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NO. COA12-329
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

EARNEST R. KENNEDY and TAMMY B.
KENNEDY,
Plaintiffs,

v.

Bladen County
No. 09 CVS 448

MARCIA LANGSTON,
Defendant.

Appeal by plaintiffs from order entered 3 August 2010 by Judge Douglas B. Sasser and order entered 23 June 2011 by Judge Thomas H. Lock, both in Bladen County Superior Court. Heard in the Court of Appeals 12 September 2012.

Melissa Gott of GOTT JOHNSON LAW FIRM, PLLC, attorney for plaintiffs.

Jennifer S. O'Connor of HOLLAND & O'CONNOR, attorney for defendant.

ELMORE, Judge.

Earnest and Tammy Kennedy (plaintiffs) appeal from two orders: 1) entered 3 August 2010, dismissing a portion of their claims for lack of subject matter jurisdiction, and 2) entered 23 June 2011, granting summary judgment in favor of Marcia

Langston (defendant) on plaintiffs' remaining claims. After careful consideration, we affirm the 3 August 2010 order, but we reverse and remand the 23 June 2011 order.

I. Background

Plaintiffs and defendant currently own adjoining tracts of land at White Lake. The original tract, owned by Derek Benedict, extended from the public road to the waterfront of White Lake and was subsequently divided into two lots. For the lot on the lakeside, Benedict reserved a ten-foot easement for access to the road, and for the lot on the roadside, Benedict conveyed a five-foot pedestrian right-of-way easement to the lake.

In 2001, plaintiffs purchased the tract on the roadside, and entered into a recorded long-term lease (the lease) with Benedict for "the pier extending into the waters of White Lake and adjoining the lessor's land described in Book 456 at page 552 in the Bladen County Public Registry" (the pier). The lease provided that "lessee and guests shall be entitled to use the lakefront 'beach area' adjoining the waters edge of White Lake." The lease also provided that 1) rent was to be paid annually on the first day of March, 2) Benedict would pay all lawful taxes, the annual pier permit, and the insurance, 3) Benedict would be

responsible for any and all repairs to the pier, and 4) if plaintiffs failed to pay the annual rental payment by the first of March, Benedict could terminate the lease and take possession of the pier.

In 2008, defendant purchased the lakeside lot, subject to the lease. Defendant acknowledged that she was aware of the lease prior to purchasing the lot. The following month, defendant put up signs stating, "Pier unsafe. Don't come on this pier."

On 15 May 2009, plaintiffs filed suit in Bladen County Superior Court, requesting several declaratory judgments, including: 1) that the lease agreement for the pier and beach area is valid and in full force and effect, 2) that plaintiffs have a valid five-foot pedestrian easement across the lands of defendant, and 3) that the tenants of the other lands of defendant do not have any rights to use the ten-foot easement across the lands of plaintiffs or any rights to use the pier leased by plaintiffs. Additionally, plaintiffs sought a temporary restraining order, preliminary injunction, and permanent injunction to prohibit defendant from interfering with plaintiffs' rights to use and access the pier.

On 15 May 2009, the court granted a temporary restraining order, ordering defendant to not interfere with the rights of plaintiffs under the lease and the five-foot pedestrian easement. Subsequently, on 26 May 2009, the trial court granted a preliminary injunction, ordering defendant not to obstruct or interfere with the rights of plaintiffs to use and access the pier. However, also on 26 May 2009, defendant asserted a counterclaim contending 1) that the lease attached to plaintiffs' complaint was unenforceable as it was against public policy, 2) that the lease was void because plaintiffs failed and refused to pay the obligations when due, and 3) that plaintiffs should be evicted from the property and prohibited from further use.

On 20 January 2010, defendant filed a motion to dismiss plaintiffs claims for lack of subject matter jurisdiction. Defendant asserted that plaintiffs had not exhausted relief from the North Carolina Department of Natural Resources (DENR) pursuant to the Administrative Procedure Act and accordingly, that the trial court did not have subject matter jurisdiction over plaintiffs' claims.

On 22 February 2010, the trial court continued defendant's motion to dismiss, so that plaintiffs could exhaust their

administrative remedies with DENR. The motion was then set for hearing on 24 May 2010. On 24 May 2010, the trial court again continued the motion to dismiss so that plaintiffs could determine whether DENR had subject matter jurisdiction over their claims regarding the pier.

On 3 August 2010, the trial court granted defendant's motion to dismiss for lack of subject matter jurisdiction concerning any claims relating to the pier. The trial court concluded that DENR has authority to develop rules and regulations for piers and boat ramps on White Lake, and that plaintiffs had not exhausted their administrative remedies with DENR. Additionally, the trial court vacated the preliminary injunction as it pertained to usage of the pier.

Subsequently, during a separate hearing on plaintiffs' non-pier related claims, all parties consented to the matter being heard by the trial court as a motion for summary judgment. The trial court then concluded that no genuine issues of material fact existed regarding plaintiffs' remaining claims, because "the lease itself is too vague to allow for the identification of the real property leased with reasonable certainty." Accordingly, on 23 June 2011, the trial court granted

defendant's motion for summary judgment. Plaintiffs now appeal from both orders.

II. Arguments

A. Subject Matter Jurisdiction

Plaintiffs first argue that the trial court erred in granting defendant's motion to dismiss for lack of subject matter jurisdiction. Specifically, plaintiffs contend 1) that DENR did not have jurisdiction over their claims regarding the pier, and 2) in the alternative, that the trial court erred in finding that plaintiffs had not exhausted their administrative remedies with DENR, because DENR issued a letter stating that a pier lease is outside of its jurisdiction. We disagree.

"Whether a trial court has subject matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

i. Jurisdiction of DENR

According to our General Statutes, the district and superior court divisions of our judicial system have original subject matter jurisdiction over most claims. Our statutes provide that

[e]xcept for the original jurisdiction in respect of claims against the State which is

vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (2012). However, "[a]s to the rights of the parties in [a] pier and boat ramp, original jurisdiction for a declaratory ruling rests in the North Carolina Department of Natural Resources and Community Development pursuant to the Administrative Procedure Act, G.S. 150A-1, et seq." *Woodlief v. Johnson*, 75 N.C. App. 49, 56, 330 S.E.2d 265, 269-70 (1985).

Here, in their complaint, plaintiffs sought a declaratory ruling regarding their right to use and access the pier. Thus, DENR possessed original jurisdiction over plaintiffs' claims.

ii. exhaustion of administrative remedies

However, plaintiffs argue that they were not required to exhaust their administrative remedies with DENR, because DENR issued a letter to defendant, stating that it did not have jurisdiction over plaintiffs' claims.

That letter was issued by DENR on 4 June 2010. It states:

It is our finding that a lease is considered a property transaction, rather than a

commercial activity within the meaning of 15A NCAC 12C. Therefore, the provisions of the State Lakes Regulations do not invalidate the lease. The terms of the lease and any other conveyance of rights to the tenant would control the validity of the lease after the transfer of fee ownership of the property.

Based on this letter, plaintiffs appear to argue that exhausting their administrative remedies through DENR would have been futile, since DENR had seemingly admitted to defendant that it did not have jurisdiction. We are not persuaded by this argument.

This Court has held that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999) (citation omitted). However, "[w]here the remedy established by [the agency] is inadequate, exhaustion is not required." *Id.* at 222, 517 S.E.2d at 411 (citation omitted). But, "the burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy[.]" *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002) (citation omitted). And, "futility cannot be

established by plaintiffs' prediction or anticipation that the Commission would again rule adversely to plaintiffs' interests." *Id.*

Here, plaintiffs' argument is that, based on DENR's letter to defendant, DENR was likely to reject plaintiffs' claims for lack of jurisdiction. Such argument is not sufficient to satisfy plaintiffs' burden of showing the inadequacy of the administrative remedy. Accordingly, we affirm the trial court's 3 August 2010 order.

As an aside, we note that prior to the issuance of DENR's letter, during the 22 February 2010 hearing, plaintiffs asserted that had defendant filed her motion to dismiss earlier, "we would have gone to DENR, [] we would've gone and had a ruling by DENR by now and we wouldn't be talking about this." Taking this statement into consideration, the trial court then continued the motion to dismiss, granting plaintiffs the opportunity to seek remedy through DENR. Plaintiffs chose not to take such action, as there is no evidence in the record to indicate that plaintiffs sought a ruling from DENR, or even contacted DENR. In order to invoke superior court jurisdiction, plaintiffs should have taken advantage of the trial court's

continuance, and sought a conclusive ruling by DENR regarding whether it had jurisdiction over plaintiffs' claims.

B. Summary Judgment

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary judgment on their remaining claims. Specifically, plaintiffs argue 1) that a valid lease agreement existed between them and defendant and 2) that genuine issues of material fact exist regarding their non-pier related claims. We agree.

i. valid lease agreement

First, we will address whether a valid lease agreement existed between plaintiffs and defendant. At the hearing, the trial court concluded that "as a matter of law, the description of the real property in the memorandum of lease and in the lease itself is too vague to allow for the identification of the real property leased with reasonable certainty."

"If the description set forth in the writing is uncertain in itself to locate the property, and refers to nothing extrinsic by which such uncertainty may be resolved, such ambiguity is said to be patently ambiguous[,]and the contract is held to be void." *Elec. World v. Barefoot*, 153 N.C. App. 387, 392, 570 S.E.2d 225, 229 (2002) (quotations and citations

omitted). "A description of property is merely latently ambiguous, however, if it is insufficient, by itself, to identify the land, but refers to something external by which identification might be made." *Id.* (quotations and citation omitted). "The determination of whether a description is patently ambiguous is a question of law for the court." *Id.* (citation omitted). "[W]e review questions of law *de novo*[]" *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citation omitted).

Here, the lease states as follows:

Lessor hereby leases to Lessee and Lessee hereby rents from Lessor the pier extending into the waters of White Lake and adjoining **the Lessor's land described in Book 456 at Page 552 in the Bladen County Public Registry**. In addition, Lessor agrees that Lessee and its guests shall be entitled to use **the lakefront 'Beach Area' adjoining the waters edge of White Lake**.

At issue is whether the description of the land in the lease is sufficient to allow for identification of the real property.

This Court faced a similar issue in *Electronic World, Inc. v. Barefoot*. There, the plaintiff argued that the trial court erred in concluding that the lease referenced in the plaintiff's complaint was void because the description of the land conveyed was insufficient as a matter of law. We held that the property description, "all that certain parcel of land together with

improvement presently known as Shortie's Convenient Mart, located on U.S. 74/76 in Whiteville, Columbus County, North Carolina[,]” provided sufficient indicators to possibly identify with certainty the property. *Electronic World, Inc.*, 153 N.C. App at 392-93, 570 S.E.2d at 229. We concluded that “the property description contained in the lease was latently rather than patently ambiguous, and the trial court should have considered extrinsic evidence in order to determine the identity of the property before ruling on the validity of the lease.” *Id* at 393, 570 S.E.2d at 229.

Similarly, here we conclude that the property description in the lease is merely latently ambiguous, because it refers to an external document which describes the property. Specifically, it refers to a book and page number in the Bladen County Public Registry, which identifies the bounds of the land. Further, the lease describes the “beach area” as “adjoining the waters edge of White Lake.” From this language, we are able to deduce that the “beach area” in reference describes the area between White Lake and defendant's property, as it is clear from the record that there is only one lake abutting her land.

Thus, we conclude that the trial court erred in determining that no valid lease existed between the parties. The lease

agreement at issue is only latently ambiguous, and it contains sufficient extrinsic indicators to identify with certainty the property.

ii. genuine issues of material fact

We will now turn our analysis to plaintiffs' second contention. Plaintiffs argue that genuine issues of material fact exist regarding 1) whether defendant breached the lease by preventing plaintiffs from using the leased premises, 2) whether defendant obstructed, interfered, or materially impaired plaintiffs' use of the pedestrian easement, 3) whether defendant overburdened the access easement, 4) whether defendant engaged in unfair methods of competition, 5) whether plaintiffs suffered damages due to defendant's unlawful actions.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "In determining the propriety of summary judgment, all evidence is viewed in the light most

favorable to the non-movant." *Electronic World, Inc.*, 153 N.C. App. at 392, 570 S.E.2d at 229 (citation omitted).

Upon a de novo review of the record, we conclude that the pleadings are sufficient to establish that the parties agree on very little regarding plaintiffs' use of the leased premises, or the role defendant may or may not have played in prohibiting plaintiffs from accessing the leased premises. Further, it is clear from the record that the parties were not afforded an opportunity to present evidence at trial regarding the substantive claims at issue, because the trial court erroneously determined that no valid lease existed between them. Regarding those substantive claims, at the hearing plaintiffs' attorney said "[t]he Court's going to have to plow that field at some point, and there's no point in us going through a trial if, as a matter of law, we don't have a lease; we just go home and save everybody some time." Thus, since the trial court determined that the lease was invalid, those claims were not reached. Therefore, we reverse the trial court's decision to grant summary judgment in favor of defendant, and remand for further proceedings on plaintiffs' non-pier related claims.

Affirmed in part, reversed and remanded in part.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).