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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-238

No. COA20-579

Filed 1 June 2021

Mecklenburg County, No. 19-CVS-9596

ASCENDUM MACHINERY, INC., f/k/a ASC CONSTRUCTION EQUIPMENT USA,
Plaintiff,

v.

EDWARD C. KALEBICH, Defendant.

Appeal by Plaintiff from order entered on 24 October 2019 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 April 2021.

Freeman & Freeman, LLC, by William S. F. Freeman, for the Plaintiff-Appellant.

No brief for the Defendant-Appellee.

JACKSON, Judge.

¶ 1 Ascendum Machinery, Inc., f/k/a ASC Construction Equipment USA, Inc., (“Plaintiff”) appeals from an order granting Edward C. Kalebich’s (“Defendant”) motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Because the trial court dismissed Plaintiff’s complaint under Rule 12(b)(6), our recitation of the facts is based

on the allegations in Plaintiff's complaint and the exhibits attached thereto. We affirm.

I. Background

¶ 2 On 3 November 2016, Defendant was employed as the general manager of Duke Recycling, LLC ("Duke Recycling"). That day he completed an application for credit from Plaintiff, an equipment financing company, and executed a Guaranty to secure Duke Recycling's obligation. The terms and conditions to which Defendant agreed by submitting the application for credit included that Duke Recycling would receive monthly statements, payment was due on the 30th of each month, and late fees would apply to any balance remaining after the 30th.

¶ 3 Duke Recycling later went out of business and its assets were liquidated to pay other creditors.

¶ 4 Plaintiff initiated this action on 27 May 2019 in Mecklenburg County Superior Court to collect from Defendant the \$18,475.83 balance owed to it by Duke Recycling, alleging that Defendant had executed the Guaranty securing Duke Recycling's obligation in his individual capacity. Plaintiff also sought to recover unpaid finance charges, costs, attorney's fees, and interest.

¶ 5 On 8 August 2019, Defendant moved to dismiss Plaintiff's complaint under Rules 12(b)(2), 12(b)(3), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant filed an affidavit in support of the motion to dismiss and an answer on 10

October 2019.

¶ 6 The motion came on for hearing on 24 October 2019. The trial court granted the motion in an order entered the same day.

¶ 7 Plaintiff entered timely notice of appeal from the trial court's order on 21 November 2019.

II. Analysis

¶ 8 Plaintiff makes two arguments on appeal, which we address in turn.

A. Motion to Dismiss

¶ 9 Plaintiff first argues that the trial court erred in dismissing Plaintiff's claims for failure to state a claim upon which relief can be granted under Rule 12(b)(6) because, Plaintiff asserts, Defendant executed the Guaranty in his individual capacity. We disagree.

1. *Standard of Review*

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three 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.

Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (citation omitted). “We review the trial court’s decision *de novo*, treating [the] plaintiff’s factual allegations as true.” *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (citation omitted). “When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment.” *Id.*

2. Legal Framework

¶ 10 “[C]ontracts of guaranty are subject to the more general law of contract when not otherwise provided.” *O’Grady v. First Union Nat. Bank*, 296 N.C. 212, 220, 250 S.E.2d 587, 593 (1978). “It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument.” *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010) (citation omitted). “When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . , and the court cannot look beyond the terms of the contract to determine the intentions of the parties.” *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (citations omitted), *aff’d per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986).

¶ 11 Moreover, an agent is not “individually bound when contracting within the

scope of his employment[.]” *Howell v. Smith*, 261 N.C. 256, 260, 134 S.E.2d 381, 384 (1964) (citation omitted). As a result, “where individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer signs twice, once as an officer and again as an individual.” *Keels v. Turner*, 45 N.C. App. 213, 218, 262 S.E.2d 845, 847 (citation omitted), *disc. review denied*, 300 N.C. 197, 269 S.E.2d 624 (1980). Thus, while “a party [who] signs . . . twice, once in a representative capacity and once in a personal capacity, . . . is personally liable on [a] contract[.]” *Telerent Leasing Corp. v. Boaziz*, 200 N.C. App. 761, 764, 686 S.E.2d 520, 522 (2009) (citation omitted), a party who only signs once in a representative capacity is not, *RD & J Props. v. Lauralea–Dilton Enters.*, 165 N.C. App. 737, 742, 600 S.E.2d 492, 497 (2004).

3. Defendant’s Signature on Behalf of Duke Recycling

¶ 12

Plaintiff alleged in its complaint that Defendant executed the Guaranty in his individual capacity, personally guaranteeing the obligation of Duke Recycling. However, the copy of the Guaranty attached to Plaintiff’s complaint contradicts this allegation. At the bottom of the single-page Guaranty, beneath the word “GUARANTOR[.]” the following words are handwritten:

Chicago Capital Holdings
David Onion (president)
120 E Ogden Ave[,] Hinsdale[,] IL 60521

Defendant’s signature appears below these words. Beneath Defendant’s signature,

his name and the words “general manager for Duke Recycling” are handwritten.

¶ 13 Defendant thus executed the Guaranty only once and in a representative capacity, not individually. The words “general manager for Duke Recycling” beneath Defendant’s signature and the words identifying the principal on whose behalf Defendant executed the Guaranty demonstrate that Chicago Capital Holdings, Duke Recycling’s parent company, is the guarantor, and Defendant signed on behalf of Chicago Capital Holdings as general manager of Duke Recycling. Accordingly, we hold that the complaint in this case, including the unambiguous terms of the attached Guaranty, “discloses [a] fact that necessarily defeats [] [P]laintiff’s claim.” *Corneal*, 238 N.C. App. at 195, 767 S.E.2d at 377. The trial court therefore did not err in granting Defendant’s motion to dismiss.

B. Motion for Alteration or Reconsideration

¶ 14 Plaintiff next argues that the trial court erred by failing to alter or amend the order dismissing Plaintiff’s claims without prejudice. Specifically, Plaintiff contends that the court’s failure to rule on its Motion for Alteration or Reconsideration of the Court’s Order on Defendant’s Motion to Dismiss was an abuse of discretion because the court dismissed Plaintiff’s claims without prejudice and the order contained findings supporting an adjudication on the merits against Plaintiff, and a dismissal *with* prejudice. However, we do not reach the merits of this argument because the trial court never ruled on the motion.

ASCENDUM MACHINERY V. KALEBICH

2021-NCCOA-238

Opinion of the Court

¶ 15 Under Rule 10 of the North Carolina Rules of Appellate Procedure, “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.” N.C. R. App. P. 10(a)(1). Rule 10 also requires that “the complaining party [] obtain *a ruling* upon the party’s request, objection, or motion.” *Id.* (emphasis added).

¶ 16 At the hearing on the motion to dismiss, after the trial court announced that it would rule in favor of Defendant, Plaintiff’s counsel requested leave to amend its complaint, whereupon the court asked, “Did you file a motion to amend?” Plaintiff’s counsel admitted that he had not. Counsel for Defendant volunteered that he “ha[d] an order, dismissed with prejudice.” “I can cross that out[,]” he offered. Plaintiff’s counsel replied, “Okay, without prejudice then?” The court then indicated its assent.

¶ 17 On 24 October 2019, the court entered an order granting the motion to dismiss without prejudice. However, the order contained the following findings:

1. Based upon the Plaintiff’s documents, the Defendant is not obligated on this alleged debt because he did not sign in his individual capacity.
2. Defendant did not sign the Guaranty Agreement in his individual capacity.

In the decretal portion of the order, the word “with” is crossed out, and the words “without prejudice” are handwritten above it, as Defendant’s counsel offered.

¶ 18 On 4 November 2019, Plaintiff filed a motion requesting that the trial court amend the order under either Rule 52 or 59 and (1) reverse its ruling in the 24 October 2019 order, or (2) remove the findings in the order. Plaintiff included two proposed orders with the motion, one that would have denied the motion to dismiss, and another that would have granted the motion to dismiss without prejudice without making findings. The court did not rule on the motion. Instead, Plaintiff was informed in an 8 November 2019 e-mail from the court’s judicial assistant that the court had reviewed the motion and the proposed orders and had declined to sign either proposed order. Nothing in the record indicates whether counsel noticed the motion for hearing or followed up on the 8 November 2019 e-mail with a proposed order denying the 4 November 2019 motion. Because Plaintiff never obtained a ruling on the motion, its argument related to the propriety of the trial court’s failure to rule on it has not been preserved for our review. *See, e.g.*, N.C. R. App. P. 10(a)(1) (“It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”).

III. Conclusion

¶ 19 Because Defendant did not execute the Guaranty in his individual capacity, we affirm the trial court’s order granting Defendant’s motion to dismiss.

AFFIRMED.

Judges DIETZ and COLLINS concur.

ASCENDUM MACHINERY V. KALEBICH

2021-NCCOA-238

Opinion of the Court

Report per Rule 30(e).