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NO. COA06-436

NORTH CAROLINA COURT OF APPEALS

Filed: 20 February 2007

WELLONTON LIMITED PARTNERSHIP,
Plaintiff,

v.

Columbus County
No. 05 CVD 774

YVETTE HUINS,
Defendant.

Appeal by plaintiff from judgments entered 10 June 2005 and 15 November 2005 by Judge Napoleon B. Barefoot, Jr., Columbus County District Court. Heard in the Court of Appeals 13 December 2006.

Manning, Fulton, & Skinner, by Michael S. Harrell and Evan B. Horwitz, for plaintiff-appellant.

No brief filed by defendant-appellee.

BRYANT, Judge.

Wellonton Limited Partnership (plaintiff) appeals from judgments entered 10 June 2005 and 15 November 2005, denying plaintiff's motion for summary judgment and the judgment consistent with a jury verdict denying plaintiff's possession of the leased premises (action for summary ejectment).

Plaintiff owns and operates an apartment complex called "Wellonton Apartments" in Chadbourn, North Carolina. Yvette Huins (defendant) entered into a written lease with plaintiff on 4

October 2002. On 12 April 2004, defendant signed a lease addendum which extended her lease through 1 June 2005.

In February of 2005, Detective W. H. Little of the Columbus County Sheriff's Office investigated defendant on suspicion of narcotics distribution. During that investigation, Detective Little conducted surveillance of defendant in and around her apartment. As part of the investigation, Detective Little conducted a "controlled purchase" whereby law enforcement uses a reliable informant to purchase drugs or contraband. Thereafter, Detective Little followed the informant to defendant's apartment and observed the informant and defendant engage in an alleged controlled purchase of marijuana. Based upon this information, Detective Little obtained a search warrant for defendant's apartment. During the search of defendant's apartment, an odor of recently smoked marijuana was detected.

On 29 April 2005, plaintiff sent a letter entitled "Notice Of Non-Renewal Of Lease/Termination of Tenancy" giving defendant notice that her lease would not be "renewed for good cause and material non-compliance with the substantial provisions of [the] lease: Section Eight, par. 11, where [defendant] agreed not to use the premises for unlawful purposes; not to engage in or permit guests to engage in unlawful activities in the unit, or in the common areas and Section Eighteen, Provisions for Drug-Free Housing." The letter noted defendant's alleged conduct related to Detective Little's investigation. Plaintiff informed defendant she

must vacate her apartment at the end of her lease term, 1 June 2005.

Plaintiff filed a magistrate's complaint against defendant in the Small Claims Division of Columbus County District Court on 7 June 2005. On 10 June 2005, the presiding magistrate granted possession of the premises to plaintiff. Defendant filed notice of appeal to the Columbus County District Court. Plaintiff then moved for summary judgment and plaintiff's motion was denied. Subsequently, the case was tried before a jury which returned a verdict in favor of defendant. The trial court entered judgment on 15 November 2005. Plaintiff appeals.

On appeal plaintiff argues the trial court erred by: (I) denying plaintiff's motion for summary judgment; (II) denying the admission of the search warrant and application for the search warrant; and (III) denying plaintiff's motion for a directed verdict or, in the alternative, denying plaintiff's motion for judgment notwithstanding the verdict. For the foregoing reasons, we affirm.

I

Plaintiff argues the trial court erred by denying the motion for summary judgment. Plaintiff contends summary judgment as a matter of law should have been granted to Wellonton Limited Partnership because "[d]efendant failed to raise any factual dispute in opposition to the summary judgment motion." We disagree.

"The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Gattis v. Scotland County Bd. of Educ.*, 173 N.C. App. 638, 639, 622 S.E.2d 630, 631 (2005) (alteration and citation omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. *Beneficial Mortg. Co. v. Peterson*, 163 N.C. App. 73, 78-79, 592 S.E.2d 724, 728 (2004) (quotation omitted).

In this case, plaintiff argues because defendant failed to rebut evidence that defendant had allegedly violated her lease terms, the trial court erred in granting its motion for summary judgment. The trial court denied the motion and proceeded to trial on the merits. Even if the trial court improperly denied the summary judgment motion based on allegations of defendant's breach and defendant's failure to present rebuttal evidence, a trial on the merits ensued. Where a jury trial ensued and determined the issue of who was entitled to possession of the apartment, plaintiff's challenge of the denial of the summary judgment fails. *Id.* ("Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been

determined on the merits by the trier of the facts, either judge or jury.”). This assignment of error is overruled.

II

Plaintiff argues the trial court erred by denying the admission of the search warrant and application for search warrant based on the fact that defendant “opened the door” upon cross-examination of Detective Little. Specifically, plaintiff sought to question Detective Little as to defendant’s alleged drug activity in and around her apartment.

Written materials sought to be admitted at trial must be properly authenticated, and must satisfy the requirements of the “best evidence rule.” N.C. Gen. Stat. § 8C-1, Rule 1002 (2005). Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule pursuant to N.C. Gen. Stat. § 8C-1, Rules 803 and 804. *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Plaintiff sought to introduce both the application of the search warrant and the search warrant itself. However, outside the presence of the jury, the trial court determined the application for the search warrant was “not verified and sworn to in front of the magistrate, which it has to be in order . . . to serve it. And . . . it is all hearsay.” The trial court stated that

[Detective Little] can testify as to what he saw and what went on with him at [defendant’s apartment], but he can’t testify as to what somebody else told him[.] . . . [Detective Little] can certainly testify [that he did get a search warrant based on the information in the application] . . . [b]ut as to the

information that's included in that search warrant, no.

Plaintiff's brief correctly states that in questioning Detective Little "[d]efendant only referenced items in the search warrant and application for search warrant that related to things that Detective Little did not do or did not find in relation to the Defendant's alleged drug activity." This did not "open the door" to the admission of evidence which was not properly authenticated. The trial court properly found and concluded that the search warrant and search warrant application did not comport with the best evidence rule and were therefore inadmissible. This assignment of error is overruled.

III

Plaintiff argues the trial court erred in denying its motion for directed verdict or, in the alternative, denying plaintiff's motion for judgment notwithstanding the verdict. Plaintiff argues the evidence compels such result based on the ground that the evidence as a matter of law established that defendant violated material terms of her lease thereby allowing plaintiff to terminate defendant's tenancy. We disagree.

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the

movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations and quotations omitted). "The party moving for a directed verdict bears a heavy burden in North Carolina." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (internal quotations and citations omitted), *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). When the decision to grant a motion for directed verdict "is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Id.*

Plaintiff cites to the lease agreement provisions that state defendant is "[n]ot to use the premises for unlawful purposes" and that plaintiff may terminate the lease agreement for defendant's "material noncompliance" with the lease terms. Plaintiff contends by virtue of Detective Little's controlled purchase and a search of defendant's apartment, plaintiff is justified in the termination of defendant's lease. However, the testimony presented in this case raised a question of fact as to whether defendant breached her lease. On cross-examination, defendant elicited the following testimony from Detective Little:

DEFENDANT: Are you familiar with this search warrant here? Is this your signature where you signed off, [stating you] did not seize any items in my home?

DETECTIVE: Yes, ma'am.

DEFENDANT: Okay. Thank you. You say that you sent an informant in my home, according to this search warrant, with traceable money.

DETECTIVE: That's correct.

DEFENDANT: Okay, Did you recover that traceable money?

DETECTIVE: No, ma'am.

. . .

DEFENDANT: Okay. What is the purpose of traceable money?

. . .

DETECTIVE: What it is, in general we'll take down serial numbers when we send the informant in, and if we recover it, that shows an actual transaction was done.

Whether a controlled purchase had in fact been completed in defendant's apartment and whether the ensuing search of defendant's apartment (which was premised on the alleged controlled purchase) were sufficient evidence of a breach of defendant's lease terms was a question for the jury. Viewed in the light most favorable to the non-movant, the evidence was insufficient to show defendant breached her lease terms. The trial court properly denied plaintiff's motion for directed verdict.

Furthermore, "[a] motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict, and the same standard of review applies to both motions." *Zubaidi v. Earl L. Pickett Enters.*, 164 N.C. App. 107, 119, 595 S.E.2d 190, 197, *disc. rev. denied*, 359 N.C. 76, 605 S.E.2d 151 (2004). As stated above, the trial court properly denied plaintiff's motion for directed verdict. The trial court also properly denied plaintiff's motion for judgment notwithstanding the verdict. This assignment of error is overruled.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).