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NO. COA01-571

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

GEORGE S. COOK,
Plaintiff,

v. Guilford County
No. 00 CVD 4800

PHIL GIURINTANO, d/b/a
TRUCK STUFF,
Defendant.

Appeal by plaintiff from judgment entered 11 October 2000, *nunc pro tunc* to July 17, 2000, by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 18 February 2002.

Randolph M. James, P.C. for plaintiff-appellant.

Forman Rossabi Black Marth Iddings & Slaughter, P.A., by Amiel J. Rossabi, for defendant-appellee.

BIGGS, Judge.

George S. Cook (plaintiff) appeals from judgment entered in favor of Phil Giurintano, d/b/a Truck Stuff (defendant), following a non-jury civil trial. We affirm in part and reverse in part.

In June, 1998, defendant rented a commercial building, in Greensboro, North Carolina, in order to operate a "truck accessories" business at the site. The property was owned by plaintiff, and managed by Bissell Properties, through their agent,

Garth Miller (Miller). A lease was signed by the parties which included a provision requiring plaintiff to repair any leaks in the roof. Defendant assumed occupancy of the building on 21 July 1998.

From the time defendant moved in, he experienced continuous problems with the roof leaking. In August and September, 1998, defendant notified Miller several times that the roof leaked, and in September and October, 1998, plaintiff made repairs to the roof. However, the roof continued to leak, and in February, 1999, defendant informed plaintiff that he would no longer pay rent because plaintiff had failed to repair the roof. In February, 1999, plaintiff brought a civil ejectment action against defendant for failure to pay rent. The record does not include a judgment or order entered on this claim.

In May, 1999, the parties met and reached an agreement that defendant's rent would be reduced to $1250 a month and that plaintiff would repair the leaking roof within a reasonable time. During the following months, defendant paid the reduced rent. However, in October, 1999, when he tendered to plaintiff a check for "twelve-fifty," the bank processed it as $12.50, rather than $1250.00, the amount owed. Between May and October, 1999, the roof was not repaired; in November and December, 1999, and January, 2000, defendant again complained to plaintiff about the leaking roof. Plaintiff's attempts to repair the roof were unsuccessful; consequently, defendant refused to pay rent after December, 1999. When the roof was still not repaired by June, 2000, defendant vacated the premises.

In February, 2000, plaintiff instituted a second suit for summary ejectment, based upon defendant's failure to pay rent. Defendant answered asserting plaintiff's breach of contract, failure of consideration, estoppel, and unclean hands; defendant also counterclaimed for damages for breach of contract, unfair and deceptive trade practices, and specific performance. On 10 July 2000, the case was heard before the trial court in a non-jury civil trial. On 11 October 2000, *nunc pro tunc* 17 July 2000, the trial judge entered judgment in favor of defendant. The court concluded that "[a]s of November 30, 1999, Plaintiff constructively evicted Defendant from the leased premises as a result of Plaintiff's failure to prevent leakage from the roof into the Premises, thereby breaching the lease agreement between the parties." The court ordered plaintiff to pay $34,012.50 in damages to defendant for constructive eviction and breach of contract, and dismissed all other claims by both parties. Plaintiff appeals from this order.

I.

"When the trial court sits as a fact finder, its findings of fact generally have the weight of a jury verdict and are conclusive on appeal if supported by competent evidence." *K & S Enters. v. Kennedy Office Supply Co.*, 135 N.C. App. 260, 264, 520 S.E.2d 122, 125 (1999). "'The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.'" *Lewis v. Edwards*, 147 N.C. App. 39, 48, 554 S.E.2d 17, 23 (2001) (quoting

In Re Foreclosure of C and M Inv., 123 N.C. App 52, 54, 472 S.E.2d 341, 342 (1996) *aff'd in part, rev'd in part*, 346 N.C. 127, 484 S.E.2d 546 (1997)). This standard applies "even though the evidence might sustain findings to the contrary." *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975).

II.

Plaintiff argues first that the trial court erred in finding that he constructively ejected defendant from the premises as of 30 November 1999.

To prevail on a claim of constructive eviction, a tenant must establish that the landlord's acts or omissions deprive the tenant of the "'beneficial enjoyment of the premises to which he is entitled under his lease,' causing his tenant to abandon them," *K & S Enters.*, 135 N.C. App. at 266, 520 S.E.2d at 126 (quoting *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.,* 100 N.C. App. 82, 92, 394 S.E.2d 824, 830, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990)), or that the landlord's breach of duty "renders the premises untenable." *Marina Food Associates,* 100 N.C. App. 92, 394 S.E.2d 830 (evidence that landlord failed to repair or replace roof held sufficient to find constructive eviction). The tenant must also establish that the landlord's breach of contract proximately caused his abandonment. *McNamara v. Wilmington Mall Realty Corp*, 121 N.C. App. 400, 466 S.E.2d 324, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 73 (1996). In addition, the tenant must show that he vacated the premises within a reasonable time after the landlord's breach of contract. *ARE-100/800/801*

Capitola, LLC v. Triangle Labs., Inc., 144 N.C. App. 212, 550 S.E.2d 31 (2001) (where defendant remains in possession of premises, he may not maintain action for constructive eviction).

In the case *sub judice*, plaintiff asserts that the trial court's conclusion that defendant was constructively evicted was not supported by competent evidence that the leaking roof either rendered the premises untenable or deprived defendant of the "beneficial enjoyment of the premises." Plaintiff also contends that there was no competent evidence supporting the trial court's conclusion that defendant vacated the premises in a reasonable time. We disagree with both of plaintiff's assertions.

In its order, the trial court found that "from the onset of Defendant's possession of the Premises, Defendant experienced repeated and continual leaking into the Premises from the roof and possibly from the walls." The trial court also found that defendant had complained repeatedly about the roof and that plaintiff's attempts to repair the roof were unsuccessful. We conclude that there is competent evidence in the record to support these findings and that the court's findings are sufficient to establish that the leaking roof rendered the premises untenable or deprived defendant of the "beneficial enjoyment" of the property.

Regarding defendant's obligation to vacate the premises within a reasonable time, this Court has held that "[w]hat constitutes a reasonable time for abandonment depends on the circumstances of each case and is an issue of fact for the [fact-finder]." *McNamara*, 121 N.C. App. at 405, 466 S.E.2d at 328. In *McNamara*,

the tenant-jeweler abandoned his store after the landlord leased the adjoining space to a very noisy aerobics studio. Although plaintiff remained in the store for seven to eight months after the problem began, this Court upheld the trial court's finding of constructive eviction, noting that the plaintiff had complained to the landlord for over six months "in an effort to resolve the situation," before abandoning the store. On the other hand, in *K & S Enters.*, 135 N.C. App. 260, 520 S.E.2d 122, the tenant remained on the premises for over three and a half years despite a leaking roof. Further, although he left several phone messages, defendant never wrote to plaintiff expressing his dissatisfaction. On these facts, this Court held that the defendant failed to prove that he was disturbed in his use and possession of the property, or that plaintiff's failure to fix the roof rendered premises untenable. The Court also found defendant did not abandon the premises in a reasonable time.

In the instant case, the trial court found that defendant was in frequent contact with plaintiff regarding the leaking roof; that he agreed in May, 1999, to remain on the premises on the condition that the roof would be repaired; that after reaching this agreement, defendant continued to press for roof repairs; and that he vacated the premises six months after informing plaintiff that he would no longer pay rent unless the roof were fixed. We conclude that competent evidence supports these findings, and that the findings support the trial court's conclusion that the defendant vacated the building within a reasonable time.

We hold that the trial court did not err in its conclusion that plaintiff constructively evicted defendant by failing to stop the roof from leaking; accordingly, this assignment of error is overruled.

III.

Plaintiff argues next that the trial court erred in its calculation of damages. We agree.

A plaintiff who has been constructively evicted may recover general damages measured by the value, "at the time of eviction, of the unexpired term, less any rent reserved." *Marina Food Assoc.*, 100 N.C. App. at 93, 394 S.E.2d at 831. The "rent reserved" is simply the rent due under the lease:

> The parties have discussed . . . the use of the words "rent reserved[,]" [but we] cannot give any particular significance to the term "reserved." It is a word which has been combined with "rent" by lawyers since antiquity probably with little understanding of its history or specific meaning. . . . [T]he term "rent reserved" has reference to the [fact that] . . . the owner reserves the right to collect rent.

Norcomo Corp. v. Franchi Const. Co., Inc., 587 S.W.2d 311, 319 (Mo. App. 1979). The calculation of these damages was discussed by the North Carolina Supreme Court in *Ross v. Perry*, 281 N.C. 570, 576, 189 S.E.2d 226, 229 (1972):

> Ordinarily the value of a lease is the difference between the rental value of the unexpired term and the rent reserved in the lease. . . . If a forfeited lease is worth nothing more than the stipulated rent, the lessee has sustained no damage. He suffers a loss only when his lease is worth more than the rent he pays, that is, only when his lease is a bargain.

Thus, the "tenant is entitled, as the measure of his damages, to the difference between the rental value of the premises for the term, in the condition as contracted to be, and the rental value in their actual condition." *Brewington v. Loughran*, 183 N.C. 559, 564, 112 S.E. 257, 259 (1922). Moreover, "as a general rule, . . . the stipulated rent, in the absence of other evidence [is]. . . regarded as the fair rental value of the demised premises in the condition as called for in the lease." *Id.* In the instant case, the only evidence regarding the fair rental value of the premises was the amount of rent agreed upon in the original lease. At the time that defendant was constructively evicted, the rent remaining on the lease as initially agreed to was $40,500 (3 months at $1500 and 18 months at $2000), but only $35,250 under the revised lease (3 months at $1250 and 18 months at $1750). The proper measure of defendant's damages is $5250, the difference between the original rental and the reduced rental, starting from the date that defendant was constructively evicted. The trial court, however, awarded defendant damages in the amount of the total rent remaining under the lease. We conclude that the trial court erred in its calculation of damages.

IV.

Plaintiff next argues that the trial court erred in its determination of the terms of the accord and satisfaction reached by the parties in May, 1999. We disagree.

Accord and satisfaction is "'a method of discharging a contract, or settling a cause of action arising either from a

contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement.'" *Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963) (quoting *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43 (1921)). The existence of accord and satisfaction "turns on a central factual issue: whether there was a meeting of the minds and therefore an agreement[.]" *Metric Constructors, Inc. v. Hawker Siddeley Power Engineering,* 121 N.C. App. 530, 540, 468 S.E.2d 435, 441 (1996). The 'accord' is the agreement between the parties in which "'one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim,'" and the 'satisfaction' "'is the execution or performance, of such agreement.'" *Zanone v. RJR Nabisco,* 120 N.C. App. 768, 772, 463 S.E.2d 584, 587 (1995) (quoting *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 565, 302 S.E.2d 893, 894, *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983)), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

In the present case, the trial court found that the parties met in May, 1999, and reached an agreement that (1) the rent would be reduced, (2) defendant would be compensated for certain damages he had incurred due to the leaking roof, (3) defendant would pay rent owed for the months before the agreement was reached, and (4) plaintiff would repair the roof. At trial, the parties presented contradictory testimony regarding whether plaintiff or defendant agreed to repair the roof; each party testified that the other had

assumed responsibility for any further repairs. The resolution of this issue was a matter of fact, for "the existence of accord and satisfaction is generally a question of fact." *Griffin v. Sweet*, 120 N.C. App. 166, 171, 461 S.E.2d 32, 35 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996). We conclude that competent evidence supported the trial court's finding that plaintiff had agreed to repair the roof. This assignment of error is overruled.

V.

Finally, plaintiff argues that the trial court erred by not entering judgment against defendant for a breach of the modified lease. This assignment of error is without merit. Plaintiff argues that he did not constructively evict defendant and that defendant breached the lease by withholding rent. We have concluded that the trial court did not err in finding constructive eviction. Plaintiff also alleges defendant's violation of the lease in October, 1999, when he tendered in payment a check for "twelve-fifty," which was processed by the bank as $12.50, rather than $1250.00. Plaintiff asserts that defendant breached his lease by failing to repay the amount owed for October, 1999. The trial court found that defendant was in violation of the lease by his failure to send the full amount for October, 1999, and reduced the damage award by a corresponding amount. We conclude, therefore, that any error in the trial court's failure to enter judgment on this issue is harmless. This assignment of error is overruled.

In sum, we affirm the trial court's ruling that defendant was

constructively evicted and its dismissal of the parties' other claims. We reverse the court's calculation of the measure of damages, and remand for entry of judgment consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).