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IN THE COURT OF APPEALS OF NORTH CAROLINA

Nos. COA24-760, COA24-761

Filed 2 April 2025

Macon County, No. 18CVS000428

COWEE MOUNTAIN IMPROVEMENT ASSOCIATION, INC., Plaintiff,

v.

MARK MURRAH and wife, DOROTHY LANE MURRAH, et al., Defendants.

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Macon County, No. 19CVS000265

ERIC S. MURRAH, RAYMOND SCOTT MURRAH and wife, GWEN MURRAH,  
Plaintiffs,

v.

COWEE MOUNTAIN IMPROVEMENT ASSOCIATION, INC., et al., Defendants.

Appeal by defendants from order entered 2 January 2024 by Judge R. Greg Horne in Macon County Superior Court. Heard in the Court of Appeals 19 March 2025.

*Jordan Price Wall Gray Jones & Carlton, by Brian S. Edlin and Frank W. Bullock, III, for defendants-appellants and plaintiffs-appellants.*

COWEE MOUNTAIN IMPROVEMENT ASS'N, INC. V. MURRAH

*Opinion of the Court*

*McAngus, Goudelock & Courie, PLLC, by Jeffrey Kuykendal, for plaintiff-appellee and defendant-appellee Cowee Mountain Improvement Association, Inc.*

*Ferikes Bleynat & Cannon, PLLC, by Edward L. Bleynat, Jr., for multiple third-party appellees.*

FLOOD, Judge.

Defendants Mark Murrah and wife Dorothy Lane Murrah (the “Murrah Defendants”) appeal from the trial court’s order granting, in relevant part: summary judgment in favor of Cowee Mountain Improvement Association, Inc. (the “Association”) as to the Murrah Defendants’ claims for declaratory judgment, recoupment, and setoff. On appeal, the Murrah Defendants argue: first, the trial court erred in granting summary judgment on the Murrah Defendants’ claim for declaratory judgment by concluding that an implied contract exists “wherein the Association is not responsible for maintenance to [a gravel road] and [a] water system with respect to [a lot], while concurrently holding that the Murrah[ Defendants] are responsible for assessments and dues for such maintenance”; and second, the trial court erred in granting summary judgment in favor of the Association as to the Murrah Defendants’ claims for setoff and recoupment. Upon review, we conclude: first, the trial court did not err in granting summary judgment in favor of the Association because there is no genuine issue of material fact as to the existence and terms of an implied in fact contract, and the Association is entitled to judgment as a matter of law because the Murrah Defendants failed to pay assessments due to the

Association; and second, the trial court did not err in granting summary judgment in favor of the Association on the Murrah Defendants' setoff and recoupment claims, because they are not entitled to such relief.

### **I. Factual and Procedural Background**

Cowee Mountain is a private, residential subdivision (the "Subdivision") located in Macon County, North Carolina. On 29 September 1975, a Declaration of Protective Covenants (the "Original Covenants") was executed for the Subdivision, recorded in Book R-10, Page 272 of the Macon County Registry. The Original Covenants provided, in relevant part, that: "[a]ll tract owners . . . agree to contribute one/thirty-fourth [] for the maintenance of utilities and roads within [the Subdivision]"; and that "[t]he foregoing restrictions, covenants, burdens and servitudes shall run with the land and . . . remain in full force and effect for a period of twenty-five [] years, from September 29, 1975." The Original Covenants contained neither automatic renewal nor amendment provisions, and expired on their own terms in 2000. *See State ex rel. Utils. Comm'n v. Cowee Mountain Improvement Ass'n*, 173 N.C. App. 234, \*1 (2005) (unpublished).<sup>1</sup>

On 10 April 1997, the Murrah Defendants acquired, in Jackson County, North Carolina, a 5.14-acre tract of land which is located outside of the Subdivision ("Lot M5A"), as recorded in Book 958, Page 100 of the Jackson County Registry. On 27

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<sup>1</sup> The Association and Subdivision were previously involved in litigation unrelated to the matter *sub judice*.

December 2012, Roberta Hodgson, the mother of Defendant Mark Murrah, as well as the mother of Eric Stanley Murrah and Raymond Scott Murrah (collectively, along with Gwen Murrah, wife of Raymond Scott Murrah, the “Murrah Siblings”) transferred to each of her sons a one-third interest in Lot 31, located in the Subdivision, as recorded in Book J-35, Page 530 of the Macon County Registry.<sup>2</sup>

The Subdivision contains several roads, all of which are private. The main road through the Subdivision, Cowee Ridge Road, was initially paved by the original developers from the entrance until Lot 9; all other subsequent paving was completed at the expense of the individual owners whose properties were situated adjacent to the applicable section of road. An access road (the “Gravel Road”) branches off from Cowee Ridge Road, and provides access to, among other properties, Lot 31. Additionally, the Subdivision has a private main water line and ancillary water lines (the “Water System”). The Water System was installed by the original developers, and is currently operated and maintained by the Association. The Association is responsible for repairing and maintaining the Water System, and in turn, the property owners pay assessments to repair and maintain the Water System. Each property owner is individually responsible for connecting to the Water System.

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<sup>2</sup> The Murrah Defendants also have a property interest in Lot 30 of the Subdivision, recorded in Book D-21, Page 531 of the Macon County Registry. The Murrah Defendants and the Murrah Siblings additionally have a property interest in Lot 10 of the Subdivision, recorded in Book C-29, Page 558 of the Macon County Registry. These properties are not relevant to the issues presented on appeal.

The Association has annually presented a budget, which has included the proposed amount for maintenance of the roads and Water System. The Association has sent each property owner an annual assessment, with different assessment amounts based on each property's improved or unimproved lot status. Following expiration of the Original Covenants, the property owners, including the Murrah Defendants and the Murrah Siblings: attended and participated in Association meetings; paid assessments; voted on matters impacting the Association; and utilized common areas in the Subdivision, including the Gravel Road.

Prior to August 2011, the Murrah Defendants—being dissatisfied with the condition of the Gravel Road, complaining that they had “suffered from inability to have a proper road for a quarter of a century,” and having various complaints regarding the Association, including complaining that their “rights ha[d] been really just torn asunder, including [their] civil rights”—began refusing to pay the full amount of the annual assessments, deducting “arbitrary” amounts, and eventually stopping making payments all together.<sup>3</sup> The Association, in response, threatened to file liens for the unpaid assessments.

In August 2011, the Murrah Defendants, through counsel, opened a dialogue with the Association relating to unpaid assessments, and discussed obtaining an easement to access Lot M5A through the Subdivision. As a result, on 28 June 2013,

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<sup>3</sup> The Record is unclear as to when, precisely, the first deductions were made.

an easement agreement (the “Easement Agreement”) was executed by all property owners of the Subdivision and recorded in Book S-35, Page 671 of the Macon County Registry. The Easement Agreement provided, in relevant part: the Gravel Road “will be improved by [the] Murrah[ Defendants] at no expense to the Association”; and the Murrah Defendants would pay certain amounts to the Association. Following execution of the Easement Agreement, the Murrah Defendants paid assessments for Lot 31.

Since then, the Association has performed maintenance work on all of the roads in the Subdivision, including the Gravel Road. Around June 2016, the Association began a project to repair and improve the roads in the Subdivision and common areas. The Association provided maintenance to the Gravel Road by applying gravel. After 9 November 2016, the Murrah Defendants again stopped paying assessments.

On 26 June 2018, the Association filed a complaint against the Murrah Defendants concerning the assessments owed (the “2018 Action”), and the Murrah Defendants answered and filed counterclaims, raising issues pertaining to, in relevant part, Lot 31. The Association sought to recoup assessment fees that it alleged it was owed, and alternatively, sought a declaration that the Murrah Defendants were in breach of the Easement Agreement, and that the Easement Agreement was as a result “null and void and unenforceable.” On 4 January 2019,

the Association filed a lien against Lot 31, and initiated a foreclosure action on 19 March 2019.

On 16 April 2019, the Murrah Siblings filed a complaint against the Association (the “2019 Action”), involving many of the same issues as those of the 2018 Action, and the Association answered and filed counterclaims. On 18 March 2021, the trial court consolidated the 2018 Action and 2019 Action for discovery and “all other pretrial purposes.” On 27 May 2019, a consent order was filed, wherein the parties and the trial court agreed to stay the foreclosure actions.

In August 2021, the Murrah Defendants and the Murrah Siblings, respectively, joined all property owners in the Subdivision as necessary parties to the actions.<sup>4</sup> Following additional filings of counterclaims and answers between the parties in both lawsuits, on 31 January 2022, the cases were designated “exceptional” pursuant to “Rule 2.1 of the North Carolina General Rules of Practice for Superior Courts[.]”

On 2 December 2022, the Murrah Siblings filed a motion for partial summary judgment, in which they argued the Original Covenants and subsequent amendments in 2007 and 2008 were expired, and the Association did not have the authority to levy assessments. On 21 July 2023, the property owners in the Subdivision moved for summary judgment. On that same day, the Association moved for summary

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<sup>4</sup> Lenders were also added to the action; all lenders, however, have been dismissed from the action, failed to appear, or entered into consent orders waiving further service in the case.

judgment on all pending claims. Finally, on 27 July 2023, the Murrah Defendants filed a motion for partial summary judgment.

On 27 December 2023, the trial court issued its order on all motions for summary judgment. In pertinent part, the trial court concluded the following:

**Seventh Answer and Counterclaim (Recoupment)**

The [trial c]ourt concludes that there remain[s] no genuine issues of material fact and that the Association is entitled to judgment as a matter of law.

**Eighth Answer and Counterclaim (Setoff)**

The [trial c]ourt concludes that there remain[s] no genuine issues of material fact and that the Association is entitled to judgment as a matter of law.

. . . .

**Count Two. Declaratory Judgment.**

. . . .

2) As to the Association's authority to levy assessments, the [trial c]ourt concludes that, while the Original Covenants are no longer valid, an implied in fact contract exists as a matter of law between the Association and [the Murrah Siblings], as well as all individual property owners. . . . The [trial c]ourt acknowledges that [the Murrah Defendants] are covered by the express terms of the Easement Agreement as to Lot 30 and Lot M5A as relates to sums owed. As to all other parties and all other lots within the community, the Association has authority to levy assessments pursuant to the implied in fact contract. As to this issue, the [trial c]ourt concludes that there remain no genuine issues of material fact and that the Association is entitled to judgment as a matter of law.

On 31 January 2024, the Murrah Defendants, but not the Murrah Siblings, filed notices of appeal.<sup>5</sup>

## **II. Jurisdiction**

This Court has jurisdiction to review this appeal from a final judgment of a superior court, pursuant to N.C.G.S. § 7A-27(b) (2023).

## **III. Standard of Review**

The “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 (2008) (internal quotation marks omitted); *see also Orsbon v. Milazzo*, 910 S.E.2d 706 (2024).

[T]his Court has stated that an issue is genuine if it is supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]

*DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations omitted) (cleaned up). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *In re Will*

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<sup>5</sup> Although the Murrah Siblings did not file notices of appeal, we have consolidated the cases for resolution in the same opinion due to the interrelated nature of the cases. *See* N.C.R. App. P. 40.

*of Jones*, 362 at 573. “The party moving for summary judgment has the burden of showing that there is no triable issue of material fact. . . . Once the movant meets his burden, the burden then shifts to the non-moving party to show that a genuine issue exists by forecasting sufficient evidence of all essential elements of their claim.” *Bd. Of Educ. of Hickory Admin. Sch. Unit v. Seagle*, 120 N.C. App. 566, 569 (1995).

#### **IV. Analysis**

On appeal, the Murrah Defendants argue the trial court erred in granting summary judgment in favor of the Association as to the Murrah Defendants’: (A) claim for declaratory judgment by concluding that an implied contract exists wherein the Association is not responsible for maintenance of the Gravel Road and Water System with respect to Lot 31, and the Murrah Defendants are responsible for assessments and dues for such maintenance; and (B) claims for setoff and recoupment. We address each argument, in turn.

##### **A. Implied in Fact Contract**

The Murrah Defendants first argue the trial court erred in granting summary judgment on their claim for declaratory judgment by concluding that an implied contract exists wherein the Association is not responsible for maintenance of the Gravel Road and Water System with respect to Lot 31, and the Murrah Defendants are responsible for assessments and dues for such maintenance. We disagree.

This Court has defined an implied in fact contract as:

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[A] genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words.

*Ellis Jones, Inc. v. W. Waterproofing Co.*, 66 N.C. App. 641, 646 (1984); *see also Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557 (2001) (“An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding.”). “Such an implied contract is as valid and enforceable as an express contract. . . . [T]here is no difference in the legal effect of express contracts and contracts implied in fact.” *Creech v. Melnik*, 347 N.C. 520, 526–27 (1998); *see also Miles v. Carolina Forest Ass’n*, 167 N.C. App. 28, 36 (2004).

The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. This mutual assent and the effectuation of the parties’ intent is normally accomplished through the mechanism of offer and acceptance. In the formation of a contract an offer and an acceptance are essential elements.

*Snyder v. Freeman*, 300 N.C. 204, 218 (1980) (citation omitted) (cleaned up). “Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact.” *Id.* at 217. “With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.” *Id.* at 218.

In *Miles*, a land development company prepared covenants and restrictions in 1970 to run with the land for a gated community, in which property owners were

members of an association, and the covenants were to expire in 1990. 167 N.C. App. at 29–30. As 1990 approached, some of the property owners voted in favor of amendments to extend the covenants beyond their expiration date, while other property owners did not vote to extend the covenants. *Id.* at 30. Some of the property owners did not pay assessments, and extensive litigation ensued, resulting in a prior appeal to this Court. *See id.* at 30–31; *see generally Miles v. Carolina Forest Ass’n*, 141 N.C. App. 707, 714 (2021) (remanding to the trial court the issue of whether all property owners had “impliedly agreed to pay for maintenance, upkeep and operation of the roads, common areas and recreational facilities with the subdivision”).

Following remand to the trial court by this Court, the matter was eventually appealed again, whereupon we considered, in relevant part, whether an implied in fact contract had been created between the association and all of its members. *See Miles*, 167 N.C. App. at 36–37. Upon review, this Court concluded that the trial court’s unchallenged findings of fact, demonstrating that the members had paid some or all fees and assessments to the association until 1997 or 1998, and that those assessments and fees protected “the value of their properties, by way of maintaining private roads” and other amenities, supported the conclusion that an implied in fact contract existed between the association and the members. *Id.* at 37. This Court further concluded that where the members “attempt[ed] to stop payments” to the association, such action was “tantamount to breach of that contract.” *Id.* at 37.

Here, as a preliminary matter, the Murrah Defendants do not substantively challenge the existence of a contract between themselves and the Association, but rather assume a contract exists, and challenge the parties' obligations under the contract. In their brief, the Murrah Defendants suggest there are questions of material fact "as to whether the terms to which the Murrah[ Defendants] assented include maintenance and repair of the Gravel Road[,]" and "whether the Association is obliged to provide access to the Water System in exchange for the assessments they receive from the owners of Lot 31." While these assertions appear to suggest the Murrah Defendants question whether "mutual assent" was established between the parties, which might warrant there being questions for the trier of fact, *see Snyder*, 300 N.C. at 217, the Murrah Defendants in their same brief also repeatedly acknowledge that a contract exists: "the Association has a duty to repair and maintain all subdivision roads, including the Gravel Road, in exchange for the assessments they receive from the Murrah[ Defendants] for Lot 31"; "the question of whether the Association has a duty to maintain [the S]ubdivision roads generally is not in dispute"; and "there is no dispute that the implied bilateral contract between the Association and the lot owners entails a duty on the part of the Association to maintain, repair and provide access to the [S]ubdivision's Water System." The Murrah Defendants, instead, generally assert that they "receive less benefits and services from the Association" than are provided to other property owners. As such, the Murrah Defendants do not substantively challenge "[w]hether mutual assent is

established and whether a contract was intended between parties[.]” and we proceed to our analysis under our standard of review for summary judgment. *See id.* at 217; *see also In re Will of Jones*, 362 N.C. at 573.

Upon review, we conclude there is no genuine issue of material fact, and the Association is entitled to judgment as a matter of law. *See In re Will of Jones*, 362 N.C. at 573. The undisputed forecast of evidence reveals the following: the Original Covenants required “[a]ll tract owners . . . agree to contribute one/thirty-fourth [] for the maintenance of utilities and roads within [the Subdivision]”; all additional pavement beyond Lot 9 was done at the expense of the individual owners whose properties were situated adjacent to the applicable section of road; the Association has performed maintenance work on all of the roads in the Subdivision, including the Gravel Road; the Association provided maintenance to the Gravel Road by applying gravel; the Easement Agreement provides that the Gravel Road “will be improved by the Murrah[ Defendants] at no expense to the Association”;<sup>6</sup> the Association is responsible for repairing and maintaining the Water System; each property owner is responsible for connecting to the Water System; and after 9 November 2016, the Murrah Defendants stopped paying assessments to the Association.

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<sup>6</sup> We note that “improvement” of the Gravel Road is distinct from “maintenance” of the Gravel Road, and only maintenance was provided for in the Original Covenants. *See, e.g., Foxx v. Davis*, 289 N.C. App. 473, 482 (2023) (“Paving [the gravel road] did not constitute maintenance or repair because it did not keep the gravel road in an existing state or restore the gravel road to good condition. Rather, paving [the gravel road] constituted an improvement because it enhanced the quality of the road.”).

As in *Miles*, where this Court concluded that an implied in fact contract existed based on terms that the members pay assessments and fees in return for benefits provided by the association, including the maintenance of private roads and other amenities, here, the actions of the Murrah Defendants and the Association beyond the expiration of the Original Covenants demonstrate conduct that is “consistent with the existence of a contract implied in fact[,]” the terms of the contract requiring the Murrah Defendants to pay assessments to the Association in return for maintenance of the roads—including the Gravel Road—and maintenance of the Water System. 167 N.C. App. at 29–31, 37. Because the undisputed forecast of evidence demonstrates that the Association’s obligations under the implied in fact contract included maintaining the roads and utilities, and the Association maintained the Gravel Road, just as this Court in *Miles* concluded that the members’ failure to pay assessments was “tantamount to breach of that contract[,]” so here does the Murrah Defendants’ failure to pay assessments constitute a breach of the implied in fact contract. *See id.* at 37; *see also Ellis Jones, Inc.*, 66 N.C. App. at 646.

Accordingly, because the Association has met its burden demonstrating there is no triable issue of material fact, and the Murrah Defendants have not shown there exists substantial evidence to demonstrate a genuine issue of material fact, considering the forecast of evidence in the light most favorable to the Murrah Defendants, we conclude that there is no genuine issue of material fact, and the

Association is entitled to judgment as a matter of law. *See In re Will of Jones*, 362 N.C. at 573; *DeWitt*, 355 N.C. at 681; *Seagle*, 120 N.C. App. at 569.

### **B. Setoff and Recoupment**

The Murrah Defendants next argue the trial court erred in granting summary judgment in favor of the Association as to the Murrah Defendants' claims for setoff and recoupment. We disagree.

Setoff is “[a] defendant’s counterdemand against the plaintiff, arising out of a transaction independent of the plaintiff’s claim.” *Setoff*, Black’s Law Dictionary (12th ed. 2024). “A recoupment is a defen[s]e by which a defendant, when sued for a debt or damages, might recoup the damages suffered by himself from any breach by the plaintiff of the same contract.” *Settlers Edge Holding Co. v. RES-NC Settlers Edge, LLC*, 250 N.C. App. 645, 660 (2016) (citation and italics omitted); *see also Recoupment*, Black’s Law Dictionary (12th ed. 2024) (Recoupment is a “[r]eduction of a plaintiff’s damages because of a demand by the defendant arising out of the same transaction.”).

Here, the doctrine of setoff is inapplicable because the Murrah Defendants’ counterdemand against the Association arises from the same implied in fact contract, not a different contract. *See Settlers Edge Holding Co.*, 250 N.C. App. at 660. Recoupment is likewise inapplicable here, however, because there is no showing of a breach of contract by the Association, where, as described previously, the Association’s conduct of maintaining the roads, including the Gravel Road, and Water

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System, complied with the implied in fact contract. *See Miles*, 167 N.C. App. at 37. Accordingly, because the Murrah Defendants cannot demonstrate they are entitled to recoupment, the trial court did not err in granting summary judgment in favor of the Association. *See Settlers Edge Holding Co.*, 250 N.C. App. at 660. We therefore affirm the trial court's order.

**V. Conclusion**

Upon review, we conclude the trial court did not err in granting summary judgment in favor of the Association because there is no genuine issue of material fact as to the existence and terms of an implied in fact contract, and the Association is entitled to judgment as a matter of law because the Murrah Defendants failed to pay assessments due to the Association. We further conclude that the trial court did not err in granting summary judgment in favor of the Association on the Murrah Defendants' setoff and recoupment claims because they are not entitled to such relief.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).