797 S.E.2d 380 (Table)
Unpublished Disposition
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Court of Appeals of North Carolina.

COUNTY OF HARNETT, Plaintiff,
v.
Randy D. ROGERS, Defendant.

No. COA16-757
|
Filed: March 21, 2017

Appeal by Defendant-Appellant from (1) an order entered 21 May 2014 by Judge Douglas B. Sasser in Harnett County Superior Court; and (2) an order rendered 16 May 2014 by Judge Douglas B. Sasser. Heard in the Court of Appeals 1 December 2016. Harnett County, No. 12 CVS 890

Attorneys and Law Firms

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Coy E. Brewer, Jr., for Defendant-Appellant.

Opinion

DILLON, Judge.

****1** Randy D. Rogers ("Defendant") appeals from: (1) an order granting partial summary judgment to County of Harnett ("Plaintiff"), and (2) an order denying his motion to continue the summary judgment hearing. For the following reasons, we affirm the order denying Defendant's continuance motion, and we affirm in part and reverse in part the trial court's partial summary judgment order and remand.

I. Background

Defendant was a right-of-way agent for the Harnett County Department of Public Utilities ("Department") from 2006 until his termination in 2011. Plaintiff alleges that Defendant, while employed by the Department, obstructed a number of Department projects, including the South Central Sewer Line Project, the South Harnett Waste Water Treatment Expansion Project, and the Cameron Hills Water Line Project (collectively "the Projects").

Plaintiff filed suit against Defendant to recover stolen, confidential Department documents and damages stemming from Defendant's obstruction. Defendant asserted a counterclaim.

On 9 May 2014, the trial court granted Plaintiff partial summary judgment on its fraud and unfair and deceptive trade practices ("UDTPA") claims and on Defendant's counterclaim. In a separate order, the trial court denied Defendant's motion to continue the summary judgment hearing. Defendant has timely appealed both orders.

II. Appellate Jurisdiction

As Plaintiff voluntarily dismissed the remaining claims left undisposed by the trial court's partial summary judgment order, we have jurisdiction to review the merits. *See Hernandez v. Coldwell Banker Sea Coast Realty*, 223 N.C. App. 245, 249, 735 S.E.2d 605, 608 (2012).

III. Standard of Review

The standard of review for a partial summary judgment order is *de novo*. *See Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Builders Mut. Ins. Co. v. N. Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (internal quotation marks omitted). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

IV. Analysis

A. Defendant Has Abandoned Several Arguments

At the outset, we note that Defendant's appellate brief contains no argument challenging the trial court's denial

of his motion to continue the summary judgment hearing. Further, Defendant's brief contains no argument challenging the trial court's grant of summary judgment on Defendant's counterclaim or on Plaintiff's injunction for return of its confidential information. As these issues are not presented in his brief, they are deemed abandoned and we therefore affirm those portions of the trial court's orders. N.C. R. App. P. 28(b)(6).

B. Genuine Issues of Fact Remain on Fraud Claim

Defendant contends that summary judgment was improper on Plaintiff's fraud claim as there is a genuine issue of fact. We agree.

**2 The elements of fraud are as follows: "(1) False 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 injur[ed] party," *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974), along with reasonable reliance, *Johnson v. Owens*, 263 N.C. 754, 757, 140 S.E.2d 311, 313 (1965). [1]

Broadly speaking, Plaintiff *alleges* that Defendant committed fraud by: (1) refusing to perform his work duties in connection with the Projects; (2) stealing confidential documents; (3) providing falsified documents to his supervisors; (4) meeting with Harnett County property owners and assisting them in obstructing the Projects (in part by providing them with stolen confidential documents); (5) knowingly or recklessly submitting false allegations of Department fraud and corruption to outside government agencies under various aliases; (6) filing frivolous lawsuits; and (7) lying to his supervisors about his work on the Projects, his concerns with the Projects, his meetings with property owners, and contact with outside government agencies.

Plaintiff cites to a number of factual allegations that support its fraud claim. And we believe that there is strong evidence that Defendant engaged in malfeasance. However, as to Plaintiff's claim, we conclude that there is a conflict in the evidence.

The recordings corroborating many of Plaintiff's allegations contain Defendant's *unsworn* statements. In opposition to Plaintiff's motion, Defendant provided *sworn* statements and affidavits denying, among other things, providing falsified documents to his superiors, knowingly or recklessly submitting false allegations of fraud and corruption, filing frivolous lawsuits, lying about certain issues with the Projects, and stealing confidential information. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47-48, 727 S.E.2d 866, 869 (2012) (reaffirming general principle that a non-movant may create a genuine issue of fact by setting forth specific facts in an opposing affidavit); *Summey*, 357 N.C. at 496, 586 S.E.2d at 249 ("Evidence presented by the parties is viewed in the light most favorable to the non-movant."). *But see Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) (holding in part that a non-movant may not create a genuine issue of fact by filing an affidavit that contradicts prior sworn testimony), *aff'd by an equally divided court*, 297 N.C. 696, 256 S.E.2d 688 (1979) (per curiam).

Furthermore, a genuine issue of fact exists regarding Plaintiff's reasonable reliance upon Defendant's alleged fraudulent misrepresentations and concealments. Reasonable reliance "is a question for the jury, unless the *facts are so clear* that they support only one conclusion." *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387 (emphasis added). Here, we conclude that a jury could find that Plaintiff did not act reasonably in relying on Defendant's vague and at times evasive responses to questions regarding his meetings with property owners, his job performance, and his contact with government agencies. A jury would be as justified, if not more so, in concluding that Plaintiff did not reasonably rely on Defendant's failure to *disclose* these and other wrongdoings. This is not to say that a jury could not find reasonable reliance in this case. Rather, we merely hold that there are genuine issues of fact regarding Plaintiff's reasonable reliance that preclude summary judgment. [2]

C. Summary Judgment Was Improper on the UDTPA Claim

**3 Defendant contends that summary judgment was improper as the UDTPA does not apply. We address this argument.

Pursuant to N.C. Gen. Stat. § 75-16 (2013), a plaintiff may recover damages for an UDTPA violation by establishing: "(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 the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

While commerce for the purposes of the UDTPA is expansive and "includes all business activities, however denominated," N.C. Gen. Stat. § 75-1.1(b), "the General Assembly indicated through its original statement of purpose that the [UDTPA] was designed to achieve fairness in *dealings between individual market participants*," *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010) (emphasis added). Accordingly, our Supreme Court has limited the application of the UDTPA to conduct occurring in "(1) interactions between businesses, and (2) interactions between businesses and consumers." *Id.* It is for this reason that most employer-employee disputes do not fall within the UDTPA's purview. *See id.* at 53, 691 S.E.2d at 680 ("[T]he [UDTPA] is not focused on the internal conduct of individuals within a single market participant, that is, within a single business."). We now apply these principles to Defendant's alleged conduct.

1. Application of the UDTPA to Defendant's Conduct on the Projects

Plaintiff has offered evidence concerning Defendant's conduct, both in his dealings internally at the Department and externally with members of the public or other entities. Much of this evidence is undisputed. For instance, there is evidence establishing that Defendant: (1) refused to purchase easements on behalf of the Department; (2) falsely represented to his supervisors that he was working diligently to procure easements; (3) failed to provide sufficient information in a timely manner to the consulting firm assisting the Department on the Projects; (4) falsely represented that he and the consulting firm were making good progress in acquiring easements; (5) falsely represented to the Department and an independent engineering company that the proposed sewer lines would bisect residential properties and other structures in approximately seventy-two instances and that he could not procure easements until these issues were remedied [3]; (6) provided his supervisor with a falsified easement spreadsheet [4]; and (7) met with Harnett County property owners to encourage and assist them in obstructing the Projects.

**4 While Defendant's acts were unfair and deceptive practices, *Walker v. Fleetwood Homes of N. Carolina, Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (concluding in part that an unfair and deceptive practice is an "immoral, unethical ... [and] unscrupulous" act), not all of his conduct falls within the UDTPA's purview. That is, Defendant's statements, submissions, [5] and false representations made to the *Department* did not occur in interactions *between* market participants. *See White*, 364 N.C. at 52-53, 691 S.E.2d at 679-80. Rather, they were the "internal conduct of individuals within a single market participant," namely the Department. *Id.* at 53, 691 S.E.2d at 680. Therefore, these acts are not covered by the UDTPA.

In contrast, damages stemming from Defendant's meetings with Harnett County property owners, his failure to provide sufficient information to the consulting firm, and his representations to the project engineer regarding the sewer line issues are generally compensable under the UDTPA as they pertain to interactions between market participants. The consulting firm and project engineer are independent businesses and the property owners are consumers of the Department's wastewater services. *Id.* at 52-53, 691 S.E.2d at 679-80. The fact that these damages, if any, were incurred while Defendant was a Department employee is irrelevant. Defendant's conduct here was more akin to the "buyer-seller relations" that our Supreme Court found were covered under the UDTPA in *Sara Lee Corp. v. Carter*, 351 N.C. 27, 33-34 519 S.E.2d 308, 312 (1998).

Additionally, Defendant's related argument that Plaintiff is barred from recovering under the UDTPA as the same conduct was cited in support of an allegedly defective fraud claim is invalid. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) ("Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true.").

We note that the evidence fails to establish as a matter of law that Defendant's *individual* failure to obtain easements from property owners constitutes an UDTPA violation. For instance, if a jury concludes that damages stemmed from Defendant's complete failure to even initiate contact with property owners, it seems plain that Plaintiff would be barred from recovery, as the UDTPA's primary

purpose is to police *dealings* between market participants. *Id.* at 52, 691 S.E.2d at 679. Said another way, Defendant's omissions by definition would not constitute *dealings* as they would only be unfair and deceptive *to the Department*. *Cf. White*, 364 N.C. at 54, 691 S.E.2d at 680 (holding that plaintiffs' argument that defendant's conduct could potentially affect the price a third-party company would pay for fabrication work was misplaced because it "overlook[ed] that the unfairness of defendant Andrew Thompson's conduct did not occur in his dealings with Smithfield Packing").

In sum, we hold that some of the damages proximately caused by Defendant's acts and omissions from market participant interactions are compensable under the UDTPA. We nevertheless reverse the partial summary judgment order on the UDTPA claim as it is unclear from the evidence before us whether the damages awarded in the order were in fact proximately caused by Defendant's unfair and deceptive practices arising from these interactions.

V. Conclusion

We affirm the trial court's order denying Defendant's motion to continue. We also affirm the trial court's partial summary judgment order in favor of Plaintiff on its injunction claim and on Defendant's counterclaim. However, we conclude genuine issues of fact exist and preclude summary judgment on Plaintiff's fraud and UDTPA claims, and reverse the trial court's partial summary judgment order as to these claims and remand for further proceedings not inconsistent with this opinion.

****5** ***381** AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Report per Rule 30(e).

Judges MCCULLOUGH and TYSON concur.

All Citations

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Footnotes

1 While *Roberson v. Williams*, 240 N.C. 696, 83 S.E.2d 811 (1954) has never explicitly been overturned, Plaintiff's reliance on this decision for the proposition that fraud encompasses general malfeasance is subsumed in light of the *Ragsdale* decision and decades of precedent from this Court and our Supreme Court adopting the *Ragsdale* decision. *See Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 387; *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-69, 374 S.E.2d 385, 391 (1988); *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 74-75, 598 S.E.2d 396, 401 (2004); *Moore v. Wachovia Bank & Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 834 (1976).

2 While there may be additional genuine issues of material fact that preclude summary judgment, we need not address those to dispose of Plaintiff's fraud claim.

3 Plaintiff asserts that Defendant identified over *eighty* issues requiring relocation of the sewer lines. Defendant's affidavit in opposition of the summary judgment motion provides that "[o]n at least *eight* occasions[,] the South Central project construction plans did not match plats and showed lines running through houses and other structures [.]" (emphasis added).

4 While Defendant's opposing affidavit provides that the spreadsheet was "accurate," Defendant's prior deposition testimony contradicts this. Accordingly, we disregard Defendant's affidavit on this point. *See Wachovia*, 39 N.C. App. at 9, 249 S.E.2d at 732 (holding in part that a non-movant may *not* create a genuine issue of fact by filing an affidavit that contradicts prior sworn testimony).

5 The falsified easement spreadsheet.