NO. COA01-774

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

CLARK L. HARRIS,

Plaintiff,

v. Pasquotank County
No. 00 CVS 449

THE LAMAR COMPANY, L.L.C. d/b/a LAMAR ADVERTISING COMPANY - NORTH CAROLINA, AND THE DEPARTMENT OF TRANSPORTATION,

Defendants.

Appeal by defendants from order entered 8 February 2001 by Judge W. Russell Duke, Jr. in Superior Court, Pasquotank County. Heard in the Court of Appeals 27 March 2002.

Herring, McBennett, Mills & Finkelstein, PLLC, by Kenneth C. Haywood and Elizabeth A. Kane, for the plaintiff-appellee.

Waller Law Firm, by Betty S. Waller, for the defendant-appellant Lamar Company, L.L.C., d/b/a Lamar Advertising Company-North Carolina.

WYNN, Judge.

This dispute arose after the expiration of a sign-lease agreement between Lamar Company, L.L.C., d/b/a Lamar Advertising Company-North Carolina, and Clark L. Harris, the landowner. Based on evidence showing that Lamar Company failed to promptly remove

its billboard signs after the expiration of the lease, the trial court summarily declared the signs as abandoned. We reverse.

Clark Harris brought this declaratory judgment action in July 2000 against Lamar Company and the North Carolina Department of Transportation. He alleged, and Lamar Company does not dispute, that the lease agreement allowing Lamar Company to erect two billboard signs on property in Pasquotank County expired on 15 August 1999 after the lease-listed landowners, Clark Harris and Jesse Harris, informed Lamar Company that the lease would not be renewed. Indeed, Lloyd Johnson, Lamar Company's lease manager, confirmed the 8 August 1999 lease expiration date by letter to Jesse Harris, and indicated that the billboard signs would be dismantled on or before 29 September 1999. However, according to Clark Harris, Lamar Company never attempted to remove the structures from his property before 15 August 1999 or thereafter. Clark Harris therefore brought this action to declare his ownership of the sign structures.[1] Following entry of summary judgment by Judge W. Russell Duke, Jr., Lamar Company appealed.

In a declaratory judgment action, summary judgment is appropriate 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 a party is entitled to judgment as a matter

[1] Clark Harris voluntarily dismissed the North Carolina Department of Transportation from the action without prejudice before the summary judgment motion hearing.

of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2001); *see Meachan v. Board of Education*, 47 N.C. App. 271, 275, 267 S.E.2d 349, 351 (1980).

On appeal, Lamar Company contends that the trial court improperly awarded summary judgment in favor of Clark Harris because the law liberally allows for the removal of trade fixtures such as billboard signs by a tenant whose lease has expired. Under the particular facts in this case, we agree that the trial court erred in granting summary judgment to Clark Harris.

We addressed an issue similar to the one in this case in *National Advertising Co. v. N.C. Dept. of Transportation*, 124 N.C. App. 620, 478 S.E.2d 248 (1996). In that case, following the termination of a sign-lease agreement with the plaintiff, the North Carolina Department of Transportation on 29 March 1994 instructed the plaintiff to remove its sign. When the plaintiff failed to remove the sign by August 1994, the Department of Transportation moved the sign, prompting the plaintiff to bring an inverse condemnation action. The undisputed facts in that case showed that the plaintiff was not hindered or prevented from removing its sign within the period between the Department of Transportation's notice to plaintiff to remove its sign and the Department of Transportation's subsequent removal of the sign. Thus, this Court reversed the trial court's ruling that the Department of Transportation must pay the plaintiff just compensation for its sign, stating:

> [M]ore than 90 days prior to the actual removal of the sign in August 1994, the

> [Department of Transportation] notified [the plaintiff] that it must remove its sign. We conclude that . . . the [Department of Transportation] effectively terminated any purported lease that [the plaintiff] may have had with the [Department of Transportation] by virtue of the [Department of Transportation's] purchase of the property.
>
> Thus, at the time the sign was removed, [the plaintiff] did not have a leasehold interest in the land on which its sign was located and was not entitled to exhibit its sign there. [The plaintiff] was given a reasonable time to remove the sign. By not doing so, it effectively abandoned its sign. *See* 51C C.J.S. *Landlord and Tenant* § 317(b) (1968).

124 N.C. App. at 624-25, 478 S.E.2d at 251.

In his appeal, Harris contends that *National Advertising*:

> stands for the principle that where a billboard is not removed by a tenant within a reasonable time after the termination of a lease, the structure is in effect abandoned and the right of removal is lost. North Carolina follows the minority view that a tenant may remove its trade fixture within a reasonable time after the lease termination.

While we agree with this general statement of law, our decision to reverse summary judgment in this case is guided by our conjunctive consideration of this Court's opinion in *Oil Co. v. Riggs*, 13 N.C. App. 547, 186 S.E.2d 691 (1972). In that case, this Court discussed the right of a tenant or lessee to remove trade fixtures following the expiration of the leasehold. *Riggs* noted that trade fixtures are distinct from the land and are treated as belonging to the tenant. *Id.* at 552, 186 S.E.2d at 694-95. Even trade fixtures attached to the land belong to the tenant and may be removed during the lease term, and sometimes even following the lease expiration. *Id.* at 552, 186 S.E.2d at 695. Quoting at length from *Railroad v.*

Deal, 90 N.C. 110 (1884), this Court in *Riggs* recognized that some authorities presume that a tenant's failure to remove its attached trade fixtures within the lease term effectively relinquishes or abandons any such right of removal:

> "in favor of the landlord, but such presumption cannot arise, where the facts and circumstances, and the nature of the property, and the uses to which it is devoted, combine to rebut such a presumption. If the tenant yields possession and leaves the structure standing, this fact may be *evidence* . . . of abandonment of it[.]"

Riggs, 13 N.C. App. at 553, 186 S.E.2d at 695 (quoting *Deal*, 90 N.C. at 113) (emphasis added).

Reading *National Advertising* and *Riggs* together, we conclude that the question of whether a tenant has abandoned a trade fixture by failing to remove it prior to the expiration of the lease term or thereafter requires a close examination of the particular facts and circumstances at issue, in order to determine whether the tenant failed to remove the trade fixture within a *reasonable* time. A tenant's failure to remove the trade fixture upon the expiration of the lease term may be *evidence* of abandonment, but is not in itself conclusive. For instance, in *National Advertising* the Department of Transportation wrote to the plaintiff three times between March and July 1999 warning that it would remove the sign if the plaintiff failed to do so. This Court recognized that the plaintiff was required to remove its sign within a reasonable time after the expiration of the lease agreement, and concluded that the plaintiff "had ample opportunity to do so but *refused*." 124 N.C. App. at 626, 478 S.E.2d at 251 (emphasis added). "By *refusing* to

remove its sign within a reasonable time after termination of the tenancy, [the plaintiff] effectively abandoned the sign." *Id.* (emphasis added). Thus, despite the fact that the sign was a trade fixture, there was ample undisputed evidence in *National Advertising* to support the legal presumption that the plaintiff abandoned its sign.

In contrast, in the case at bar there is no evidence of record that Lamar Company ever *refused* to remove its sign or *intended* to abandon it. The fact that Lamar Company failed to remove it prior to the termination of the lease on 15 August 1999 may be *evidence* of abandonment, but not conclusively so. Indeed, Johnson's 28 June 1999 letter to Jesse Harris indicated Lamar Company's intent to remove the signs "on or before September 29th, 1999." In his affidavit supporting Lamar Company's summary judgment motion, Johnson affied that Lamar Company's intent was to remove the signs if a new lease agreement could not be negotiated with the Harrises. Johnson further indicated in his affidavit that the occurrence of Hurricane Floyd in early September 1999 hindered its ability to remove the signs. In its answer to plaintiff's complaint, Lamar Company denied Clark Harris' allegation that it never attempted to remove the signs.

Additionally, there is evidence that there were ongoing negotiations for a new lease agreement extending well after the lease expiration on 15 August 1999. Johnson affied that in late September or early October 1999, he conversed with Jesse Harris concerning a new lease agreement at double the prior rate; Johnson

then memorialized this conversation in a letter to Jesse Harris dated 8 October 1999. Although plaintiff states in his brief that "the record shows no evidence of ongoing negotiations between the parties," the record includes a letter from attorney Kenneth Haywood (plaintiff's attorney in this matter) on behalf of Jesse Harris to Johnson dated 14 October 1999, responding to Johnson's 8 October 1999 letter. Therein, Haywood states that "Mr. [Jesse] Harris has indicated to me that he [Jesse Harris] asked you [Lloyd Johnson] to give him your highest offer for rental[.]"

These facts and circumstances indicate at the very least some confusion concerning the true owner of the property upon which the signs are located. Although plaintiff affied in support of his summary judgment motion that he is the sole owner of the property, the leases list both plaintiff and Jesse Harris as the landowners. Furthermore, plaintiff's complaint (prepared and signed by Kenneth Haywood) states that plaintiff "owns real property . . . which is the subject of this Complaint"; plaintiff is not alleged to be the *sole* owner of said property. Additionally, the complaint acknowledges that both plaintiff and Jesse Harris met with Johnson on 17 June 1999 to discuss the leases. Defendant Lamar Company's answer indicates its belief that both plaintiff and Jesse Harris own the property in question. The confusion over the correct property owner(s) may have contributed to the delay in removing the signs.

There is also evidence that there were continuing negotiations between Lamar Company and Jesse Harris (perhaps as a result of the

ownership confusion) following the expiration of the leases on 15 August 1999 concerning new leases for the signs. Notably, there is also evidence that, prior to Lamar Company's intended removal date of 29 September 1999, Hurricane Floyd intervened and may have hindered Lamar Company's ability to remove the signs.

Unlike *National Advertising*, we cannot conclude in the instant case as a matter of law that there is ample undisputed evidence that Lamar Company intended to abandon its signs. There was never any outright refusal by Lamar Company to remove the signs. Rather, at all times Lamar Company indicated and communicated its intent to remove the signs. Whether Lamar Company's failure to do so resulted in its abandonment of the signs requires a determination whether Lamar Company failed to remove them within a reasonable time, which depends upon the surrounding facts and circumstances.

> [W]hat is [a] "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by [a] jury upon proper instructions on the particular circumstances of each case. [Citations omitted.]
>
> The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law. Whether the question of reasonable time is one of fact or law must "from the very nature of things" depend upon the circumstances of each particular case[.]

Claus v. Lee, 140 N.C. 552, 554-55, 53 S.E. 433, 434-35 (1906). The cumulative evidence before us raises a genuine issue of material fact whether Lamar Company failed to remove the signs within a reasonable time. Accordingly the trial court's entry of

summary judgment in Clark Harris' favor was improper and is hereby vacated, and the matter remanded to the trial court.

Vacated and remanded.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).