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NO. COA10-95

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

FRED E. BEAR, III,

Plaintiff,

v.

Dare County
No. 09 CVS 621

EXOTIC IMPORTS, INC.
and MICHAEL B. DAY,

Defendants.

Appeal by plaintiff from order entered 13 November 2009 by Judge Alma Hinton in Dare County Superior Court. Heard in the Court of Appeals 2 September 2010.

Trimpi & Nash, LLP, by John G. Trimpi, for plaintiff-appellant.

Poyner Spruill LLP, by J. Nicholas Ellis, for defendants-appellees.

JACKSON, Judge.

Fred E. Bear, III ("plaintiff") appeals the trial court's 13 November 2009 order granting summary judgment in favor of Exotic Imports, Inc. ("Exotic Imports") and Michael B. Day ("Day") (collectively "defendants"). For the reasons stated herein, we affirm.

On 18 April 2001, plaintiff leased unit W of the Lake Drive Industrial Park in Kill Devil Hills, North Carolina ("the property"), to Exotic Imports. Day, the owner and president of Exotic Imports, guaranteed the lease. The lease provided a duration of five years and a monthly rent of \$2,500.00. Exotic Imports took possession of the property on 1 May 2001. On the same day, plaintiff and Exotic Imports entered into an option to purchase agreement for the property. Pursuant to the option, Exotic Imports could decide to purchase the property for \$265,000.00, with a twenty-five percent credit for rent during the first twenty-four months of the option.

On 3 December 2003, Exotic Imports notified plaintiff that it wanted to exercise the option. Plaintiff declined to accept Exotic Imports's attempt to exercise its option, because rent for the month of December had not been paid.

On 14 January 2004, Exotic Imports filed a claim for breach of contract and unfair and deceptive trade practices. Plaintiff filed an answer and counterclaim, alleging that Exotic Imports had breached the lease by failing to pay the December 2003 rent. Exotic Imports filed a notice of *lis pendens* against the property, which the trial court granted on or about 8 April 2005, with the requirement that Exotic Imports post a \$40,000.00 bond as security against plaintiff's claims. Plaintiff counterclaimed for malicious filing of the *lis pendens*, slander of title, and interference with business relationships based upon Day's conduct. Plaintiff specifically raised the issue of unpaid rent in a 7 December 2005

motion to increase the bond that Exotic Imports had deposited with the court by \$65,000.00, "which represent[ed] the amount of rent due [d]efendant through May, 2006."

On 20 January 2006, Exotic Imports moved for summary judgment. The trial court granted the motion in favor of Exotic Imports as to the breach of the option contract but allowed the issues of damages, the sufficiency of Exotic Imports's unfair and deceptive trade practices claim, and the sufficiency of plaintiff's claims to proceed. The trial court also denied plaintiff's motion to increase the bond and released Exotic Imports from the bond in its entirety.

On or about 5 October 2007, plaintiff moved to supplement his pleadings with a claim for "back due rent" - which he had calculated to be \$115,000.00, with additional "late fees" of \$11,500.00. The trial court denied the motion without prejudice on 9 October 2007, noting that the parties could offer "competent, relevant and admissible proofs of damages and setoffs." In the pretrial order, signed by attorneys for both parties, plaintiff asserted that he intended to contest "[i]n what amount [Exotic Imports is] indebted to [plaintiff] for past due rent and late fees for the warehouse condominium[.]" The trial transcript is not included in the record. Moreover, the order of judgment does not mention plaintiff's rent claim. Exotic Imports surrendered possession of the warehouse on 20 March 2009.

On 28 July 2009, plaintiff filed this claim for past due rent in the amount of \$159,166.67, plus late fees and interest.¹ In its answer, Exotic Imports alleged *res judicata* as an affirmative defense and moved for Rule 11 sanctions against plaintiff for filing a frivolous lawsuit. On 2 October 2009, Exotic Imports moved for judgment on the pleadings based upon *res judicata*. On or about 19 October 2009, plaintiff moved for partial summary judgment as to the *res judicata* defense, alleging in affidavits that "during the trial [the trial judge] consistently denied [plaintiff's] attempts to introduce evidence that Exotic Imports [] had not paid rent while remaining in possession." On 13 November 2009, the trial court granted Exotic Imports's motion for judgment on the pleadings – which it treated as a motion for summary judgment pursuant to Rule 56 of our Rules of Civil Procedure – and dismissed the lawsuit with prejudice. Plaintiff appeals this order.

Plaintiff first argues that the trial court erred by granting summary judgment in favor of Exotic Imports based upon *res judicata* principles, because the issue of past due rent was neither litigated in the prior litigation nor was it required to have been litigated at that point. We disagree.

We review a summary judgment order *de novo*. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). Summary judgment is proper "if (1) the pleadings, depositions,

¹ Plaintiff actually filed this claim on 7 November 2007 but voluntarily dismissed that action pursuant to Rule 41 of our Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 41 (2007). Neither party contends that the claim *sub judice* was filed outside of the one year deadline provided in Rule 41.

answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Stephenson v. Warren*, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811 (citing N.C.R. Civ. P. 56(c) (1999)), *disc. rev. denied*, 351 N.C. 646, 543 S.E.2d 883 (2000).

In order for summary judgment to be granted to a defending party, it must show that "(1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; or (3) the other party cannot overcome an affirmative defense which would bar the claim." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (citing *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996)).

"The doctrine of *res judicata* is intended to force parties to join all matters which might or should have been pleaded in one action." *Skinner v. Quintiles Transnational Corp.*, 167 N.C. App. 478, 482, 606 S.E.2d 191, 193 (2004) (citing *Clancy v. Onslow Cty.*, 151 N.C. App. 269, 271-72, 564 S.E.2d 920, 923 (2002)). This Court has held that, in order to succeed on a claim of *res judicata*, the party must prove "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 262. "A final judgment bars not only all matters actually

determined or litigated in the prior proceeding, but also all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Skinner*, 167 N.C. App. at 482, 606 S.E.2d at 193-94 (citing *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)).

Here, the parties do not dispute that they are the same parties that were involved in the prior litigation nor that the prior judgment was a final judgment based upon the merits of the case. Therefore, the only question before us is whether the same issues are presented.

Plaintiff attempted to raise the issue of past due rent at numerous times throughout the prior litigation, including a motion for an additional bond, a motion to supplement his pleadings, and the final pretrial order. However, the trial court dealt with this issue the first time plaintiff raised it. When the trial court denied plaintiff's motion for an additional bond, which plaintiff had requested "[i]n order to secure [his] position concerning [Exotic Imports's] obligation to pay rent," it concluded "that [plaintiff] cannot sustain his primary equity in a claim for damages under the [l]ease . . . and that the \$40,000 bond paid . . . by Exotic Imports . . . should be released[.]"

Even after the trial court made this determination, plaintiff continued to pursue a claim for rent. On or about 5 October 2007, plaintiff moved to supplement his pleadings, requesting that Exotic

Imports either "tender[] to [plaintiff] payment of \$250,000.00, plus interest at the legal rate from the date of [the trial court's summary judgment] [o]rder (\$30,000.00), or [] elect the reinstatement of the lease by tendering [plaintiff] the sum of \$115,000.00 in back due rent and late fees of \$11,500.00[.]" The trial court denied this motion, concluding that "the issues raised by the [m]otions can be most effectively addressed by the judge who conducts the trial of the captioned action" and "the [m]otions are denied without prejudice to the proffer by the parties of any competent, relevant and admissible proofs of damages and setoffs."

Furthermore, the final pretrial order, signed by both parties' counsel, included the issue: "The Defendant [plaintiff Bear in the case *sub judice*] contends that the contested issues to be tried are as follows: . . . In what amount is [Exotic Imports] indebted to [plaintiff] for past due rent and late fees for the warehouse condominium?" Although plaintiff asserts that the trial court refused to allow his offer of evidence related to past due rent at trial, he had the opportunity to appeal the trial court's evidentiary rulings. Because plaintiff raised the issue of rent in the prior litigation and failed to appeal that trial court's determination, plaintiff's current claim for past due rent is barred by *res judicata*, which the trial court properly concluded in its 13 November 2009 order.

Plaintiff's second contention is that the trial court erred by denying his motion for partial summary judgment as to the *res judicata* defense. Because we hold that summary judgment in favor

of Exotic Imports was proper based upon the doctrine of *res judicata*, plaintiff's second argument – that the principle of *res judicata* does not bar his action for past due rent – is without merit.

For the foregoing reasons, we hold that the trial court's grant of summary judgment in favor of Exotic Imports was proper and that its denial of plaintiff's motion for partial summary judgment also was proper.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).