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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-270

Filed 07 February 2023

New Hanover County, No. 19CVS2724

WATER DAMAGE EXPERTS OF HILLSBOROUGH, LLC, a Florida Limited Liability Company, Plaintiff,

v.

KARL W. MILLER, EQUITY TRUST COMPANY as Custodian FBO the KARL W. MILLER IRA, and ASHLEY W. MILLER, Defendants.

Appeal by defendants from judgment and order entered 2 September 2021 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 4 October 2022.

*Chris Haaf Law PLLC, by Chris W. Haaf, for defendants-appellants.*

*The Regan Law Firm, PLLC, by Conor P. Regan, for plaintiff-appellee.*

GORE, Judge.

Defendants, Karl W. Miller and Equity Trust Company as Custodian FBO the Karl Miller IRA, appeal the trial court's Judgment and Order Granting Summary Judgment in favor of plaintiff Water Damage Experts of Hillsborough, LLC, and denying defendants' Motion for Leave to Amend their Answer. Upon review, we

affirm the trial court's Judgment and Order.

**I.**

**A.**

Defendant Karl Miller was the owner of two properties in Wilmington, North Carolina. On or around 15 September 2018, Hurricane Florence tore through Wilmington causing severe wind and water damage to both properties. Both properties were insured for hurricane damage.

Plaintiff Hillsborough performs mitigation and restoration services under the trade name "Puroclean." On 18 September 2018, defendant Miller signed a Service Authorization with Puroclean regarding mitigation and restoration services for the two subject properties. Defendants admitted in their Answer that plaintiff "performed some mitigation and restoration on the [properties]," and "[d]efendants anticipated paying the reasonable expenses associated with the agreed-upon services." The only disputed fact was whether the amount charged by plaintiff for its services was reasonable.

During discovery, plaintiff served interrogatories on defendants seeking their assertion as to the reasonable value of plaintiff's services. Defendants contested only \$417.24 of \$31,425.38 in charges for plaintiff's services at property "a," leaving \$30,954.14 as defendants' assertion as to the reasonable value of plaintiff's services on that property. Defendants contested \$26,612.49 of \$64,278.65 in charges for services on property "b," leaving \$37,666.16 as defendants' assertion as to reasonable

value of plaintiff's services on that property.

**B.**

On 11 August 2021, plaintiff filed a Motion for Partial Summary Judgment. A few days later, on 16 August 2021, defendants filed a Motion for Leave to Amend Their Answer. The proposed amended pleading asserted two counterclaims against plaintiff.

On 24 August 2021, the trial court heard arguments on the parties' motions. In support of its Motion for Partial Summary Judgment, plaintiff relied on defendants' Answer and defendants' discovery responses. On 2 September 2021, the trial court granted plaintiff's motion and entered judgment against defendants in the total amount of \$30,954.14 for claims relating to property "a," and \$37,666.16 for claims relating to property "b," with interest on the foregoing at a rate of 8.0% per annum from 1 November 2018 until paid in full. The trial court also denied defendants' Motion for Leave to Amend their Answer on grounds of undue delay and futility.

**C.**

Pursuant to N.C. Gen. Stat. § 7A-27(b)(1), this Court has jurisdiction to hear this appeal from a final judgment of a superior court. The superior court entered its final Judgment and Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Leave to Amend their Answer on 2 September 2021, and defendants timely filed written notice of appeal on 29 September 2021, thereby

vesting this Court with jurisdiction to hear this appeal and consider the issues raised by the parties.

**II.**

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quotation marks and citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). “Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Id.* (citation omitted). “If there is any question as to the weight of evidence, summary judgment should be denied.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (citation omitted).

Defendants argue plaintiff failed to demonstrate there was no genuine issue of material fact as to whether (1) plaintiff, a non-party to the contract at issue, had a legal right to enforce that contract; and (2) all the damages it sought were not covered by defendant Miller’s insurance policies (and thus recoverable under the contract). Defendants contend plaintiff’s quantum meruit claims also fail because there was an express contract governing the subject matter at issue. Finally, defendants assert

plaintiff presented no credible evidence to substantiate the damages the trial court awarded. These arguments lack merit.

A.

“It is well established that a judicial admission is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute . . . .” *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 509, 648 S.E.2d 531, 535 (2007) (citation omitted). “An admission in a pleading which admits a material fact becomes a judicial admission in the case” *Buie v. High Point Assocs. Ltd. P’ship*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (1995) (citation omitted). “A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.” *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964) (citation omitted).

Plaintiff Hillsborough alleged the following in its Complaint:

2. Plaintiff is a limited liability company organized and existing under the laws of the State of Florida.
3. *Plaintiff is the owner and operator of a PuroClean franchise, under which name Plaintiff performs services.*

Defendants responded to those averments, stating:

2. As to the allegations contained in paragraphs 2,3,4,5, 6, and 7 the *Defendants do not deny* the contents of such allegations.

Plaintiff Hillsborough further alleged:

14. On or about September 20, 2018, the Millers hired Plaintiff to perform mitigation and restoration services at . . . [address “a”].

15. On or about September 20, 2018, Mr. Miller, acting in his capacity as trustee or otherwise on behalf of the IRA, but without disclosing his status as trustee, hired Plaintiff to perform mitigation and restoration services at . . . [address “b”].

Defendants responded to these allegations in their Answer as follows:

4. As to the allegations contained in paragraphs 11, 12, 13, 14, and 15, it is admitted that in September of 2018 substantial hurricane damage was incurred to the property described in such paragraphs. *It is further admitted that the Defendant Karl Miller retained the services of the Plaintiff to perform mitigation and restoration services on the properties.* Except as specifically admitted, the remaining allegations contained in those paragraphs are denied.

Here, the trial court held defendants to their admissions that they hired plaintiff Hillsborough, operating under the name PuroClean, to perform mitigation and remediation services on their properties. Defendants admitted that plaintiff Hillsborough performed the work, and that they owed plaintiff compensation for the reasonable value of that work. Defendants are bound to the contents of their pleadings. Such statements are not evidence, they are judicial admissions that remove these facts from the realm of dispute. *See Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 162, 284 S.E.2d 697, 700 (1981) (citation omitted) (“The effect of a judicial admission is to establish the fact for the purposes of the case and to

eliminate it entirely from the issues to be tried.”).

**B.**

Defendants further assert that there is a genuine issue of material fact as to whether all the damages plaintiff sought were covered by their insurance policies, and thus, recoverable under the contract. This position also contradicts prior admissions.

Plaintiff's Complaint alleged that:

21. To date, and despite Plaintiff's demand, the Millers have refused to pay for any of Plaintiff's services at [property “a”]; and]

22. To date, and despite Plaintiff's demand, both Mr. Miller and the IRA have refused to pay for any of Plaintiff's services at [property “b”].

Defendant admitted in their Answer:

6. As to the allegations contained in paragraphs 21 and 22 of the Complaint, the Defendants acknowledge that they have not paid to the Plaintiff the amount demanded by the Plaintiff *for the reason that the amount demanded by the Plaintiff is not a valid or reasonable reflection of the value of the services performed by the Plaintiff* and that said amounts were never agreed upon.

In their pleadings, defendants admitted their refusal to pay was based on the disputed reasonableness of the amount that plaintiff demanded. Defendants later asserted by affidavit that their refusal to pay was based on plaintiff's failure to demonstrate that services rendered were not covered by insurance. In viewing the material facts as alleged in the Complaint and admitted in the Answer, the only fact

remaining to be litigated was the reasonable value of plaintiff's restoration and mitigation services. "[A] party may not create a genuine issue of material fact so as to avoid summary judgment by filing an affidavit contradicting his own prior sworn testimony in a deposition[;] . . . a party may not defeat summary judgment by presenting deposition testimony which contradicts the prior judicial admissions of his pleadings." *Id.* at 162, 284 S.E.2d at 700-01.

**C.**

In the alternative to its breach of contract claim, plaintiff asserted a claim for quantum meruit. Defendants argue that because an express contract between PuroClean and Karl Miller governed the subject matter at issue, there can be no contract implied in equity under a theory of quantum meruit. *See Ron Medlin Constr. v. Harris*, 199 N.C. App. 491, 495, 681 S.E.2d 807, 810 (2009) (citation omitted) ("It is a well established principle that an express contract precludes an implied contract *with reference to the same matter.*").

Here, there was no agreed upon value of services at the time the parties executed the service authorization agreement. This Court has previously held that "where there is an express agreement to pay, but the amount is not specified, the person performing the services is entitled to recover on the theory of quantum meruit." *Duffell v. Weeks*, 15 N.C. App. 569, 570-71, 190 S.E.2d 379, 381 (1972) (citation omitted). Accordingly, plaintiff was permitted to recover damages based on a claim for quantum meruit.



**D.**

Defendants contend there is a genuine issue of material fact as to the reasonable value of plaintiff's services. In its Judgment and Order, the trial court awarded damages to plaintiff in the amount of \$30,954.14 for work performed at property "a" and \$37,666.16 for work performed at property "b." The court awarded interest to plaintiff on those amounts at an annual rate of 8.0% from 1 November 2018 until paid in full. Defendants contend their own "unverified" discovery responses were not competent evidence as to their assertion of the reasonable value of plaintiff's services. We disagree.

Under Rule 56, summary judgment is appropriate "if the pleadings, depositions, *answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (emphasis added). Here, plaintiff served interrogatories on defendants, with questions aimed specifically towards ascertaining defendants' assertion as to the reasonable value of plaintiff's services. Defendants contested \$417.24 of plaintiff's \$31,425.38 in charges for its services performed at property "a" and \$26,612.49 of plaintiff's \$64,278.65 in charges for services performed at property "b." Defendants neither retracted this response, nor did they present an alternative amount. The trial court did not err in awarding damages consistent with defendants' own discovery responses.

**III.**

Defendants argue the trial court erred by denying their Motion for Leave to Amend their Answer. We disagree.

“A motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion.” *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996) (alteration in original) (quotation marks and citation omitted). “Leave shall be freely given when justice so requires.” N.C. Gen. Stat. § 1A-1, Rule 15(a) (2021). “Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the nonmoving party.” *Isenhour*, 345 N.C. at 155, 478 S.E.2d at 199. “A trial court abuses its discretion only where no reason for the ruling is apparent from the record.” *Rabon v. Hopkins*, 208 N.C. App. 351, 353, 703 S.E.2d 181, 184 (2010), *rev. denied*, 365 N.C. 195, 710 S.E.2d 22 (2011).

In its Judgment and Order, the trial court denied defendants’ Motion for Leave to Amend their Answer on grounds of undue delay and futility of the proposed amended answer. In this case, denial based on futility is unclear, but the basis of undue delay is apparent.

Defendants’ attempted amendment came 21 months after they served their answer, more than 1 year after they served discovery responses, and only after plaintiff filed its Motion for Summary Judgment. We have consistently held that “a trial court may appropriately deny a motion for leave to amend on the basis of undue

delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay.” *Id.* at 354, 703 S.E.2d at 184 (citations omitted). We discern no abuse of discretion in this case.

**IV.**

For the foregoing reasons, we affirm the trial court’s Judgment and Order entered 2 September 2021 Granting Plaintiff’s Motion for Summary Judgment and Denying Defendant’s Motion for leave to Amend their Answer.

AFFIRMED.

Chief Judge STROUD and Judge MURPHY concur.

Report per Rule 30(e).