IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-760

No. COA21-581

Filed 15 November 2022

Carteret County, No. 18-CVD-416

SEA GATE ASSOCIATION, INC., Plaintiff,

v.

DENISE WILLIS RANGE, Defendant.

Appeal by Defendant from order entered 31 December 2020 by Judge Peter Mack in Carteret County District Court. Heard in the Court of Appeals 11 May 2022.

David A. Sawyer for the Defendant-Appellant.

Ward and Smith, P.A., by Eric J. Remington and Christopher S. Edwards for the Plaintiff-Appellee.

DILLON, Judge.

¶ 1 Plaintiff homeowners' association commenced this action to recover assessments/dues it claims is owed by Defendant homeowner.

I. Background

¶ 2 Sea Gate is a residential subdivision in Carteret County. In 1972, covenants were recorded to govern Sea Gate. These covenants referenced Plaintiff association. Plaintiff owns the common areas within Sea Gate, including roads which provide

access from public roadways to subdivision lots.

¶ 3 The 1972 covenants provide that Sea Gate lot owners be members of and pay assessments to Plaintiff for the maintenance of Sea Gate's common areas. By their terms, the covenants were to expire in 1992 but provided they could be "changed, altered, amended or revoked" by written agreement of owners representing two-thirds of the lots in Sea Gate. In 1991, residents recorded a document to allow the assessment of dues for the association past 1992. However, our Court subsequently held that, based on the ambiguous language in the 1972 covenants, the obligation to pay dues contained therein could not be extended past 1992 by amendment. *Allen v. Sea Gate Ass'n*, 119 N.C. App. 761, 460 S.E. 2d 197 (1995).

¶ 4 Notwithstanding, lot owners including Defendant continued to pay assessments for the maintenance of the Sea Gate common areas, including the roads Defendant continues to use to access her lot.

¶ 5 In 2015, Sea Gate sent assessment notices to the lot owners, including Defendant, for the maintenance of the Sea Gate common areas. Defendant, however, stopped paying the assessments, though she continued to use the Sea Gate common areas. Plaintiff commenced this action to recover the assessed dues.

¶ 6 Plaintiff moved for summary judgment. The trial court granted Plaintiff summary judgment, essentially concluding that there was an implied in fact contract between Plaintiff and Defendant, as a matter of law. The trial court ordered

Defendant to pay the dues assessed by the association and awarded Plaintiff attorney's fees.

¶ 7 Defendant timely appealed.

II. Analysis

¶ 8 Defendant argues the trial court erred in granting summary judgment based on Plaintiff's implied contract theory *and* in granting Plaintiff attorney's fees. We address each in turn.

A. Summary Judgment-Implied Contract

¶ 9 Defendant essentially argues that summary judgment was inappropriate on the theory of the existence of an implied contract because Plaintiff also alleged the existence of an express contract based on the provisions of the covenant. We disagree.

¶ 10 It is true that Plaintiff alleges in its complaint three conflicting theories to support its claim to recover assessments. Plaintiff alleges that Defendant breached the 1972 covenants, which Defendant characterizes as a claim for breach of an express contract; that Defendant breached an implied contract; and that Defendant owes Plaintiff money under a *quantum meruit*/unjust enrichment theory.

¶ 11 Defendant points out that the existence of "an express contract precludes an implied contract [for] the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962). Our Supreme Court, however, has allowed a plaintiff to plead the existence of an express contract *and* an implied contract as

alternative theories. *See*, *e.g.*, *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 148, 139 S.E.2d 362, 369 (1964) ("[t]he complaint may allege an express contract or the allegations may be so general as to allow a recovery either upon the express contract or an implied contract.") Further, our Rules of Civil Procedure allow for pleading alternate theories: "Relief in the alternative or of several different types may be demanded." N.C. R. Civ. P. 8(a)(2) (2018).

¶ 12 Here, Plaintiff explicitly pled breach of implied contract in the alternative. We acknowledge Defendant is correct that Plaintiff incorporated by reference all prior allegations when alleging the existence of an implied contract, including allegations concerning the existence of an express contract. However, to any extent that Plaintiff might have mistakenly incorporated *all* prior allegations when stating its claim based on an implied contract theory, its intent to allege the existence of an implied contract as an *alternate* theory is obvious.

¶ 13 Defendant attempts to compare this case to *Keith v. Day*, 81 N.C. App. 185, 343 S.E.2d 562 (1986). *Keith* is easily distinguishable. The issue before the Court in *Keith* was whether an implied contract claim could be submitted to the jury after the defendant admitted to the existence of an express contract. *Id.* at 198, 343 S.E.2d at 570. We have a dissimilar set of facts and a different procedural posture here.

¶ 14 Defendant contends that the court erred by granting Plaintiff's motion under an implied contract theory because there is an issue of fact that the contract may

have been express. Defendant bases this theory on the rule that, "a contract implied in fact arises *where the intent of the parties is not expressed*, but an agreement in fact, creating an obligation, is implied or presumed from their acts." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (emphasis added). Otherwise said, "where there is an express contract between parties, there can be no implied contract between them covering the same subject matter dealt with in the express agreement." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). No evidence of an enforceable express contract was pending before the trial court. Indeed, we have already held that the express requirement contained in the 1972 covenants could not be extended beyond 1992. *See Allen*, *supra*.

¶ 15 In any event, we are also guided by our holding in *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 604 S.E.2d 327 (2004), in which we affirmed a trial court's conclusion that an implied contract existed between homeowners and an association. In that case, we held that expired covenants could not be extended but that their terms evidenced the terms of an implied contract where the association continued to maintain common areas and the residents continued to utilize the common areas. *Id.* at 37, 604 S.E.2d at 334.

¶ 16 And we agree that there is no issue of material fact regarding the existence of an implied contract in this case. Defendant does not question the veracity of the bills Plaintiff submitted that document the cost of services rendered. Defendant only

questions whether, based on that undisputed evidence, the damages assessed by the trial court were "reasonable." As to the reasonableness of the damages, Plaintiff offered evidence including the assessment letters it sent to Defendant, the terms of the 1972 covenant, and Defendant's admission that she continued to take advantage of and use the Sea Gate common areas after receiving the letters. The reasonableness of the damages was not contested at the summary judgment hearing.

¶ 17 We have carefully reviewed the record and conclude, considering Defendant's admission and no issues raised on reasonableness, that the trial court did not err in granting Plaintiff summary judgment regarding the existence of an implied contract.

B. Attorney's Fees

¶ 18 Defendant argues that the trial court erred by awarding attorney's fees to Plaintiff, and asserts no statutory authority exists for making the award. We agree.

¶ 19 A litigant may not recover attorneys' fees unless such a recovery is expressly authorized by statute. *Stillwell Enter. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980).

¶ 20 Plaintiff argues the trial court was authorized to award attorney's fees under the Planned Community Act, specifically N.C. Gen. Stat. § 47F-3-116, which allows an association to recover attorney's fees "for taking actions to recover the sums due the association." N.C. Gen. Stat. § 47F-3-116 (2018).

¶ 21 However, Plaintiff has not conclusively established that Sea Gate is subject to

the Planned Community Act. That is, a "Planned Community" is defined by the statute as "real estate with respect to which any person, by virtue of that person's ownership of a lot, is *expressly obligated* by a declaration to pay" for services. *See* N.C. Gen. Stat. § 47F-1-103(23) (2018) (emphasis added). No evidence shows Defendant continues to be "expressly obligated by a declaration to pay" for the services provided by the association. We, therefore, reverse the trial court's order awarding attorney's fees at the summary judgment stage.

III. Conclusion

¶ 22 We affirm the trial court's grant of summary judgment in favor of Plaintiff on its assessment claim based on an implied contract theory. However, we reverse the trial court's award of attorney's fees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).