires the determination of a litigant’s state of mind. *Whitman v. Forbes*, 55 N.C. App. 706, 713, 286 S.E.2d 889, 893 (1982) (citations omitted).

¶ 18 If materials outside of the pleadings and arguments are considered, the Rule 12(c) motion is to be reviewed under the standards applicable to a Rule 56 motion for summary judgment. “If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.” *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985).

¶ 19 This Court reviews a grant of a motion for judgment on the pleadings *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

### **V. Fraudulent Concealment Claim**

¶ 20 Fraud can be actual or constructive. *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). Constructive fraud arises when a confidential or fiduciary relationship exists. *Id.* at 83, 273 S.E.2d at 677.

¶ 21 Our Supreme Court has stated: “[t]o successfully assert an allegation of actual fraud, the plaintiff must plead five elements: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 9, 812 S.E.2d 831, 837 (2018) (citations and internal quotation marks omitted). “[A]ny reliance on the allegedly false representation must be reasonable.” *Id.* (citations omitted).

¶ 22 Rule 9(b) of the North Carolina Rules of Civil Procedure requires “[i]n all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity.” N.C. Gen. Stat. § 1A-1, Rule 9(b) (2019). Our Supreme Court has held Rule 9(b)’s particularity of pleading requirement asserting fraud “is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent facts or representations.” *Terry*, 302 N.C. at 85, 273 S.E.2d at 678.

¶ 23 Plaintiff alleged and argues he was fraudulently induced and tricked into foregoing his performance-based compensation agreement and accepting the new position as a salaried-only senior solutions engineer. He asserts when Brady and Tonker offered to allow him to “continue his employment” under the new agreement, they already knew and fraudulently concealed their plans to terminate his employment “in the near future.” Plaintiff alleged in his pleadings “Brady and



Tonker made false statements to Plaintiff regarding Plaintiff's continued employment with [JBC] if Plaintiff agreed to forego future commission payments." Plaintiff argues he relied upon these false statements to his detriment and damage. These allegations satisfy Plaintiff's Rule 9(b) pleading requirement. N.C. Gen. Stat. § 1A-1, Rule 9(b); *Terry*, 302 N.C. at 85, 273 S.E.2d at 678. The trial court erred in granting Defendants' Rule 12(c) motion for judgment on the pleadings on the fraud claim. That portion of the trial court's order is reversed.

## **VI. *Quantum Meruit***

¶ 24 Plaintiff argues the trial court erred by granting Defendants' Rule 12(c) motion for judgment on the pleadings for his *quantum meruit* claim.

*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment.

*Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414-15 (1998) (internal citations and quotation marks omitted).

¶ 25 Plaintiff is seeking commission compensation under an express contract for work he completed as an energy service salesman. Plaintiff relinquished the right to

earn trailing commissions on projects already under construction in return for Defendants' cancelling any repayment of overpaid commissions and acceptance of continued employment. This is an express agreement between Plaintiff and Defendants.

¶ 26 Plaintiff asked the trial court to enforce the terms of the contract. In *Whitfield*, our Supreme Court barred a court from imposing a “quasi contract or a contract implied in law” where an express agreement exists. *Id.* We are bound by our Supreme Court's precedent. See *Crawford v. Commercial Union Midwest Ins. Co.*, 147 N.C. App. 455, 459 n.5, 556 S.E.2d 30, 33 n.5 (2001). Plaintiff's argument is overruled.

## VII. Conclusion

¶ 27 Viewed in the light most favorable to Plaintiff and giving him the benefit of any disputed inferences, Defendant was not entitled to judgment on the pleadings. Plaintiff alleged elements of fraud to survive Defendants' motion for judgment on the pleadings.

¶ 28 Plaintiff seeks to enforce and recover under an express agreement. Plaintiff is barred from asserting a *quantum meruit* claim. Defendants were entitled to judgment on the pleadings on that claim. The trial court order is reversed in part, affirmed in part, and remanded. *It is so ordered.*

GASPER V. BRADY TRANE SERVICE, INC

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*Opinion of the Court*

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).