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NO. COA11-1016
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

NEWBRIDGE BANK and HENRY
PROPERTIES, LLC,

Plaintiffs-Appellees,

v.

Guilford County
No. 09 CVS 11379

KOTIS HOLDINGS, LLC; KOTIS
PROPERTIES, INC.; WILLIAM M.
KOTIS, III; BRIAN C. GASTER; and
WHITEHURST INVESTMENT PROPERTIES,
LLC,

Defendants-Appellants.

Appeal by Defendants from judgment entered 16 March 2011 by
Judge John O. Craig in Superior Court, Guilford County. Heard
in the Court of Appeals 21 February 2012.

*Carruthers & Roth, P.A., by Rachel Scott Decker and J.
Patrick Haywood, for Plaintiffs-Appellees.*

*James, McElroy & Diehl, P.A., by Preston O. Odom III, John
R. Buric, and Harrison A. Lord, for Defendants-Appellants.*

McGEE, Judge.

NewBridge Bank (NewBridge) and Henry Properties, LLC (HP)
(collectively, Plaintiffs), filed a complaint on 31 August 2009,

seeking damages for breach of a ground lease, breach of contract, fraud, unfair and deceptive trade practices, punitive damages, interference with prospective economic advantage, and negligent misrepresentation. Kotis Holdings, LLC; Kotis Properties, Inc.; William M. Kotis, III; Brian C. Gaster; and Whitehurst Investment Properties, LLC (Whitehurst) (collectively, Defendants) filed a document titled "Defendants' motions to dismiss, motion for statement of monetary relief, answer, affirmative defenses, counterclaim, rule 11 motion, and demand for trial by jury[,]" dated 9 November 2009.

Defendants amended their responsive pleadings on 31 December 2009, asserting a counterclaim for declaratory judgment regarding Whitehurst's entitlement to excess rent payments. Plaintiffs filed their Reply to Amended Counterclaim on 5 March 2010. The trial court entered an order granting Defendants' motion to dismiss as to: (1) Plaintiffs' claims for breach of ground lease and breach of contract as the claims related to William M. Kotis, III and Brian C. Gaster; and (2) Plaintiffs' claim for interference with prospective economic advantage in its entirety.

Defendants filed a motion for judgment on the pleadings on 16 June 2010 and subsequently amended their motion on 25 June 2010. The trial court heard Defendants' motion for judgment on

the pleadings on 7 July 2010, and denied the motion by order entered 26 July 2010. Defendants moved for summary judgment on all claims remaining in the case on 19 July 2010, and gave notice to Plaintiffs of a hearing scheduled for 2 August 2010. Plaintiffs filed a motion for voluntary dismissal without prejudice as to all their claims on 2 August 2010. Defendants objected because Defendants' counterclaim was the sole matter properly remaining before the trial court. The trial court entered judgment on 16 March 2011, denying Defendants' summary judgment motion and granting Plaintiffs' motion for summary judgment. Defendants appeal.

I. Factual Background

Starmount Company (Starmount) executed a ground lease (the lease) as landlord of real property (the property) located in Greensboro on 5 December 2001 with Henry James Bar-Be-Que, Inc. (HJB) as tenant. The term of the lease was ten years, with six options to renew for five years each. HJB was required to construct a building on the property for use as a restaurant. In addition, Section 10.1 of the lease included the following provision:

If under the transfer, assignment, or sublease consented to by Landlord, the rent or other consideration payable thereunder exceeds the rent provided in this Lease, Tenant or, at Landlord's option, transferee,

sublessee or assignee shall pay said excess rent or other consideration to Landlord as additional rent hereunder as and when the same becomes due under said transfer, assignment or sublease.

(emphasis added).

HJB contracted with FNB Southeast Bank (the Bank), predecessor in interest to NewBridge, to obtain a \$1,500,000.00 loan to finance the construction of the restaurant building. HJB entered into a "Leasehold Deed of Trust, Security Agreement, and Fixture Filing" (Deed of Trust) with the Bank on 29 July 2002. The Deed of Trust included the following provision concerning the payment of rents:

(E) RENTS, INCOME: TOGETHER WITH all rents, income and other benefits to which Grantor may now or hereafter be entitled from the property described in paragraphs (A), (B), and (C) hereof to be applied against the indebtedness and other sums secured hereby[.]

. . .

The foregoing provisions hereof shall constitute an absolute and present assignment of the rents, income and other benefits from the property described in (A), (B), (C) above[.]

(emphasis added).

Starmount, HJB, and the Bank entered into an agreement, "Landlord's Consent to Encumber, Estoppel Certificate, Amendment to Lease, and Nondisturbance Agreement" (the amendment), on 31

July 2002. The amendment stated, among other things, the following: "[Starmount] hereby consents to the encumbrance of [HJB's] leasehold estate by the Deed of Trust securing the loan." In addition, Section 4.1 of the amendment provided the following concerning the termination of the deed of trust by foreclosure or assignment-in-lieu of foreclosure:

In the event Lender shall foreclose the Deed of Trust by foreclosure or otherwise, or by acceptance of an assignment-in-lieu of foreclosure, the Lease shall remain in full force and effect and shall remain subject to the terms and provisions of this Agreement as modified hereby.

Starmount sold the property to Whitehurst on 7 December 2007, and Whitehurst assumed all of the rights and obligations under the lease and the amendment. Whitehurst sent notices of non-payment of rent and lease default to HJB and the Bank on 28 October and 4 November 2008. Subsequently, on 24 and 25 November 2008, Whitehurst sent "Notice[s] of Actual Default and Landlord's Intention to Terminate Lease." The Bank exercised its right under the amendment to cure the default on behalf of HJB. HJB assigned its interest in the lease to HP, a limited liability company that is a wholly owned subsidiary of the Bank, on 18 August 2009. The Assignment in Lieu of Foreclosure provided the following:

WHEREAS, in order to avoid foreclosure under the Deed of Trust, [HJB] has agreed to assign, grant, convey and transfer to [HP], as the designee of the Bank, all right, title and interest in and to the Lease and the Property in exchange for, among other things, *the cancellation of the Deed of Trust*[:.]

(emphasis added).

HP subleased the property to another restaurant, REFS, LLC (REFS) on 20 August 2009. REFS began operation on 15 September 2009 as a restaurant on the property. Under the sublease, REFS was to pay HP \$9,500.00 per month from 20 December 2009 through 19 April 2010; \$14,000.00 per month from 20 April 2010 through 19 November 2010; and \$14,000.00 for each month during any renewal term. Under Section 3.2 of the amendment, HJB was obligated to pay \$4,965.84 per month in rent. Defendants' request for a declaratory judgment to determine which party was entitled to the excess rents was granted. The trial court's judgment ordered that the excess rents paid by sublessees "is payable to [HP] until such time as it has recovered the amounts due to it for extending financing to construct the Building on the [p]roperty." Defendants appeal.

II. Issue on Appeal

Defendants argue that the trial court erred in granting Plaintiffs' motion for summary judgment. Defendants argue that,

because they were entitled to the excess rents pursuant to the lease, the trial court erroneously entered summary judgment against them. Specifically, Defendants contend that "the Deed of Trust was extinguished by the Bank's acceptance of the assignment in lieu of foreclosure." We agree.

III. 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." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)(2007)). "Furthermore, when considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.'" *Id.* (citation omitted). Appellate courts "review a trial court's order granting or denying summary judgment *de novo*." *Id.* at 337, 678 S.E.2d at 354. "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* (citation omitted).

Summary judgment is appropriate when "the language of a contract is not ambiguous, no factual issue appears[,] and only

a question of law which is appropriate for summary judgment is presented to the court." *Metcalfe v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009). "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit." *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (citations omitted). "The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Id.* at 719-20, 127 S.E.2d at 541. "'It is a well-settled principle of legal construction that "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.'" *Cater v. Barker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005) (citation omitted).

IV. Analysis

In the present case, the parties agree that there is no genuine issue of material fact. The sole dispute involves which party is entitled to judgment on the undisputed facts. After a careful review of the record, for the reasons stated, we conclude that the trial court erred in granting summary judgment in favor of Plaintiffs.

The Bank executed a Deed of Trust with HJB on 29 July 2002.

The Deed of Trust provided, in pertinent part:

(E) *RENTS, INCOME: TOGETHER WITH all rents, income and other benefits to which Grantor may now or hereafter be entitled from the property described in paragraphs (A), (B), and (C) hereof to be applied against the indebtedness and other sums secured hereby[.]*

. . .

The foregoing provisions hereof shall constitute an absolute and present assignment of the rents, income and other benefits from the property described in (A), (B), (C) above[.]

Starmount later consented to the terms of the Deed of Trust by signing the amendment, which included the following provision: "[Starmount] hereby consents to the encumbrance of [HJB's] leasehold estate by the Deed of Trust securing the loan." Under the Deed of Trust and the amendment, the Bank was rightfully entitled to the excess rents, and Defendants were entitled to their monthly rent pursuant to the lease.

However, after HJB defaulted on its payments under the Deed of Trust, the Bank decided to allow HJB to enter into an "Assignment in lieu of Foreclosure" (the assignment). The assignment included the following provision:

WHEREAS, in order to avoid foreclosure under the Deed of Trust, [HJB] has agreed to assign, grant, convey and transfer to [HP], as the designee of

the Bank, all right, title and interest in and to the Lease and the Property in exchange for, among other things, *the cancellation of the Deed of Trust*[:.]

The language of the assignment is clear and unambiguous. Accordingly, in partial consideration of the assignment, it was agreed the Deed of Trust was to be cancelled. The assignment transferred HJB's leasehold interest in the property in contemplation of cancellation of the Deed of Trust; the assignment did not transfer the Deed of Trust itself as Plaintiffs contend. Moreover, Section 4.1 of the amendment stated:

In the event Lender shall foreclose the Deed of Trust by foreclosure or otherwise, or by acceptance of an assignment-in-lieu of foreclosure, the Lease shall remain in full force and effect and shall remain subject to the terms and provisions of this Agreement as modified hereby.

Here, HJB never transferred its leasehold interest to the Bank; rather, the leasehold interest was transferred to HP, a limited liability company owned wholly by the Bank. Therefore, with a cancelled Deed of Trust and a voided amendment, the lease again became the controlling contract. Section 10.1 of the ground lease included the following provision:

If under the transfer, assignment, or sublease consented to by Landlord, *the rent or other consideration payable*

thereunder exceeds the rent provided in this Lease, Tenant or, at Landlord's option, transferee, sublessee or assignee shall pay said excess rent or other consideration to Landlord as additional rent hereunder as and when the same becomes due under said transfer, assignment or sublease.

The lease, in clear and unambiguous language, plainly provides that the excess rents were payable to Starmount in the event that the property was subleased. Accordingly, pursuant to the provisions of the lease, Defendants are entitled to the excess rents subsequent to execution of the assignment in lieu of foreclosure. Summary judgment was erroneously granted in favor of Plaintiffs and should have been entered in favor of Defendants. We therefore reverse and remand with direction to the trial court to enter judgment in favor of Defendants.

Reversed and remanded.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).