NO. COA14-783
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

NIXON ASSOCIATES, LLC,
Plaintiff

v.

New Hanover County
No. 12-CVS-3806

NINA BROWN AND MATHIAS EPSTEIN,
Defendants

Appeal by defendants from order entered 10 February 2014 and order and judgment entered 19 March 2014 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 19 November 2014.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for plaintiff-appellee.

Marshall, Williams & Gorham, LLP, by John L. Coble and Matthew B. Davis, for defendants-appellants.

DAVIS, Judge.

Nina Brown ("Ms. Brown") and Mathias Epstein (collectively "Defendants") appeal from the trial court's orders (1) granting summary judgment in favor of Nixon Associates, LLC ("Plaintiff") both as to its claim seeking to recover unpaid rent from

Defendants and as to Defendants' counterclaims; (2) entering a judgment in the amount of $251,334.00 in Plaintiff's favor; and (3) ordering Defendants to pay $37,700.00 in attorneys' fees. After careful review, we affirm.

Factual Background

Defendants lease a parcel of real property located on U.S. Highway 17 in Wilmington, North Carolina from Plaintiff pursuant to a commercial real estate lease agreement (the "Lease Agreement") entered into on 15 August 2001. Ms. Brown operates her business, Stone Gardens, on the leased premises. Under the Lease Agreement, Defendants agreed to pay Plaintiff $12,600.00 per month in rent for the first five years of their tenancy. After the first five years, the rental rate would increase by a designated percentage during each subsequent five-year period.

In December of 2008, Ms. Brown approached Cornelius E. Nixon, Jr. ("Mr. Nixon"), the owner and manager of Plaintiff at that time, regarding her concerns that Stone Gardens could not generate sufficient income to continue paying the monthly rental amount. Mr. Nixon told Ms. Brown to "do the best [she] can." Ms. Brown proceeded to pay various amounts of rent to Plaintiff from December of 2008 through August of 2011, ranging from $5,000.00 to $10,000.00 a month.

After Mr. Nixon passed away in June of 2011, his daughter Alice Nixon ("Ms. Nixon") began acting for Plaintiff with regard to the parties' landlord-tenant relationship on behalf of her mother, Plaintiff's new majority owner and manager. On 29 June 2012, Plaintiff sent a demand letter to Defendants requesting payment of the balance of the rent they owed. Plaintiff subsequently initiated a summary ejectment action against Defendants. Plaintiff later dismissed the summary ejectment action and commenced the present action by filing a complaint in New Hanover County Superior Court on 1 October 2012 seeking recovery of $326,925.40 in unpaid rent and late fees from Defendants.

Defendants filed an answer and counterclaims on 5 November 2012. Defendants asserted various defenses, including the statute of limitations, accord and satisfaction, modification of the Lease Agreement, and waiver. Defendants also sought a declaratory judgment establishing "the parties' relevant rights and obligations in relation to the Lease, as modified, and the Stone Garden tract" and asserted counterclaims alleging breach of the Lease Agreement, breach of a joint venture agreement, and misrepresentation.

The parties both moved for summary judgment, and the trial court initially denied the motions by means of an order entered

on 10 April 2013. On 30 August 2013, Plaintiff filed a motion for reconsideration of the trial court's denial of its motion for summary judgment, asserting that the parties had conducted discovery following the trial court's 10 April 2013 order and requesting that the court "reconsider its earlier decision and now base its decision upon the entire record, rather than the partial record that was submitted at the earlier hearing."

The trial court heard Plaintiff's motion for reconsideration on 27 January 2014 and entered an order on 10 February 2014 (1) granting partial summary judgment in favor of Plaintiff with respect to its claim for rental payments owed between October 2009 and August 2012; and (2) granting partial summary judgment in favor of Defendants with respect to Plaintiff's claim for rent payments owed prior to October 2009 based on the statute of limitations. In an order and judgment entered on 19 March 2014, the trial court entered a final judgment in which it granted summary judgment in favor of Plaintiff with respect to Defendants' counterclaims, determined that Plaintiff was entitled to recover $251,334.00 based on its claim for unpaid rent, and ordered Defendants to pay attorneys' fees in the amount of $37,700.00. Defendants gave timely notice of appeal to this Court.

Analysis

On appeal, this Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only 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." *Premier, Inc. v. Peterson*, ___ N.C. App. ___, ___, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

Defendants contend that the trial court improperly granted summary judgment in favor of Plaintiff because the evidence before the trial court — specifically the evidence regarding Mr. Nixon's statement that Ms. Brown should "do the best [she] can" in terms of paying rent — was sufficient to establish "a natural and reasonable belief that the Lease had been modified as to the rental amount." We disagree.

While Plaintiff offers several arguments as to why the entry of summary judgment in its favor was proper, we uphold the trial court's ruling based on the statute of frauds. North Carolina's statute of frauds provides that a lease contract with a term extending beyond three years "shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some

other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2013). "If a contract falls within the statute of frauds, the party against whom enforcement is sought may generally avoid enforcement if there is no written memorandum of that party's assent to the contract. This rule also applies to the modifications of contracts that must be in writing." *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, ___ N.C. App. ___, ___, 731 S.E.2d 837, 842 (2012).

In arguing that summary judgment in favor of Plaintiff was not appropriate, Defendants rely upon *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 315 S.E.2d 346, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). In *Son-Shine*, we explained that

> [t]he provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract have been modified or waived, even though the instrument involved provides that only written modifications shall be binding.

Id. at 422, 315 S.E.2d at 349.

While we have applied the above-quoted proposition of law to recognize the validity of an oral modification to a written contract despite the contract's inclusion of a "no oral modifications" clause, we have not done so where, as here, the original contract was subject to the statute of frauds. *See*

Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984) (explaining that written contracts not covered by statute of frauds may be modified by subsequent parol agreement but contracts subject to statute of frauds cannot be so modified).

"When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are ineffectual." *Id.*; *see Concrete Mach. Co., Inc. v. City of Hickory*, 134 N.C. App. 91, 95, 517 S.E.2d 155, 157-58 (1999) (holding that oral modification of contract required to be in writing by statute of frauds was unenforceable). Here, because the Lease Agreement in this case extended beyond a three-year period, it is governed by the statute of frauds. *See* N.C. Gen. Stat. § 22-2.

Defendants do not dispute that the Lease Agreement is subject to the statute of frauds. Rather, they contend that the alleged subsequent modification of the rental amount owed by them was nevertheless valid because "[t]he checks are sufficient writings signed by the parties to be charged to support the Defendants' claim that the rental terms of the Lease were modified by the parties." Our Court has held that a check may, in some cases, be a sufficient memorandum of an agreement to satisfy the requirements of the statute of frauds. *Hurdle v.*

White, 34 N.C. App. 644, 648, 239 S.E.2d 589, 592 (1977), *disc. review denied*, 294 N.C 441, 241 S.E.2d 843 (1978). However, we have explained that in order to constitute a sufficient memorandum, the check must demonstrate that there was a meeting of the minds between the parties with respect to the terms of the contract or, in this case, the modification of the contract. *Id.* at 651, 239 S.E.2d at 594; *see also Northwestern Bank v. Church*, 43 N.C. App. 538, 541, 259 S.E.2d 313, 315 (1979) (explaining that language of memorandum must be adequate to show that "there was a meeting of the minds of the parties"), *disc. review denied*, 299 N.C. 328, 265 S.E.2d 397 (1980).

In the present case, we cannot conclude that the checks from Ms. Brown to Plaintiff qualify — for statute of frauds purposes — as memoranda sufficient to evidence an agreement between the parties that Defendants could pay various amounts of rent each month in full satisfaction of their monthly rent obligation. The checks do not indicate that they were being tendered in full payment of the monthly rent by any sort of notation on the checks' memo line, and Mr. Nixon's statement that Ms. Brown should "do the best [she] can" does not, without more, support the conclusion that Plaintiff agreed to permanently forego unpaid rent and accept Defendants' monthly checks as fully satisfying Defendants' rent obligation. *See*

Lewis v. Edwards, 147 N.C. App. 39, 49, 554 S.E.2d 17, 23 (2001) (explaining that modification to contract only occurs "if there is mutual assent to the terms of the modification"). Thus, because the forecast of the evidence does not support Defendants' claim that a legally valid modification of the Lease Agreement occurred, the terms of the original Lease Agreement govern with respect to Defendants' rent obligation.

Defendants next argue that the trial court erred in granting summary judgment in favor of Plaintiff because their affirmative defenses of accord and satisfaction and waiver were supported by "clear, convincing, and uncontroverted" evidence such that Defendants were entitled to summary judgment in their favor. We address each of these affirmative defenses in turn.

First, Defendants contend that the evidence established an accord and satisfaction because the checks written to Plaintiff from Ms. Brown "were less than the amount Plaintiff knew was due and . . . Plaintiff accepted the same in satisfaction of the rental obligations as they came due." "Accord and satisfaction may result where there is a dispute as to the amount actually due followed by payment of something less than or different from the amount claimed." *N.C. Monroe Constr. Co. v. Coan*, 30 N.C. App. 731, 737, 228 S.E.2d 497, 501, *disc. review denied*, 291 N.C 323, 230 S.E.2d 676 (1976).

While we have explained that the existence of an accord and satisfaction is generally a question of fact, "where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when essential facts are made clear of record." *In re Five Oaks Recreational Ass'n, Inc.*, 219 N.C. App. 320, 326, 724 S.E.2d 98, 102 (2012) (citation and quotation marks omitted). Thus, "establishing an accord and satisfaction . . . as a matter of law requires evidence that permits no reasonable inference to the contrary and that shows the unequivocal intent of one party to make and the other party to accept a lesser payment in satisfaction . . . of a larger claim." *Zanone v. RJR Nabisco, Inc.*, 120 N.C. App. 768, 772, 463 S.E.2d 584, 588 (1995) (citation, quotation marks, and brackets omitted), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

In arguing that an accord and satisfaction existed based on these facts as a matter of law, Defendants cite *Zanone* for the proposition that when "a check is given and received clearly purporting to be payment in full or when such check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full payment of all indebtedness . . . the courts will allow to such a payment the effect contended

for." *Id.* at 774, 463 S.E.2d at 589 (citation, quotation marks, brackets, and emphasis omitted).

However, as Plaintiff correctly points out in its brief, the remittance of a check — even when it purports to constitute payment in full — "does not result in an accord and satisfaction if the claim involved is liquidated and *undisputed* . . . ." *Five Oaks Recreational Ass'n*, 219 N.C. App. at 327, 724 S.E.2d at 102 (citation and quotation marks omitted and emphasis added); *see also Zanone*, 120 N.C. App. at 774, 463 S.E.2d at 589 (explaining that accord and satisfaction applies only to "a disputed account between parties").

Here, the amount of Defendants' rent obligation was governed by the Lease Agreement, and Defendants offered no evidence of (1) the existence of a dispute concerning the amount of rent owed pursuant to the Lease Agreement; or (2) a discussion between the parties that Ms. Brown's checks, which were written in varying amounts, were intended to satisfy Defendants' monthly rental obligation *in full*. *See Five Oaks Recreational Ass'n*, 219 N.C. App. at 327, 724 S.E.2d at 103 (stating that party asserting accord and satisfaction must offer evidence that there is dispute over amount or validity of debt and that no accord and satisfaction exists where there was no

discussion between parties that check was intended to cover entire debt owed).

Indeed, while the amount of Defendants' rental obligation is the subject of the current litigation because of the parties' conflicting theories concerning the effect of Mr. Nixon's statement that Ms. Brown should "do the best [she] can," Defendants have failed to show that Defendants' rent obligation *pursuant to the Lease Agreement* was in dispute at the time Ms. Brown submitted checks in varying amounts to Mr. Nixon or, for that matter, have ever been in dispute. Accordingly, we hold that Defendants' accord and satisfaction defense fails as a matter of law.

Second, Defendants contend the evidence shows that Plaintiff waived its right to collect unpaid rent from Defendants because it accepted partial payments from Ms. Brown. It is well established, however, that a waiver must be "based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up." *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 509, 722 S.E.2d 1, 6 (2012) (citation and quotation marks omitted).

As explained above, the forecast of the evidence in the summary judgment record does not support Defendants' contention that Plaintiff demonstrated an intention to give up its right to collect the unpaid rent owed to it under the Lease Agreement. Accordingly, this defense fails as a matter of law as well.

Defendants next assert that the trial court's interpretation of the late fees provision of the Lease Agreement was incorrect because they claim that late fees should be assessed only on the unpaid portion of the rent rather than on the entire rental amount due each month. However, Defendants cite no legal authority and offer no substantive argument in support of this contention beyond their bare assertion that calculating late fees based on the full rent amount is "unfair" and unreasonable. As such, we conclude that Defendants have abandoned this issue on appeal. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Finally, Defendants argue that the trial court erred in granting summary judgment in favor of Plaintiff with respect to Defendants' counterclaims. However, as Defendants state in their brief, each of their counterclaims "is premised upon an agreement between the parties to pay/accept a reduced rent

amount." As discussed above, we hold that (1) the trial court properly granted summary judgment in favor of Plaintiff based on the fact that the forecast of the evidence did not support a determination that an actual agreement existed between the parties under which Plaintiff would forego past unpaid rent; and (2) consequently, the Lease Agreement remained controlling with regard to Defendants' rental payment obligation. Therefore, because Defendants' counterclaims hinge on the validity of a proposition we have rejected, we conclude that the trial court properly granted summary judgment in favor of Plaintiff with respect to Defendants' counterclaims.

Conclusion

For the reasons stated above, we affirm the trial court's 10 February 2014 order and 19 March 2014 order and judgment.

AFFIRMED.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).