NO. COA05-1582

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

MOHAMED SALEH ZUBAIDI and
ABDO A. HAFEED,
Plaintiffs,

v. Durham County
No. 03 CVS 3123

EARL L. PICKETT ENTERPRISES,
INC., and EARL L. PICKETT,
Defendants.

Appeal by plaintiffs from orders entered 1 June 2004 by Judge Donald W. Stephens and 8 March 2005 by Judge W. Osmond Smith, III, and judgment entered 23 March 2005 by Judge Robert H. Hobgood in the Superior Court in Durham County. Heard in the Court of Appeals 8 June 2006.

Wardell & Associates, P.L.L.C., by Bryan E. Wardell, for plaintiff-appellants.

Thomas F. Loflin, III, for defendant-appellees.

HUDSON, Judge.

In June 2003, plaintiffs filed this action against defendants based on a commercial lease of property owned by defendants. The plaintiffs asserted claims of breach of the lease agreement, slander *per se*, tortious interference with contract, and unfair and deceptive trade practices. In March 2005, after a jury trial, the trial court directed a verdict against plaintiffs as to all claims. Plaintiffs appeal. For the reasons discussed below, we affirm.

The evidence tends to show that on 1 July 1998, plaintiffs and

defendants entered into an asset purchase agreement whereby plaintiffs purchased certain assets including the right to operate a convenience store and gas station in Durham, the Town 'N Country. An express condition of the sale required plaintiffs to enter into a lease with defendants, owners of the store, for use of the premises for $4000.00 monthly. The initial lease, entered in July 1998, had a five-year term ending 30 June 2003, with the right to renew. Paragraph 41 of the lease, pertaining to this right, states that plaintiffs had the right, "upon 180 days written notice prior to the end of the term, to extend this Lease for three additional terms of five years each," but that "[n]o exercise of this option shall be effective if the Tenant shall be in default hereunder as of the date of such attempted exercise." Additional provisions of the lease also required that plaintiffs provide liability insurance for the premises and the business operated thereon.

In March 2000, defendants attempted to remove plaintiffs from the leased premises, alleging plaintiffs' default in the terms and conditions of the lease. Plaintiffs obtained a restraining order and preliminary injunction preventing their removal. In August 2001, after a jury trial, plaintiffs were found to be in substantial compliance with the lease and the jury awarded plaintiffs $212,001.00 in damages for wrongful eviction, breach of contract, conversion and punitive damages. That lawsuit is not at issue here. *Zubaidi v. Pickett,* 164 N.C. App. 107, 595 S.E.2d 190, *aff'd* 359 N.C. 76, 605 S.E.2d 151 (2004).

Under the 180-day notice requirement for renewal of the lease,

plaintiffs were required to give notice of their intent to renew on or before 10 January 2003. At trial, plaintiffs argued that they attempted to serve defendants several times in December 2002 and January 2003 and that defendants refused to accept any certified items from them. Plaintiffs' counsel sent a letter dated 3 March 2003 to defendants stating that plaintiffs intended to exercise their option to renew the lease. On 28 March 2003, defendants' counsel wrote plaintiffs' counsel and informed him of defendants' intent to take possession of the premises on 10 July 2003, for failure to exercise the renewal option within the applicable time frame. Plaintiffs allege that thereafter they sought to sell their business and that they secured a bona fide purchaser, but that defendants persuaded the purchaser not to perform.

In June 2003, plaintiffs filed this lawsuit and the court granted a preliminary injunction ordering that the parties maintain their landlord/tenant relationship pending the outcome of this litigation. Defendants asserted several counterclaims, including that plaintiffs failed to provide insurance policies as provided by sections 11 and 13 of the lease. Defendants maintained that plaintiffs only provided policies for the periods of March 2000 to March 2001, and March 2001 to March 2002, and that these only covered plaintiffs' personal property and exterior building glass and did not name defendants as an insured party, as required.

In their first argument, plaintiffs assert that the trial court erred in granting defendants' motion for a directed verdict as to all of plaintiffs' claims. Plaintiffs argue each of these

claims separately, and we address them separately as well. In determining whether to grant a motion for a directed verdict, "the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence." *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 531, 551 S.E.2d 546, 551-52 (2001). Thus, the trial court must resolve all contradictions, conflicts and inconsistencies in the evidence in favor of the non-moving party. *Eatman v. Bunn*, 72 N.C. App. 504, 506, 325 S.E.2d 50, 52 (1985). The trial court may grant a directed verdict only where "the evidence is insufficient, as a matter of law, to support a verdict for the non-moving party." *Id.* We review a trial court's grant of a motion for directed verdict *de novo*. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004).

First, plaintiffs argue that the court erred in granting a directed verdict on their claims regarding their lease with defendants. We disagree. Plaintiffs argue that they established that defendants thwarted their efforts to comply with the renewal clause of the lease. They assert that they sent a letter of renewal to defendant Pickett within 180 days of the end of the lease term, as required by paragraph 41 of the lease. However, the trial court based its directed verdict on evidence showing that plaintiffs were already in default of the insurance provisions of the lease and thus did not have the right to renew, per paragraph 41's express provision that "[n]o exercise of this option shall be

effective if the Tenant shall be in default hereunder as of the date of such attempted exercise." At trial, defendants presented evidence that they sent a certified letter to plaintiffs in October 2002, which was picked up by an unknown signer at the store location, informing them that they were in default of the insurance provisions and that they must procure and pay insurance coverage for the premises. In June 2004, the trial court had ordered plaintiffs to produce, "[a]ll existing insurance policies obtained by the Plaintiffs pursuant to or required by the Lease Agreement," within 10 days of the signing of the Order. This pretrial order also stated that:

> Plaintiffs at trial or in support of or in opposition to any dispositive motions shall not provide testimony about or seek to introduce any insurance policies not already provided at the Hafeed deposition on October 1, 2003, unless the Plaintiffs produce them in obedience to this Order within the time allowed in this Order.

At the time of jury selection, plaintiffs' counsel acknowledged that no new insurance policies had been provided yet and the court ruled that it was bound by the pretrial order and would not allow plaintiffs to introduce an invoice or an account status statement from an insurance agency. We overrule this assignment of error.

Plaintiffs next argue that the court erroneously directed a verdict as to their tortious interference with contract claim. To establish a claim for tortious interference with contract, a plaintiff must show:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third

> person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). However, this tort normally applies to "outsiders" to the contract, an outsider being "one who was not a party to the [breached] contract and who had no legitimate business interest of his own in the subject matter thereof." *Smith v. Ford Motor Co.*, 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976). In contrast, "a non-outsider is one who, though not a party to the [breached] contract, had a legitimate business interest of his own in the subject matter." *Id.* A non-outsider, while not wholly immune from liability for tortious interference with contract, will only be liable if he acted with legal malice. *Varner v. Bryan*, 113 N.C. App. 697, 702, 440 S.E.2d 295, 298 (1994). "A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties." *Id.* "The plaintiff's evidence must show that the defendant acted without any legal justification for his action." *Id.* Without such a showing, a plaintiff has not produced sufficient evidence, as a matter of law, to support a judgment in its favor. *See id.* at 702, 440 S.E.2d at 298-99.

Here, as defendant Pickett owns the property the business is on and acts as landlord to the owners of Town 'N Country, who lease the property from him, we conclude that he was a non-outsider to any contract that plaintiffs had for the sale of Town 'N Country.

Indeed, plaintiffs contend that they could not sell the business to their prospective buyer because Pickett refused to grant the buyers a lease. Plaintiffs' witness testified that the buyers sought a straight twenty-year lease from Pickett rather than a five-year renewable lease like plaintiffs'. We conclude that plaintiffs have thus failed to "show that the defendant acted *without any legal justification* for his action." *Varner*, 113 N.C. App. at 702, 440 S.E.2d at 298. Accordingly, we overrule this assignment of error.

Plaintiffs also contend that the trial court erroneously granted defendants' motion for directed verdict as to the claim for slander *per se*. Slander *per se* includes "an allegation that impeaches the plaintiff in his trade, business, or profession." *Boyce & Isley v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002), *disc. review denied, dismissed,* 357 N.C. 163, 580 S.E.2d 361 (2003). "False words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*." *Id.* at 30, 568 S.E.2d at 898. Although plaintiffs' testified that they had heard from others that defendant Pickett told people that they were bad businessmen, plaintiffs presented no evidence as to what exactly Pickett said or to whom, specifically, he said it. We conclude that the trial court did not err in granting defendants' motion for directed verdict on this claim.

Plaintiffs also contend that the trial court erred in granting a directed verdict to defendants on their unfair and deceptive

trade practices ("UDTP") claim. Plaintiffs based this claim on their allegation that defendants frustrated their compliance with the renewal terms of the lease. Since, as discussed earlier, the trial court correctly held that any notice of renewal was ineffective as a matter of law and directed a verdict against plaintiffs on the lease renewal issue, we conclude that the court also correctly directed a verdict against plaintiffs on the UDTP claim.

Next, plaintiffs argue that the trial court erred by refusing to dismiss defendants' counterclaims. On 9 March 2005, defendants voluntarily dismissed their counterclaims for breach of the asset purchase agreement and lease entered into between the parties in July 1998. The only counterclaim defendants did not dismiss was their request for declaratory judgment regarding whether plaintiffs properly renewed the commercial lease, which declaration was also sought by plaintiffs and was litigated as discussed above. Plaintiffs contend that the trial court should have granted summary judgment as to the voluntarily dismissed counterclaims, because of the possibility that defendants could refile the counterclaims, as the voluntary dismissal operated without prejudice. N.C. Gen. Stat. § 1A-1, Rule 41 (2004). However, this Court has held a voluntary dismissal without prejudice under Rule 41 leaves "nothing in dispute, and render[s] the trial court's denial of [plaintiff's] motion for summary judgment moot." *Teague v. Randolph Surgical Assocs., P.A.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1998). We overrule this assignment of error.

Finally, plaintiffs argue that the trial court erred in ordering the pre-trial exclusion of evidence of certain insurance policies, and then erred at trial in excluding evidence regarding payment of their insurance premiums. We disagree. As discussed earlier, the trial court ordered, in June 2004, that plaintiffs could not introduce any further new insurance policies unless plaintiffs produced such policies within ten days of the order. The trial court issued this order in response to defendants' motion for discovery sanctions. We review a trial court's ruling on discovery sanctions for abuse of discretion and will not disturb it unless the ruling is so arbitrary that it could not have been the result of a reasoned decision. *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). The record indicates that defendants had made repeated requests for these documents and that the trial court had ordered plaintiffs to bring them to their depositions, which they did not do. In *Joyner v. Mabrey Smith Motor Co.*, this Court upheld discovery sanctions including striking all of defendant's defenses from the pleadings for failure to answer interrogatories, citing Rule 37. 161 N.C. App. 125, 129, 587 S.E.2d 451, 454 (2003). Rule 37 allows a court to impose sanctions by

> refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence[.]

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)b (2003). Thus, we conclude that the trial court here did not abuse its discretion in ordering plaintiffs to produce new insurance policies within ten days of the

order, or not at all. As we conclude that the trial court did not abuse its discretion in entering this order, we also conclude that the court did not err in enforcing the order at trial by excluding evidence of insurance policies not produced until trial.

Affirmed.

Judges MCCULLOUGH and TYSON concur.

Report per rule 30(e).