NO. COA09-1614

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

GAYATRI MAA, INC.,
Plaintiff-Appellant,

v.

Onslow County
No. 09 CVD 1165

TERRIBLE T. LLC.,
Defendant-Appellee.

Appeal by Plaintiff from order entered 31 August 2009, *nunc pro tunc*, 10 August 2009, by Judge William M. Cameron, III, in District Court, Onslow County. Heard in the Court of Appeals 12 May 2010.

Collins & Maready, PA, by George L. Collins, for Plaintiff-Appellant.

Jeffrey S. Miller for Defendant-Appellee.

McGEE, Judge.

The following facts were stipulated to by Gayatri MAA, Inc. (Lessor), and Terrible T. LLC. (Lessee). Lessor and Lessee entered into a five year lease agreement (the agreement), commencing on 5 February 2004. The agreement set the rent at $3,000.00 per month from commencement through the end of the second year. At the beginning of the third year, the rent increased to $3,500.00 per month. After the initial five years, the agreement provided Lessee with the option of renewing for an additional five years,

terminating in January 2014. In order to renew the agreement, Lessee was required to provide written notice within thirty days of the end of the initial five-year term. The rental rate was set at $4,000.00 per month for the second five-year term. Rent was due by the tenth day of each month. The agreement imposed a $250.00 penalty for late payment of rent. The agreement included the following relevant provision:

> This lease is made upon the express condition that if the Lessee shall neglect to make any payment of rental when due or shall neglect to perform or shall violate any condition, restriction, covenant or agreement herein for a period of fifteen (15) days, the Lessor, its successors and assigns may thereupon enter the premises at its option and eject the Lessee or its successors and assigns therefrom, without prejudice to any other remedy which the Lessor, its successors and assigns may have on account of such default. Notice to quit or surrender possession and all other formalities connected with the re-entry of the premises by the Lessor is waived expressly hereby in the event of such default[.]

Lessee gave timely notice of its intent to renew the agreement for five years, commencing 1 February 2009. Pursuant to the agreement, the new rental rate was $4,000.00 per month. However, Lessee paid only $3,500.00, by check, for each of the months of February, March, April, May, and June of 2009. Lessor stipulated that Lessee's underpayment of rent was an oversight on Lessee's part, and was not intentional. Lessee believed it was tendering the proper amount of rent. Lessor did not notify Lessee "that the checks tendered by [Lessee] were in the wrong amount until some time in June 2009." Lessor did not deposit the insufficient rent checks Lessee sent for the months of February through June 2009.

Lessor filed a complaint for summary ejectment on 16 March 2009, alleging Lessee had defaulted on the agreement. Lessor sought possession of the premises, $3,000.00 in past due rent, damages, and reimbursement of court costs.

As stipulated by the parties, Lessee attempted in June 2009 to pay Lessor the rent owed, plus late fees, but Lessor rejected Lessee's attempted payment. In July 2009, Lessor returned Lessee's uncashed rent checks for February through June 2009.

The trial court heard the case on 10 August 2009 as an action for summary judgment[1] for possession of the premises and the recovery of rent. The trial court considered the stipulations of the parties and found that Lessee's partial rent payments for February through June 2009 did not constitute a basis for Lessor to declare default, terminate the agreement, and re-enter the premises. The trial court entered final judgment on 31 August 2009, *nunc pro tunc*, 10 August 2009, and ordered Lessee to pay rent due, and penalties, pursuant to the agreement. The trial court denied Lessor's claim for summary ejectment, attorney's fees,[2] and costs. Lessor appeals.

Lessor alleges that because Lessee was in default under the terms of the agreement, the trial court erred by not granting Lessor's claim for summary ejectment. We disagree.

Our Court's standard of review for the grant or denial of

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[1]The record does not indicate how this matter came on for summary judgment.

[2]The record does not show that Lessor ever requested attorney's fees as part of this action.

summary judgment is *de novo*. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Summary judgment must be granted "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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009); *Free Spirit*, 191 N.C. App. at 583, 664 S.E.2d at 10.

Lessor argues the trial court erred by failing to find that Lessee was in default and by denying Lessor's claim for summary ejectment. Lessor alleges Lessee was in breach of the agreement because Lessee did not pay the full amount of rent due for February through June 2009. N.C. Gen. Stat. § 42-26 (2009) states in relevant part:

> (a) Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, 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:
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> . . . .
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> (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.G.S. § 42-26(a)(2). Therefore, Lessee's breach of the agreement could have been a basis for summary ejectment, because the agreement explicitly granted Lessor the right of re-entry upon

such a breach. *Tucker v. Arrowood*, 211 N.C. 118, 119-20, 189 S.E. 180, 181 (1937); *Midimis v. Murrell*, 189 N.C. 740, 742, 128 S.E. 150, 151 (1925); *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 414, 442 S.E.2d 94, 96 (1994); *Stanley v. Harvey*, 90 N.C. App. 535, 369 S.E.2d 382 (1988). However: "'Our courts do not look with favor on lease forfeitures.'" *Lincoln Terrace Assocs., Ltd. v. Kelly*, 179 N.C. App. 621, 623, 635 S.E.2d 434, 436 (2006) (quoting *Stanley*, 90 N.C. App. at 539, 369 S.E.2d at 385). Removal is only appropriate pursuant to N.C.G.S. § 42-26(a)(2) "[w]hen 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.G.S. § 42-26(a)(2). The terms of the agreement in the present case gave Lessor the *option* to terminate Lessee's right of possession for failure to pay full rent in a timely manner.

Lessee properly renewed the agreement according to its terms. However, upon renewal, Lessee failed to make the additional payments of $500.00 per month as required under the agreement. This mistake by Lessee constituted a breach of a condition of the agreement. *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (when performance of a duty under contract is presently due, any nonperformance constitutes a breach).

Therefore, the forfeiture provision of the agreement granted Lessor the right to re-enter the premises once Lessee failed to proffer full rental payment within the time period set by the

agreement for payment of rent. N.C.G.S. § 42-26; *Kuykendall*, 114 N.C. App. at 414, 442 S.E.2d at 96.

However, though Lessor had the *option* to declare Lessee in default and take possession of the property based upon Lessee's breach of the payment provision, Lessor was not *required* to do so. We must therefore look to Lessor's actions following the breach to determine whether Lessor exercised its option to eject Lessee from the property.

> A provision in a lease for termination at the option of the lessor upon breach of the lessee's obligation to pay rental is not self-executing. Such a provision may be waived by the landlord, for whose benefit it was inserted, and he may elect to treat the lease as continuing in effect. Moreover, the purpose of such a provision is not to provide a forfeiture with which to surprise an unwary tenant, but to secure the landlord in his right to receive the rental called for in the lease. "Provisions for the forfeiture of a lease for nonpayment of rent, whether contractural or statutory, are considered in equity as securing the rent, and not as providing for the forfeiture of the lease where the tenant acts in good faith and pays promptly on demand." 49 Am. Jur. 2d, Landlord and Tenant, § 1034, p. 1002.

Price v. Conley, 12 N.C. App. 636, 640, 184 S.E.2d 405, 408 (1971); *see also Price v. Conley*, 21 N.C. App. 326, 329-30, 204 S.E.2d 178, 180-81 (1974).

> [T]he landlord has an election. He may choose whether he will declare the lease at an end and reënter at once, or whether he will overlook the breach and let the lease remain in force. Of course, he cannot do both, for the two courses lead in opposite directions; and, because the taking of rent which accrues subsequently to the breach is incompatible with a rescission of the lease, it is held that the acceptance of rent under such

> circumstances is clear evidence of an election to have the lease continue in force.

Winder v. Martin, 183 N.C. 410, 412, 111 S.E. 708, 709 (1922).

> It is the generally accepted rule that if the landlord receives rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof.

Id. at 411-12, 111 S.E. at 709 (citation omitted); *see also Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 466, 98 S.E.2d 871, 877 (1957).

> "No one can be said to have waived that which he does not know, or where he has acted under a misapprehension of facts. Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so he neglects to enforce them, or chooses one benefit instead of another, either, but not both of which he might claim. The knowledge may be actual or constructive; but one cannot be willfully ignorant and relieve himself of a waiver because he did not know. The question of waiver is mainly one of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waive, when he will be forbidden to assert to the contrary."

Spiegel, 246 N.C. at 466, 98 S.E.2d at 877 (citation omitted); *see also Federal Land Bank v. Lieben*, 89 N.C. App. 395, 399, 366 S.E.2d

592, 595 (1988). In *Spiegel*, the plaintiff landlord asserted that the defendants-tenants had breached their lease agreement, and that the plaintiff had a right to evict the defendants from the property, and brought an action for ejectment. However, the plaintiff continued to accept rent payments from the defendants. Our Supreme Court found:

> Prior to 3 October 1955 plaintiff did not know whether the breach would be cured or not. Hence, acceptance of rents in August and September 1955 did not waive its rights, but when 3 October came and passed, plaintiff was required to elect whether it would continue with the contract or maintain its position that there was no longer any contractual relations existing between it and the defendants. Two roads were open. Plaintiff had the right to choose which route it would take. Plaintiff says that the rent payments were but the contractual obligation of [the defendant] Spiegel, and hence there was no waiver of its rights; but Spiegel had no contractual obligation if no contract any longer existed. Its obligation to pay rents was based on the continued existence of the contract. If and when the contract terminated and Spiegel or [the defendant] Morrison remained in possession, their possession was wrongful, and plaintiff was entitled to recover from them damages for wrongful possession, not rent. Damages and rent are different.[3]

Spiegel, 246 N.C. at 467, 98 S.E.2d at 878.

The fact that Lessor did not negotiate the tendered rent checks, and eventually returned them, does not prove non-acceptance of the checks. *See Griffin v. Sweet*, 120 N.C. App. 166, 171, 461

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[3]Plaintiff, however, could still be able to recover the equivalent of unpaid rent as damages. *See* N.C. Gen. Stat. § 42-28; *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990).

S.E.2d 32, 35 (1995).

> "[T]he settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable."

Morris v. Austraw, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967) (citation omitted). We held in *Price*:

> In the present case the plaintiff landlord, by quietly accepting monthly payments of rental in the amount of $35.00 for many months after August 1969, recognized the lease as continuing in effect and waived, not his right to collect monthly rental in the increased amount of $40.00 as called for in the lease, but his right to terminate the lease by reason of his lessee's past defaults. This waiver continued until the lessor made demand upon the lessee to pay the amount by which he was in arrears and until the lessee, after being given a reasonable opportunity to do so, should fail to make such payment.

Price, 12 N.C. App. at 640, 184 S.E.2d at 408; *see also Price*, 21 N.C. App. at 329-30, 204 S.E.2d at 180-81. In this case, Lessor accepted rent payments from February to June 2009, and did not return these payments until July 2009, approximately four months after initiating this action. Lessor stipulated that Lessee was acting in good faith when Lessee erroneously sent insufficient payments. *Price*, 12 N.C. App. at 640, 184 S.E.2d at 408. By

accepting the rent checks for these months, Lessor "recognized the lease as continuing in effect and waived, not his right to collect monthly rental in the increased amount . . . as called for in the lease, but his right to terminate the lease by reason of his lessee's past defaults." *Id.*; *see also Spiegel*, 246 N.C. at 467, 98 S.E.2d at 878 (lessor had to elect whether to terminate the lease or waive its right to terminate the lease in the month that it became clear lessee would not remedy its breach by date demanded by lessor). We also note that by holding onto Lessee's checks, and failing to "communicate to [Lessee] that the checks tendered . . . were in the wrong amount until some time in June 2009[,]" Lessor failed to "exercise his right promptly" *Morris*, 269 N.C. at 223, 152 S.E.2d at 159.

Lessor had the right to declare Lessee in default immediately upon Lessee's breach. Lessor, under the contract, had no obligation to notify Lessee of the breach or of Lessor's decision to initiate an action for summary ejectment before initiating such an action, provided Lessor exercised its right within a reasonable time. Lessor stipulated that it did not inform Lessee of the breach until after Lessor had received five insufficient rent checks from Lessee. By accepting Lessee's rent checks without protest, Lessor acted in a manner which tended "to induce [Lessee] to believe that [Lessor] intended to waive, [and therefore, Lessor] will be forbidden to assert to the contrary." *Spiegel*, 246 N.C. at 466, 98 S.E.2d at 877. We hold that Lessor waived its right under the agreement to re-enter the property due to the insufficient rent

checks sent by Lessee. Lessor was still entitled to recover past rent arrearages and penalties, which the trial court granted Lessor. We affirm the order of the trial court on this issue.

Lessor next argues that the trial court erred in denying Lessor's request for attorney's fees and costs. Lessor's entire argument in favor of reversing the trial court's denial of attorney's fees and costs is as follows:

> Item 10 of the subject Lease which was admitted into evidence as "controlling the tenancy in question" provides that "the Lessor shall be entitled to collect court costs and reasonable attorney's fees in addition to any other relief which the Lessor shall seek and recover. Denying Plaintiff attorney's fees is an error.

N.C.R. App. P. 28(b)(6) states the appellant's brief shall contain:

> An argument, to contain the contentions of the appellant with respect to each question presented. . . . . Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.
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> . . . .
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> The argument shall contain a concise statement of the applicable standard(s) of review for each question presented[.]

Lessor's brief to our Court merely quotes the agreement, followed by a one sentence statement of Lessor's opinion that denying Lessor attorney's fees was error. Lessor's brief contains no legal argument, nor citation to any authority, in support of Lessor's blanket statement that denial of attorney's fees and costs constituted error. Lessor has abandoned this argument. *Id.*; *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C.

191, 200, 657 S.E.2d 361, 367 (2008).

Affirmed.

Judges STROUD and HUNTER, Jr. concur.

Report per Rule 30(e).