

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-364
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,
Plaintiff,

v.

Buncombe County
No. 12 CVD 3975

RUSSELL MCLEAN IV,
Defendant.

Appeal by defendant from order entered 19 December 2012 by Judge J. Calvin Hill in Buncombe County District Court. Heard in the Court of Appeals 9 September 2013.

Brock & Scott, PLLC, by Marc S. Asbill, for plaintiff-appellee.

McLean Law Firm, P.A., by Russell L. McLean, III, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Russell McLean IV entered into a one-year residential lease on 13 July 2010 with Tiffany Cherise Methvin for a property located at 608 Carrington Place, Arden, North Carolina. The lease could be extended at any time via first-class mail sent to Ms. Methvin before thirty days prior to the

expiration of the lease as long as all installments of rent had been paid and all other conditions of the lease complied with by the lessee.

Defendant claims he sent Ms. Methvin a letter exercising his right under the lease to renew for a period of one year on 24 June 2011; however, the letter purporting to do so was evidenced by a blank certified mail receipt, which did not contain the recipient's name or address. Defendant also claims he later sent a letter to Ms. Methvin in October 2011 attempting to extend the lease for the period July 2012 to July 2013. This letter was also not evidenced by a receipt or any other document.

On 22 December 2011, plaintiff Federal National Mortgage Association sent a "Notice to Vacate" to defendant as "Current Occupant" at 608 Carrington Place via certified mail. The notice stated that the property located at 608 Carrington Place was foreclosed upon on 21 November 2011. The letter gave notice that "in the event you are a bona fide tenant of the mortgagor of the Deed of Trust described above," defendant should, within ninety days, "vacate the premise along with all of your personal property." The letter further asked bona fide tenants to provide evidence that defendant is "protected by Section 703 of

the federal 'Protecting Tenants at Foreclosure Act of 2009'" "within five (5) business days to the undersigned law firm." If defendant failed to do so, the letter advised him "that an Application for Writ of Possession will be made to the Clerk of Superior Court for an Order directing the Sheriff of Buncombe County to remove you and your personal property from the premises." Another letter was sent to defendant on 7 June 2012 notifying him that the lease was being terminated by plaintiff as the new owner and giving thirty days' notice to vacate by 14 July 2012, the day after the lease was to end and the "eviction process [to] begin."

Plaintiff filed a complaint for summary ejectment on 19 July 2012. After a hearing in small claims court on 17 August 2012, the trial court ordered that "defendant(s) be removed from and the plaintiff be put in possession of the premises." Defendant appealed to the Buncombe County District Court. After a hearing on 12 October 2012, judgment was again entered for plaintiff. The court held that "[d]efendant's arguments regarding Foreclosure [were] without merit" and that defendant was "not a bona fide lease holder" in part because he was "some five thousand dollars (\$5000.00) in arrears in rent payments." Defendant appeals.

On appeal, defendant contends that the trial court erred in granting judgment for the plaintiff with regard to the summary ejectment proceedings. Specifically, defendant argues that the court erroneously concluded that he had not established a defense to ejectment when he asserted that the Federal Protecting Tenants at Foreclosure Act of 2009 required plaintiff to afford him ninety days' notice to vacate the premises prior to instituting summary ejectment proceedings, which they failed to do. We disagree.

"Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Under Title VII of the Protecting Tenants at Foreclosure Act of 2009, the immediate successor in interest to a property foreclosed upon "shall assume such interest subject to . . . the rights of any bona fide tenant." Pub. L. No. 111-22, Title VII, § 702(a), 123 Stat. 1660, 1661 (2009). If a bona fide lease was "entered into before the notice of foreclosure," the bona fide tenant can occupy the premises "until the end of the remaining term of the lease" unless the successor in interest terminates

the lease "effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence." § 702(a)(2)(A). In that case, the tenant must be given ninety days' notice. *Id.* Alternatively, if one is a bona fide tenant "without a lease or with a lease terminable at will under State law," then one is "subject to the receipt by the tenant of the 90 day notice under subsection (1)." § 702(a)(2)(B).

§ 702(b) defines a person as a bona fide tenant only if:

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is *not* the tenant;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy

§ 702(b) (emphasis added).

Here, no party has disputed that defendant is not the mortgagor or a family member of the mortgagor, that the initial lease was an arm's length transaction, and that rent was not substantially less than fair market value. The record is unclear, however, as to whether defendant was in a bona fide leasehold as of July 2012. Defendant contends he extended his

lease for the period of July 2011 to July 2012 via the letter dated 24 June 2011, however, there is no evidence this letter was actually sent or received because the certified mail receipt attached is blank in both the name and address fields. Despite the lack of evidence, plaintiff seems to concede in its pleadings that defendant's lease ended on 13 July 2012. Defendant also alleges he later exercised his option to renew the lease from the period July 2012 to July 2013 in a letter dated October 2011, but there is no evidence showing that letter was sent or received, and defendant was five thousand dollars in arrears for rent payments, making him ineligible for lease renewal. Furthermore, the trial court specifically found that defendant's evidence regarding his purported renewals of the lease was "unpersuasive," and defendant does not challenge any of the trial court's findings of fact. See *Kaufman v. Kaufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). Therefore, we conclude that defendant's lease ended on 13 July 2012.

Although defendant claims that the ninety-day notice period begins at the expiration of the lease, he cites no support for

this interpretation. As specified in the statute, the ninety-day notice period begins "before the effective date of [the notice to vacate]." § 702(a)(1). Accordingly, plaintiff was required to provide defendant notice to vacate ninety days prior to 13 July 2012. Defendant first received notice of the foreclosure and instructions to vacate the premises in December 2011, six months prior to the end of his lease. This greatly exceeds the statutory requirement of ninety days' notice. Therefore, we hold that the trial court did not err in granting summary ejectment for plaintiff.

Affirmed.

Judges GEER and STROUD concur.

Report per Rule 30(e).