IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1171

Filed: 21 April 2015

GLEN WILDE, LLC, Plaintiff,

v.

Watauga County
No. 13 CVD 538

KENDRA FLETCHER and LORRAINE S. GROSSO, Defendants.

Appeal by plaintiff from judgment entered 11 July 2014 by Judge F. Warren Hughes in Watauga County District Court. Heard in the Court of Appeals 18 February 2015.

Moffatt & Moffatt, PLLC, by Tyler Moffatt, for plaintiff-appellant.

Eggers, Eggers, Eggers & Eggers, by Kimberly M. Eggers, for defendants-appellees.

INMAN, Judge.

Plaintiff appeals the judgment granting summary judgment in favor of defendants Kendra Fletcher and Lorraine Grosso. On appeal, plaintiff contends that there was a genuine issue of material fact as to whether the lease agreement was rescinded.

After careful review, we affirm the trial court's judgment.

Factual and Procedural Background

On 1 July 2013, defendant Lorraine Grosso's ("Grosso's") daughters, Carolyn and Michelle, entered into a lease agreement with Johnny Cook for an apartment on State Farm Road in Boone, North Carolina ("the apartment"). The lease would end 1 July 2013. In April 2013, Kuester Real Estate Services, an agent of plaintiff Glen Wilde, LLC ("plaintiff"), took over the management of the apartment complex where the apartment was located. Plaintiff owned the apartment complex. Grosso's daughter Michelle and Michelle's friend Kendra Fletcher ("'Fletcher") (collectively, Fletcher and Grosso are referred to as "defendants") wanted to remain in the apartment after the initial lease ended. After paying the July rent, defendants entered into a one-year lease with plaintiff which was effective from 1 August 2013 to 31 July 2014; Grosso executed a personal guaranty agreement as a personal guarantee for the lease with Liz Moore ("Moore"), plaintiff's employee and agent. The $1,280 security deposit from the original lease was transferred to the new lease.

A few weeks later, Grosso learned that she would be losing her job. She immediately contacted Moore about terminating the lease. Moore told Grosso that it would be "no problem . . . [to] find other renters for the apartment since there was a big demand by ASU students for the 2013 school year." On 6 August, Moore told Grosso that she "ha[d] Michelle's room rented [and was] [w]orking on getting [Fletcher's] rented as well." Moore told Grosso that the new tenant wanted to move

in on 17 August. Defendants vacated the apartment on 13 August and returned all of the keys to the apartment back to Moore.

About one month later, Moore called Grosso and left her a message stating that she had not succeeded in renting the other half of the apartment and asking Grosso to pay Fletcher's portion of the September rent. Grosso returned Moore's phone call but never reached her. Grosso received a civil summons for small claims court on 24 September 2013. On 3 October 2013, a Watauga County magistrate dismissed plaintiff's summary ejectment actions, finding that it had failed to prove its case. Plaintiff appealed the judgment to District Court.

The District Court heard the parties' cross motions for summary judgment on 9 July 2014. After concluding that there was no genuine issue of material fact as to whether the contract was rescinded, the trial court entered summary judgment in favor of defendant. Plaintiff timely appealed.

Standard of Review

"An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 778, 782 (2004); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). We review a trial court's order granting summary judgment *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713. Once a moving party shows that an affirmative

defense would bar a claim, "the non-moving party must forecast evidence demonstrating the existence of a *prima facie* case." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008).

Analysis

"Rescission is not merely a termination of contractual obligations. It is abrogation or undoing of it from the beginning. It seeks to create a situation the same as if no contract ever had existed." *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 542 (1967). This Court has explained that

> Rescission may be made by mutual agreement. Rescission depends not only upon the acts of the parties, but it also depends upon the intent with which they are done. For rescission there must be mutuality, express or implied. The mutuality essential to rescission may be found to exist if, after breach of contract or abandonment by one party, the other by word or act declares the contract rescinded.

Top Line Const. Co. v. J.W. Cook & Sons, Inc., 118 N.C. App. 429, 433, 455 S.E.2d 463, 466 (1995) (internal quotations omitted).

> The agreement to rescind need not be expressed in words. Mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party even wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be sometimes circumstances justifying the inference that he assents.

Restatement (First) of Contracts § 406, Comment b (1932). However, "[w]hile an abandonment or waiver of rights under a written option or other contract can be established by oral evidence, . . . such evidence must be positive, unequivocal, and

inconsistent with the contract." *Lancaster v. Lumby Corp.*, 77 N.C. App. 644, 646, 335 S.E.2d 791, 792 (1985).

Here, because defendants offered evidence showing that Moore, who was plaintiff's agent for purposes of handling the rental property (which plaintiff admitted in written discovery responses), rescinded the contract and because plaintiff failed to offer any evidence in opposition to rebut the defense of rescission, we conclude that defendants were entitled to judgment as a matter of law.

In her affidavit, Grosso alleged the following: On 30 July 2013, Moore told her and her husband that it would be "no problem" to terminate the lease because she had a waiting list for the complex. Moreover, even though the August rent had been paid, Grosso agreed that both Michelle and Fletcher would vacate the apartment as soon as Moore found someone who wanted to move in. Moore called Grosso on 3 August and told her that she "had people" who wanted to move into the apartment on 17 August and inquired as to how soon Michelle and Kendra could be moved out. After informing Moore that Michelle and Fletcher would completely vacate the apartment on 13 August, Moore told Grosso that she would refund the unused days in August and return defendants' security deposit. After returning the keys to the apartment on 13 August, Grosso did not hear anything from defendants until 19 September, over a month after the apartment was vacated, when Moore called her and told her that she owed payment for Fletcher's portion of the September rent.

Even though Grosso returned Moore's call, she did not hear anything else from plaintiff until receiving the small claims summons on 24 September.

In contrast to defendants' evidence establishing the defense of rescission, plaintiff's only evidence offered in opposition was the affidavit of Nicola Sica ("Sica"), the regional director of Kuester Real Estate Services. Plaintiff admitted in its answer to defendants' interrogatories that Sica "has very limited knowledge of the circumstances surrounding the events which are the subject of the Amended Complaint as she was not employed by Kuester Real Estate Services, Inc. at the time the events occurred." In addition, Sica's affidavit included no allegations addressing defendants' claim that, by her words and actions, Moore agreed to rescind the lease. Instead, the affidavit states only that, even though plaintiff entered into written leases with new tenants twice for the apartment, Fletcher and Grosso, as Fletcher's guarantor, still owed Fletcher's portion of the rent from August 2013 to July 2014 because permanent attempts to re-lease Fletcher's half of the apartment were, apparently, not successful. However, Sica's affidavit fails to offer any allegations that dispute defendants' claims or provide an alternative interpretation of Moore's actions and words other than one indicating that Moore mutually assented to rescind the contract. Moreover, even though plaintiff identified three people as having either direct or indirect knowledge of the relevant events in its discovery responses—specifically, Shaw Kuester, Moore, and Kayla Morton—plaintiff failed to produce any

evidence by these individuals or anyone else establishing that a triable issue of fact existed.

In summary, even construing the evidence in a light most favorable to plaintiff, *Canady v. McLeod*, 116 N.C. App. 82, 84, 446 S.E.2d 879, 880 (1994), it clearly and unequivocally shows that both parties mutually assented to cancel the lease. Both plaintiff's and defendants' actions are inconsistent with continuation of the lease, and defendants met their burden of showing that the defense of rescission would bar plaintiff's claim. Therefore, summary judgment was properly granted in favor of defendants.

Conclusion

For the foregoing reasons, we affirm the trial court's judgment.

NO ERROR.

Judges ELMORE and GEER concur.

Report per Rule 30(e).