THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2009-0495

A&B Lumber Company, LLC

v.

Town of Pembroke
Troy Brown
Laura Scott

BRIEF OF THE APPELLEES/RESPONDENTS LAURA SCOTT AND TROY BROWN

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QUESTIONS FOR REVIEW

I. Whether the trial court correctly determined that A&B Lumber presented no evidence that a valid contract existed between A&B Lumber and the Town of Pembroke?

II. Whether the trial court correctly determined that because there was no valid contract between A&B Lumber and the Town of Pembroke, the claims against Troy Brown and Laura Scott and the vicarious liability claim against the Town of Pembroke fail as a matter of law?

III. Whether the trial court erred in not ruling on the plaintiff's motion to strike the affidavits submitted with the defendants' reply memorandum, where in rendering its decision, the trial court relied on and referenced only those facts alleged by the plaintiff, and did not rely on or reference any facts alleged in the defendants' affidavits?

STATEMENT OF THE FACTS AND CASE

A&B Lumber sued the Town of Pembroke for breach of contract claims and for *respondeat superior* liability on tortuous interference of contract claims that were brought against Laura Scott and Troy Brown, the former planning director and town administrator for the Town of Pembroke. The superior court granted the Town of Pembroke's, Laura Scott's and Troy Brown's joint motion for summary judgment after it determined that no contract existed between A&B Lumber and the Town of Pembroke. Because there is no valid contract between A&B Lumber and the Town, the tortuous interference with contract claims against Troy Brown and Laura Scott fail as a matter of law.

The facts, as determined by the Court in ruling in the motion for summary judgment, were construed most favorably to A&B Lumber.[1] Indeed, the Court accepted as true the facts as stated by A&B Lumber in its objection to the motion for summary judgment.

A&B Lumber owns a building supply facility on Route 106 in Pembroke. In January 2006, A&B Lumber sought to expand its operations by building a drive-through facility for its customers. At that time, A&B Lumber met with the Pembroke Planning Board and proposed construction of a drive-through facility. On May 30, 2006, A&B Lumber submitted a site plan for the proposed construction. On August 22, 2006, the planning board accepted the application as complete, approved the application at the same meeting, subject to final approval by the town's consulting engineer and issued a site permit.

On or about August 23 and August 30, 2006, A&B Lumber met with Everett

[1] Troy Brown and Laura Scott reserved the right, in their motion for summary judgment, to contest all facts in the event the motion was denied. Troy Brown and Laura Scott continue to reserve that right.

Stone, the town's code enforcement officer at that time, and learned that A&B Lumber would need to acquire a demolition permit, foundation permit, building permit, mechanical permit, electrical permit and sprinkler system permit. Mr. Stone agreed that the permits could be issued in stages as the plans for each permit were approved and that A&B Lumber could begin work on each plan after the permit for it was issued. Mr. Stone also recommended that A&B Lumber hire an outside specialist to review and approve the various plans as this may expedite the approval process. Mr. Stone recommended a consultant by the name of Beverly Kowalik, of JCM Code Specialists in Pembroke, New Hampshire.

On August 30, 2006, A&B Lumber moved to modify its site plan slightly. At a special meeting on September 12, 2006, the planning board accepted this application as complete. On September 29, 2006, Mr. Stone resigned from his position as code enforcement officer for the Town of Pembroke. In the interim, Michelle Bonsteel, the Town of Hooksett's code enforcement officer, stepped in to assist Pembroke with building code issues until it could hire a new code enforcement officer.

On October 1, 2006, A&B Lumber submitted certification that the drive-through facility met the requirements on the Americans with Disabilities Act, a prerequisite for issuance of the building permit. The next day, Mr. Coombs, A&B Lumber's President, went to the town offices to obtain the building permit. He spoke to Michelle Bonsteel who informed him that she had the information that she needed and the building permit would be available that afternoon.

Construing the facts in favor of A&B Lumber, the court determined that when Mr. Coombs returned to pick up the building permit, Laura Scott had advised Ms.

Bonsteel not to issue the permit until A&B Lumber submitted approved plans for all phases of the project. As a result, A&B Lumber was not issued a building permit until October 25, 2006, when Troy Brown, the town administrator, signed the building permit after Michelle Bonsteel recommended approval. The issued building permit was subject to the following conditions: (1) an electrical & sprinkler plan approved by Ms. Kowalik of JCM Code Specialists, L.L.C.; and (2) concrete inspection and soil bearing reports by Geotechnical Testing Services.

On November 13, 2006, the Town hired Michael Pelsor to start work as the new code enforcement officer. On or about December 12, 2006, A&B Lumber's electrician applied for an electrical permit based on electrical plans that had been approved by Ms. Kowalik. Again, construing the facts in favor of A&B Lumber, the court determined that Laura Scott told Mr. Pelsor not to accept electrical plans until A&B Lumber had them stamped by an electrical engineer. As a result, the electrical permit was not issued until December 26, 2006, after A&B Lumber submitted electrical plans stamped by an electrical engineer. On March 5, 2007, A&B Lumber received final approval for the fire, sprinkler and alarm system from the code enforcement officer. Mr. Pelsor apparently told A&B Lumber that he would issue the occupancy permit as soon as he received an inspection report for a retaining wall. However, Ms. Scott refused to authorize the issuance of an occupancy permit because she refused to sign off that the site plan conditions had been met. On or about March 21, 2007, Mr. Pelsor resigned as the Town's Code Enforcement Officer. On March 26, 2007, Jack Dever started work as the Interim code enforcement officer and he was instructed to address the A&B Lumber occupancy permit. Laura Scott and Jack Dever conducted a site inspection at A&B

Lumber and discovered that many site plan conditions were not in place. On March 27, 2007, Ms. Scott met with the fire and police chief to discuss the uncompleted site plan. Following the meeting, Ms. Scott informed A&B Lumber that if it agreed to certain conditions, she was willing to sign off on a conditional certificate of occupancy. On March 30, 2007, Mr. Dever issued a temporary certificate of occupancy. This appeal followed.

SUMMARY OF ARGUMENT

A&B Lumber argues that it had a contract with the Town of Pembroke because of representations made by Everitt Stone, the former code enforcement officer for the Town. Mr. Stone represented that he would issue certain building permits in stages and that an electrical permit would be issued upon the approval of the code specialist hired by A&B Lumber. A&B Lumber did not provide any evidence that Mr. Stone had any actual authority, implied authority or apparent authority to enter into contracts on behalf of the Town of Pembroke. With no such authority, no contract occurred between A&B Lumber and the Town.

Moreover, because Mr. Stone's gratuitous promises were not bargained for nor were there any exchange of promises, there was no consideration and therefore, there was no contract.

Finally, because there was no contract, the tortuous interference with contractual relations claims against Laura Scott and Troy Brown also fail as do the claims against the Town for vicarious liability on those claims.

STANDARD OF REVIEW

A motion for summary judgment should be granted where the moving party shows that there is no genuine issue of material fact, and, on those uncontested facts and applicable law, the moving party is entitled to recover. *BlueCross/Blue Shield v. St. Cyr*, 123 NH 137 (1983). A fact is considered material if it would affect the outcome of the case under the applicable law. *Palmer v. Nan King Restaurant*, 147 NH 681, 683 (2002). The court must make all reasonable inferences from the facts alleged in the light most favorable to the non-moving party. *Sintros v. Hamon*, 148 NH 478, 480 (2002). In reviewing the trial court's grant of summary judgment, this court applies the same standard as the trial court in reviewing the trial court's "application of the law to the facts *de novo*." *Colony Insurance Company v. Dover Indoor Climbing Gym*, 158 NH 628, 630 (2009). If this court determines that there are no genuine issues of material fact and the moving party is entitled to recover as a matter of law, the trial court's decision must be affirmed.

ARGUMENT

I. The Trial Court Correctly Determined That There Was No Evidence Which Demonstrated The Existence Of A Valid Contract Between A&B Lumber And The Town Of Pembroke.

A. The Trial Court Correctly Determined That A&B Lumber Did Not Show That The Town Communicated Or Manifested To A&B Lumber That Mr. Stone Had The Authority To Enter Into Contracts On Behalf Of The Town With Permit Applicants.

A&B Lumber argues that the code enforcement officer, Mr. Stone, agreed that permitting could proceed in stages, construction could begin as soon as permits were issued, and the review and approval of the project plans would be expedited if A&B Lumber retained a third-party building code specialist. A&B Lumber claims that this

constitutes an oral contract that the Town breached by refusing to issue the permits in stages and delaying the issuance of the building permit. A&B Lumber also alleges that Mr. Stone agreed to issue the electrical permits so long as A&B Lumber's code specialist approved the electrical plan. A&B Lumber claims that this agreement constitutes an oral contract that the Town breached by refusing to issue the electrical permit unless A&B Lumber had its electrical plans stamped by an electrical engineer. Because the agreements involve the Town of Pembroke, A&B Lumber must demonstrate that Mr. Stone had the authority to enter contracts on behalf of the Town. *Sinclair v. Town of Bow*, 125 NH 388, 391-92 (1984). Because Mr. Stone did not have any authority to enter into contracts on behalf of the Town, A&B Lumber's argument must fail. There is no evidence that A&B Lumber produced to the court in motions, exhibits, or pleadings of any communication by the Town directed to A&B Lumber that could have led A&B Lumber to reasonably believe that the Town authorized Mr. Stone, or anyone else, to enter into such contracts. Moreover, A&B Lumber has produced no evidence that it inquired into the nature and extent of Mr. Stone's authority. Anyone dealing with an agent of a municipal corporation is bound to ascertain the nature and extent of his authority. *Id.*

A&B Lumber argues that Mr. Stone had apparent authority to enter into a contract. New Hampshire does not recognize this doctrine. *Sinclair* at p. 393. Moreover, even if New Hampshire recognized this doctrine, A&B Lumber did not produce any evidence which demonstrated that Mr. Stone had apparent authority to enter into a contract with it on behalf of the Town. A&B Lumber confuses the doctrine of municipal estoppel with its claims for breach of contract. Here, there is no estoppel claim

as A&B Lumber seeks money damages for the alleged breach of contract. Accordingly, A&B Lumber's argument regarding estoppel is unwarranted and does not demonstrate that Mr. Stone had any apparent authority. Additionally, there is no contract between A&B Lumber and the Town of Pelham based on any actual or implied authority. A&B Lumber produced no evidence that the Town of Pelham's Selectmen expressly granted Mr. Stone the authority to enter into contracts with permit applicants on the Town's behalf. *Sinclair* at p.393. Additionally, A&B Lumber produced no evidence showing that Mr. Stone believed that he had actual authority to enter into contracts with permit applicants on the Town's behalf. *Sinclair* at p.393. Accordingly, A&B Lumber cannot show, because it has not produced any evidence to the contrary, that Mr. Stone had actual or implied authority to enter into contracts with it.

Defendants Troy Brown and Laura Scott hereby incorporate by reference the argument made by defendant Town of Pembroke at pages 8-14 of its brief in this matter.

B. Even If There Was Any Authority On Behalf Of A Code Enforcement Officer, The Alleged Contract Fails For Lack Of Consideration.

To constitute consideration, a performance or a return promise must be bargained for. Restatement of Contracts §71 (1981). A performance or return promise is bargained for if it is sought by the promisor in exchange for its promise and is given by the promisee in exchange for that promise. *Id.* As the trial court determined, Mr. Stone agreed to do two things for A&B Lumber; (1) issue the construction permits in stages; and, (2) issue the electrical permit after A&B Lumber submitted electrical plans approved by Ms. Kowalik. There was no evidence in any of the motions, pleadings or exhibits that Mr. Stone sought performance or a return promise from A&B Lumber in exchange for

these agreements. No legal benefit or detriment ran to the Town as a result of these gratuitous promises.

Defendants Troy Brown and Laura Scott hereby incorporate by reference the argument regarding consideration contained at pages 14-16 of the Town of Pembroke's brief in this matter.

II. Because There Was No Contractual Relationship Between The Town And A&B Lumber, The Trial Court Correctly Ruled As A Matter Of Law That Troy Brown And Laura Scott Were Entitled To Judgment On The Tortuous Interference With The Contractual Relationship Claim And There Is No Vicarious Liability On The Part Of The Town.

A&B Lumber's contention that Ms. Scott and Mr. Brown intentionally interfered with its contractual relationship with the Town and the claim that the Town is vicariously liable for that interference cannot stand unless A&B Lumber establishes the existence of a contract. To establish liability for intentional interference with a contractual relationship, a plaintiff must show, at the very least, that it had a contractual relationship with a third party. *Hughes v. N.H. Division of Aeronautics*, 152 NH 30, 41 (2005). Accordingly, absent a valid contract, A&B Lumber's tortuous interference with contract claims against Laura Scott and Troy Brown and the vicarious liability asserted by A&B Lumber against the Town of Pelham for these tortuous interference claims fail as a matter of law.

III. Because The Trial Court Relied On And Referenced Only The Facts Alleged By A&B Lumber And Did Not Rely On Any Facts Alleged In The Town's, Laura Scott's And Troy Brown's Affidavits, There Was No Error In Not Ruling On A&B Lumber's Motion To Strike Affidavits.

Defendants Laura Scott and Troy Brown incorporate by reference the argument contained in the Town of Pembroke's brief at pages 16-18.

CONCLUSION

For the above-stated reasons, defendants Laura Scott, Troy Brown and the Town of Pembroke respectfully request that this Honorable Court affirm the judgment of the Superior Court.

Respectfully submitted,
Laura Scott and Troy Brown
By his Attorneys,
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Dated: October 27, 2009

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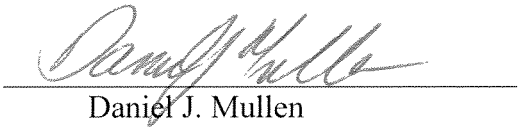
ORAL ARGUMENT

The defendants, Laura Scott and Troy Brown request, if oral argument is necessary, fifteen minutes for oral argument, to be presented by Daniel J. Mullen.

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief have this day been sent by first-class U.S. Mail to H. Christopher Carter, Esquire and Jae Whitelaw, Esquire.

Dated: October 27, 2009



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