NO. COA09-1664

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

WILLIAM S. AGAPION,

Plaintiff,

v. Guilford County
No. 08 CVS 9012

CITY OF GREENSBORO, N.C., a municipal corporation organized and existing under the laws of the State of North Carolina, WALTER SIMMONS, Head of Engineering and Inspections for the City of Greensboro, N.C., in both his official and personal capacities, DAN REYNOLDS, Manager of Inspections Division for the City of Greensboro, N.C., in both his official and personal capacities, BRAD TOLBERT, Building Inspector for the City of Greensboro, N.C., in both his official and personal capacities, RON PARKER, Building Inspector for the City of Greensboro, N.C., in both his official and personal capacities, GREENSBORO MINIMUM HOUSING STANDARDS COMMISSION, A Municipal agency of the City of Greensboro, N.C., and CHUCK ASSENCO, Chairman of the Greensboro Minimum Housing Standards Commission, in both his official and personal capacities,

Defendants.

Appeal by plaintiff from judgment entered 29 September 2009 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 13 May 2010.

Plaintiff appears pro se.

Greensboro City Attorney's Office, by Becky Jo Peterson-Buie, for defendants.

ELMORE, Judge.

William S. Agapion (plaintiff) owns the properties located at 200, 204, 208, 210, 213, 215, 219, 223, and 225 Guerrant Street in Greensboro. On 14 December 2004, the City of Greensboro (defendant) notified plaintiff to repair or vacate and close the properties. On 10 January 2006, the Greensboro Minimum Housing Standards Commission entered an order to repair or demolish the properties by 10 April 2006; that order was served on plaintiff. An amended order was entered on 31 January 2006 stating that plaintiff must repair the properties before a certificate of occupancy could be issued to them for habitation. Plaintiff never appealed either order; instead, on 10 July 2008, plaintiff filed an action against all named defendants alleging an unconstitutional taking without just compensation and demolition of property in violation of due process. A partial motion to dismiss was granted on 8 August 2008 as to all but defendant. Defendant filed a motion for summary judgment on 3 September 2009. That motion was granted on 1 October 2009; plaintiff now appeals.

> 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. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against

> the movant and in favor of the party opposing the motion. The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quotations and citations omitted); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

Plaintiff argues first that there was an insufficient factual record upon which to determine whether the summary judgment should have been properly granted.

Plaintiff's argument is based on his statement that, "[s]ignificantly, the Superior Court failed to make any findings of fact, nor did it provide any explanation of how or why it discredited [defendant's] alleged facts and/or rejected [defendant's] legal theories." He then goes on to quote at length the following holding from *Capps v. City of Raleigh*:

> [I]t is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. As we have pointed out on previous occasions, finding the facts in a judgment entered on a motion for summary judgment presupposes that the facts are in dispute. . . . [T]he Supreme Court and this Court have emphasized in numerous opinions that upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. . . . Granted, in rare situations it can be helpful for the trial court to set out the undisputed facts which form the basis for his judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts.

35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978) (quotations and citations omitted). As this Court plainly stated, then, it would

have been improper for the court to make findings of fact in its order.

Plaintiff's sole statement as to what genuine issue of material fact existed that should have precluded the court from granting the summary judgment order is: "whether the residential units located at 211 and 217 Guerrant Street were lawfully included in the condemnation proceedings of 213 and 215 Guerrant Street." As is clear from plaintiff's phrasing, however, this is a question of law, not a question of fact. As such, plaintiff has not proven that there existed a genuine issue of material fact, and this assignment of error is overruled.

Plaintiff next makes two arguments that defendant was not entitled to judgment as a matter of law. We disagree.

This Court considered a very similar set of facts in *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 206 S.E.2d 802 (1974). There, certain properties owned by the plaintiffs were declared unfit for habitation, and the city's zoning board ordered that they be demolished. *Id.* at 390, 206 S.E.2d at 805. In lieu of pursuing the administrative remedies available to them, the plaintiffs brought an action against the city. *Id.* at 391, 206 S.E.2d at 806. This Court spelled out why this course of action did not comply with statutory requirements:

> G.S. 160A-446 delineates the administrative remedies which are available to a property owner who is aggrieved by an order of a public officer. In the instant case, the record on its face reveals that the plaintiffs have not followed the proper review procedure as set forth in G.S. 160A-446, but rather have attempted to circumvent the established

> procedure by filing the cause of action now being considered. Plaintiffs must exhaust the administrative remedies available to them, and they cannot be allowed to undermine the prescribed statutory procedure set forth in G.S. 160A-446.

Id. at 391-92, 206 S.E.2d at 806.

In the case at hand, plaintiff's filing of this action is likewise an attempt to circumvent the prescribed statutory procedure for appeals. As such, the court's order granting summary judgment was proper.

Affirmed.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).