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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1052

Filed 06 June 2023

Guilford County, No. 22CVS3160

RICHARD J. BATTEN, JR. and CARINNA BATTEN, Plaintiffs,

v.

DEBORAH WELCH, d/b/a, TRANSFORMING ROOMS, Defendant.

Appeal by plaintiffs from order entered 25 July 2022 by Judge John O. Craig III in Guilford County Superior Court. Heard in the Court of Appeals 10 May 2023.

Carruthers & Roth, P.A., by Kevin A. Rust, for plaintiffs-appellants.

Hall Booth Smith, P.C., by Katherine W. Dandy, for defendant-appellee.

FLOOD, Judge.

Richard Batten (“Mr. Batten”) and Carinna Batten (collectively “Plaintiffs”) appeal from the 25 July 2022 Order dismissing their Complaint for failure to state a claim upon which relief can be granted. On appeal, Plaintiffs argue the trial court erred in dismissing their Complaint because they sufficiently pled: (1) the existence of an oral contract and a breach of said contract; (2) fraud/fraud in the inducement; (3) unfair and deceptive trade practices; and (4) negligent misrepresentation. After

careful review, we affirm the trial court's dismissal of Plaintiffs' Complaint. We also grant Defendant's request for reasonable attorney's fees and remand to the trial court for a determination of the reasonable amount of attorney's fees incurred by Defendant in defending this appeal.

I. Factual and Procedural Background

In November 2021, Plaintiffs and Deborah Welch ("Defendant") began discussing the possibility of Defendant providing interior design services for Plaintiffs' home. According to Plaintiffs, Defendant represented to them that she had access to high-end designer home furnishings for a price-point much lower than that available to the general public, and she would purchase these "exclusive" items for their home. The parties did not reduce this agreement to writing.

On 4 December 2021, Plaintiffs selected several items to purchase from Defendant. These items were reflected in a written invoice that contained a description of the items, the full price of the items, the discounted price of the items, and the total price to be paid by Plaintiffs. The invoice, which clearly stated "[a]ll sales final," was signed by Mr. Batten. Based on the purchases set forth in the invoice, the parties entered into a sales agreement with the following, relevant terms: (1) payment was due on delivery by cash or check, (2) no cancellations were allowed, and (3) no refunds would be issued. The sales agreement was signed by Defendant and Mr. Batten on 4 December 2021. Plaintiffs paid Defendant \$23,000 for the items purchased.

After these items were purchased and delivered to their home, Plaintiffs allegedly found “identical” items at discount retail stores such as “TJ Maxx” and “Home Goods.” According to Plaintiffs, the items at these discount retail stores were being sold “for far less than” the cost of the items reflected on the invoice and the price Plaintiffs paid. Plaintiffs allege they found a rug that Defendant had represented was \$2,399 for sale for \$399 at one discount retail store, and a mirror Defendant represented was \$300 for sale for \$39.99 at another store. After finding these items at discount retailers, Plaintiffs informed Defendant they were unhappy with the quality of the items and the price charged. Even though the sales agreement did not allow for refunds or cancellations, Defendant offered to accept a return of the items in exchange for a twenty-five percent restocking fee. Plaintiffs declined this offer.

On 24 February 2022, Plaintiffs filed a Complaint against Defendant in Guilford County Superior Court alleging breach of contract, fraud/fraud in the inducement, unfair and deceptive trade practices (“UDTP”), and negligent misrepresentation. The breach of contract claim was not based on the invoice or sales agreement but on an alleged oral contract created by the parties when Defendant allegedly agreed to purchase high-end furnishings for Plaintiffs’ home.

On 6 May 2022, Defendant filed an Answer and Motion to Dismiss, arguing the Complaint failed to state a claim upon which relief can be granted in violation of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 22 July 2022, the

trial court granted Defendant's Motion to Dismiss. Plaintiffs filed timely notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear this appeal as a final order from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

The two issues in this case are whether Plaintiffs stated: (1) a valid breach of contract claim and (2) valid misrepresentation claims for fraud/fraud in the inducement, UDTP, and negligent misrepresentation. We address these issues in turn.

A motion to dismiss under North Carolina Rules of Civil Procedure, 12(b)(6) "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine the legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Upon review,

the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Birtha v. Stonemor, N.C., LLC, 220 N.C. App. 286, 291, 727 S.E.2d 1, 6 (2012)

(internal quotation marks and citation omitted).

A. Breach of Contract

First, Plaintiffs argue the trial court erred by dismissing their breach of contract claim because they pled facts sufficient to show an enforceable oral contract existed between the parties, and Defendant breached said contract. We disagree.

The elements for a breach of contract claim are: “(1) existence of a valid contract and (2) breach of the terms of [the] contract.” *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 276, 827 S.E.2d 458, 472 (2019) (alteration in original) (citation omitted). The threshold inquiry into whether Plaintiffs sufficiently pled a breach of contract claim hinges on whether a valid contract existed. *See id.* at 276, 827 S.E.2d at 472.

The alleged oral contract is purported to be for a sale of designer home furnishings and is therefore governed by the Uniform Commercial Code (“UCC”). *See* N.C. Gen. Stat. § 25-2-102 (2021); *see also* N.C. Gen. Stat. § 25-2-105 (“goods” are “all things . . . which are moveable at the time of identification.”). Under the UCC, “[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract.” N.C. Gen. Stat. § 25-2-204(1) (2021). The UCC does not clearly define the term “offer,” and whether there is a valid offer, is, therefore, subject to common law contract principles. *See* 77A C.J.S. *Sales* § 41. A valid offer must be “communicated,” “complete,” and “accepted in its exact terms.” *Yeager v. Dobbins*, 252 N.C. 824, 828,

114 S.E.2d 820, 824 (1960). A proposal that is made to merely open negotiations that may result in a contract is not binding even if accepted. *Id.* at 828, 114 S.E.2d at 823.

In this case, Plaintiffs alleged in their Complaint that the parties entered into a valid and enforceable oral contract, the “material terms” of which were: (1) “Defendant had access to high-end and designer home furnishings at a price-point not available to the general public, nor Plaintiff[s,]” and (2) “Defendant agreed to purchase this caliber of items for Plaintiffs’ Home.” This is not a complete, valid offer. This is merely a proposal to open negotiations which did ultimately result in a written contract, that is, the invoice and sales agreement signed by Defendant and Mr. Batten. The oral proposal alone, without any material terms such as price, quantity, or specific subject matter, is insufficient to form a valid oral contract. *See Yeager*, 252 N.C. at 828, 114 S.E.2d at 824.

Accordingly, the trial court did not err in dismissing Plaintiffs’ claim for breach of contract because no law would support the existence of an oral contract, and Plaintiffs, therefore, cannot prove a *prima facie* case of breach of contract. *See Birtha*, 220 N.C. App. at 294–96, 727 S.E.2d at 6; *see also Wells Fargo Ins.*, 372 N.C. at 276, 827 S.E.2d at 472.

B. Fraud

Next, Plaintiffs argue the trial court erred in dismissing their fraud claim because it was adequately pled even under the heightened pleading standard. We disagree.

“The essential elements of fraud [in the inducement] are: (1) [f]alse 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.” *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 840, 733 S.E.2d 162, 168 (2012) (first alteration in original) (citation omitted).

“Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by our liberal rules of notice pleading.” *Murray v. Deerfield Mobile Home Park, LLC*, 277 N.C. App. 480, 490, 860 S.E.2d 323, 331 (2021); *see also* N.C. R. Civ. P. 9(b). “[I]n order to survive a motion to dismiss pursuant to Rule 12(b)(6), the complaint must allege with particularity all material facts and circumstances constituting the fraud, although intent and knowledge may be averred generally.” *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 10, 748 S.E.2d 171, 178 (2013) (citation and internal quotation marks omitted). “Thus, ‘there is a requirement of specificity as to the element of a representation made by the alleged defrauder: The representation must be definite and specific.’” *Id.* at 10, 748 S.E.2d at 178.

Here, Plaintiffs alleged in their Complaint the following:

25. Defendant [] made, among others, the following material misrepresentations/concealments: (1) as an interior designer, Defendant had access to certain home furnishings not available to the general public; (2) as an interior designer, Defendant had access to certain home furnishings at price points not available to the general public; (3) Defendant [] grossly overstated the cost of the

materials placed in the Home . . . Defendant [] concealed the actual costs of the materials in the Home; (4) Defendant [] concealed from where the materials were procured; and (5) prior and after undertaking the purported services, Defendant [] created ambiguity as to the scope of work she would perform and the costs in an effort to conceal fraud.

As discussed above, however, the alleged oral contract on which Plaintiffs based their fraud in the inducement claim does not contain any specific or definite representations from Defendant regarding the nature of the goods. Without a valid contract that states clear terms, we are unable to discern any “definite and specific” representation that would support a claim for fraud in the inducement. *See Charlotte Motor Speedway, LLC*, 230 N.C. App. at 10, 748 S.E.2d at 178.

Accordingly, we conclude the trial court correctly dismissed Plaintiffs’ claim for fraud in the inducement. *See Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

C. Unfair Deceptive Trade Practices

Plaintiffs’ sole argument for their UDTP claim is that proof of fraud in the inducement necessarily constitutes a UDTP violation. Having concluded there was no fraud in the inducement, Plaintiffs’ UDTP argument necessarily fails. As we are conducting a *de novo* review, however, we will review the merits of Plaintiffs’ claim. *See Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

A claim for UDTP requires a plaintiff to show: (1) defendant “committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to [plaintiffs].” *Gress v. Rowboat*

Co., Inc., 190 N.C. App, 773, 776, 661 S.E.2d 278, 281 (2008) (citations omitted). “[A] plaintiff must allege and prove egregious or aggravating circumstances to prevail on a UDTPA claim.” *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 196, 767 S.E.2d 374, 377 (2014). Further, a broken promise without facts sufficient to show an intent to break the promise at the time it was made does not constitute a UDTP claim. *Id.* at 196 – 97, 767 S.E.2d at 378.

Here, Plaintiffs failed to plead any egregious or aggravating circumstances. At most, Plaintiffs pled a broken promise by Defendant without any facts showing she intended to break the promise at the time it was made. Simply stating Defendant intended to deceive, without more, is insufficient for a UDTP claim. *See Wells Fargo Bank, N.A.*, 238 N.C. App. at 196, 767 S.E.2d at 377.

Thus, we conclude the trial court properly dismissed this claim. *See Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

D. Negligent Misrepresentation

“The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Rountree v. Chowan Cnty.*, 252 N.C. App. 155, 158, 796 S.E.2d 827, 830 (2017) (citations omitted). The duty of care as it relates of negligent misrepresentation has been defined as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the

guidance of others in their business transactions, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the effort.

Id. at 160, 796 S.E.2d at 831 (alteration in original).

To support this claim, Plaintiffs again rely on the alleged oral misrepresentation Defendant made. Specifically, Plaintiffs stated in their Complaint that “[t]he information supplied by Defendant was false because, among other reasons, Defendant misrepresented or hid the scope and true intention of services and misrepresented the price of the goods sold to Plaintiffs.” We disagree.

As with Plaintiffs’ fraud in the inducement claim, the lack of material terms in the alleged oral contract dooms this claim. Even if we were to find Defendant owed Plaintiffs a duty, there was no specific representation made by Defendant sufficient to support a claim for negligent misrepresentation. *See Rountree*, 252 N.C. App. at 158, 796 S.E.2d at 830. Moreover, as we will discuss in greater detail below, it is unclear how Defendant misrepresented the price of the goods.

Accordingly, the trial court properly dismissed Plaintiffs’ claim for negligent misrepresentation. *See Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

E. Defendant’s Request for Sanctions

Defendant has requested sanctions in the form of attorney’s fees be imposed on Plaintiffs for their allegedly frivolous and meritless UDTP claim, and the overall meritless appeal. Defendant first requests attorney’s fees pursuant to N.C. Gen. Stat.

§ 75-16.1(2) (2021). We decline to consider Defendant's request for attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1(2) because it was not properly preserved.

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1). Defendant argues the issue was properly preserved because attorney's fees were requested in her Answer. This alone, however, is insufficient to comply with Rule 10(a)(1) because the specific grounds for the attorney's fees were not stated in Defendant's Answer, and she did not obtain a ruling on attorney's fees from the trial court. *See* N.C.R. App. 10(a)(1).

Alternatively, Defendant requests this Court award attorney's fees pursuant to Rule 34(a)(1) of our rules of appellate procedure. *See* N.C.R. App. P. 34(a). Under Rule 34(a), this Court,

may, on its own initiative or motion of party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal is frivolous because . . . the appeal was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . or was grossly lacking in the requirements of propriety[.]

N.C.R. App. P. 34(a).

First, Plaintiffs' appeal is not well grounded in fact. Plaintiffs allege in their

Complaint that “Defendant refused to provide any documentation as to the actual costs of the items, instead Defendant [] orally told Plaintiffs what the costs were.” This alleged oral statement of the costs is not one of the “terms” alleged in the oral contract. Based on the Complaint, it appears Defendant’s “refusal” to provide Plaintiffs with the actual cost occurred after Plaintiffs demanded to return the items. Plaintiffs’ argument that Defendant concealed her costs is difficult to reconcile with the invoice signed by Mr. Batten, which details the cost of each item. The invoice includes one column for the full price of the items, a second column for the discount price, and a third column for the total price to Plaintiffs based on the quantity of the individual items they elected to purchase.

The Complaint further states Defendant furnished only “one room” in the home and had more work to complete. The invoice reflects, however, Plaintiffs purchased items for their kitchen, family room, dining room, and a bedroom. Moreover, Defendant represented to the trial court that all the items Plaintiffs selected were delivered on 4 December 2021, the date the invoice and sales agreement was signed by Mr. Batten. Finally, Mr. Batten’s signature appears next to a line, which states in relevant part: “Terms . . . *I have received this merchandise* in good condition” (emphasis added).

Second, Plaintiffs’ appeal is not well grounded in law. For reasons explained above, Plaintiffs’ alleged “oral contract” is not a valid, enforceable contract, and their arguments to the contrary are not warranted by existing law or made in “good faith.”

See N.C.R. App. P. 34(a). Plaintiffs argue they adequately pled a breach of contract claim because they stated the terms of the contract, and that Defendant breached the contract by allegedly placing items from discount retail stores in Plaintiffs' home. Plaintiffs' argument lacks any explanation of how the alleged oral contract meets the requirements for an enforceable contract. As previously determined, there is no offer, and there are no material terms such as price, quantity, specific subject matter, or date of performance. The reliance on the "oral contract" to support the breach of contract claim is particularly misplaced because the parties ultimately entered into a written agreement that both parties signed. The appropriate cause of action would have been a breach of the sales agreement, not the baseless "oral contract," which we concluded was merely an invitation to open negotiations for the home furnishings. *See Yeager*, 252 N.C. at 828, 114 S.E.2d at 824.

Moreover, Plaintiffs' remaining misrepresentation claims improperly rely on an alleged representation made by Defendant that is not specific or definite. For these reasons, we grant Defendant's request for reasonable attorney's fees incurred by her in defense of this appeal. *See* N.C.R. App. P. 34(a). "Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by [D]efendant in responding to this appeal." *Shebalin v. Shebalin*, 284 N.C. App. 86, 91, 874 S.E.2d 913, 916 (2022) (citation omitted).

IV. Conclusion

The trial court did not err in dismissing Plaintiffs' Complaint for failure to

BATTEN V. WELCH

Opinion of the Court

state a claim upon which relief can be granted under Rule 12(b)(6) because Plaintiffs did not state valid claims for breach of contract, fraud in the inducement, UDTP, or negligent misrepresentation. We therefore hold Plaintiffs' Complaint was properly dismissed by the trial court. We further conclude Defendant is entitled to reasonable attorney's fees pursuant to Rule 34(a)(1) because Plaintiffs' Complaint was not well grounded in law or fact, and remand for the trial court to determine reasonable attorney's fees.

AFFIRMED in Part; REMANDED in Part.

Judge GORE concurs.

Judge MURPHY concurs in part and dissents in part in a separate opinion.

Report per Rule 30(e).

BATTEN V. WELCH

Opinion of the Court

No. COA22-1025– *Batten v. Welch*

MURPHY, Judge, concurring in part and dissenting in part.

While I join in the bulk of the Majority’s analysis, I do not join in awarding attorney fees as a sanction in accordance with Rule 34. Despite Plaintiffs’ appeal being unsuccessful, the issues raised therein are not “frivolous.” I respectfully dissent in part.