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NO. COA07-777

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

KMART CORPORATION and
KROGER LIMITED
PARTNERSHIP I,
Plaintiffs

Wake County
No. 01 CVS 012138

v.

THOMAS GUASTELLO,
Defendant

Court of Appeals

Appeal by defendant from order entered 22 March 2007 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 9 January 2008.

Slip Opinion

*Womble Carlyle Sandridge & Rice, PLLC, by Christopher T. Graebe and Sean E. Andrussier, for plaintiffs-appellees.*

*Taylor, Penry, Rash & Riemann, PLLC, by Neil A. Riemann, for defendant-appellant.*

CALABRIA, Judge.

Thomas Guastello ("defendant") appeals from an order of the trial court granting summary judgment in favor of Kmart Corporation ("Kmart") and Kroger Limited Partnership I ("Kroger Limited") (collectively, "plaintiffs"). We affirm.

In April of 1988, Raleigh Associates, the lessor, executed a commercial lease ("the lease") with Builders Square, Inc. ("Builders Square"), the lessee, for property located in Raleigh, North Carolina. According to the terms of the lease, Builders

Square acquired a 20-year base term beginning in 1991 through 2011, plus four 5-year extension options ("lease options") that allowed an additional 5-year lease extension when each option was exercised. Builders Square's parent corporation, Kmart, guaranteed Builders Square's lease obligations by executing a lease guaranty agreement in 1988.

Raleigh Associates' interest in the lease was assigned to defendant. At the time defendant acquired Raleigh Associates' interest in the lease, Builders Square operated a store on the leased premises. Approximately one or two years after defendant became Builders Square's landlord, Builders Square experienced financial difficulties and closed its store. Kmart, Builders Square, and defendant then sought to negotiate a new lease with a replacement tenant. Defendant engaged in negotiations to lease the property to the Hannaford grocery store chain ("Hannaford"). Before defendant executed a lease with Hannaford, Builders Square asked defendant to honor a deal it previously had reached with The Kroger Company ("Kroger Company"). Defendant agreed to Builders Square's request and cooperated with the deal between Builders Square and Kroger Company.

On 31 March 1995, Builders Square and Kroger Company entered into an agreement titled "Assignment of Lease" ("the 1995 agreement"). In the 1995 agreement, Builders Square assigned to Kroger Company its interest in the base term of the lease, which expires in 2011. Builders Square excluded from the 1995 agreement

its lease options. On 14 February 1997, Builders Square assigned its interest in the lease, mainly the lease options, to Kmart.

On 29 November 1997, Kroger Company assigned its interest under the 1995 agreement to its affiliate Kroger Limited. Because the distinction between Kroger Company and Kroger Limited is immaterial for this controversy, we refer to both entities as "Kroger." On 3 October 2000, Kmart and Kroger entered into a written agreement titled "Assignment of Lease Modification No. 1" ("lease modification") where Kmart, as successor in interest to Builders Square, assigned to Kroger the lease options Kmart acquired from the 1995 agreement.

Kroger and defendant negotiated regarding an extension of the lease after 2011, but were unable to reach an agreement. Kroger then contended that Kmart previously assigned the lease options to Kroger via the 2000 lease modification. On 14 March 2001, defendant wrote a letter ("the letter") to Kmart and Kroger stating his position that the "[lease] options no longer exist by virtue of the 1995 assignment." In the letter, defendant stated the 1995 agreement extinguished the lease options as a matter of law because the agreement did not include language that was needed to expressly reserve the options.

On 2 October 2001, Kmart and Kroger filed a complaint seeking a declaratory judgment that the options were not extinguished by virtue of the 1995 assignment. Defendant filed an answer and counterclaims seeking money damages for breach of the lease and negligent misrepresentation. On 1 June 2004, Judge Robert H.

Hobgood dismissed defendant's counterclaim for money damages with prejudice. Defendant appealed and this Court affirmed the trial court's order denying defendant's counterclaim for breach of contract. *See Kroger Ltd. P'ship v. Guastello*, 177 N.C. App. 386, 628 S.E.2d 841 (2006).

On 13 May 2004, Kmart and defendant stipulated that all remaining claims and counterclaims, including the counterclaim for negligent misrepresentation that defendant asserted against Kmart in his answer, were dismissed with prejudice. The parties agreed that the stipulation did not limit or affect the rights of defendant and Kroger to adjudicate the validity of the lease options. Further, the stipulation did not limit or affect any rights defendant or Kmart may have regarding Kmart's guaranty.

After this Court affirmed the trial court's order denying defendant's counterclaim for money damages for breach of lease, defendant and plaintiffs subsequently filed motions for summary judgment regarding the lease options. On 22 March 2007, Judge Michael R. Morgan granted plaintiffs' motion for summary judgment. From that order, defendant appeals.

The central dispute in this case concerns whether Builders Square reserved or extinguished the lease options from the original 1988 lease when Builders Square assigned its rights to the lease in the 1995 agreement to Kroger. On appeal, defendant argues the trial court erred when it denied defendant's motion for summary judgment and concluded there was no genuine issue of material fact as to whether the 1995 agreement extinguished the lease options.

Defendant also contends the trial court erred by granting plaintiffs' motion for summary judgment because (I) even if the 1995 assignment did not extinguish the lease options, Kroger has waived or is estopped from asserting the lease options and (II) even if the 1995 agreement did not extinguish the lease options, Kroger has surrendered or abandoned them.

I. Standard of Review

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Summary judgment is appropriate if '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.'" *Id.* at 523-24, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)). "The evidence must be considered 'in a light most favorable to the non-moving party.'" *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (quotation omitted).

II. 1995 Agreement

Defendant first argues Builders Square's 1995 agreement with Kroger, by its terms and as a matter of law, extinguished the lease options. We disagree.

"It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.'" *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (alteration in original) (quoting

*Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)). "The trial court's determination of original intent is a question of fact." *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 552, 478 S.E.2d 518, 521 (1996).

In the case *sub judice*, defendant argues the trial court erred in denying defendant's motion for summary judgment by concluding there was no genuine issue of material fact that the lease options were extinguished by the 1995 agreement between Builders Square and Kroger.

The 1988 lease entered into between Raleigh Associates and Builders Square stated in pertinent part: "Tenant shall have four (4) successive options to extend the term of this lease for an additional period of five (5) years . . . on each such option . . . ." In the 1995 agreement, Builders Square assigned to Kroger its interest in the base term of the lease, which expires in 2011. The agreement further states as follows:

> 1. Assignment and Term. Effective on the Effective Date (defined below), Assignor hereby assigns and transfers to Assignee all of Assignor's rights and obligations under the Lease (except as set forth herein), and Assignee hereby accepts such assignment and assumes such rights and obligations for a term that is coterminous with the term of the Lease.
>
> . . . .
>
> 7. Claims. After the Effective Date, Assignor shall have no further rights or obligations under the Lease except as expressly set forth herein, all such rights and obligations having been assigned to Assignee.
>
> . . . .
>
> 9. Renewal rights. Assignee shall not have any rights to renew or extend the term of the Lease.

Defendant argues that paragraph nine does not "expressly set forth" that Builders Square is retaining the lease options. Defendant contends that since Builders Square did not expressly state that it is retaining the lease options, the 1995 agreement then extinguished the lease options.

Defendant quotes the language "expressly set forth herein," which is from paragraph seven of the 1995 agreement. However, "expressly set forth herein" is only in paragraph seven. Paragraph one states "transfers to Assignee all of Assignor's rights and obligations under the Lease (except as set forth herein)." When we construe both paragraphs one and seven of the 1995 agreement "to mean what on its face it purports to mean," we determine the language "expressly set forth herein" only refers to paragraph seven of the 1995 agreement. *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234. We determine paragraph seven reads that Builders Square renounces the rights and obligations that were *expressly* assigned to Kroger, not the rights or obligations that it was not assigning to Kroger.

Plaintiffs argue that because Builders Square assigned the entire base term of the lease to Kroger, the assignment was a qualified assignment which expressly reserved the lease options to the assignor, Builders Square.

"An assignment of a lease is a conveyance of the lessee's *entire interest* in the demised premises, without retaining any reversionary interest in the term himself." *Kennedy v. Gardner*, 170 N.C. App. 118, 121, 611 S.E.2d 480, 482 (2005) (emphasis

supplied) (internal quotation marks and quotation omitted). In *Kennedy v. Gardner*, the memorandum of assignment of lease stated in pertinent part: "Assignor . . . hereby assigns, sets over and transfers to Assignee . . . all of Assignor's right, title, and interest in and to the above-referenced lease for the premises . . . including any and all addendums, amendments, *extensions*, rights of first refusal, options to purchase and modifications . . . ." *Id.* at 122, 611 S.E.2d at 482-83. This Court held "[t]his is an absolute assignment" because "it leaves [the assignor] with no interest in the assigned property." *Id.* at 122, 611 S.E.2d at 483.

In the instant case, paragraph nine of the 1995 agreement states: "Assignee shall not have any rights to renew or extend the term of the Lease." As previously stated, the original 1988 lease between Raleigh Associates and Builders Square gave Builders Square lease options beyond the base term of the lease. Since the 1995 agreement says the assignee shall not have any rights to extend the lease, Builders Square did not assign the lease options to Kroger. Therefore, Builders Square kept a reversionary interest and as such, did not convey the "lessee's entire interest in the demised premises." *Id.* at 121, 611 S.E.2d at 482. Thus, we conclude the 1995 written agreement between Builders Square and Kroger titled "Assignment of Lease" was not actually an assignment since it did not convey all of Builders Square's "entire interest" in the property. *Id.*

This Court has held that an assignment of less than the assignor's interest may be treated as a sublease, with the assignor

retaining the unassigned interest. *See Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987) ("A sublease . . . is a conveyance of only a part of the term of the lessee, the lessee retaining a reversion of some portion of the term." (internal quotation marks omitted) (citation omitted).

> [O]ur courts have adopted the traditional bright line test for determining whether a conveyance by a tenant of leased premises is an assignment or a sublease. Under this test, a conveyance is an assignment if the tenant conveys his entire interest in the premises, without retaining any reversionary interest in the term itself. A sublease, on the other hand, is a conveyance in which the tenant retains a reversion in some portion of the original lease term, however short.

*Christensen v. Tidewater Fibre Corp.*, 172 N.C. App. 575, 578, 616 S.E.2d 583, 586 (2005) (alteration in original) (quotation marks omitted) (citation omitted).

In the 1995 agreement, Builders Square did not assign its lease options to Kroger. Therefore, because Builders Square assigned only part of its rights and obligations under the 1988 lease, the 1995 agreement between Builders Square and Kroger was a sublease and not an assignment. We note that the 1995 agreement is titled "Assignment of Lease." However, the label used by the parties is not determinative. *See Northside Station Associates Partnership v. Maddry*, 105 N.C. App. 384, 413 S.E.2d 319 (1992). Since we conclude the 1995 agreement between Builders Square and Kroger was a sublease, Builders Square then retained the lease options and as such, could later assign the lease options to a subsequent assignee. Thus, we hold Builders Square retained its

lease options from the 1988 lease. The lease options were validly conveyed to Kmart and subsequently to Kroger on 3 October 2000 via the lease modification. This assignment of error is overruled.

III. Waiver and Estoppel

Defendant next contends that even if the 1995 agreement between Builders Square and Kroger did not extinguish the lease options, Kroger has waived the lease options or is estopped from asserting them. We disagree.

a. Waiver

Defendant argues Kroger waived the lease options through parol and written waivers and is therefore estopped from asserting the lease options. Specifically, defendant avers (I) Kroger representatives acknowledged the elimination of the lease options by writing a letter on 15 March 1995 to defendant seeking to negotiate a new lease with him directly; (II) in discussing the proposed lease, representatives of both Kmart and Builders Square told defendant that Kmart and Builders Square would continue to honor Kmart's guaranty only for the base term of the lease (until 2011); and (III) representatives of both Kroger and Builders Square told defendant that he would be free to negotiate with parties other than Builders Square and Kmart for a new lease after 2011. Therefore, defendant argues, Kmart would not have limited its guaranty and defendant would not have been free to negotiate with Kroger regarding a new lease after 2011 had the lease options not been waived.

Plaintiffs contend that because defendant argues there were parol agreements or understandings to eliminate the lease options, evidence of the parol agreements is barred by the Statute of Frauds.

N.C. Gen. Stat. § 22-2 (2001) provides:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

In the instant case, the original 1988 lease between Raleigh Associates and Builders Square had a 20-year base term running from 1991 through 2011. Thus, the 1988 lease had a period that exceeded three years and was therefore subject to the Statute of Frauds. A modification of a contract or lease coming under the purview of the Statute of Frauds also must satisfy the Statute of Frauds' formalities. "When the original agreement comes within the Statute of Frauds, subsequent *oral modifications* of the agreement are ineffectual." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984) (emphasis supplied).

Here, defendant argues that the parties, by subsequent parol conversations, agreed to waive or extinguish four 5-year lease options that would allow the lease to remain effective up to an additional twenty years beyond the base term of the lease.

Plaintiffs contend defendant is seeking to modify an essential term, the duration of the lease, and as such, evidence of any parol agreements are barred by the Statute of Frauds. Defendant argues since plaintiffs never pled the affirmative defense of Statute of Frauds in their reply to defendant's counterclaims, they have waived the affirmative defense pursuant to N.C. Gen. Stat. § 1A-1, Rule 8(c) (2001).

Rule 8(c) of our Rules of Civil Procedure provides that the defense of Statute of Frauds is an affirmative defense and must be set forth affirmatively in the pleadings. N.C. Gen. Stat. § 1A-1, Rule 8(c). In defendant's answer and counterclaim, defendant pled four counterclaims against plaintiffs. However, none of the counterclaims related to the lease options. While defendant's answer asserted that the lease options were "waived and extinguished," the answer stated the lease options were "waived and extinguished" pursuant to the 1995 agreement. Defendant's answer did not allege that the lease options were waived by parol agreements or understandings among the parties to eliminate the lease options. Therefore, the pleadings did not present an issue that came under the purview of the Statute of Frauds. Nonetheless, "our Supreme Court held that for the purpose of ruling on a motion for summary judgment, an affirmative defense may be raised for the first time by affidavit." *Furniture Industries v. Griggs*, 47 N.C. App. 104, 106, 266 S.E.2d 702, 704 (1980).

On 20 December 2006, plaintiffs filed a motion for summary judgment against defendant declaring that as a matter of law Kroger

is the owner of the lease options. On 22 December 2006, defendant filed a motion for summary judgment against plaintiffs. Defendant's motion asserted, *inter alia*, the lease options were extinguished or waived. In support of his motion, defendant attached an affidavit averring that representatives of Builders Square and Kmart indicated to him that they would continue to honor Kmart's guaranty only through the base term of the lease (until 2011). The affidavit further stated that Kmart and Builders Square told defendant they would no longer have any obligations after the base term of the lease expired. Thus, defendant's motion for summary judgment asserted that the lease options were waived in part by parol representations made to defendant.

Plaintiffs filed their motion for summary judgment *before* defendant filed his motion for summary judgment asserting the lease options were waived in part due to parol representations. As such, plaintiffs did not have an opportunity to assert the affirmative defense of the Statute of Frauds when filing the motion for summary judgment. However, this Court has stated that although a party did not expressly reference the affirmative defense in the motion for summary judgment, "if the affirmative defense was clearly before the trial court, the failure to expressly mention the defense in the motion will not bar the trial court from granting the motion on that ground." *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 74, 394 S.E.2d 263, 265 (1990) (internal quotation marks omitted) (citation omitted).

After defendant filed his motion for summary judgment, the plaintiffs were on notice that at the hearing on the cross-motions for summary judgment, defendant was going to argue the lease options were waived in part due to parol representations made by representatives of Kmart and Builders Square. However, there is no evidence in the record indicating that at the hearing on the cross-motions for summary judgment, plaintiffs argued the Statute of Frauds as a defense to defendant's motion for summary judgment, or that the trial court granted plaintiffs' motion for summary judgment based on the affirmative defense. Thus, there is no evidence in the record showing the affirmative defense was "clearly before the trial court." *Id.* As such, the Statute of Frauds was not before the trial court, and the plaintiffs cannot raise this affirmative defense for the first time on appeal. N.C. Gen. Stat. § 1A-1, Rule 8(c). *See also Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993); *Grissett v. Ward*, 10 N.C. App. 685, 687, 179 S.E.2d 867, 869 (1971) (Since defendants did not plead the Statute of Frauds in the pleadings or present the defense at trial, they cannot present the issue on appeal to this Court.). We now determine whether plaintiffs waived the lease options.

"The essential elements of waiver are the existence at the time of the alleged waiver of a right, advantage or benefit, the knowledge, actual or constructive, of the existence thereof, *and an intention to relinquish such right*, advantage or benefit." *Long Drive Apartments v. Parker*, 107 N.C. App. 724, 729, 421 S.E.2d 631, 633 (1992) (internal quotation marks omitted) (citation omitted).

The question of whether plaintiffs waived the lease options must be inferred from the facts and circumstances. *Id.*

In the instant case, paragraph eleven of the 1995 agreement states in relevant part: "The foregoing shall not limit Assignee's right to amend the Lease effective after the expiration of the initial term of the Lease when Assignor and Assignor's guarantor are no longer liable under the Lease." Defendant argues this sentence implies Builders Square's intent to extinguish the lease options. Defendant avers that by allowing Kroger to negotiate a new lease for the period after the base term of the lease (post the year 2011), Builders Square and Kmart must have intended to extinguish the lease options. Defendant contends it would have been impossible for Kroger to enter into a lease after 2011 if Builders Square or Kmart retained the rights to renew the lease for the same period. Defendant also contends Kroger representatives acknowledged the elimination of the lease options by writing a letter on 15 March 1995 to defendant seeking to negotiate a new lease with him directly.

However, Leo Fenton Childers ("Childers"), real estate manager for the mid-Atlantic marketing region for Kroger, explained the 1995 agreement as follows:

> Builders Square was willing . . . to assign us the base term of the Lease, retaining the [lease] options. The understanding at the end of the discussions with Builders Square was that Kroger would attempt to secure future [lease] options by negotiating a new lease with the successor landlord, [defendant], or negotiating with Builders Square or Kmart for rights to the existing [lease] options. If such negotiations for a new lease were

> successful with [defendant], then it was contemplated that the Builders Square lease would be terminated . . . .

Childers' affidavit reveals that Builders Square and Kroger contemplated that Builders Square would retain the lease options in the event that Kroger was unsuccessful in negotiating a new lease with the successor landlord. The fact Childers wrote a letter to defendant seeking to negotiate a new lease for a term after the initial base term expires in 2011 does not show "an intention to relinquish such right." *Id.* Moreover, the fact that Kmart released its guaranty after the base term of the lease expired, does not show Builders Square's intention to relinquish the lease options. As such, there exists no genuine issue of material fact as to whether plaintiffs subsequently waived the lease options. The trial court did not err in granting plaintiffs' motion for summary judgment regarding waiver. This assignment of error is overruled.

b. Promissory estoppel

In addition to waiver, defendant also contends Kroger is estopped from asserting the lease options. Plaintiffs argue estoppel is an affirmative defense that is waived if not pled. *See Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989) ("Waiver and estoppel are affirmative defenses which must be pled with certainty and particularity and established by the greater weight of the evidence."). Plaintiffs contend that since defendant did not plead promissory estoppel in his answer and counterclaim, defendant has waived the affirmative defense of promissory estoppel.

We note that the majority of cases holding estoppel is an affirmative defense that "must be pled with certainty and particularity" are referring to equitable estoppel and not promissory estoppel. *Id.*; *See also Stuart v. Insurance Co.*, 18 N.C. App. 518, 197 S.E.2d 250 (1973); *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984). However, in *Wachovia Bank v. Rubish*, 306 N.C. 417, 424, 293 S.E.2d 749, 754 (1982), the Supreme Court held the defendant "bore the burden of establishing his affirmative defenses" of waiver and promissory estoppel. Thus, since our Supreme Court previously determined promissory estoppel is an affirmative defense, we now determine whether defendant waived this affirmative defense.

"Although the failure to plead an affirmative defense ordinarily results in its waiver, the parties may still try the issue by express or implied consent." *Duke University*, 95 N.C. App. at 673, 384 S.E.2d at 42; *See also* N.C. Gen. Stat. § 1A-1, Rule 15(b) (2001) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Our Supreme Court discussed the application of N.C. Gen. Stat. § 1A-1, Rule 15(b) as follows:

> [T]he implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

*Eudy v. Eudy*, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87 (1975), *overruled on other grounds, Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). In addition, "[u]npled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense." *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58 (1980), *rev'd in part on other grounds*, 302 N.C. 437, 276 S.E.2d 325 (1981).

In the instant case, defendant did not plead promissory estoppel as an affirmative defense in his answer and counterclaims. However, defendant did raise the issue of promissory estoppel after he filed his answer and counterclaims. In his deposition, defendant testified that he abandoned an agreement to lease the property to Hannaford because he thought he later would be able to negotiate a new lease with Kroger having better terms after the base term of the lease expired. Plaintiffs' motion for summary judgment, filed on 20 December 2006, stated in relevant part: "A declaratory judgment is appropriate, as there is a genuine case or controversy as a result of Defendant's erroneous claim that the extension options were somehow 'waived and extinguished.'" On 22 December 2006, defendant filed his motion for summary judgment that stated: "Because the options at issue were extinguished, abandoned, surrendered, or waived; because plaintiff is estopped from asserting them; or for other reasons to be shown at the hearing . . . ." Thus, since defendant previously testified in his deposition he abandoned a lease with Hannaford based on representations made by

Builders Square's representatives and plaintiffs argued in their motion for summary judgment defendant had an "erroneous claim" that the lease options were waived, we determine it "appear[s] that the parties understood the evidence to be aimed at the unpleaded issue," promissory estoppel. *Eudy*, 288 N.C. at 77, 215 S.E.2d at 787. As such, we hold plaintiffs impliedly consented to the issue of promissory estoppel being raised at trial.

We now address defendant's argument that he detrimentally relied on the assertions made by representatives of Builders Square and Kmart. He contends that he gave up a lease with Hannaford and agreed to lease his property to Kroger because representatives of Builders Square and Kmart told him he would be free to negotiate a new lease with Kroger after the base term expired.

In *Wachovia Bank*, our Supreme Court discussed the elements needed for a party to assert promissory estoppel as a ground for waiver:

> The use of "estoppel" as a ground for "waiver" sometimes leads to confusion as to exactly what must be proved by the party asserting the estoppel. This is illustrated in the instant case by the defendant's pleading and the trial court's instructions on estoppel. In order to prove a waiver by estoppel defendant need not prove all elements of an *equitable* estoppel, for which proof of actual misrepresentation is essential; neither need he prove consideration to support the waiver. Rather, he need only prove an express or implied promise by Wachovia or Mr. Baker to waive the notice provision and defendant's detrimental reliance on that promise.

*Wachovia Bank*, 306 N.C. at 427, 293 S.E.2d at 755-56.

In the instant case, the original lease entered into between Builders Square and Raleigh Associates gave Builders Square the right to assign the lease to whomever it wanted without the landlord's consent. Thus, defendant could not have prevented Builders Square's assignment to Kroger and instead entered into a new lease with Hannaford. As such, defendant could not have detrimentally relied on any assertions or promises made by representatives of Builders Square and Kmart. This assignment of error is overruled.

IV. Abandoned

Lastly, defendant argues that even if the 1995 agreement between Builders Square and Kroger did not extinguish the lease options, Kroger has surrendered or abandoned them. We disagree.

Defendant contends that the oral statements made by Kroger representatives to defendant seeking to negotiate a new lease constituted an effective abandonment and surrender of the lease options. Defendant also avers that the oral statements made by representatives of both Kmart and Builders Square to defendant that Kmart and Builders Square would continue to honor Kmart's guaranty only for the base term of the lease constituted an abandonment of the options.

> To constitute an abandonment or renunciation of [his fee simple interest] there must be acts and conduct *positive, unequivocal, and inconsistent with his claim of title*. Nor will mere lapse of time or other delay in asserting his claim, unaccompanied by acts clearly inconsistent with his right, amount to a waiver or abandonment

*Williams v. Williams*, 72 N.C. App. 184, 187-88, 323 S.E.2d 463, 466 (1984) (emphasis supplied) (alteration in original) (internal quotation marks and quotation omitted).

In the instant case, the fact that Kroger representatives sought to negotiate a new lease with defendant is not conduct that is "positive, unequivocal, and inconsistent" with Kroger retaining the lease options from the 1988 lease. *Id.* As previously stated, Childers testified that Kroger representatives sought to negotiate a new lease with defendant and if negotiations did not work out, they would then seek to use Builders Square's lease options. Thus, because we find Builders Square and Kmart did not act inconsistently with the retention of the lease options, we find there exists no genuine issue of material fact regarding this issue. As such, the trial court did not err in granting plaintiffs' motion for summary judgment. This assignment of error is overruled.

Affirmed.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).