

2018 WL 1162699

Unpublished Disposition

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Court of Appeals of North Carolina.

JAMES CAPPS and SHARON CAPPS, Plaintiffs

v.

STEVE McSWAIN, MAPLESTONE  
CONSTRUCTION, LLC, CARL VON  
ISENBURG AND GEOSCIENCE &  
TECHNOLOGY, P.A., Defendants.

No. COA16-1264

Filed: March 6, 2018

Forsyth County, No. 16-CVS-4309

Appeal by plaintiffs from order entered 13 September  
2016 by Judge Susan Bray in Superior Court, Forsyth  
County. Heard in the Court of Appeals 2 May 2017.

#### Attorneys and Law Firms

Crumpler Freedman Parker & Witt, by E. Winslow  
Taylor, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Lee M.  
Whitman, Paul J. Puryear, Jr., and Tobias S. Hampson,  
for defendant-appellees.

#### Opinion

STROUD, Judge.

\*1 Plaintiffs appeal an order dismissing their action. Because plaintiffs' complaint states a claim for fraud and unfair and deceptive trade practices against defendants Steve McSwain and Maplestone Construction, LLC, we reverse the trial court's order dismissing both claims.<sup>1</sup>

In July of 2016, plaintiffs filed a complaint against defendants alleging that around June of 2012 they had attended the open house of a home for sale by BB&T. Plaintiffs noticed "the deck appeared to be sagging in some areas." After plaintiff James Capps ("Capps") "inquired about the deck" he "was provided a document dated July 31, 2012 prepared by [defendant] GeoScience addressed to [defendant] McSwain, a Member Manager of

[defendant] Maplestone [Construction Inc.]." "The report advised McSwain as to the necessary repairs which would be required to make the deck safe."

Plaintiff Capps then "returned to the property" with an architect and defendant "McSwain represented to Capps [and the architect] that all the necessary repairs had been completed in accordance with GeoScience's instructions and that the deck was in conformance with the appropriate building codes." Defendant McSwain even removed one ceiling panel from underneath the deck where he knew there were no issues knowing that other panels would have shown the repairs plaintiff Capps was concerned with had not taken place. "At the time he made the representations, [defendant] McSwain knew that all required repairs had not been made as represented, that the deck did not meet the applicable building codes, and that the deck was unsafe." Plaintiffs later purchased the property. In October of 2015, plaintiff Capps noticed the sag in the deck and that the "deck floor seemed to 'bounce' when one walked on the deck." A local builder inspected the deck and informed plaintiff Capps it

was extremely dangerous and that no one should be allowed on the deck until [it] was properly repaired. When the panels covering the underside of the deck were removed, [plaintiff] Capps discovered the deck was separating from the house, the deck did not meet code, and the overall condition of the deck was dangerous.

Plaintiffs then brought this action for fraud and unfair and deceptive trade practices against defendants McSwain and Maplestone. Plaintiffs did not bring any claims against BB&T, the seller of the house, even though the action was for fraud and unfair and deceptive trade practices which resulted in their purchase of a home with a defective deck. In August of 2016, defendants moved to dismiss plaintiffs' claims pursuant to Rule 12(b)(6). Defendants included an exhibit attached to the motion which included an "OFFER to PURCHASE AND CONTRACT" from plaintiffs to BB&T, *the seller*, for the property at issue, an "ADDENDUM TO CONTRACT OR SALE[.]" and a "MATERIAL FACT DISCLOSURE[.]"<sup>2</sup> In September of 2016, the trial court granted defendants' motion to dismiss with prejudice. Plaintiffs appeal.

\*2 On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is 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. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

*Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 39, 742 S.E.2d 287, 290–91 (2013) (citation omitted).

The elements of fraud are: (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 injured party. In order to survive a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#), a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud.

*Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 481, 593 S.E.2d 595, 598 (2004) (citations and quotation marks omitted). Plaintiffs alleged that defendants misrepresented the condition of the deck to them and concealed a material fact in order to intentionally deceive them, and as a result of that deception they purchased a home with a defective deck.

We must note that the relationship between plaintiffs and defendants is not clear from the complaint or anything else in the record on appeal. The allegations do at least show that defendants performed deficient repairs on the deck, or were retained by someone to perform repairs but failed to perform them and were charged with advising plaintiffs about the repairs. In our research in the fraud cases cited by the parties and other cases, the plaintiff had some sort of contractual, legal, or other relationship to the defendant; we are not aware of any case where fraud was ultimately found where there was no relationship alleged between the parties. Some sort of legal or contractual relationship seems to be an implicit requirement for a fraud claim, but we have been unable to find any case making this an explicit element of the claim. Furthermore, we cannot assume from the minimal record before us that defendants are somehow protected from plaintiffs' claim by the offer to purchase and contract or other documents they included with their motion to dismiss, because defendants have not shown that they have any legal relationship to BB&T, the seller of the home. Nonetheless, as plaintiffs have properly pled the

elements of fraud we conclude their claim should have withstood defendant's motion to dismiss.

Defendants also point out that plaintiffs failed to inspect the deck properly, but taking the allegations of the complaint as true, defendant McSwain intentionally showed plaintiff Capps and the architect an area where no defect could be seen and represented that all needed repairs had been done, thus inducing plaintiffs to purchase the home. Defendants' argument regarding inspection is partially based upon the offer to purchase and contract, but again the record does not show why the document is relevant to defendants since the defendants were not the seller of the house. Defendants' arguments would be more appropriate for a summary judgment hearing with a more developed record. The order on appeal addresses defendants' motion to dismiss under [Rule 12\(b\)\(6\)](#) and because “the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]” see *Highland Paving Co.*, 227 N.C. App. at 39, 742 S.E.2d at 290–91, the motion should have been denied on plaintiffs' claim for fraud.

\*3 Plaintiffs have also stated a claim for unfair and deceptive trade practices. See *Craven v. SEIU Cope*, 188 N.C. App. 814, 819, 656 S.E.2d 729, 733 (2008).

A claim of unfair and deceptive trade practices under [section 75–1.1 of the North Carolina General Statutes](#) requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant.

*Id.* (citation and brackets omitted). It is clear that “the mere purchase and sale of a residence is not an act in or affecting commerce under [G.S. 75-1.1\[.\]](#)” *Adams v. Moore*, 96 N.C. App. 359, 361, 385 S.E.2d 799, 801 (1989) (citation and quotation marks omitted). But defendants did not sell the house to plaintiffs, and claims for unfair and deceptive practices are not limited to a particular type of business relationship:

Unfair and deceptive practices tend to involve buyer and seller relationships. Nevertheless, courts have also recognized actions based on other types of commercial relationships, including those outside of contract.

....

The proper inquiry, therefore, is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts affected commerce. A contractual relationship is not required in order to affect commerce.

Commerce in its broadest sense comprehends intercourse for the purpose of trade in any form. The unfair and deceptive practices statute provides that commerce includes all business activities, however denominated.

*Prince v. Wright*, 141 N.C. App. 262, 268, 541 S.E.2d 191, 196-97 (2000) (citations and quotation marks omitted). But as discussed above, defendants were not the sellers of

the home; this claim arose out of some other sort of “act or practice” related to the repair of the deck.

Because plaintiffs properly stated their claims, we reverse.

REVERSED.

Report per Rule 30(e).

Judge DAVIS concurs.

Judge BRYANT concurs in the result only.

**All Citations**

Slip Copy, 2018 WL 1162699 (Table)

#### Footnotes

- 1 Defendants Carl Von Isenburg and GeoScience & Technology, P.A., were dismissed from this appeal.
- 2 Plaintiffs contend that the trial court should not have considered the “offer to purchase and contract” because it was not attached to the complaint. We have been unable to determine from the record before us if the trial court did consider the documents defendant included with their motion to dismiss. But whether or not we consider the offer to purchase and contract and other documents, defendants were not a party to the “offer to purchase and contract,” plaintiffs' agreement was with the seller, BB&T.