NO. COA09-1644

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

JAMES HAROLD DANIEL and
JUDD WILSON DANIEL,

Plaintiffs

Wake County
No. 07 CVS 17159

v.

RANDHIR GULLZAR and EVERGREEN
MOBILE HOME ESTATES, INC.,

Defendants

Appeal by plaintiffs from judgment entered 12 June 2009 by Judge A. Leon Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 May 2010.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings and M. Cory Howes, for plaintiffs-appellants.

Michael K. Perry, Attorney, P.A., by Michael K. Perry, for defendants-appellees.

CALABRIA, Judge.

James Harold Daniel ("Harold") and Judd Wilson Daniel ("Wilson") (collectively "plaintiffs") appeal the trial court's judgment granting Randhir Gullzar's ("Gullzar") and Evergreen Mobile Home Estates, Inc.'s ("Evergreen") (collectively "defendants"), motion for directed verdict, dismissing plaintiffs' claims, and taxing the defendants' attorneys' fees and costs to plaintiffs. We affirm in part and vacate and remand in part.

I. BACKGROUND

Plaintiffs and their sister, Ann Bunn, were co-owners of a mobile home park ("the park") consisting of approximately sixty-four lots in Wake County, North Carolina. In March 2001, all three owners conveyed their interests in the park to defendants, but plaintiffs retained ownership of some of the mobile homes in the park. As part of the conveyance, Evergreen leased numerous lots in the park to plaintiffs. The leases, executed on 27 March 2001, provided that plaintiffs would pay rent in the amount of $200.00 per month for three years. Upon the expiration of the three-year period, plaintiffs had the option to renew their leases for an additional three years at the same rent the other tenants in the park paid. According to the lease, if the plaintiffs exercised their option, the monthly rent would not increase any higher than $225.00 per month unless substantial improvements were made to the park. When plaintiffs renewed their leases in 2004, the monthly rent increased to $225.00, the amount stated in the lease.

After Evergreen bought the park, the tenants' water bills increased. Evergreen obtained a water franchise from the North Carolina Utilities Commission and installed water meters in the park. To offset the cost of installing water meters, Evergreen offered tenants a discount on their water bills. This discount was $50.00 from 2002 through the end of 2005, then was reduced to $25.00 at the beginning of 2006. Some tenants deducted the discount from their rent payment and paid the water bill in full.

On 13 July 2006, Michael Conlon ("Conlon"), a potential buyer for the park, requested financial information and other matters about the park. Conlon reviewed the documents and decided not to purchase the park. Wilson claimed Conlon reviewed the park's rent rolls[1] and other financial documents ("rent documents"). Then Wilson sent a letter to Gullzar in August 2006 ("the letter") claiming that there were discrepancies in the rent rolls regarding the amount of rent plaintiffs were paying. Wilson requested an explanation for the discrepancies as well as more information. On 6 September 2006, Gullzar met Wilson and explained that all tenants in the park, including plaintiffs, were being charged $225.00 in monthly rent.

Gullzar sold the park in January of 2007. On 15 October 2007, plaintiffs filed an action against defendants in Wake County Superior Court alleging breach of contract and unfair and deceptive trade practices ("UDTP"). Defendants filed an answer and a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007). After presenting evidence at trial, defendants moved for a directed verdict and later filed a motion seeking court costs and attorneys' fees. On 12 June 2009, the trial court considered all of the evidence and in the judgment stated that plaintiffs had not met their burden of proof. The trial court granted defendants' motion for a directed verdict, dismissed plaintiffs' claims, and ordered

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[1]A "rent roll" is a list of tenants and the amount of rent each tenant pays.

plaintiffs to pay defendants' attorneys' fees in the amount of $15,000.00 and costs in the amount of $1,743.22. Plaintiffs appeal.

II. DIRECTED VERDICT

> The standard of review for a motion for directed verdict is whether the evidence, considered in a light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*.

Herring v. Food Lion, LLC, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (internal citations omitted). To withstand a Rule 50 motion for directed verdict, the court determines a question of law; that question is "'whether substantial evidence introduced at trial would support a verdict in favor of the nonmoving party.'" *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 322, 595 S.E.2d 759, 761 (2004) (quoting *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotations and citation omitted). "A 'directed verdict is mandated where the facts and the law will reasonably support only one conclusion.'" *Miller v. Barber-Scotia College*, 167 N.C. App. 165, 167, 605 S.E.2d 474, 476 (2004) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991)).

A. Breach of Contract

Plaintiffs argue that the trial court erred in granting defendants' motion for a directed verdict on the breach of contract claim. We disagree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). In the instant case, there is no dispute that a valid contract existed between the parties. Under the terms of the lease agreements executed 27 March 2001, plaintiffs agreed to pay rent to defendants in the amount of $200.00 per month for the first three years. If plaintiffs exercised their option for an additional three-year period, the lease stated, "[m]onthly rent for each lot . . . shall be the same as LESSOR charges other tenants in the park, however, monthly rent on individual lots shall not exceed $225.00 per month[.]" Plaintiffs contend that defendants charged them more than other tenants in the park and therefore defendants breached the terms of the leases.

At trial, plaintiffs offered conflicting testimony regarding the rent documents. Harold stated that while he had seen the documents, Wilson "really handled the contents . . . . I never really got involved with it." Harold added that Wilson told him that the rent documents contained information that "sort of looked like" plaintiffs were being overcharged. On cross-examination, Harold admitted that the leases Gullzar provided plaintiffs' attorney during the course of the litigation showed that other

tenants were also charged $225.00 per month in rent. Harold further admitted that he had no evidence that defendants collected less than $225.00 per month from the tenants.

Wilson testified that he had reviewed the rent documents containing the rent rolls which showed the amount of rent defendants collected from the tenants and that they showed that plaintiffs were being overcharged. The trial court admitted the rent rolls into evidence. However, on cross-examination, Wilson admitted that nothing from Gullzar indicated the rent defendants collected from the tenants was any lower than $225.00 during the relevant time period. On cross-examination, the following exchange occurred:

> Q [counsel for defendants]: From your own personal knowledge, you don't know what the other tenants in the park were paying, do you?
> A [Wilson]: On rent?
> Q: On rent. From your own personal knowledge.
> A: Yeah, pretty much.
> Q: Without looking at any other documents from Mr. Gallzar [sic], from your own personal knowledge, do you know what they were paying?
> A: Not a hundred percent. All I know is what was paid in my office, and from the talking to people. From all tenants. Mine and theirs too.

Counsel for plaintiffs also introduced portions of the deposition of Vicky Weiland ("Weiland"), the assistant manager who resided at the park.[2] In her deposition, Weiland stated that she collected $200.00 in rent from the tenants of lots 2 and 56, and

[2]Weiland was unable to testify because she was undergoing treatment for cancer.

wrote two receipts for that amount. However, Weiland admitted that the payments she collected were partial payments and that she did not know the amounts other tenants paid for their lot rent. She also stated that she was unsure if she had lot rent receipts from any other tenants who paid her, and that she was not sure if such receipts even existed.

Gullzar testified that he sold the park in January of 2007 and many of the rent documents were either turned over to the buyer or destroyed at that time. He further testified that he had examined the rent rolls and nineteen leases for the other tenants. Gullzar stated that during the relevant period, the rent rolls showed each tenant was charged, and paid, $225.00 per month in rent. All nineteen leases were admitted into evidence, and all of them showed that every other tenant paid the same amount of rent as plaintiffs. Richard Sanderford ("Sanderford"), a park tenant who testified for defendants, said that the lot rent he paid was $200.00 per month from 2000 until the beginning of 2004, and then $225.00 per month until he moved in 2007.

Defendants offered substantial direct evidence that showed all the tenants in the park paid the same amount of monthly rent. The facts and law in the instant case reasonably support only one conclusion: no breach of contract occurred. The trial court did not err by granting defendants' motion for a directed verdict because plaintiffs failed to offer any evidence that defendants breached the contracts by charging other tenants less than $225.00 in monthly rent. Plaintiffs' assignment of error is overruled.

B. Unfair and Deceptive Trade Practices ("UDTP")

Plaintiffs also argue that the trial court erred in granting defendants' motion for a directed verdict on the claim of UDTP. Plaintiffs base their claim that Gullzar's actions were deceptive in that he, *inter alia*: (1) "creat[ed] evidence out of thin air;" (2) destroyed potential evidence; (3) falsified evidence; and (4) refused to respond to plaintiffs' letter. We disagree.

> Pursuant to N.C. Gen. Stat. § 75-1.1, . . . [t]he elements of a claim for unfair or deceptive trade practices are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.

Noble v. Hooters of Greenville (NC), LLC, ___ N.C. App. ___, ___, 681 S.E.2d 448, 452 (2009), *review dismissed and denied*, 363 N.C. 806, ___ S.E.2d ___ (2010) (internal quotations, citations, and brackets omitted). "The purpose of G.S. Chapter 75 is 'to provide means of maintaining ethical standards of dealings . . . between persons engaged in business and the consuming public and to promote good faith and fair dealings between buyers and sellers . . . .'" *Allen v. Simmons*, 99 N.C. App. 636, 643, 394 S.E.2d 478, 483 (1990) (quoting *Love v. Pressley*, 34 N.C. App. 503, 517, 239 S.E.2d 574, 583 (1977)) (internal quotations omitted).

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. [] A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Mosley & Mosley Builders v. Landin Ltd., 97 N.C. App. 511, 517, 389 S.E.2d 576, 579 (1990) (quoting *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)). "The conduct must be fraudulent or deceptive." *Allen*, 99 N.C. App. at 644, 394 S.E.2d at 483 (internal citation omitted).

In the instant case, there is no dispute that the rental of residential housing affects commerce. *See Love*, 34 N.C. App. at 516, 239 S.E.2d at 583 ("[T]he rental of residential housing is 'trade or commerce' under G.S. 75-1.1."). Plaintiffs base their argument regarding deceptive practices on defendants' destruction of evidence related to the rent rolls. At trial, plaintiffs' counsel accused Gullzar of creating evidence "out of thin air," which Gullzar denied. However, arguments of counsel are not evidence. *Plummer v. Plummer*, ___ N.C. App. ___, ___, 680 S.E.2d 746, 753 (2009) (citation omitted). Conlon testified that he received rent rolls from Gullzar. However, on cross-examination, Conlon stated that he could not specifically remember looking at any of the rent documents, nor could he remember sending the rent documents to plaintiffs. Gullzar denied creating the rent rolls that were allegedly sent to Conlon. Gullzar testified that after he sold the park, he made sure the rent rolls matched his tax returns. After he reported his income to the Internal Revenue Service, he disposed of the underlying documents, including rent rolls, that he used to complete his tax returns.

Gullzar denied plaintiffs' allegations that he falsified tenants' names on leases, and plaintiffs failed to present any

contrary evidence. Wilson testified that Gullzar responded to plaintiffs' letter and sent them the leases showing all other tenants paid $225.00 for monthly rent. Therefore, plaintiffs failed to produce substantial evidence that defendants created evidence out of thin air or destroyed evidence. None of plaintiffs' allegations were supported by substantial evidence that defendants engaged in unfair and deceptive trade practices.

The trial court did not err in granting defendants' motion for a directed verdict on the claim of breach of contract or the claim that defendants engaged in unfair and deceptive trade practices. The trial court properly granted defendants' motions for both claims. Plaintiffs' assignment of error is overruled.

III. ATTORNEYS' FEES

Plaintiffs argue that the trial court erred in granting defendants' motion for attorneys' fees. We agree.

"'The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding.'" *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 141, 463 S.E.2d 199, 204 (1995) (quoting *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)). N.C. Gen. Stat. § 75-16.1 (2008) provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the

> court costs and payable by the losing party, upon a finding by the presiding judge that:
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> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

"Thus, N.C. Gen. Stat. § 75-16.1 has two standards that allows the trial court to assess attorney's fees to the opposing side, depending on which party is the prevailing party." *Birmingham v. H&H Home Consultants and Designs, Inc.*, 189 N.C. App. 435, 442-43, 658 S.E.2d 513, 518 (2008). Since plaintiffs instituted the action against defendants, N.C. Gen. Stat. § 75-16.1(2) is applicable to defendants' motion for attorneys' fees. *Id.* at 443, 658 S.E.2d at 519. Therefore, in order to prevail on a motion for attorneys' fees under N.C. Gen. Stat. § 75-16.1(2), defendants must (1) be the "prevailing party" and (2) prove that plaintiffs "knew, or should have known, the [] action was frivolous and malicious." *Lincoln v. Bueche*, 166 N.C. App. 150, 158, 601 S.E.2d 237, 244 (2004) (internal citation omitted). "This is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damages provisions of G.S. 75-16 might otherwise encourage." *Marshall*, 302 N.C. at 550, 276 S.E.2d at 404.

"A claim 'is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it].'" *Blyth v. McCrary*, 184 N.C. App. 654, 663, 646 S.E.2d 813, 819 n.5

(2007) (quoting *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004)) (internal quotations and citation omitted). "A claim 'is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will.'" *Id.* (quoting *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94) (internal quotations and citation omitted). "Whether to award or deny attorneys' fees [under N.C. Gen. Stat. § 75-16.1] is within the sound discretion of the trial judge." *Custom Molders*, 342 N.C. at 141, 463 S.E.2d at 204 (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (2005) (citation omitted).

"In awarding attorneys' fees under G.S. 75-16.1, the trial court must make findings of fact to support the award." *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). "Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee." *Custom Molders*, 342 N.C. at 142, 463 S.E.2d at 204. "For this Court to determine whether an award is reasonable, the record on appeal must contain findings of fact that support the award." *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 626, 664 S.E.2d 388, 396 (2008), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009) (citation omitted). In determining whether attorneys' fees are reasonable, the trial court should consider and make findings concerning:

> the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney[,] . . . the novelty and difficulty of the questions of law; the adequacy of the representation; the difficulty of the problems faced by the attorney, especially any unusual difficulties; and the kind of case . . . for which the fees are sought and the result obtained.

United Laboratories, Inc. v. Kuykendall, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993) (internal quotations and citations omitted).

In the instant case, since the plaintiffs failed to meet their burden of proof, the trial court granted defendants' motion for a directed verdict. Although defendants are the prevailing party, to recover attorneys' fees they had to show that plaintiffs "knew, or should have known, the[ir] action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1(2). The trial court made a finding that "[t]he Plaintiffs knew or should have known that their action for unfair and deceptive trade practices was frivolous." In defendants' motion for costs, defendants submitted eighteen affidavits from all but one tenant evidencing that the other tenants paid the same lot rent as plaintiffs. These affidavits contradicted plaintiffs' allegations in their complaint. Defendants also presented the trial court with leases from all nineteen tenants. The record shows that plaintiffs never directly interviewed any of the tenants in the park to determine the amount of their rent payments, not even Sanderford, defendants' witness at trial and the only tenant to testify in person at trial. Sanderford stated that the lot rent he paid was $200.00 per month

from 2000 until the beginning of 2004, and then $225.00 per month until he moved in 2007. The trial court noted that since plaintiffs' "whole case [was] based on the fact that other tenants were paying less than" plaintiffs, then plaintiffs should have obtained evidence from one or more of the tenants to testify to that effect. The trial court also noted that this was important especially considering that the crux of plaintiffs' case involved the rent rolls, which proved to be inaccurate. This evidence supports the trial court's finding that plaintiffs knew or should have known their claim for UDTP was frivolous.

"In order for us to determine if the award of attorney's fees is reasonable, the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Pierce v. Reichard*, 163 N.C. App. 294, 299, 593 S.E.2d 787, 790 (2004) (citation omitted). "Where these necessary findings are absent from the trial court's order awarding attorney's fees, we must remand the case to the trial court to take further evidence if necessary and make appropriate findings as to these facts and then make conclusions of law based thereon." *Id.* at 299, 593 S.E.2d at 790-91 (citation omitted).

In the instant case, the trial court made the following finding:

> 2. Defendants' Attorneys' fees in the amount of $15,000.00 for defending the unfair and deceptive trade practices claim are reasonable and appropriate under the circumstances.

However, the trial court's judgment does not contain any findings "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability" of defendants' attorneys. Therefore, we vacate and remand the portion of the trial court's judgment awarding attorneys' fees. On remand, the trial court may take further evidence if necessary, and must "make appropriate findings as to these facts and then make conclusions of law based thereon." *Id.*

IV. CONCLUSION

We affirm that portion of the judgment granting defendants' motion for a directed verdict and dismissing plaintiffs' claims, and we vacate and remand for additional findings that portion awarding attorneys' fees and costs.

Affirmed in part, vacated and remanded in part.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).