

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA14-334  
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

BHOLA N. GUPTA,  
Plaintiff,

v.

Wake County  
No. 13 CVD 14441

ANGEL B. CARTER,  
Defendant.

Appeal by plaintiff from judgment entered 30 December 2013 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 10 September 2014.

*Hatch, Little & Bunn, LLP, by Justin R. Apple, for plaintiff-appellant.*

*No brief filed on behalf of defendant-appellee.*

DAVIS, Judge.

Bhola N. Gupta ("Plaintiff") appeals from the trial court's judgment awarding Angel B. Carter ("Defendant") \$1,500.00 on her claim for damages based on her allegations that Plaintiff breached his lease agreement with Defendant. On appeal, Plaintiff contends that the trial court (1) lacked subject matter jurisdiction to consider Defendant's claim for damages;

and (2) erred in determining that Plaintiff breached the lease agreement. After careful review, we affirm the trial court's judgment.

### **Factual Background**

On 13 September 2013, Defendant entered into a 12-month residential lease agreement with Plaintiff regarding property owned by Plaintiff located at 540 Marble Street in Raleigh, North Carolina. The terms of the lease agreement provided for monthly rental payments of \$750.00 in addition to an initial \$750.00 security deposit. On 18 October 2013, Plaintiff filed a summary ejectment action ("the First Small Claims Action") in Wake County Small Claims Court seeking (1) summary ejectment of Defendant from the premises; (2) rent arrearages plus interest; and (3) court costs. Plaintiff alleged in his complaint that Defendant had breached the terms of the lease agreement due to a "[f]ailure to pay full rent on time[.]"

On 28 October 2013, the matter was heard by Magistrate C. Pigford. The magistrate entered an order ejecting Defendant from Plaintiff's property and awarding Plaintiff rent arrearages in the amount of \$387.20 and other damages in the amount of \$37.50.

On the same day the magistrate's order was entered, Defendant filed a notice of appeal in Wake County District Court seeking a trial *de novo* pursuant to N.C. Gen. Stat. § 7A-228.

Defendant also commenced a separate small claims action ("the Second Small Claims Action") against Plaintiff, seeking damages in the amount of \$1,400.00 - representing the approximate combined amount of the security deposit and first month's rent that Defendant had paid under the lease. In her complaint, Defendant contended that Plaintiff had breached a condition precedent to the lease that obligated him to make certain repairs to the premises before Defendant moved in. Defendant asserted that she never actually moved into the leased premises because Plaintiff failed to make the promised repairs. On 2 December 2013, Magistrate Pigford dismissed the Second Small Claims Action without prejudice. In the section of the form order provided for the purpose of stating the grounds for dismissal, the magistrate wrote: "Pending appeal 13CVD014441 12/12/13[.]"<sup>1</sup>

On 12 December 2013, a trial *de novo* was held in Wake County District Court before the Honorable Debra Sasser on Defendant's appeal of the First Small Claims Action. The trial court entered judgment for Defendant, awarding her \$1,500.00 along with pre-judgment and post-judgment interest. The trial court additionally ordered that Plaintiff pay court costs. Plaintiff filed a timely notice of appeal with this Court.

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<sup>1</sup> 13CVD014441 was the docket number of the First Small Claims Action.

## **Analysis**

### **I. Subject Matter Jurisdiction**

Plaintiff's first argument on appeal is that the district court lacked subject matter jurisdiction in the appeal of the First Small Claims Action to consider Defendant's claim for damages. Plaintiff contends that Defendant's claim for damages was not properly before the district court because (1) Defendant did not assert her claim for damages as a counterclaim in the First Small Claims Action; and (2) while Defendant did assert a claim for damages in the Second Small Claims Action, she failed to appeal the magistrate's dismissal of her complaint in that action to district court.

It is well established that "[q]uestions of subject matter jurisdiction may properly be raised at any point, even for the first time on appeal. Our standard of review for questions of subject matter jurisdiction is *de novo*." *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 350, 673 S.E.2d 667, 670 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009).

The process by which appeals may be taken from decisions rendered in small claims court is established by statute. N.C. Gen. Stat. § 7A-228(a) provides, in pertinent part, that "[a]fter final disposition before the magistrate, the sole

remedy for an aggrieved party is appeal for trial de novo before a district court judge or a jury.” N.C. Gen. Stat. § 7A-228(a) (2013).

In the present case, it is undisputed that Defendant properly filed a timely appeal of the magistrate’s order in the First Small Claims Action in accordance with N.C. Gen. Stat. § 7A-228. Therefore, the district court was authorized to conduct a trial *de novo*.

A *de novo* proceeding pursuant to a specific statutory mandate requires the judge or jury to disregard the facts found in an earlier hearing or trial and engage in independent fact finding. A trial *de novo* is a new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.

*City of Asheville v. Aly*, \_\_ N.C. App. \_\_, \_\_, 757 S.E.2d 494, 499 (internal citations, quotation marks, and brackets omitted), *disc. review denied*, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_ (2014).

N.C. Gen. Stat. § 7A-229 provides that

[u]pon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed.

N.C. Gen. Stat. § 7A-229 (2013); see *Don Setliff & Assocs., Inc. v. Subway Real Estate Corp.*, 178 N.C. App. 385, 387, 631 S.E.2d

526, 528 (2006) ("Upon appeal from small claims court to district court, the district judge before whom the action is tried *may* order repleading or further pleading by some or all of the parties; *may* try the action on stipulation as to the issue; or *may* try it on the pleadings as filed. This statute gives discretion to the trial court as to whether further pleadings are needed or to try the case on the pleadings filed in small claims court . . . ."), *aff'd per curiam*, 361 N.C. 586, 650 S.E.2d 593 (2007).

Thus, pursuant to the authority conferred by N.C. Gen. Stat. § 7A-229, the district court could have allowed the parties to litigate all of the issues raised in *both* small claims actions through one of the methods provided for in this statute. However, because of Plaintiff's failure to submit a complete record of the district court proceedings, we are unable to determine whether the district court's consideration of Defendant's claim for damages was authorized under N.C. Gen. Stat. § 7A-229.

Our caselaw makes clear that "our review is limited to what appears in the record on appeal" and that "[i]t is appellant's duty to ensure that the record is complete. This Court will not consider matters discussed in a brief but not appearing in the record." *Morley v. Redden*, 194 N.C. App. 806, 810, 670 S.E.2d

586, 589 (internal citations omitted), *disc. review denied*, 363 N.C. 373, 678 S.E.2d 238 (2009).

If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. Similarly, Rule 9 of the North Carolina Rules of Appellate Procedure requires the appellant to include in the record on appeal so much of the evidence as is necessary for an understanding of all errors assigned. It is the duty of the appellant to ensure that the record is complete. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court. Without the transcript, we are unable to review plaintiff's argument that the trial court erred in making findings of fact that are unsupported by the evidence.

*Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) (internal citations, quotation marks, and ellipses omitted).

Here, the record on appeal filed by Plaintiff states that "[t]he 12 December 2013 trial on this action was recorded with an electronic recording device. Neither party has requested a transcript." Therefore, because Plaintiff has failed to provide us with a transcript of the proceedings that took place at the trial held in district court, we have no way of ascertaining whether the trial court's consideration of Defendant's claim for damages was based on a stipulation by the parties pursuant to

N.C. Gen. Stat. § 7A-229. Accordingly, because we cannot presume error on the part of a trial court and cannot determine whether such error actually occurred without the benefit of a complete record, we must dismiss Plaintiff's argument on this issue.

## **II. Sufficiency of Evidence**

Plaintiff's final argument on appeal is that the district court's determination that Plaintiff breached the lease was not supported by competent evidence.

[T]he applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding. Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

*Aly*, \_\_ N.C. App. at \_\_, 757 S.E.2d at 499 (internal citations, quotation marks, brackets, and ellipses omitted).

Specifically, Plaintiff challenges the italicized portions of findings of fact 11 and 12 set out below:

11. Defendant returned to the Property on September 18, 2013 and discovered that Plaintiff had still failed to remedy/repair the items on the list. Defendant contacted

Plaintiff requesting a refund of her first month's rent and security deposit since Plaintiff had failed to do the agreed upon work. Plaintiff agreed to refund Defendant her money, but that she would need to return the key to him and vacate the premises. That day, Defendant waited at the Property for several hours so that she could return the key to him as discussed. Plaintiff never appeared, and *Defendant left the key in the Property and vacated the Property.*

12. When Defendant and *the other adult on the lease, Felicia, vacated the Property on September 18, 2013,* other than Felicia leaving some canned goods behind, the Property was in the same condition as when Defendant signed the lease on September 13, 2013.

(Emphasis added.)

Plaintiff contends that the return of service information on the summons issued in connection with the First Small Claims Action indicates that a copy of the summons and complaint was left by a deputy sheriff with Defendant's tenant, Felicia Brown, at the leased premises on 21 October 2013 – over a month after the date on which the trial court found the premises had been vacated by Defendant and her tenant. For this reason, Plaintiff asserts that

[t]he evidence before the Court demonstrates that Defendant, not [Plaintiff], breached the Lease by failing to pay rent despite taking possession and residing in the Property. This evidence overwhelmingly demonstrates, and there is no evidence in the Record to the contrary, that Defendant continued residing in the Property long after [Plaintiff's] purported failure to

comply with the "conditions" thereby waiving said conditions.

However, as discussed above in relation to Plaintiff's subject matter jurisdiction argument, Plaintiff has failed to meet his burden of providing us with an adequate record that would enable us to conduct meaningful appellate review of this issue. The mere notation on the return of service suggesting that Defendant's authorized occupant *may* have been living on the subject premises beyond the date on which the trial court found Defendant had vacated the premises is an inadequate substitute for a fully developed record of witness testimony and evidence introduced at trial. Therefore, Plaintiff's argument on this issue is overruled.

#### **Conclusion**

For the reasons stated above, the judgment of the trial court is affirmed.

AFFIRMED.

Judge DILLON concurs.

Judge HUNTER, Robert C., concurs in the result only.

Report per Rule 30(e).