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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1104

Filed 7 May 2024

Mecklenburg County, No. 19-CVD-12741

BRAD W. HURD, Plaintiff,

v.

PRIORITY AUTOMOTIVE HUNTERSVILLE, INC., Defendant.

Appeal by Plaintiff from order entered 14 July 2023 by Judge Alyssa Levine in Mecklenburg County District Court. Heard in the Court of Appeals 16 April 2024.

Collum & Perry, by M. Shane Perry, for Plaintiff-Appellant.

Woods Rogers Vandeventer Black, PLC, by Joshua F. P. Long, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Brad W. Hurd appeals from an order dismissing his Amended Complaint alleging Defendant engaged in unfair and deceptive trade practices, fraud, and fraudulent concealment. Plaintiff contends the trial court erred by dismissing his claims under N.C. Rule Civ. P. 12(b)(6) because his Amended Complaint sufficiently pled facts to support the causes of actions contained therein. We agree. Plaintiff also contends the trial court erred by failing to rule on his Motion to Request

Findings of Facts and Conclusions of Law and by failing to grant said motion. We do not address Plaintiff's second and third arguments because we reverse the trial court's order dismissing his claims and remand.

I. Factual and Procedural Background

Defendant is a car dealership located in Huntersville. In May 2018, Plaintiff visited Defendant seeking to purchase a used car. Plaintiff was shown a 2018 Honda Accord, which Defendant asserted had been used as a demonstration vehicle. Defendant's salesman provided Plaintiff a Damage Disclosure Statement, which represented the car had not been involved in any accidents. On 27 May 2018, Plaintiff purchased this car for a discounted price of $26,400.00. Later, Plaintiff noticed the discrepancies between the vehicle identification number ("VIN") on his vehicle and the VIN on the purchase agreement. Plaintiff returned to the dealership the following day where he signed a revised purchase agreement.

Approximately one year later, Plaintiff discovered his vehicle was involved in an accident on 12 December 2017. Defendant filed an insurance claim in the amount of $10,238.000 for this accident. Defendant's sales manager refused to provide Plaintiff with a copy of the CarFax report for the Honda he had purchased. Rather, the manager provided Plaintiff with a copy of an Experian AutoCheck that did not contain information prior to Plaintiff purchasing the vehicle. When Plaintiff requested the CarFax report again, the manager required Plaintiff to leave the dealership. Plaintiff then, at his own expense, pulled both the CarFax reports for the

vehicle he had purchased and for the vehicle listed on the initial purchase agreement.

On 18 October 2019, Plaintiff filed an amended complaint alleging Defendant had engaged in unfair and deceptive trade practices, fraud, and fraudulent concealment. Defendant moved to dismiss Plaintiff's claims pursuant to Rule12(b)(6) and submitted a memorandum of law in support thereof. On 23 May 2023, the trial court held a motion on the hearing. On 22 June 2023, Plaintiff moved to request findings of facts and conclusions of law. The trial court did not rule on Plaintiff's motion. On 14 July 2023, Judge Alyssa Levine entered an order granting Defendant's Motion to Dismiss. Plaintiff timely appealed.

II. Analysis

Plaintiff contends the trial court erred in granting Defendant's Motion to Dismiss, failing to enter findings of fact and conclusions of law upon the order, and failing to hear Plaintiff's motion for the same. Defendant contends Plaintiff's Amended Complaint is legally and factually deficient and Plaintiff's claims are barred by the economic loss rule. We agree with Plaintiff in that his Amended Complaint was sufficient to survive a Rule 12(b)(6) motion. However, we do not reach the merits of Plaintiff's Motion to Request Findings of Facts and Conclusions of Law because we reverse the trial court's order and remand.

A. Motion to Dismiss

Plaintiff argues the trial court erred by dismissing his complaint under Rule 12(b)(6). Specifically, Plaintiff argues he pled facts sufficient to state a claim against

Defendant for: (1) engaging in unfair and deceptive trade practices in violation of section 75-1.1, (2) fraud, and (3) fraudulent concealment. We address each claim below.

"We review *de novo* orders granting motions to dismiss under Rule 12(b)(6)." *Jessey Sports, LLC v. Intercollegiate Men's Lacrosse Coaches Ass'n, Inc.*, 289 N.C. App. 166, 169, 888 S.E.2d 677, 680 (2023) (citation and internal marks omitted). Under a *de novo* review, we consider the motion anew and freely substitute our own judgment for that of the trial courts. *Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022).

A "motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint." *Kohn v. Firsthealth of the Carolinas, Inc.*, 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (citation and internal marks omitted); *see also Grich v. Mantelco, LLC.*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013). When reviewing a trial court's Rule 12(b)(6) dismissal, we "must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Fagundes v. Ammons Dev. Grp, Inc.*, 261 N.C. App. 138, 141, 820 S.E.2d 350, 354 (2018) (citation and internal marks omitted). Dismissal for failure to state a claim is proper "if no law exists to support the claim[s] made, if sufficient facts to make out [] good claim[s] are absent, or if facts are disclosed which will necessarily defeat the claim[s]." *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 606, 566 S.E.2d 818, 821 (2002)

(citation and internal marks omitted); *see also Mileski v. McConville*, 199 N.C. App. 267, 269, 681 S.E.2d 515, 517 (2009). "Legal conclusions, however, are not entitled to a presumption of truth." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal marks omitted).

A plaintiff is required to plead "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and [a] demand for [the] judgment [sought]." N.C. R. Civ. P. 8(a)(1)–(2) (2023).

1. Deceptive and Unfair Trade Practices

Section 75-1.1 of the North Carolina General Statutes prohibits businesses operating in North Carolina from engaging in "unfair or deceptive acts or practices in or affecting commerce[.]" N.C. Gen. Stat. § 75-1.1(a) (2023). To state a claim under section 75-1.1, "a plaintiff must show: (1) an unfair or deceptive act or practice . . . , (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff or to his business." *Huff v. Autos Unlimited, Inc.*, 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996) (citation and internal marks omitted); *see also Combs v. City Elec. Supply Co.*, 203 N.C. App. 75, 87, 690 S.E.2d 719, 727 (2010) (holding the same). Commerce, for the purposes of section 75-1.1, "includes all business activities, however denominated[.]" N.C. Gen. Stat. § 75-1.1(b) (2023).

A practice is deemed unfair when it offends established

> public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers or amounts to an inequitable assertion of power of position. To prove deception, while it is not necessary to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, a plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.

Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 196, 767 S.E.2d 374, 377 (2014) (citation and internal marks omitted).

Whether a specific practice is unfair or deceptive is a fact-specific inquiry and is a question of law. *See Suntrust Bank v. Bryant/Sutphin Properties, LLC.*, 222 N.C. App. 821, 825, 732 S.E.2d 594, 598 (2012) (holding "it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive trade practice" (citation and internal marks omitted)); *see also Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 624, 664 S.E.2d 388, 395 (2008) ("Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." (citation and internal marks omitted). "[A] claim under section 75-1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of Northern Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013).

Here, Defendant does not dispute whether Plaintiff sufficiently pled the act

occurred in commerce as Defendant is a used car dealership which regularly engages in the kind of transaction at issue. Defendant argues Plaintiff did not plead an actionable misrepresentation upon which Plaintiff relied.

We have held it to be a violation of section 75-1.1 for "'an employee of an auto dealership to make a statement to a customer leading the customer to believe the vehicle has not been involved in a collision, when the employee knows this to be untrue.'" *Sain v. Adams Auto Group, Inc.*, 244 N.C. App. 657, 666, 781 S.E.2d 655, 661 (2016) (citing *Torrance v. AS & L Motors, Ltd.*, 119 N.C. App. 552, 556, 459 S.E.2d 67, 70 (1995)). The Department of Motor Vehicles' Damage Disclosure Statement requires that every seller disclose to the buyer if they know whether the vehicle has been involved in a collision to the extent the damages exceed 25% of the vehicles value. Defendant was bound by this duty because it had knowledge of the vehicle's accident history as evidenced by the insurance claim. While Defendant contends Plaintiff failed to allege an actionable misrepresentation by Defendant, Plaintiff specifically points to the Damage Disclosure Statement signed by an employee of Defendant which states the vehicle had not been in an accident where the damages were more than 25% of the value of the vehicle.

Defendant frames the incorrect VIN as a "mix-up" and "clerical error[.]" In doing so, Defendant admits the Damage Disclosure Statement contained a false representation. Moreover, whether the misrepresentation was intentional or not is immaterial to a claim under section 75-1.1. *See Marshall v. Miller*, 302 N.C. 539, 546,

276 S.E.2d 397, 402 (1981) (holding "we do not find [] that these cases establish that intentional wrongdoing is necessary in order to find a violation of G.S. 75-1.1"); *see also Torrance*, 119 N.C. App. at 555, 459 S.E.2d at 70 (citation and internal marks omitted) (holding "[a] purchaser does not have to prove fraud, bad faith or intentional deception to sustain unfair and deceptive practice claim"). An employee of Defendant made an untrue statement on the Damage Disclosure Statement, which states that there may be civil liability imposed for falsely completing the form, leading Plaintiff to believe the vehicle had not been involved in a collision despite the vehicle having been repaired by Defendant. Defendant's employees also failed to fulfill their duty to disclose the vehicle's accident history, as required by the Damage Disclosure Statement, by failing to inform Plaintiff of the damage prior to the sale. These allegations, taken as true, are sufficient to plead an unfair and deceptive trade practice claim under section 75-1.1. *See Sain*, 244 N.C. App. at 665, 781 S.E.2d at 661 (holding an allegation that an auto dealership's employee misrepresented a vehicle's accident history sufficient to survive a Rule 12(b)(6) motion to dismiss for section 75-1.1 claim).

Plaintiff sufficiently pled causation and damages as well. Plaintiff alleges that, but for Defendant's false representation, he would not have purchased the vehicle. Additionally, as a result of Defendant's misrepresentation, Plaintiff has incurred damages by paying for increased fuel costs because he borrowed another vehicle to drive in lieu of the purchased vehicle to mitigate damages, taking off work to

investigate the circumstances surrounding the alleged fraud, and purchasing the CarFax reports as part of said investigation. Plaintiff also alleges that the vehicle is worth less than what he paid for it as a vehicle's prior accident history is material to its value.

Defendant contends that Plaintiff did not suffer damages because he received the vehicle at a discount and whether the discount was given because the car was used as a demonstration vehicle or because of its accident history is immaterial. This argument is meritless. A prudent car-purchaser would be aware of the potential impact that a prior collision may have on the condition of a vehicle and either investigate the vehicle's condition more scrupulously, factor that history into the bargain to protect their interests, or both. Defendant deprived Plaintiff of these opportunities when it failed to provide him with an accurate Damage Disclosure Statement, and Plaintiff has therefore alleged damages incurred from this transaction.

For the reasons stated above, Plaintiff pled sufficient facts to sustain a cause of action under section 75-1.1, and therefore the trial court erred by granting Defendant's Rule 12(b)(6) motion for dismiss.

2. Fraud

To state a claim for fraud, a plaintiff must plead facts sufficient to show: "'(1) [a 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.'" *Rowan Cnty. Bd. of Educ. v U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (citing *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981)). N.C. Rule Civ. P. 9 requires that "the circumstances constituting fraud [] shall be stated with particularity. N.C. R. Civ. P. 9(b) (2023). "In pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Value Health Solutions, Inc. v. Pharm. Rsch. Associates, Inc.*, 385 N.C. 250, 263, 891 S.E.2d 100, 112 (2023) (citing *Terry*, 302 N.C. at 85, 273 S.E.2d at 678) (cleaned up)).

The alleged "misrepresentation generally must be definite and specific." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983) (citing *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974) (internal marks omitted)). Intent to defraud is "usually not shown by direct evidence but generally is proven by circumstances," and "is generally a question of fact for the jury." *Latta v. Rainey*, 202 N.C. App. 587, 600, 689 S.E.2d 898, 909 (2010) (citing *McLamb v. McLamb*, 19 N.C. App. 605, 610, 199 S.E.2d 687, 690 (1973); *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178–79 (1986) (cleaned up)).

Here, Plaintiff pled the specific misrepresentation contained in the Damage Disclosure Statement. This allegation met the requirements of time, place, content, and identity. Plaintiff pled that on 27 May 2018, when he went to the dealership,

Defendant's salesman provided Plaintiff with a Damage Disclosure Statement that falsely represented the vehicle had not been in a collision requiring repairs that exceeded 25% of the vehicle's value. This statement can be viewed as calculated to deceive Plaintiff because it was about a material fact of the transaction—whether the vehicle had sustained serious previous damage.

Moreover, Plaintiff pled facts to support an allegation of Defendant's intent to deceive. The initial purchase agreement and accompanying documentation referred to a vehicle that was not in fact the vehicle Plaintiff had received. Upon discovery of the vehicle's prior history, Defendant's agents not only refused to provide Plaintiff with a copy of documentation showing the vehicle's actual history when it had the documentation at its disposal, but instead provided him with documentation on a different vehicle. Defendant's agent then asked Plaintiff to leave the premises. This series of events is inconsistent with disclosure and is probative of an intent to deceive, at least to the extent required to survive a Rule 12(b)(6) motion for fraud. Plaintiff pled these facts in support of the proposition that, but for them, he would not have purchased the vehicle he received for the price he paid. Moreover, as stated above, Plaintiff pled damages resulting from Defendant's misrepresentations.

Plaintiff has pled, with specificity and definiteness, facts sufficient to state a claim for fraud. Accordingly, the trial court erred in granting Defendant's Rule 12(b)(6) motion to dismiss.

3. Fraudulent Concealment

A claim of fraudulent concealment requires a plaintiff to plead: "(1) concealment of a past or existing material fact, (2) that is reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the plaintiff." *Jones v. Kim Hatcher Ins. Agencies Inc.*, 290 N.C. App. 316, 323, 893 S.E.2d 1, 6–7 (2023) (citation and internal marks).

Here, Plaintiff alleges concealment by pleading the series of events involving Defendant's failure to disclose the vehicle's accident history despite Plaintiff's repeated requests for documentation. Incorporating Plaintiff's allegations above, the Amended Complaint sufficiently pleads a claim for fraudulent concealment. Thus, the trial court erred in granting Defendant's motion to dismiss.

4. Economic Loss Rule

"The economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law." *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 32, 795 S.E.2d 253, 257 (2016) (citation and internal marks omitted). However, application of the economic loss rule has been limited to "merely barring negligence claims." *Id.* 251 N.C. App. at 32, 795 S.E.2d at 258. Moreover, the economic loss rule does not prevent a plaintiff from recovering for claims of fraud. *See Cummings v. Carroll*, 379 N.C. 347, 361, 866 S.E.2d 675, 686 (2021) (holding "the Court of Appeals did not err by holding that the economic loss rule did not bar the assertion of fraud claims")

Here, the economic loss rule does not bar Plaintiff's claims because he is not

claiming Defendant acted negligently. The gravamen of Plaintiff's claims are the circumstances surrounding the Purchase Agreement and the intentional acts of Defendant's agents thereafter, not the agreement itself. Plaintiff, as both parties recognize, is not pleading a breach of contract claim, but rather pleading tortious conduct independent of the contract. Thus, the economic loss rule is inapplicable to the facts at hand.

III. Conclusion

We hold that Plaintiff adequately pled facts sufficient to support his claims for a violation of N. C. Gen Stat. § 75-1.1, fraud, and fraudulent concealment. The trial court erred in granting Defendant's Rule 12(b)(6) motion to dismiss. The trial court's order is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED

Chief Judge DILLON and Judge TYSON concur.

Report per Rule 30(e).