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NO. COA11-217  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

RICHARD ALLISON,  
Plaintiff-Appellee,

v.

McDowell County  
No. 09 CVS 398

DONALD WILLIAM DAVIDSON,  
Defendant-Appellant.

Appeal by Defendant from judgment entered 24 August 2010 and order entered 22 September 2010 by Judge Mark E. Powell in Superior Court, McDowell County. Heard in the Court of Appeals 30 August 2011.

*Krinn E. Evans for Plaintiff-Appellee.*

*Currin & Currin, by George B. Currin and Robin T. Currin, for Defendant-Appellant.*

McGEE, Judge.

Donald William Davidson (Defendant) appeals from judgment entered following a jury verdict finding Defendant in breach of contract and awarding the sum of \$541,020.83 in damages to Richard Allison (Plaintiff). Defendant also appeals the trial

court's order denying his motion for judgment notwithstanding the verdict (JNOV) and his motion for a new trial.

Plaintiff and Defendant entered into a fifteen-year lease agreement on 29 June 2007 (the lease), whereby Plaintiff leased from Defendant two ponds "approximately six (6) acres in size and adjoining land" (Plaintiff's leasehold property). The lease stated that Plaintiff was authorized to use the ponds for a fishing pond business. Plaintiff's leasehold property was a portion of real property owned by Defendant, who operated a mining and camping business thereon.

The lease contained the following pertinent provision:

[Defendant] further covenants and warrants that if [Plaintiff] shall discharge the obligations herein set forth to be performed by [Plaintiff], [Plaintiff] shall have and enjoy during the term hereof the quiet and undisturbed possession of the demised premises, with all appurtenances. [Defendant] specifically agrees he will not interfere with [Plaintiff's] fishing enterprise and [Plaintiff] specifically agrees he will not interfere with [Defendant's] mining operations.

Under the lease, Plaintiff also agreed to build a gate at the end point of a road running between the two ponds and extending onto the portion of Defendant's real property that had not been leased to Plaintiff. The lease also stated that Plaintiff "shall keep the road between the river and ponds unobstructed[.]"

Beginning in June 2007, Plaintiff made significant landscaping improvements to his leasehold property, including draining the ponds and excavating debris and "draining [a] swamp." Plaintiff used one pond for the fishing of catfish (the catfish pond), and it opened for business in the summer of 2008. The second pond was used as a carp pond (the carp pond), and it opened for business in January 2009. Plaintiff testified that after both ponds were open, he averaged ten to fifteen fishermen "on Saturdays" during January and February 2009. Plaintiff testified that "[o]n a good day[,] " he would make \$200.00 to \$250.00, and that he had several "good days" prior to the dispute with Defendant.

Plaintiff testified that he began having problems with Defendant in February of 2009, after Plaintiff found Defendant placing "t-posts" in the road that ran between Plaintiff's leasehold property and Defendant's real property. Defendant contended that the t-posts were necessary because Plaintiff never erected the gate required under the lease. Plaintiff contended the gate was unnecessary because Defendant had directed the workers who were removing material from the ponds to dump "15 loads of dirt" across the road at the location where the gate was to be erected. Plaintiff further testified that

Defendant "harassed" Plaintiff's customers, and that Plaintiff's customer numbers decreased after Defendant erected the t-posts.

Plaintiff filed his complaint on 7 May 2009, seeking to recover, *inter alia*, damages for breach of contract, including "lost revenues and profits" arising from "a loss of direct customer traffic . . . in the amount of \$250.00 per day . . . for the remaining lease term of 13 years resulting in a total loss over the lifetime of the lease of Six Hundred Fifty Thousand and 00/100 Dollars (\$650,000.00)[.]" Defendant filed an answer and counterclaim, alleging, *inter alia*, that Plaintiff was in breach of contract because Plaintiff failed to erect a gate at the road and failed to keep the road unobstructed.

At the close of Plaintiff's evidence at trial, Defendant moved for a directed verdict on grounds that Plaintiff's evidence of future lost profits was too speculative. The trial court denied Defendant's motion as well as his renewed motion for directed verdict at the close of all the evidence. The jury returned its verdict finding Defendant in breach of contract and awarded Plaintiff damages. Defendant filed motions for JNOV and for a new trial. The trial court denied Defendant's motions in an order entered 22 September 2010. Defendant appeals. Further facts will be addressed below as necessary.

#### I. Issues

Defendant challenges the trial court's denial of his motions for directed verdict, for JNOV, and for a new trial, and contends the trial court erred in denying his motions for the following reasons: (1) Plaintiff failed to establish that he had fulfilled his own obligations under the lease, entitling Plaintiff to recover for breach of contract; (2) Plaintiff failed to plead that he was constructively evicted, which Defendant contends was a prerequisite to Plaintiff's action for breach of the covenant of "quiet possession" under the lease; (3) Plaintiff failed to present sufficient evidence to support an award of damages for future lost profits; and, (4) the trial court erred by failing to instruct the jury that an award of lost profits must be reduced to its present value. For the following reasons, we affirm in part, vacate in part, and remand for a new trial on the issue of damages.

## II. Standards of Review

In reviewing a ruling on a motion for a directed verdict, "the plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to [plaintiff], giving [plaintiff] the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Bryant v. Thalhimer Brothers, Inc.*, 113

N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993). "Where more than a scintilla of evidence has been presented by the plaintiff which supports each element of [plaintiff's] *prima facie* case, a directed verdict should be denied." *Id.* "A motion for a judgment notwithstanding the verdict is essentially the renewal of the directed verdict motion, and the standards are the same." *Id.* "In the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal." *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008).

### III. Breach of Contract/Discharge of Obligations

Defendant argues that the trial court erred by denying his motions for a directed verdict, for JNOV, and for a new trial on the grounds that Plaintiff failed to present sufficient evidence that he "discharged his own obligations under the lease[.]" Specifically, Defendant contends that Plaintiff failed to either fulfill, or to show that he was prepared to fulfill, two of the provisions of the lease agreement. First, Defendant contends that Plaintiff failed to "discharge his obligation under the [l]ease to keep the River Road unobstructed[.]" Next, Defendant contends that "the evidence was undisputed that Plaintiff did not gate the end point of the road leased to Plaintiff." Defendant presents two arguments concerning Plaintiff's actions.

First, that "[i]t is black letter law that '[a] party to a contract, in order to maintain an action for damages for its breach . . . must both allege and prove performance by him, or a waiver of performance by the party against whom relief is sought.'" Second, that Plaintiff's performance of his obligations under the contract was specifically set forth as a condition precedent in the lease.

Plaintiff contends that Defendant admitted during trial that the road was passable to traffic. Plaintiff also contends that, when Defendant directed workmen to place "30 truckloads of dirt and lakebed material" near the intended location of the gate, Defendant rendered the placement of a gate on the road unnecessary.

"The general rule governing bilateral contracts requires that if either party commits a material breach of the contract, the other party should be excused from the obligation to further perform. The question of whether a breach is material or immaterial is ordinarily a question of fact." *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987) (citations omitted). In the present case, the trial court provided the following instructions to the jury with respect to materiality:

Second, that . . . [P]laintiff failed to perform or abide by a material term of the

contract. A material term is one that is essential to the transaction; that is, a term which if omitted or modified would cause one of the parties to withhold assent or to bargain for a substantially different term. Not every term in a contract is material.

A parties [sic] failure to perform or abide by a term that is not material is not a breach of contract. In determining whether a term is material you may consider the following factors: The subject matter and purpose of the contract, the intentions of the parties, the scope of performance reasonably expected by each party, the prior dealings of the parties, and any custom, practice or usage so commonly known to other reasonable persons in similar situations that the parties knew or should have known of its existence.

In this case . . . [D]efendant contends and . . . [P]laintiff denies that . . . [D]efendant was ready, willing and able to perform his obligations. . . . [D]efendant further contends and . . . [P]laintiff denies that . . . [P]laintiff failed to perform or abide by a material term of the contract.

The jury found that Plaintiff did not breach the contract. In light of the trial court's instructions concerning whether Plaintiff breached a material term of the contract, the jury's finding must have been based on a determination that Plaintiff's actions constituting the alleged breach of contract were not material. Alternatively, the jury could have found that the terms of the contract that Plaintiff was alleged to have breached were not material terms. After full review of the



record, including the testimony concerning Defendant's actions, we find the evidence supports either conclusion by the jury. We therefore hold that there was sufficient evidence to support the jury's verdict as to breach of contract and that the trial court did not err in denying Defendant's motions for directed verdict, JNOV, and a new trial.

#### IV. Constructive Eviction

Defendant also argues that the trial court erred in denying his motions for directed verdict, for JNOV, and for a new trial because Plaintiff failed to show evidence of constructive eviction. Defendant characterizes Plaintiff's cause of action as being based on a breach of the covenant of quiet possession. Defendant argues that, "[i]f there is no constructive eviction, there is no breach of quiet possession." Defendant also contends that "Plaintiff did not contend he was constructively evicted and constructive eviction was a prerequisite to Plaintiff's claim for future lost profits damages for breach of the covenant of 'quiet possession'" under the lease. Plaintiff counters that "[t]he breach of the implied covenant of quiet enjoyment was never pled by . . . Plaintiff as a basis for relief either in his complaint or at trial." However, reviewing the record of this case, it appears that Defendant is raising this argument concerning constructive eviction for the first

time on appeal. It is well-settled that the "law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). We therefore do not address Defendant's arguments concerning Plaintiff's failure to prove constructive eviction, nor do we resolve the apparent disagreement between the parties as to the theory on which Plaintiff based his action.

#### V. Damages

Defendant next argues that the trial court erred in denying his motions for directed verdict, for JNOV, and for a new trial because Plaintiff failed to present sufficient evidence to support an award for lost profits. We agree.

This Court addressed the issue of lost profits in *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987). We noted the following applicable rules:

Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach. To prove lost profits, the injured party "must prove as part of his case both the amount and cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of loss must be shown with reasonable certainty." If an established business is wrongfully interrupted, the damages can be proved by showing the profitability of the business for a reasonable time before the wrongful act. It is only "when prospective profits

are conjectural, remote, or speculative, they are not recoverable."

*Id.* at 446, 361 S.E.2d at 613 (citations omitted).

Defendant contends that "Plaintiff's business was not established and had been open only four months at the time the lawsuit was filed." Plaintiff presented evidence of his earnings based on "several good days" with respect to the catfish pond, which opened several months earlier than the carp pond. Defendant also argues that "[t]here was no evidence of the number of 'good days' versus the number of 'bad days' (during which there could have been substantial losses)[.]" Defendant concludes that "[u]nder these facts, future lost profits are completely speculative and the jury should not have been allowed to award any damages on this basis."

However, contrary to Defendant's assertion, the jury did not award Plaintiff \$541,020.83 solely for "lost profits." Rather, the jury's verdict sheet indicated that the "amount . . . Plaintiff . . . [was] entitled to recover from . . . Defendant . . . for breach of contract" was \$541,020.83. There is no indication in the verdict as to which portion was awarded because of lost profits.

We note that Plaintiff retained possession of his leasehold property after Defendant's breach and that Plaintiff had been able to continue operating the fish ponds. Further, the actions

giving rise to this case were the actions of Defendant's "harassing" Plaintiff's customers. Thus, it was Defendant's interference with Plaintiff's operation of the fish ponds that gave rise to this case. We must review the evidence to determine whether Plaintiff presented more than speculative evidence that Defendant's interference with Plaintiff's business caused Plaintiff to suffer lost profits, and whether Plaintiff's "'prospective profits [were] conjectural, remote, or speculative[.]'" *Mosley*, 87 N.C. App. at 446, 361 S.E.2d at 613 (citations omitted).

Plaintiff asserts that he did offer evidence that, in draining and repairing the two ponds, he incurred \$84,000.00 in expenses. Plaintiff also contends that "he had incurred \$3,000.00 [in] expenses in obtaining the soil erosion plan[,] expenses for 350 bales of straw, grass seed, fertilizer, and soil erosion control fencing." Plaintiff also contends that he testified that he had "personally invested labor in the form of man hours planting grass, fertilizing, erecting soil erosion fencing, clearing pumps, and mowing in the amount of '74 weeks at 30 to 40 hours per week.'" However, subtracting the \$87,000.00 for which Plaintiff contends he offered direct proof, the jury still awarded an additional \$454,020.83. Thus, even if Plaintiff did invest 2,220 to 2,960 hours of labor, a

significant portion of the jury's award must have included damages based on lost profits. We find any connection between Defendant's interference and an award of damages for lost profits for the remaining thirteen years of the lease to be far too tenuous and speculative to support an award in the amount of several hundred thousand dollars. There is simply no evidence that Defendant's actions would negatively affect Plaintiff's profits for the next thirteen years, particularly because Plaintiff continues to be in possession of his leasehold property and continues to operate the fish ponds.

As we have concluded that the evidence presented by Plaintiff was too speculative to support an award for lost profits, and because the jury's award does not specify how much of the award was based on lost profits, Defendant is entitled to a new trial on the issue of damages. We therefore vacate the portion of the trial court's judgment awarding Plaintiff \$541,020.83 in damages, and we remand this case to the trial court for a new trial on the issue of damages. *See McNamara v. Wilmington Mall Realty Corp*, 121 N.C. App. 400, 412, 466 S.E.2d 324, 332 (1996). In light of this decision, we do not address Defendant's remaining argument as to damages. *See id.*

Affirmed in part, vacated in part and remanded for a new trial on the issue of damages.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).