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NO. COA07-1149

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

ESTATE OF JACK ALBERT HAWKINS,
DECEASED; DEBRA K. JONES,
EXECUTRIX OF THE ESTATE OF JACK
ALBERT HAWKINS,

Plaintiff,

v.

CURLEY MAE WISEMAN, f.k.a.
CURLEY MAE WISEMAN HAWKINS,

Defendant.

Appeal by defendant from order entered 8 June 2007 by Judge
Denise S. Hartsfield in Forsyth County District Court. Heard in
the Court of Appeals 5 March 2008.

*Crumpler Freedman Parker & Witt, by Dudley A. Witt and Tyler
B. Kline, for plaintiff.*

*Wood, Rabil & Peake, LLP, by Thomas R. Peake II, for
defendant.*

ELMORE, Judge.

Jack Albert Hawkins (the deceased) was an elderly man, suffering from the effects of Alzheimer's disease and dementia. On 23 June 2004, when the deceased was eighty-three years old, he entered into a purported marriage with his fifty-five-year-old live-in caretaker, Curley Mae Wiseman (defendant). A court

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Slip Opinion

declared the deceased incompetent on 1 December 2004¹ and the Clerk appointed Bryan C. Thompson as his guardian on 7 December 2004. The decedent passed away on 10 January 2007.

On 3 May 2005, the guardian instituted an action requesting the annulment of the purported marriage on behalf of the deceased. The trial court eventually annulled the purported marriage in an order entered 9 February 2007.²

Upon the decedent's death, his last will and testament left his property to his nieces, Deborah Lynn Kiser Jones (plaintiff) and Jacqueline Dawn Kiser Sides. Plaintiff was named executrix on 11 January 2007.

On 27 February 2007, plaintiff asserted a claim for summary ejectment in small claims court, seeking possession of the property where the decedent had lived with defendant. On 6 March 2007, a magistrate dismissed the action without prejudice, and plaintiff appealed to the district court. Defendant filed a motion to dismiss, which the trial court denied on 8 June 2007. That same day, the trial court granted plaintiff's motion for summary ejectment. Defendant now appeals.

In her first argument, defendant claims that plaintiff lacked standing to bring the action. Defendant bases her claim on the fact that plaintiff brought the action in her official capacity as

¹ That same day, defendant, who was present at the incompetency hearing and aware of the court's decision, took the deceased to the bank and attempted to withdraw more than \$500,000.00.

² This Court addressed defendant's appeal of her motion for reconsideration of the annulment order in COA07-1146.

executrix, rather than in her individual capacity as a devisee under the decedent's will. Defendant is correct in her assertion that in order to properly bring the action as executrix, plaintiff should have "petition[ed] the clerk of court to obtain an order authorizing such possession, custody or control." N.C. Gen. Stat. § 28A-13-3(c) (2007). Plaintiff failed to do so.

However, no prejudice to defendant ensued. Plaintiff correctly relies on our Rules of Civil Procedure for the following proposition:

[N]o error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C. Gen. Stat. § 1A-1, Rule 61 (2007). Plaintiff continues to rely on our Rules, stating:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

N.C. Gen. Stat. § 1A-1, Rule 17(a) (2007). Finally, plaintiff cites *Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd.*, in which this Court stated that "the absence of the real party in interest in the case *sub judice* does not constitute a fatal defect, since [defendant] has failed to show real prejudice in not having had the real party joined at the original trial." 68 N.C. App.

246, 251, 314 S.E.2d 801, 804 (1984) (quotations and citations omitted).³ Accordingly, the proper action would be to “remand the case to the trial court to amend the pleadings and to substitute the real party in interest in its verdict.” *Id.*

However, in her next argument, defendant claims that the trial court lacked jurisdiction to enter the summary ejectment order. We agree, and therefore reverse the trial court’s order.

This Court reviews questions of subject matter jurisdiction *de novo*, *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001), giving no deference to the findings or conclusions of the trial court, *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007). N.C. Gen. Stat. § 42-26 provides, in pertinent part, that in an action for summary ejectment:

(a) Any *tenant or lessee* of any house or land . . . who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

(1) When a *tenant* in possession of real estate holds over after his term has expired.

(2) When the *tenant or lessee*, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

N.C. Gen. Stat. § 42-26 (2005) (emphases added). There must be a landlord-tenant relationship, express or implied, between the parties for the court to have subject matter jurisdiction under

³ We note that *Carolina First* dealt with a merged corporation, but analogize the underlying reasoning to this case.

N.C. Gen. Stat. § 42-26. *Hayes v. Turner*, 98 N.C. App. 451, 454, 391 S.E.2d 513, 515 (1990). Although there is some divergence in previous opinions from this Court as to whether a complaint for summary ejectment must specifically allege a landlord-tenant relationship, *Hayes*, 98 N.C. App. at 454, 391 S.E.2d at 515 (citing *Howell v. Branson*, 226 N.C. 264, 37 S.E.2d 687 (1946)), or whether the landlord-tenant relationship need not be alleged in the complaint, but merely be proven by the evidence, *Adams v. Woods*, 169 N.C. App. 242, 244, 609 S.E.2d 429, 431 (2005); *Jones v. Swain*, 89 N.C. App. 663, 668, 367 S.E.2d 136, 138-39 (1988) (citing dicta found in *Chandler v. Cleveland Sav. and Loan Ass'n*, 24 N.C. App. 455, 211 S.E.2d 484 (1975)), in order for the trial court to gain jurisdiction of a summary ejectment action, it is clear that the burden is on the plaintiff to prove the facts in support of jurisdiction. *Hayes*, 98 N.C. App. at 454-55, 391 S.E.2d at 515.

Although there is no specific definition of "landlord-tenant relationship" in either the statute or in case law, some elements of that relationship are clear. The tenant must enter into "possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered." *Jones*, 89 N.C. App. at 668, 367 S.E.2d at 139 (citation omitted). *But see Adams*, 169 N.C. App. 242, 609 S.E.2d 429 (where the plaintiff claimed in privity based on the defendants' lease with plaintiff's vendor of the occupied property but there "was never any enforceable contract

between the [p]laintiff and the [d]efendants[,]” the trial court had no jurisdiction to enter judgment in a summary ejectment action). Because it is pursuant to a contract, the landlord-tenant relationship requires consideration, which is normally the payment of rent. See *Hayes*, 98 N.C. App. at 454, 391 S.E.2d at 515; accord 49 Am. Jur. 2d *Landlord and Tenant* § 1 (2006). But see *Simons v. Lebrun*, 219 N.C. 42, 50, 12 S.E.2d 644, 648-49 (1941) (a landlord-tenant relationship is implied where the tenant manages the property in exchange for occupancy of part of the property as a residence when occupancy is not necessary to fulfilling the duties of employment). Regardless of the label attached by the parties,

[a] landlord-tenant relationship is created when: (1) there is reversion in the landlord; (2) creation of an estate in the tenant either at will or for a term less than that which the landlord holds; (3) transfer of exclusive possession and control of the tenant; and (4) a contract.

Santa Fe Trail Neighborhood v. W.F. Coehn, 154 S.W.3d 432, 440 (Mo. App. W.D. 2005) (citation and quotation omitted).⁴

⁴ This concise summary of the basic incidents of the landlord-tenant relationship from Missouri is not inconsistent with our case law applying N.C. Gen. Stat. § 42-26, is quoted in 49 Am. Jur. 2d *Landlord and Tenant* § 1 n.4 (2006) and appears in substantially similar form in Black's Law Dictionary 895 (8th ed. 2004); we therefore find it persuasive. See *Howell*, 226 N.C. at 265, 37 S.E.2d at 688 (holding that a trial court was without jurisdiction when the affidavit supporting summary ejectment alleged only that defendant 'entered into possession' and 'refuse[d] to vacate said house'); *Hayes*, 98 N.C. App. at 454-55, 391 S.E.2d at 515 (holding that a trial court had no jurisdiction to hear a summary ejectment action when a devisee of the decedent's will sought summary ejectment of the decedent's former live-in care giver and there was no allegation or evidence of a landlord-tenant relationship, including no evidence of rental payments or a lease); *College Heights Credit Union v. Boyd*, 104 N.C. App. 494, 497, 409 S.E.2d 742, 743-44 (1991) (vacating

In the instant case, it is clear that plaintiff, who has standing to sue only as devisee of the decedent's will, is claiming in privity under the decedent. The complaint alleges that defendant entered the home of the decedent claiming to be the decedent's wife. However, an allegation that defendant wrongfully entered the home under the guise of a voidable marriage does not allege a landlord-tenant relationship where there is no evidence of a lease contract or rent, or any other incident of a landlord-tenant relationship. While such an allegation might provide the basis of a trespass action for invasion of the rightful owner's possessory rights, *Adams*, 169 N.C. App. at 245, 609 S.E.2d at 431, it cannot provide the basis of a summary ejectment action.

Further, even if we were to assume that the findings of the trial court were supported by the evidence, the trial court's findings do not support its legal conclusion that it had jurisdiction to hear the complaint for summary judgment and enter the resulting order. It is undisputed that defendant was employed by the decedent. The trial court found as fact that defendant took residence in the decedent's home "separate and apart from [her] employment" by defendant. From this finding, the trial court concluded that it had jurisdiction to hear plaintiff's complaint.

judgment in a summary ejectment proceeding on the basis that plaintiff's purchase of defendant's home at a tax sale did not create a landlord-tenant relationship); *Housing Authority v. McCleain*, 93 N.C. App. 735, 736, 739, 379 S.E.2d 104, 105, 107 (1989) (holding that a trial court had no jurisdiction to summarily eject the daughter of a tenant who remained after the tenant moved out).

However, merely finding that plaintiff took residence in the decedent's home "separate and apart from [her] employment" is not the same as finding that a landlord-tenant relationship existed.

In *Simons*, a case relied on by plaintiff, the defendant had entered the plaintiff's property pursuant to an agreement whereby the defendant was employed as manager in residence of the property in exchange for rent-free living quarters and a share of the rents the defendant collected from the other tenants. 219 N.C. at 44, 12 S.E.2d at 644-45. The plaintiff contended that the agreement was a lease agreement which created a landlord-tenant relationship; the defendant contended that it was strictly an employment contract, which created only a master-servant relationship. 219 N.C. at 47, 12 S.E.2d at 647.

Simons concluded that the agreement was a lease, because defendant's residence was "merely . . . connected with or convenient for the contract or duties of employment[,]" and not "reasonably necessary for the better performance of the particular service, inseparable therefrom, or required by the master as essential thereto." 219 N.C. at 50, 12 S.E.2d at 648 (citation and quotation marks omitted). This is not analogous to the case *sub judice*, where the record contains no evidence of any agreement between the decedent and defendant, for a lease or otherwise, upon which defendant entered possession of the residence belonging to the decedent, and no evidence that defendant's entry into the residence was in exchange for any consideration, including the work performed by defendant as the decedent's employee. Indeed, the

trial court specifically found that the "taking of residence . . . was *separate and apart* from [her] employment." (Emphasis added). Defendant is not required to prove a negative - that a landlord-tenant relationship did not exist.

Defendant correctly relies on *Hayes*, 98 N.C. App. 451, 391 S.E.2d 513, a case with similar facts. In *Hayes*, a long-term care giver remained in the patient's home after the death of the patient pursuant to a life estate granted to the care giver in the patient's will. *Id.* at 452-53, 391 S.E.2d at 514. A devisee of the will brought an action for summary ejectment. *Id.* at 452, 391 S.E.2d at 514. This Court held that the "complaint in summary ejectment allege[d] that there was no rent and that no lease existed. The record contains neither allegations nor evidence of a landlord-tenant relationship, and [the plaintiff] also failed to allege any of the statutory violations." 98 N.C. App. at 454, 391 S.E.2d at 515. Accordingly, this Court concluded, *sua sponte*, "that the trial court lacked subject matter jurisdiction to hear the summary ejectment action." 98 N.C. App. at 455, 391 S.E.2d at 515.

As in *Hayes*, there are neither allegations nor evidence of a landlord-tenant relationship in the record *sub judice*; we therefore conclude that the trial court did not have subject matter jurisdiction to hear the summary ejectment action. Accordingly, we vacate the judgment of the district court and remand for dismissal of the summary ejectment action.

Reversed and remanded with instructions.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).