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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-773

Filed 02 May 2023

Swain County, No. 21CVS223

SHIRA L. HEDGEPEETH and RONNIE C. HEDGEPEETH, Plaintiffs,

v.

SMOKY MOUNTAIN COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC., A North Carolina Corporation, SMCC CLUBHOUSE, LLC, a North Carolina Corporation, CONLEYS CREEK LIMITED PARTNERSHIP, a North Carolina Limited Partnership, MARSHALL CORNBUM, In his individual and legal capacity, MICHAEL CORNBUM, In his individual and legal capacity, SHIRLEY SCHUBERT, In her individual and legal capacity, TERRY WALTERS, In his individual and legal capacity, RAY SHARP, In his individual and legal capacity, BILL CHEW, In his individual and legal capacity, ED LAWSON, In his individual and legal capacity, and SANFORD STEELMAN, Defendants.

Appeal by plaintiffs from order entered 8 July 2022 by Judge Athena F. Brooks in Swain County Superior Court. Heard in the Court of Appeals 7 February 2023.

The Law Office of Shira Hedgepeth, PLLC, by Shira Hedgepeth, and McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiffs-appellants.

Rayburn Cooper & Durham, PA, by Ashley B. Oldfield & Ross R. Fulton, and by Sanford L. Steelman, Jr., for defendants-appellees.

Marshall Cornblum, for defendant-appellee Marshall Cornblum.

GORE, Judge.

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Plaintiffs, Shira L. Hedgepeth and Ronnie C. Hedgepeth, appeal the trial court's order dismissing their claims for failure to state a claim upon which relief may be granted. Upon review, we affirm the trial court's order dismissing the amended complaint with prejudice.

I.

This case involves an extensive history of lawsuits surrounding the Smoky Mountain Country Club Property Owners Association ("Association"). Plaintiffs purchased a townhome within the planned community of Smoky Mountain Country Club on or about 28 September 2017. At the time of purchase, plaintiffs were made aware of an ongoing lawsuit between the Association and Conleys Creek Limited Partnership ("CCLP") and SMCC Clubhouse, LLC ("SMCC"). The result of that lawsuit was a jury verdict entered against the Association in the amount of \$7,071,054.46 on 31 May 2019.

This led the Association to file for Chapter 11 Bankruptcy in the Bankruptcy Court for the Western District of North Carolina. The Association and SMCC negotiated an amended confirmation plan for the multi-million dollar judgment that required the Association to do the following: (1) collect unpaid delinquent Clubhouse Dues from members of the Association; (2) collect and pay SMCC the future Clubhouse Dues owed by the members starting 1 January 2020; and (3) assess and collect a total of \$1,500,000 from the members of the Association and pay this total amount in three equal installments of \$500,000 on 1 January 2020, 1 January 2021,

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and 1 January 2022. The Association determined this required a total payment of \$9,200 from all members in three yearly installments of \$3,066.67, due 1 January 2020, 1 January 2021, and 1 January 2022. For a more extensive history of the events leading to the bankruptcy action, refer to *In re Smoky Mountain Country Club Prop. Owners' Ass'n, Inc.*, 622 B.R. 653, 2020 WL 5633337 (W.D.N.C. 2020).

On 31 December 2019, plaintiffs filed a notice of appeal of the Bankruptcy Order with the United States District Court of the Western District of North Carolina, and defendants filed a motion to dismiss the appeal. Plaintiffs also filed a declaratory action in Swain County Superior Court on 26 March 2020 to determine whether the homeowners are obligated to pay Clubhouse Dues. The notice of appeal to the federal court was dismissed for lack of standing and the state court action was dismissed for lack of subject matter jurisdiction on account of the pending appeal of the bankruptcy confirmation plan. This determination was affirmed when plaintiffs appealed to this Court.

Defendants incurred attorneys' fees in its defense of the bankruptcy appeal. The Association initiated a "hearing" for all members to determine whether the Association could exclusively assess the attorneys' fees to plaintiffs rather than assessing the fees to all members of the Association under N.C. Gen. Stat. § 47F-3-115(e). On 31 March 2021, defendants conducted a "hearing" in which all members were invited, they transcribed the hearing, and they reduced their Decision to writing, which was dispersed to all members. The Board of the Association

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determined plaintiffs were negligent and acted with misconduct by filing the appeal to the federal court, and therefore, plaintiffs were jointly and severally assessed the total amount of attorneys' fees in the amount of \$69,623, alongside the Youngs, who were co-plaintiffs in the bankruptcy appeal.

On 6 October 2021, plaintiffs filed the lawsuit that is now on appeal before this Court. Defendants filed a motion to dismiss the verified complaint. Plaintiffs chose to voluntarily dismiss without prejudice these defendants: CCLP, Michael Cornblum, Ray Sharp, Bill Chew, Ed Lawson, and Sanford Steelman. On 8 February 2022, plaintiffs filed an amended verified complaint naming the Association, SMCC, Shirley Shubert, Marshall Cornblum, and Ed Lawson. Plaintiffs raised the following claims: violation of the North Carolina Debt Collection Act ("NCDCA"), slander and libel per se, slander and libel per quod, and violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA").

Defendants filed a motion to dismiss the amended verified complaint for failure to state a claim upon which relief may be granted, and this motion was heard in Swain County Superior Court on 25 April 2022. The trial court granted defendants' motion to dismiss with prejudice and taxed the court costs against plaintiffs on 8 July 2022. Plaintiffs timely appealed the final order through an amended notice of appeal filed 8 August 2022.

II.

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Plaintiffs appeal of right pursuant to N.C. Gen. Stat. § 7A-27(b). Plaintiffs raise the following issues for this Court to consider: (1) whether the Clubhouse Dues are valid against plaintiffs and whether the Association has authority under section 47F-3-115(e) to assess attorneys' fees against plaintiffs; (2) whether the trial court erred by dismissing the NCDCA claim; (3) whether the trial court erred by dismissing the UDTPA claim; (4) whether the trial court erred by dismissing the defamation claims; and (5) whether the trial court erred by taxing costs against plaintiffs.

Plaintiffs' issues on appeal all stem from the order granting the Rule 12(b)(6) motion to dismiss. "The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established. Appellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022). When conducting de novo review of a 12(b)(6) motion, we look to see "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

Additionally, the trial court construes the complaint liberally and will only dismiss the appeal when "it appears that the plaintiffs could not prove any set of facts in support of their claim" for relief. *Id.* Even with this standard in mind, "[w]hen the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the

claim, dismissal is proper.” *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206, 794 S.E.2d 898, 902 (2016) (citations omitted). Accordingly, we address each issue in turn through these lenses.

A.

Plaintiffs first argue as “preliminary matters,” within their brief, whether the Clubhouse Dues are valid against them as assignees of the Restrictive Covenants through their warranty deed. Within this same vein, plaintiffs also argue the Association lacked authority to conduct a “hearing” pursuant to section 47F-3-115(e). Defendants argue plaintiffs did not raise legal claims to support these arguments at the trial court.

Plaintiffs did not initiate a claim of relief for these challenges within their amended complaint apart from the allegations related to the NCDCA and UDTPA claims. Although plaintiffs challenged the validity of the Clubhouse Dues and the authority of the Association, these arguments were within the context of plaintiffs’ NCDCA and UDTPA claims. Therefore, on appeal, plaintiffs cannot for the first time argue these as separate issues from the claims argued at the lower court after failing to address them separately on the face of their complaint. “[T]he law does not permit parties to swap horses between courts in order to get a better mount, meaning, . . . a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court.” *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (internal quotation marks and citations omitted). Accordingly,

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plaintiffs' attempt to present new arguments on appeal when no legal claims were presented at the lower court are unpreserved. As an appellate court, we cannot consider unpreserved arguments. *See* N.C.R. App. P. 10(a)(1). Therefore, we will not consider these claims for the first time on appeal.

B.

Plaintiffs argue the trial court erred in dismissing their NCDCA claim because their complaint alleged sufficient facts in support of that claim to withstand a 12(b)(6) motion. To bring a proper NCDCA claim, the complainant must first address “three-threshold” elements. *Reid v. Ayers*, 138 N.C. App. 261, 263, 531 S.E.2d 231, 233 (2000). The complainant must factually allege the “obligation” is a “debt,” they must factually allege the debtor is a “consumer,” and they must factually allege the party seeking to collect the debt is a “debt collector.” *Id.* Section 75-50(1)–(3) defines a consumer as, “any natural person who has incurred a debt or alleged debt for personal, family, household, or agricultural purposes”; it defines a debt as “any obligation owed or due or alleged to be owed or due from a consumer”; and it defines a debt collector as “any person engaging, directly or indirectly, in debt collection from a consumer.” N.C. Gen. Stat. § 75-50(1)–(3) (2022). Once the complainant addresses the threshold elements, they must proceed to factually allege the elements of a UDTPA claim: “(1) an unfair act (2) in or affecting commerce (3) proximately causing injury.” *Davis Lake Cmty. Ass’n, Inc. v. Feldmann*, 138 N.C. App. 292, 296, 530 S.E.2d 865, 868 (2000).

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We previously addressed whether Associations are debt collectors, and whether assessments are classified as dues. We plainly stated that “a homeowners’ association trying to collect assessments owed to it, is a ‘debt collector.’” *Id.* at 295–96, 530 S.E.2d at 868. Additionally, “homeowners’ association dues and assessments are debt within the meaning of the NCDCA.” *Reid*, 138 N.C. App. at 264, 531 S.E.2d at 234.

Plaintiffs failed to assert the threshold elements and failed to factually allege legally unfair acts. Plaintiffs properly asserted the assessments are a debt and that the Association is a debt collector. However, in liberally construing the amended complaint, plaintiffs failed to factually allege they are consumers within the pleading.

Assuming, *arguendo*, that plaintiffs are consumers, plaintiffs also failed to factually allege any unfair act within their amended complaint to support a NCDCA claim. An unfair act in the context of NCDCA claims “include the use of threats, coercion, harassment, unreasonable publications of the consumer’s debt, deceptive representations, and unconscionable means.” *Davis Lake*, 138 N.C. App. at 296, 530 S.E.2d at 868. Plaintiffs contend in their amended complaint and on appeal that the Association’s monthly statements sent and the statements concerning a future lien for failure to pay were “coercive and threatening.” Yet, the Association has been delegated authority to collect assessments under the N.C. Planned Community Act. *See* N.C. Gen. Stat. § 47F-3-115(b), (d) (2022). The exhibits attached to defendants’ brief in support of the motion to dismiss the amended complaints were included

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because plaintiffs discussed these documents but failed to attach them as exhibits. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (“This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff’s complaint and to which the complaint specifically refers even though they are presented by the defendant.”).

The statements sent to plaintiffs show only an attempt to collect assessments consistent with the amended bankruptcy plan. Further, the “threat” of a lien for failure to pay is the means by which the Association imposes its legal rights when assessments remain unpaid. *See* N.C. Gen. Stat. § 47F-3-116 (2022). Therefore, any warning of a lien for failure to pay cannot be considered a “threat” when the Association is acting consistently with its delegated legal rights. *See Harris v. NCNB Nat. Bank of N.C.*, 85 N.C. App. 669, 676, 355 S.E.2d 838, 843 (1987) (“A statement of intention . . . to enforce one’s claimed legal rights is neither a threat nor the exercise of unlawful or wrongful coercion.”). Because plaintiffs failed to bring factual allegations for each element of the NCDCA claim, the trial court properly dismissed that claim.

C.

Plaintiffs also argue the trial court improperly dismissed their UDTPA claim because they raised sufficient factual allegations to overcome a 12(b)(6) motion. As previously stated, to establish a claim for UDTPA the party “must show: (1)

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defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff[s] [were] injured thereby.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

Plaintiffs argue that attempts to collect the fee, which they also contend is invalid, are the equivalent of an unfair act. Additionally, plaintiffs argue defendants threatened to place a lien on the Hedgepeth property, and the Association set up its own tribunal to determine if the Hedgepeths were negligent and liable for misconduct because of the bankruptcy appeal. Finally, the transcript of the tribunal was emailed to the community and placed on the website along with the Association’s “Decision.” Liberally construing the amended complaint, the Association’s “hearing” to determine whether plaintiffs were negligent and liable for misconduct could be considered an unfair act if defendants were acting outside of their authority. Thus, plaintiffs provided sufficient factual allegations for the first element of the UDTPA claim. However, plaintiffs’ factual allegations for the second element are legally deficient as a matter of law.

Plaintiffs failed to provide factual allegations that defendants’ actions were “in or affecting commerce.” *Id.* We previously stated in *Howe v. Links Club Condo. Ass’n, Inc.*, that when the acts complained of involve a single market participant, it does not affect commerce. 263 N.C. App. 130, 146, 823 S.E.2d 439, 452–53 (2018). Plaintiffs’ complaint involves actions taken against them by the Association, but as members of the Association, this is “purely internal business operations,” of which we previously

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stated, “any unfair or deceptive conduct contained solely within a single [market participant] is not covered by the Act.” *Id.* at 146–47, 823 S.E.2d at 453. Accordingly, plaintiffs failed to satisfy the legal requirement for this second element, and therefore, the trial court properly dismissed the UDTPA claim.

D.

Next, Plaintiffs argue they stated valid slander *per se*, libel *per se*, slander *per quod*, and libel *per quod* claims for relief. These claims are forms of defamation. “[T]o recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person.” *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted), *disc. rev. denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). Because we determine plaintiffs did not provide factual allegations to support the falsity element, we only address this deficiency.

Upon review of plaintiffs’ amended complaint, the defamation claim referring to slander and libel *per se*, and slander and libel *per quod* lack factual allegations to show the statements made, whether orally or in writing, were false. Plaintiffs make multiple conclusory statements asserting the communications were false but provide no factual allegations to show falsity. *See id.* at 29, 568 S.E.2d at 897–98 (articulating the plaintiff “set forth sufficient specific facts to support their claim that the statements made by defendants were false.”). The question of falsity is an essential

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element for any defamation claim; therefore, the trial court did not err in granting defendants' motion to dismiss the defamation claims. Because this is dispositive on the issue of error for the defamation claims, we do not discuss plaintiffs' and defendants' arguments regarding absolute privilege, and the special damages for slander *per quod* and libel *per quod*.

E.

Finally, plaintiffs argue the trial court erred by taxing court costs against plaintiffs. Plaintiffs cite to N.C. Gen. Stat. § 6-1 that states, “[t]o the party for whom judgment is given, costs shall be allowed” and argue the trial court must first consider whether the litigant “persisted” in the lawsuit when the litigant no longer had a valid claim. Additionally, plaintiffs appear to argue a motion was required for costs. However, as cited by defendants, N.C. Gen. Stat. § 6-19 requires the trial court to award costs to defendants in the actions stated within § 6-18, which include defamation suits. N.C. Gen. Stat. §§ 6-18, 6-19 (2022). Because plaintiffs filed multiple claims including defamation, and because defendants' motion to dismiss was granted, the trial court did not err in taxing the costs against plaintiffs.

III.

For the foregoing reasons, we affirm the trial court's decision to grant defendant's motion to dismiss the amended complaint with prejudice.

AFFIRMED.

HEDGEPEETH V. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC.

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Judge TYSON and Judge ZACHARY concur.

Report per Rule 30(e).