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NO. COA01-193

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

SUN LIFE ASSURANCE COMPANY,

Plaintiff,

v.

Wake County
No. 00 CVD 00157

PACK'N POST AT PRESTON, INC.,

Defendant.

Appeal by defendant from judgment filed 2 August 2000 by Judge William C. Lawton in Wake County District Court. Heard in the Court of Appeals 29 January 2002.

Michael W. Strickland & Associates, P.A., by Nelson G. Harris, for plaintiff-appellee.

Hatch, Little & Bunn, L.L.P., by William D. Young, IV and Tina L. Frazier, for defendant-appellant.

TYSON, Judge.

I. Facts

Pack'N Post at Preston, Inc. ("defendant"), as tenant, executed a five year lease ("Lease") in Preston Corners Shopping Center with Sun Life Assurance Company, Inc. ("plaintiff"), as successor in interest landlord, on 17 January 1995. The Initial Lease Term expired on 30 May 2000. The Lease contained a "Special Provision" which stated: "[t]enant shall have one (1), five (5) year option to extend the initial Lease Term" Defendant

was required to provide written notice to the plaintiff of its intention to extend, not less than 180 days prior to the expiration of the Initial Lease Term.

On 11 August 1997, plaintiff filed a complaint in summary ejectment for defendant's failure to timely pay the rent pursuant to the terms of the Lease. Plaintiff secured a judgment for possession against defendant, which defendant appealed to the District Court. During the pendency of the appeal, defendant again failed to pay in a timely fashion. In October 1997, plaintiff secured a Writ of Possession. Plaintiff and defendant settled this prior action on or about 9 March 1998. Thereafter, defendant failed to pay rent six times within the "applicable grace period" and tendered two worthless checks for payment of rent.

On 23 June 1999, defendant gave notice of its intent to exercise the option to extend the Lease term for an additional five years. Plaintiff informed defendant that it could not exercise the option due to defendant's failure to maintain a "history of payments" within the "applicable grace period" under the terms of the Lease.

Plaintiff commenced the present action for summary ejectment against defendant on 13 December 1999 for breach of the Lease by failure to pay rent. On 30 December 1999, plaintiff secured a judgment for possession. Defendant appealed to the District Court. On 6 January 2001, plaintiff timely filed an amendment to its complaint, adding a request for a declaratory judgment that defendant was not entitled to exercise the five year option to

extend pursuant to the terms of the Lease.

Defendant and plaintiff filed motions for summary judgment. While the motions were pending, plaintiff accepted the past due rent from defendant. The trial court granted summary judgment in favor of defendant as to summary ejectment and denied the remainder of both parties' motions. The action was tried before the court, without a jury, on the remaining issues. After denying both plaintiff and defendant's motions for a directed verdict, the trial court entered judgment in favor of plaintiff as to the declaratory judgment and denied defendant's counterclaim for specific performance. Defendant appeals. We affirm.

II. Issues

The issues presented are whether: (1) the trial court erred in denying defendant's motion to dismiss the declaratory judgment action and (2) the trial court erred in denying defendant's motion for summary judgment on the declaratory judgment action.

III. Motion to Dismiss

Defendant contends that no actual controversy exists to support the declaratory judgment action and the trial court erred in denying its motion to dismiss. We disagree.

Both parties correctly state that our courts require an actual controversy for a declaratory judgment action brought under N.C.G.S. § 1-254. See *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) ("Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional

prerequisite to an action thereunder, our case law does impose such a requirement.").

The trial court found that on 23 June 1999, defendant gave timely notice to exercise the option to extend the Initial Lease Term. On 10 August 1999, plaintiff notified defendant that it had forfeited its right to exercise the option by failure to maintain a history of payments within the "applicable grace period" under the Lease. We conclude that there was an actual controversy between the parties. This assignment of error is overruled.

IV. Motion for Summary Judgment and Declaratory Judgment

Defendant argues that the trial court erred in denying its motion for summary judgment and granting declaratory judgment in favor of plaintiff on the issue of the option to extend the Lease.

A. Summary Judgment

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c); *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

In the present case, there was a genuine issue of material fact as to whether defendant had failed to maintain a history of payments within the grace period and the definition of "applicable grace period" in the Lease. The trial court properly denied defendant's motion for summary judgment.

B. Declaratory Judgment

Defendant argues that the trial court erred in finding "an implied grace period" within the Lease and finding the grace period to be ten days. This argument is without merit.

The provision at issue in the declaratory judgment action is defendant's option to extend, found in the "Special Provisions" of the Lease. This provision granted defendant the option to extend the original Lease term for one additional five year term upon proper and timely notice. The provision further provided that defendant may not exercise the option if:

- 1) Tenant is not occupying and doing business from the premises at the time the option is exercised,
- 2) Tenant is in default under this Lease,
- 3) Tenant has not maintained a history of payments within the applicable grace period, if any, provided under this Lease,
- 4) The occupancy of the premises is an assignee, sub-lease, or successor to the original Tenant.

The term "applicable grace period" was not defined, creating an ambiguity within the Lease. See *Holshouser v. Shaner Hotel Group Properties One Limited Partnership*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999) ("[a]n ambiguity exists where the 'language of the contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.'" (quoting *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996))); *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989) (a contract is ambiguous when the "writing leaves it uncertain as to what the agreement was"). "When an agreement is ambiguous and the

intention of the parties is unclear, interpretation of the contract is for the jury." *Id.* In interpreting an ambiguous term, the trial court may refer to relevant extrinsic evidence, not to contradict, but clarify the term. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 442, 361 S.E.2d 608, 611 (1987) (citations omitted).

While "applicable grace period" was not defined in the Lease, witness testimony established that "applicable grace period" customarily meant that period of time after rent is due but before a late payment, fee, penalty, or charge can be assessed. The Lease states "TENANT shall pay all Rent when due and payable," that "[m]inimum rent shall be due the first day of each month," and "[i]f TENANT shall fail to pay any Rent within ten (10) days of the due date, TENANT shall be obligated to pay a late payment charge"

Defendant argues that the course of performance between the parties established that the "applicable grace period" was approximately twelve to twenty-seven days. Plaintiff sent defendant written notice in June 1996 and again in July 1996 which informed defendant the Lease required all rent payments to be paid by the first of the month and are considered late after the tenth of the month. Any "flexibility" or delay exhibited by plaintiff in collecting rent from defendant did not establish a grace period. Defendant's argument, if accepted, would: (1) punish plaintiff for its indulgence or forbearance for defendant's default, (2) penalize plaintiff for its aid to defendant, and (3) force plaintiff to seek

removal of defendant at the earliest possible default date.

We conclude that the extrinsic evidence established that "applicable grace period" meant payment within ten days after rent was due. This assignment of error is overruled.

Defendant next argues that the trial court erred in finding that defendant failed to pay rent within the "applicable grace period," and declaring that defendant was not entitled to exercise the option to extend the Lease.

Defendant contends that the evidence presented was unreliable and inconclusive. We disagree. The record establishes that from February 1996 to July 1997, plaintiff sent defendant seventeen letters stating that defendant was past due in rental payment. The record also discloses that defendant failed to pay its rent by the tenth of the month in September 1998, November 1998, January 1999, May 1999, August 1999, and October 1999.

Defendant questions the number of payments sufficient to constitute "a history of payments" outside the grace period. We conclude that thirteen late rental payments between January 1996 through July 1997 and six additional late rental payments between September 1998 through October 1999 are sufficient evidence to constitute a history of payments outside the grace period to bar defendant from exercising its option to extend the Lease term.

C. Waiver

Defendant's remaining assignments of error relate to evidence of its history of payments and defaults prior to March 1998. Defendant argues that plaintiff's waiver to claims arising from

defaults, in connection with a settlement agreement between the parties in March 1998, is a waiver for all purposes and estops plaintiff from using its prior payment history, before March 1998, to prove a history of payments outside the grace period.

Plaintiff did not include the 9 March 1998 letter memorializing the parties settlement agreement in the record. The trial court, in its judgment, quoted the pertinent phrase as "[m]y client [plaintiff] will waive its claims that there have been any defaults under the Lease Agreement, through the date of this letter."

Defendant cites two cases from other jurisdictions which are inapposite. In both cases the landlord had either: (1) a long acquiescence in accepting late payment of rent without objection or (2) failed to complain of the alleged defaults. In the present case, plaintiff repeatedly exercised its remedies for late payment and default. Plaintiff is not estopped under the principles of equity present in those cases cited by defendant.

Here, the trial court found that the express waiver of claims "that there have been any defaults" did not operate to waive plaintiff's right to assert defendant's history of late payments to prevent defendant's exercise of the option to extend the Lease. We disagree. All of the grounds listed under the "Special Provisions," which prohibit defendant from exercising the option, are defaults under the Lease. Therefore, we construe the waiver by plaintiff to bar evidence of defendant's payment history before 9 March 1998.

However, defendant failed to pay its rent within the "applicable grace period," six times in eleven months, after the March 1998 settlement. This fact alone is a sufficient "history of payments" to warrant plaintiff's refusal to honor defendant's option to extend the original Lease term.

We affirm the judgment declaring that defendant was not entitled to exercise the option to extend the Lease term.

Affirmed.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).