IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-478

Filed 16 January 2024

Mecklenburg County, No. 22-CVS-2113

MAXISIQ, LLC, F/K/A IOMAXIS, LLC AND D/B/A IOMAXIS, Plaintiff,

v.

KELLY C. HOWARD AND FIFTH THIRD BANK, AS CO-TRUSTEES OF THE RONALD E. HOWARD REVOCABLE TRUST; KELLY C. HOWARD; FIFTH THIRD BANK; AND JANE DOES 1-9, Defendants.

Appeal by plaintiff from order entered 1 November 2022 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2023.

Allen, Chesson & Grimes PLLC, by Benjamin S. Chesson, David N. Allen, and Anna C. Majestro, for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by Lawrence A. Moye and Scott D. Anderson; Johnston, Allison & Hord, P.A., by Greg C. Ahlum, Patrick Kelly, and Kathleen D.B. Burchette, for defendant-appellees.

THOMPSON, Judge.

Plaintiff MAXISIQ appeals from the trial court's 1 November 2022 order granting summary judgment to defendants Kelly C. Howard and Fifth Third Bank. On appeal, plaintiff contends that the trial court erred by dismissing its claims for

unjust enrichment and conversion pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm.

I. Factual Background and Procedural History

Plaintiff MAXISIQ (plaintiff) and defendants Kelly Howard and Fifth Third Bank (defendants) have been engaged in litigation pending before the North Carolina Business Court since 2018. In September 2019, the two parties began settlement negotiations, and after a round of negotiations, drafted a Memorandum of Settlement (MOS) on 12 September 2019. Pertinent to this appeal is paragraph 2a, which states that:

> [Plaintiff] shall pay to [defendant](s) [$1,000,000] of the Settlement Amount by wire transfer payable to [appellees], as co-Trustees, and delivered to [defendant]s' attorneys within TEN (10) days of this date in partial satisfaction of the Settlement Amount (the "[i]nitial [p]ayment"). . . . The [i]nitial [p]ayment shall be nonrefundable in any event but shall be credited towards any future settlement amount or judgment rendered in [defendant]s' favor.

Plaintiff made the initial payment in the sum of $1,000,000 to defendants pursuant to paragraph 2a of the MOS. Ultimately, settlement negotiations were unsuccessful, and plaintiff demanded that defendants return the initial payment, which defendants refused to do.

Defendants then filed a motion to enforce the MOS, and by order entered 1 May 2020, the court denied defendants' motion, concluding "as a matter of law, that the parties have not reached an enforceable settlement agreement . . . ." However,

the court went on to note that the issue of "whether the [i]nitial [p]ayment must be returned has not been squarely presented to the [c]ourt . . . and the [c]ourt's determination of whether the MOS is a final, enforceable settlement agreement does not invoke that issue."

On 30 March 2021, plaintiff filed a motion seeking "return of [the] initial payment made under [the] unenforceable" MOS, arguing that because "the [c]ourt determined the MOS is unenforceable, the initial payment provision likewise must be unenforceable." By order entered 9 June 2021, the court "decline[d] to exercise its authority to order a return of the funds at this juncture[,]" because the dispute over whether defendants must return the initial payment "is, itself, a claim" and "the issue has not been fully developed in the pending litigation . . . ."

On 8 February 2022, plaintiff filed a new complaint (second complaint) in Mecklenburg County Superior Court, alleging conversion and unjust enrichment by defendants, and requesting that the court enter an order allowing plaintiff to "recover a judgment of $1,000,000 plus interest and consequential damages" for the initial payment made pursuant to the MOS. In response, defendants filed a motion to consolidate the two cases, which the court denied.

Then, in April 2022, defendants filed a motion to dismiss the second complaint pursuant to Rule 12(b)(6), because "[p]laintiff agreed that the [i]nitial [p]ayment is non-refundable and is to remain in the Trust's possession 'in any event[,]' " and because the "MOS does not provide that the [i]nitial [p]ayment could become

refundable if the parties failed to execute a more formal settlement agreement and/or the MOS is found to be unenforceable as a settlement agreement." Finally, defendants contended that the MOS had "only been ruled to be unenforceable as a settlement agreement and not a contract . . . ."

By order entered 1 November 2022, the court granted defendants' motion to dismiss plaintiff's complaint for conversion and unjust enrichment pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, concluding that "[t]he phrase 'shall be non-refundable in any event' means 'shall not be refundable in any event' as a matter of law and by any and all possible definitions of that phrase[.]" From that order, plaintiff filed timely written notice of appeal.

II. Analysis

A. Standard of review

"The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established[;] [a]ppellate 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). "The appellate court, just like the trial court below, considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (citation and internal quotation marks omitted).

B. Severability of initial payment language in MOS

In its appellate brief, plaintiff correctly identifies that the "threshold question" for our Court to consider is whether "the initial payment language . . . isolated from the rest of the unenforceable MOS—creates a standalone agreement on all essential terms supported by consideration." Plaintiff asserts that "the initial payment language is part of the MOS's main goal and the parties did not intend for it to be isolated if the rest of the MOS was void." We disagree, because the initial payment language in paragraph 2a of the MOS did create a standalone agreement on all essential terms, supported by consideration, and was intended to be isolated from the remainder of the MOS.

"The most fundamental principle of contract construction—is that the courts must give effect to the plain and unambiguous language of a contract." *Am. Nat'l Elec. Corp. v. Poythress Com. Contractors, Inc.*, 167 N.C. App. 97, 100, 604 S.E.2d 315, 317 (2004) (citation and brackets omitted). "Whether or not the language of a contract is ambiguous . . . is a question for the court to determine." *Lynn v. Lynn*, 202 N.C. App. 423, 432, 689 S.E.2d 198, 205 (citation omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010). "In making this determination, words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.* (citation and internal quotation marks omitted).

"This Court has long acknowledged that an interpretation which gives a reasonable meaning to *all provisions* of a contract will be preferred to one which leaves a portion of the writing useless or superfluous." *Int'l Paper Co. v. Corporex*

Constructors, Inc., 96 N.C. App. 312, 316, 385 S.E.2d 553, 556 (1989) (emphasis added). Additionally, "[b]asic rules of construction applicable to contracts preclude an interpretation rendering such language in the parties' agreement purposeless." *Malone v. Barnette*, 241 N.C. App. 274, 282, 772 S.E.2d 256, 262 (2015).

"A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent." *Kornegay v. Aspen Asset Grp., L.L.C.*, 204 N.C. App. 213, 226, 693 S.E.2d 723, 734 (2010) (citation and internal quotation marks omitted). "On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, *not necessarily dependent upon each other*, nor is it intended by the parties that they shall be." *Id.* (citation and internal quotation marks omitted) (emphasis added).

Here, the "plain and unambiguous language of [the] contract[,]" *Am. Nat'l Elec.*, 167 N.C. App. at 100, 604 S.E.2d at 317, establishes that the MOS did contain two or more parts which were "not necessarily dependent upon each other . . . ." *Kornegay*, 204 N.C. App. at 226, 693 S.E.2d at 734. Those independent parts were the initial payment provision, which "shall be nonrefundable in any event" and "[t]he remainder of the Settlement Amount" which was to be paid "in installments no later than 120 months following [plaintiff's] remittance of the [i]nitial [p]ayment to [defendants]."

As defendants astutely note in their brief, if the initial payment was contingent and interdependent upon a *settlement* being reached, paragraph 2a of the initial payment provision would not have contemplated a scenario where a "*judgment* [is] rendered in [defendant]s' favor." (emphasis added). Applying principles of contract construction, where "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible[,]" *Lynn*, 202 N.C. App. at 432, 689 S.E.2d at 205 (citation and internal quotation marks omitted), lays bare the conclusion that the initial payment provision in paragraph 2a did create a standalone agreement capable of severability from the remainder of the MOS, regardless of whether the parties ultimately reached a settlement.

The distinction made in paragraph 2a between two possible outcomes, one where a settlement pursuant to the MOS is reached, and one where a settlement pursuant to the MOS has not been reached and a "judgment [is] rendered[,]" is susceptible of division and apportionment from the remainder of the MOS. For this reason, we find that the initial payment provision did establish a standalone agreement, independent from the MOS. Next, we must determine whether the initial payment provision was supported by valuable consideration in order to establish a valid contract.

C. Consideration

Plaintiff contends that "[t]he [i]nitial [p]ayment language has no consideration" and therefore, "is not an enforceable contract." Again, we disagree.

"The essential elements of a valid, enforceable contract are offer, acceptance, and consideration." *Lewis v. Lester*, 235 N.C. App. 84, 86, 760 S.E.2d 91, 92–93 (2014). "Consideration sufficient to support a contract consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Davis v. Woods*, 286 N.C. App. 547, 562, 882 S.E.2d 558, 570 (2022) (citation omitted). "[C]ourts ordinarily will not inquire into the adequacy of the consideration[,]" as "[i]t is sufficient that the contract shows on its face a legal and valuable consideration[.]" *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 666, 158 S.E.2d 840, 845 (1967) (citation omitted). "[W]hether [consideration] is adequate or inadequate . . . must be determined by the parties themselves upon their own view of all the circumstances attending the particular transaction." *Id.* (citation omitted).

Plaintiff argues that "[r]eleasing and dismissing all claims was the sole consideration for [plaintiff]'s payment." However, this assertion is unsupported by the clear and unambiguous language of paragraph 2a of the MOS, which states that the initial payment "shall be credited towards any future settlement amount or judgment rendered in [defendant]s' favor." Despite plaintiff's argument to the contrary, plaintiff *did* receive "[c]onsideration sufficient to support [the] contract . . . ." *Davis*, 286 N.C. App. at 562, 882 S.E.2d at 570 (citation omitted). In exchange for the initial payment, plaintiff received a *credit*; in the event of a "future settlement

amount or judgment rendered in [defendant]s' favor[,]" the initial payment amount "shall be credited towards" said future settlement or judgment.

Additionally, the MOS states that "[t]he Parties further agree to cooperate with one another in seeking from the presiding North Carolina Business Court Judge *a stay of the current case management deadlines*" or "*an extension of the current case management deadlines* . . . ." (emphases added). Paragraph 4 of the MOS clearly provides that "in the event the Parties are unable to agree to the terms of a final settlement such that it is necessary to continue with the litigation of the Action, [plaintiff] agree[s] and acknowledge[s] that [defendants] remain entitled to take the depositions of" five individuals involved in the litigation.

Although plaintiff asserts that "[r]eleasing and dismissing all claims was the sole consideration" in exchange for the initial payment, this is unsupported by the "plain and unambiguous language of [the] contract[,]" *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 100, 604 S.E.2d at 317, which establishes that postponement of impending depositions and a credit towards any future judgment or settlement amount served as consideration in exchange for the initial payment. As noted above, "[c]onsideration sufficient to support a contract consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Davis*, 286 N.C. App. at 562, 882 S.E.2d at 570 (citation omitted).

Despite plaintiff's claim that "a credit is not valuable consideration, in theory or in fact[,]" plaintiff cites to no authority to support this proposition. If this assertion

were true, a down payment would be insufficient to establish a valid contract. This argument has no basis in fact or law, and our Court "will not inquire into the adequacy of the consideration[,]" as "[i]t is sufficient that the contract shows on its face a legal and valuable consideration[.]" *Jewel Box Stores Corp.*, 272 N.C. at 666, 158 S.E.2d at 845 (citation omitted).

D. Essential Terms

Finally, plaintiff claims that "[t]he parties did not agree on all essential terms related to the isolated initial payment language." Again, we disagree.

To support its argument, plaintiff claims that there must be a "mutuality of agreement" and that because the initial payment language "does not spell out a meeting of the minds on all essential terms," such as "what happens if [plaintiff] wins in the Underlying Litigation" or "what, if any, interest rate applies while [defendants] ha[ve] had [plaintiff]'s money[,]" no "meeting of the minds on these essential terms" occurred.

Despite plaintiff's attempt for us to divine what interest rate may have applied while defendants held what plaintiff asserts were essentially escrow funds, "the plain and unambiguous language of [the] contract[,]" *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 100, 604 S.E.2d at 317, establishes that the essential terms were agreed upon pursuant to the initial payment provision. The language of the initial payment provision establishes (1) the amount of money to be paid, (2) how the money will be

paid; (3) when the payment must be made, (4) to whom the initial payment must be made, and (5) that the initial payment shall be "nonrefundable in any event[.]"

Moreover, as discussed above, the plain and unambiguous language of the initial payment provision establishes that the consideration provided in exchange for the initial payment includes a credit towards any (1) "future settlement amount" or (2) "judgment rendered in [defendant]s' favor." The essential terms of the initial payment provision were agreed upon, as established by the plain language of the MOS.

III. Conclusion

The plain and unambiguous language of paragraph 2a of the MOS did create a severable agreement, independent of whether a settlement was ultimately reached. The initial payment provision established all essential terms and was supported by valuable consideration in the form of a credit towards any future judgment or settlement amount, in addition to the postponement of pending depositions. For the foregoing reasons, the order of the trial court is affirmed.

AFFIRMED.

Judge ZACHARY concurs.

Judge STADING concurs in result only.

Report per Rule 30(e).