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NO. COA10-346

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

MCDONALD'S CORPORATION,
Plaintiff,

v.

Hoke County
No. 08CVS304

FIVE STARS, INC. and
S. SONNY DANG,
Defendants.

Appeal by Defendant from order entered 2 February 2009 by Judge Kenneth C. Titus in Hoke County Superior Court. Heard in the Court of Appeals 28 September 2010.

McCoy Wiggins Cleveland & O'Connor, PLLC, by Jim Wade Goodman, for Plaintiff-Appellee.

Robertson, Medlin & Bloss, PLLC, by John F. Bloss, for Defendant-Appellant.

BEASLEY, Judge.

Defendant appeals from a trial court order granting Plaintiff's motion for summary judgment. Because a review of the record reveals that no genuine issues of material fact remaining for trial, we affirm the trial court's order.

On 12 December 1994, Plaintiff, McDonald's Corporation, entered into a lease agreement with Billy Pugh and Ruth Pugh. The

terms of the lease agreement identified the Pughs as "Landlord" and Plaintiff as "Tenant" of real property owned by the Pughs in Hoke County, North Carolina. On 25 October 1994, Defendant entered into an "Excess Lease" and "Joint Development Addendum" with Five Star Entertainment. Defendant, S. Sonny Dang, was the purported president of Five Star Entertainment.¹ The lease entered into by the parties functioned as a twenty-year sublease and allowed Defendant to lease a portion of the premises from Plaintiff to construct and operate a video rental business. The amount of Defendant's monthly rental payments were outlined in a rent schedule included in the lease. Defendant was also required to pay a proportionate share of the real estate taxes and special and general assessments levied against the property as "additional rent." Finally, the lease agreement provided that if Defendant defaulted on the payment of rent, and the default were to continue for a period of ten days, Plaintiff would have the right to terminate the lease and retake the premises.

Defendant operated a video rental store on the subject

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The trial court would later conclude that "that at no relevant time was [Defendant] associated or authorized to act on behalf of any other legally cognizable corporation, and consequently [Defendant] engaged in the activities which are the subject of this action as a sole proprietor, and he is therefore personally liable [in Plaintiff's claim]."

premises from 1995 until February of 2002. In 2002, Defendant entered into negotiations with M.G.A., Inc., for a sublease of the premises. Because any sublease by Defendant required Plaintiff's authorization, the parties entered into a "Three-Party Agreement" to establish the specific provisions of the sublease. On 28 February 2002, Plaintiff permitted Defendant to sell its interest in the subject property to M.G.A., Inc. The terms of the agreement also required that Defendant provide Plaintiff with a \$5,000 security deposit. Rental and tax payments were to be made from M.G.A., Inc., to Plaintiff directly. Thereafter, M.G.A., Inc., took over the space previously occupied by Defendant, and continued to operate a movie rental business. In 2007, the parties learned that M.G.A, Inc. was declaring bankruptcy and would be unable to continue the leasing arrangement. While M.G.A, Inc., did make all rental payments during the course of its leasing relationship, it failed to make the required tax payments for 2006. Pursuant to the terms of the 2002 lease agreement, Defendant was responsible for the unpaid tax payments.

In April 2007, Defendant informed Plaintiff that he sought to have another tenant temporarily sub-lease the subject premises. By email, Defendant notified Plaintiff that it was inclined to allow a new tenant to temporarily lease the subject premises, however, Defendant would first have to pay all outstanding rental payments.

Additionally, Plaintiff informed Defendant that while he could use the \$5,000 security deposit to pay the amount due, Plaintiff "would not be able to allow the assignment until the security deposit is then replenished." In May 2007, acting without Plaintiff's authorization, Defendant entered into another third-party lease agreement.

Despite collecting rent from the subtenant, Defendant failed to pay rent to Plaintiff, between the months of September 2007 and December 2007. By letter dated 7 December 2007, Plaintiff provided Defendant with formal notice of his default for failing to make a number of rental payments and the 2006 taxes. On 26 December 2007, Defendant acknowledged his failure to make rental payments between the months of September 2007 and December 2007 and tendered to Plaintiff a check for the outstanding rental payments. However, Plaintiff refused tender of the check and commenced a summary ejectment action, while reserving the right to seek damages. In response, Defendant moved to dismiss Plaintiff's action, raising several defenses and counterclaims in its motion. Plaintiff moved for summary judgment on 7 January 2009. On 2 February 2009, the trial court granted Plaintiff's motion for summary judgment, awarded actual damages, and placed Plaintiff in exclusive possession of the subject premises.

Defendant appeals from the trial court's order arguing that:

(I) "the trial court erred in granting summary judgment against [Defendant] on his counterclaims for fraud and unfair and deceptive trade practices;" (II) "the trial court erred in granting summary judgment against [Defendant] on his counterclaims for breach of the lease agreement and tortious interference with [a] contractual right;" (III) "the trial court erred in granting summary judgment in favor of McDonald's on its claims for damages."

Standard of Review

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "The moving party carries the burden of establishing the lack of any triable issue." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 335 (2008). This burden may be met by demonstrating that an essential element of the non-movant's counterclaim is non-existent. *See Parrish v. Hayworth*, 138 N.C. App. 637, 640, 532 S.E.2d 202, 204 (2000). The trial court must view all evidence in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

"Once a party has come forward with a forecast of evidence

tending to support the party's motion for summary judgment, the burden shifts to the opposing party to show that the opposing party 'will be able to make out at least a prima facie case at trial.'" *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 329, 612 S.E.2d 664, 668 (2005) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). The non-moving party "may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 699, 179 S.E.2d 865, 867 (1971).

I.

Defendant contends that during his initial negotiations with Plaintiff, Plaintiff falsely represented that each party would be contributing half of the lease payments owed to the Pughs under the initial "Ground Lease" agreement. Defendant argues that because he relied on this fraudulent representation when agreeing to the rent schedule in his lease with Plaintiff, the trial court erroneously granted Plaintiff's motion for summary judgment as to his counterclaims for fraud and unfair and deceptive trade practices. We disagree.

The essential elements for actionable fraud are: "(1) [f]alse

representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted). "Additionally, reliance on alleged false representations must be reasonable." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002). Additionally, "[i]n order to prove fraud . . . a plaintiff is also required to prove that he suffered damages because of his reliance on the defendant's representation." *Wall v. Fry*, 162 N.C. App. 73, 79, 590 S.E.2d 283, 287 (2004).

In order to establish a *prima facie* cause of action for a violation of the unfair and deceptive trade practices act ("UDTPA") a litigant must establish that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). Whether a particular practice violates the UDTPA is typically a question of law for the court. *Id.* Our Courts have held that proof of fraud will constitute a violation of the UDTPA. *Bhatti v. Buckland*, 328 N.C. 240, 244, 400 S.E.2d 440, 442 (1991). Defendant in this action contends that the "facts supporting the elements of fraud . . .

also [satisfy] his burden in opposition to summary judgment with respect to his counterclaim for unfair and deceptive practices[.]” Accordingly, Defendant’s UDTPA cause of action is dependent upon his ability to establish a prima facie case of fraud.

Here, Defendant fails to present sufficient evidence that his reliance on the false representations was reasonable. In an action for fraud “[r]eliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate.” *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 26, 581 S.E.2d 452, 458 (2003) (citation omitted). “The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one’s own interest.” *Calloway v. Wyatt*, 246 N.C. 129, 135, 97 S.E.2d 881, 886 (1957). While typically a question for the jury, the reasonableness of a litigant’s reliance is appropriate for summary judgment when the facts presented clearly support a single conclusion. *Id.*

In his deposition Defendant explained that when entering into the lease agreement with Plaintiff, Defendant believed that both parties were paying an equal share of the lease amount due to the Pughs. Later, inspection revealed that the amount that Defendant was paying in rent to Plaintiff actually represented two-thirds of the rent due to the Pughs. However, Defendant fails to present any

evidence that he diligently investigated the terms allegedly discussed in the negotiation. Despite being aware of the original ground lease agreement, Defendant failed to contact the Pughs, obtain a copy of the ground lease agreement, or request any form of confirmation for this supposed material representation. Defendant's reliance on representations, made during contractual negotiations, where the contract failed to incorporate the terms of the negotiations, was unreasonable. Accordingly, the trial court appropriately granted Plaintiff's motion to dismiss as to Defendant's counterclaims for fraud and UDTPA.

II.

Defendant next argues that the trial court erroneously granted Plaintiff's motion for summary judgment as to Defendant's counterclaims for breach of the lease agreement and tortious interference with a contractual right. We disagree.

Summarizing the elements that a landlord must prove to evict a tenant in North Carolina, our Court explained: (1) the landlord must expressly reserve in the lease agreement the right to declare a forfeiture upon the alleged occurrence of an event; (2) there is clear proof that the forfeiture event did indeed occur; (3) the landlord must promptly declare that a forfeiture occurred; and (4) enforcing the forfeiture will not produce an unconscionable result. *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 513, 473

S.E.2d 373, 375 (1996). "Absent an express provision for termination or forfeiture of a lease, a breach of a covenant in a lease does not terminate the lease." *Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001). While a lease including a forfeiture provision is permissible, "[o]ur courts do not look with favor on lease forfeitures." *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988).

Here, Defendant fails to forecast sufficient evidence that would indicate the non-occurrence of an essential element for eviction. On appeal, Defendant primarily argues that there is a genuine issue of material fact as to whether a forfeiture event occurred. The forfeiture provision in the ground lease provided that:

If [Defendant] defaults in the payment of rent or any other sums payable by the [Defendant] and the default shall continue for a period of ten (10) days after written notice . . . then and in addition to any and all other legal remedies and rights, the [Plaintiff] shall have all remedies available to [Plaintiff] in law and in equity and without limiting the foregoing shall further share the right to terminate this Lease and retake possession of the Premises. . . .

However, the Joint Development Addendum states:

[Defendant] accordingly agrees that if [Defendant] does not cure or diligently commence to cure a default within thirty (30) days after written notice from [Plaintiff] . . . then any breach or default shall be grounds

for [Plaintiff] to elect, at its option, to terminate this Agreement or cure [Defendant's] default(s) and add its costs to cure [Defendant's] default(s) to the rent and any other charges to be paid by [Plaintiff] thereafter accruing. These remedies are in addition to all other remedies [Plaintiff] may have in law or in equity.

Additionally, the lease agreement executed by the parties provided that the Joint Development Addendum shall take precedence over conflicting provisions of the lease.

At the time that Plaintiff filed its Complaint, Defendant owed rental payments for the months of September through December 2007. Defendant received formal notice of the amount of the outstanding rental payments and tax payments on 7 December 2007. By letter received by Plaintiff on 26 December 2007, Defendant acknowledged "owing September through December 2007 land lease payments" and tendered payment for the amount in arrears. Defendant did not include payment for the 2006 taxes. Because Plaintiff did not receive rental payments for the past due amounts owed by Defendant until after the ten day limit established in the lease, there is no genuine issue of material fact as to whether the forfeiture event did indeed occur.

Defendant counters arguing that he should have been afforded a thirty day default limit pursuant to the Joint Development Addendum. However, a plain reading of both provisions reveals that

the ground lease specifically addressed Plaintiff's ability to terminate the lease agreement and take possession of the premises. Because the terms of the lease provision are more applicable to the relief actually sought by Plaintiff, the more specific provisions of the ground lease controls. See *Development Enterprises of Raleigh v. Ortiz*, 86 N.C. App. 191, 194, 356 S.E.2d 922, 924 (1987) ("When general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics.") Additionally, because Defendant fails to make any argument regarding the trial court's decision to grant Plaintiff's motion for summary judgment as to Defendant's tortious interference with a contractual right claim, this argument is abandoned on appeal. See N.C. R. App. P. 28(a).

III.

In addition to receiving exclusive possession of the subject premises, Plaintiff was awarded actual damages and attorney's fees. In his final argument on appeal, Defendant contends that the trial court erroneously granted Plaintiff's motion for summary judgment with respect to its claim for damages. Specifically, Defendant argues that "there is at least a genuine issue of fact as to whether [Defendant] was in breach of the lease." As we have already determined that Defendant did indeed breach the original lease agreement, Defendant's final argument on appeal is without

merit.

Affirmed.

Judges MCGEE and HUNTER, Jr. concur.

Report per Rule 30(e).