NO. COA14-512

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

BRANCH BANKING and TRUST COMPANY,
Plaintiff,

v.

New Hanover County
No. 14 CVS 423

THE HARRELSON BUILDING, LLC,
Defendant

Removed from Forsyth County
13-CVS-6326

Appeal by plaintiff from order entered 27 January 2014 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 9 October 2014.

Bell, Davis & Pitt, P.A., by Kevin G. Williams and Andrew A. Freeman, for Plaintiff-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Charnanda T. Reid and S. Leigh Rodenbough IV, for Defendant-Appellee.

BELL, Judge.

Plaintiff Branch Banking and Trust appeals from the trial court's order granting Defendant's motion to change venue as a matter of right pursuant to Rule 12(b)(3) of the North Carolina

Rules of Civil Procedure and N.C. Gen. Stat. §§ 1-76 and 1-83 in a declaratory judgment action concerning a purported lease for office space. On appeal, Plaintiff contends that the trial court erred in concluding that the action was local and not transitory in nature. After careful review of the parties' arguments in light of the record and the applicable law, we affirm the trial court's order.

I. Factual Background

A. Substantive Facts

On 6 December 2000, Plaintiff entered into a lease agreement with Defendant for office space in The Harrelson Building, located at 115 West Third Street, Wilmington, North Carolina, which is located in New Hanover County. The lease between the parties was amended and supplemented in 2005, 2007, and 2010.

On 16 November 2012, Plaintiff submitted a Request for Proposal ("RFP") to Defendant, inviting a proposal for renewal of the lease at The Harrelson Building. Plaintiff informed Defendant that the request did "not create any liabilities or obligations" between the parties and did not "constitute an agreement to enter into a legally binding agreement." Plaintiff attached a questionnaire to its RFP, which set out specific modifications and terms to be addressed in any proposal

submitted by Defendant. The questionnaire also indicated that although the existing lease term did not expire until November 2015, any lease agreed upon would be for a term of ten years beginning on 1 December 2013, a practice referred to as "blend and extend."

On 6 March 2013, Defendant submitted a lease renewal proposal to Plaintiff that incorporated the terms set out in Plaintiff's RFP and questionnaire, including committing to a ten-year lease term commencing on 1 December 2013, prior to the original 15 November 2015 expiration of the lease. Plaintiff agreed to consider the response, which would require approval from its resource allocation committee, while maintaining its position that the response did not create any liabilities or obligations on the part of Plaintiff. On 20 March 2013, under an acceptance line on the document that read "Please acknowledge the acceptance of this proposal by signature below," an agent for Plaintiff signed Defendant's proposal.

Defendant's agent wrote to Plaintiff on 13 June 2013 inquiring as to why "the bank want[ed] to delay th[e] transaction," stating that the transaction "need[ed] to move forward in the month of June as was promised by [Plaintiff]," and requesting to speak to someone that could make a "firm decision with th[e] lease renewal." The following day,

Plaintiff informed Defendant by telephone that the proposed lease renewal had not yet been approved and that Defendant should not assume that it would be approved. Defendant's agent sent a letter to Plaintiff on 24 June 2013 summarizing its understanding of the parties' respective positions with regard to the communication that had transpired between them since 20 March 2013.

Defendant continued to request status updates from Plaintiff until 6 September 2013, when Plaintiff informed Defendant that its Resource Allocation Committee "did not approve [Defendant's] response to [Plaintiff's] Request for Proposal" and that it "[was] not prepared to act on the letter of intent at [that] time." Defendant responded by letter on 16 September 2013, asserting, in pertinent part, as follows:

> On March 20, 2013, . . .[Plaintiff] executed an agreement which amended and renewed the . . . Lease . . . . Your September 6, 2012[1] letter . . . conveniently re-characterizes the Renewal Agreement as nothing more than a response to a Request for Proposal . . . .
>
> As you know, the Renewal Agreement sets forth all of the material terms of our mutual understanding . . . . Those terms include, without limitation, the new lease

[1] This is clearly a typographical error, as the parties did not begin negotiations until November 2012, and the letter referenced by Defendant, which was included in the record, is dated September 6, 2013.

> term commencement date [and] the length of the lease term . . . .
>
> * * *
>
> In short, our position is [that] . . . The Renewal Agreement is a legally enforceable contract . . . .

B. Procedural History

Plaintiff filed the present action on 2 October 2013 in the Forsyth County Superior Court seeking a declaration by the court that Defendant's RFP response was "non-binding and impose[d] no liabilities or obligations on [Plaintiff] and that the lease for space in the Harrelson Building was not renewed, extended, or otherwise amended by the RFP Response." On 13 December 2013, Defendant filed a motion to dismiss for improper venue pursuant to Rule 12(b)(3) or, in the alternative, to remove the action as a matter of right to New Hanover County pursuant to N.C. Gen. Stat. §§ 1-76(1) and 1-83(1). The trial court entered an order on 27 January 2014 denying Defendant's motion to dismiss but granting its motion to change venue. Plaintiff appealed to this Court.

II. Legal Analysis

A. Appealability and Standard of Review

Preliminarily, we note that "[a]n appeal of an order disposing of [a motion to change venue as of right] is interlocutory because it 'does not dispose of the case.'" *Snow*

v. Yates, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 135, 318 S.E.2d 887, 888 (1984)). While parties generally have "no right of immediate appeal from interlocutory orders and judgments," *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990), a "grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable." *Snow*, 99 N.C. App. at 319, 392 S.E.2d at 768; *see also* N.C. Gen. Stat. § 1-277(a) (providing that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding").

"[I]t is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.'" *Stern v. Cinoman*, __ N.C. App. __, __, 728 S.E.2d 373, 374 (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)), *disc. review denied*, 366 N.C. 245, 731 S.E.2d 145 (2012). "A determination of venue under N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*." *Id.* "For purposes of determining venue, *i.e.*, for determining whether [N.C. Gen. Stat. §] 1-76 applies, 'consideration is limited to the allegations in

plaintiff's complaint.'" *Wellons Const., Inc. v. Landsouth Properties, LLC*, 168 N.C. App. 403, 405, 607 S.E.2d 695, 697 (2005) (quoting *McCrary Stone Service, Inc. v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985)).

B. Substantive Legal Analysis

On appeal, Plaintiff argues that the trial court erred by granting Defendant's motion to change venue. Specifically, Plaintiff seeks to persuade this Court that its lawsuit against Defendant was transitory because the complaint prayed that the court "declare and enforce the terms of the continuing Lease between the parties," and did not involve an interest in real property. We disagree and affirm the trial court's order.

"As a practical matter, the plaintiff generally gets to make an initial choice as to the venue in which a particular civil action should be litigated." *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 10, 678 S.E.2d 725, 731 (2009). As a general principal,

> [an] action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in the plaintiff's summons and complaint, subject to the power of the court to change the

> place of trial, in the cases provided by statute.

N.C. Gen. Stat. § 1-82. However, actions for the "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest" "must be tried in the county in which the subject of the action, or some part thereof, is situated." N.C. Gen. Stat. § 1-76(1). "The [trial] court may change the place of trial . . . [w]hen the county designated for that purpose is not the proper one." N.C. Gen. Stat. § 1-83(1). "[W]hen [N.C. Gen. Stat.] § 1-76 controls an action's venue, the venue is considered 'local' because the action must be tried in the county which is the situs of land whose *title is affected* by the action." *Snow*, 99 N.C. App. at 320, 392 S.E.2d at 769 (emphasis added). "Conversely, an action is 'transitory' when it does not directly affect title to land and it must be tried in the county in which at least one of the parties resides when plaintiff commences suit." *Id.*

This Court has long held that the termination of an existing lease affects an "estate or interest" in real property.[2]

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[2] In a footnote in its brief, and in reference to this Court's holding in *Sample* that a lease vests a tenant with an estate or interest in real property, Plaintiff states that this "often relied upon statement in *Sample*" was made "without citation to any legal authority" and "appears to be at odds with decisions of the North Carolina Supreme Court." Plaintiff cites to

Sample v. Towe Motor Co., 23 N.C. App. 742, 743, 209 S.E.2d 524, 525 (1974) This Court has also held that N.C. Gen. Stat. § 1-76 controls venue when the parties seek to declare the nonexistance of a lease. *Snow*, 99 N.C. App. at 318, 392 S.E.2d at 768. In *Snow*, this Court held:

> It is irrelevant that the thrust of plaintiff's action is to have the court

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Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 512-13, 263 S.E.2d 595, 597 (1980), where our Supreme Court identified a "lease[,] which is a chattel real" as being "personal property for purposes of the anti-deficiency statute." This Court concluded likewise. *First S. Sav. Bank v. Tuton*, 114 N.C. App. 805, 807-08, 443 S.E.2d 345, 346 (1994) (holding that, in the context of deficiency judgments, "[a] leasehold interest in real property is a chattel real and as such is subject to rules of law applicable to personal property"). Outside the context of deficiencies, however, our courts and statutes have treated a leasehold as an estate or interest in real property. *E.g.*, N.C. Gen. Stat. § 40A-2(7) (defining "property" as "any right, title, or interest in land, including leases"); *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 503, 685 S.E.2d 34, 41 (2009) (holding that "[a] leasehold is an interest in land"); *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 570, 500 S.E.2d 752, 756 (holding, "[a] lease is a contract which contains both property rights and contractual rights"), *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). While, "[u]nder the original feudal law, no estate of less than free hold was recognized as an interest in land," meaning, "if a lessor evicted the tenant, there was no recourse against the lessor except an action for damages for breach of contract," "[t]he lessee [eventually] came to be recognized as having a direct interest in the land itself." 1 James A. Webster, Jr., Webster's Real Property Law in North Carolina § 6.01 (6th ed. 2013). Therefore, we do not find Plaintiff's assertion that *Sample* is "at odds" with decisions of the North Carolina Supreme Court to be accurate, as we find that, outside the context of deficiency litigation, our courts have held that a lease creates an interest in real property, at least for venue purposes.

> declare the nonexistence of his leasehold interest, rather than its existence. Our focus is on the *effect of the potential judgment on the estate or interest* and not on the manner in which the parties achieve the effect. *The court's judgment adjudicating the existence or nonexistence of the lease will directly and primarily affect defendant-lessors' vested interest in the leasehold.*

Id. (emphasis added).

In order to determine if an action directly affects the title to property, we must look to the principal object of Plaintiff's complaint. *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 154 S.E.2d 320 (1967). "It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone *in personam* against the parties, the action will be held local." *Id.* at 206, 154 S.E.2d at 323 (quoting 92 C.J.S., Venue, § 26, pp. 723, 724).

Plaintiff contends that the principal object of its declaratory judgment action was interpretation and enforcement of the terms of an existing lease and suggests that the facts of this case are more analogous to those found in *Rose's Stores, Inc.* and others in which the plaintiff sought to enforce a right under the contract. *E.g.*, *Kirkland's Stores, Inc. v. Cleveland Gastonia, LLC*, __ N.C. App. __, __, 733 S.E.2d 885, 887 (2012)

(where the tenant sued the landlord for breach of contract for constructing a drive-through in a location that would interfere with the plaintiff's freight access in violation of the agreement); *McCrary Stone Service, Inc.*, 77 N.C. App. at 799, 336 S.E.2d at 105 (an action involving "whether [the plaintiff was] obligated to make rental payments for rock quarried from land adjacent to the leased premises"); *Pierce v. Associated Rest & Nursing Care, Inc.*, 90 N.C. App. 210, 212-13, 368 S.E.2d 41, 42 (1988) (where the plaintiff sought to determine whether a statutory provision required a rent increase); *Roanoke Properties v. Spruill Oil Co.*, 110 N.C. App. 443, 447, 429 S.E.2d 752, 754 (1993) (where, although the plaintiff alleged that the recording of the agreement between the parties created a cloud on the title, the purpose of the lawsuit was to determine whether the plaintiff had to purchase fuel exclusively from the defendant); *Goodyear Mortg. Corp. v. Montclair Dev. Corp.*, 2 N.C. App. 138, 142, 162 S.E.2d 623, 626 (1968) (where the title to the real estate would not have been affected by a judgment).

Although Plaintiff points to four disputed terms, other than lease duration; to wit: rent, payment of operating expenses, property improvements, and broker compensation, to support its position that the "principal object" of its

complaint is "interpretation and enforcement" of a contract, we conclude from a careful reading of Plaintiff's complaint and attachments thereto that the principal object was to determine the parties' rights to and interest in real property from 1 December 2013 through 30 November 2023, the "blend and extend" provision of the RFP response. Specifically, Defendant contends that the parties have a binding lease agreement in place through 2023; Plaintiff contends they do not.

Our review of the record indicates that Plaintiff did not take issue with any specific terms of the RFP response. Rather, Plaintiff's position prior to litigation was that it did not accept Defendant's RFP response in its entirety and were not prepared to act on the letter of intent. The letter from Defendant that prompted the litigation stated Defendant's position that the lease between the parties had been renewed. Plaintiff's complaint requests a declaration that the RFP response was "non-binding and impose[d] no liabilities or obligations" on Plaintiff and that the lease was not "renewed, extended, or otherwise amended."

When applying the "principal object" test, courts are to consider the practical effect of rendering a judgment in favor of the plaintiff. *See Snow*, 99 N.C. App. at 321, 392 S.E.2d at 769 (holding that it was "irrelevant that the thrust of [the]

plaintiff's action [was] to have the court declare the nonexistence of his leasehold interest, rather than its existence" and that the "focus is on the effect of the potential judgment on the estate or interest"). In the present case, if the trial court declares that the RFP response is a binding agreement, Plaintiff will have a leasehold estate in the property until 2023. On the other hand, if the trial court declares that the RFP response is merely a proposal, "non-binding and impose[d] no liabilities or obligations", the Plaintiff's leasehold estate in the property will expire in 2015. Put simply, the existence of Plaintiff's leasehold in the property beyond November of 2015 is completely dependent upon the outcome of Plaintiff's litigation. Therefore, we do not conclude that Plaintiff's litigation will operate "alone *in personam*" and hold that Plaintiff's "action [should be] held local" as it is clear that "title to real estate may be affected by [the] action." *Rose's Stores, Inc.*, 270 N.C. at 203, 206, 154 S.E.2d at 321, 323.

III. Conclusion

For the reasons set forth above, we conclude that Plaintiff's action was for the determination of a right or interest in real property and falls under the purview of N.C.

Gen Stat. § 1-76. Therefore, the trial court's order is affirmed.

AFFRIMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).