IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-129

Filed: 3 November 2015

Henderson County, No. 12 CVS 2161

EDWARD I. SUAREZ, Plaintiff,

v.

LCD PROPERTIES, LLC, LINDA H. ANNIS, and MATTHEW YORK, Defendants.

Appeal by plaintiff from order entered 30 July 2014 by Judge Martin B. McGee in Henderson County Superior Court. Heard in the Court of Appeals 4 June 2015.

Karolyi-Reynolds, PLLC, by James O. Reynolds, for plaintiff-appellant.

Matney & Associates, P.A., by David E. Matney III and Amy P. Mody, for defendant-appellees.

McCULLOUGH, Judge.

Edward I. Suarez ("plaintiff") appeals from the trial court's grant of summary judgment in favor of LCD Properties, LLC ("LCD"), Linda H. Annis ("Annis"), and Matthew York ("York") (together "defendants"). For the following reasons, we affirm.

I. Background

This appeal stems from a dispute over mobile home units ("MHUs") in Mountain View Mobile Court (the "Park"), a mobile home park owned and operated by LCD in Hendersonville. Between 1999 and 2009, plaintiff owned multiple MHUs in the Park. Pertinent to this case, at one time plaintiff owned four MHUs situated on the following lots: 63 Dickens Lane, 80 Dickens Lane, 83 Dickens Lane, and 7 Dovetree Lane. Plaintiff resided in the MHU at 83 Dickens Lane and leased the other three MHUs to tenants. Plaintiff leased the lots on which the MHUs were located from LCD on a month-to-month basis.

During the time plaintiff owned the MHUs in the Park, the Park's Rules and Regulations ("R&Rs") were revised various times to restrict the number of MHUs a single owner could own, with the sole exception that the landlord was not subject to the restriction. As indicated in the R&Rs, the revisions were implemented to prevent the subletting of MHUs and to preclude individuals not previously approved by the landlord from residing in the Park. MHU owners who already owned multiple MHUs were to be grandfathered in.

Over the years plaintiff owned the MHUs, plaintiff and defendants had numerous disputes over various portions of the R&Rs.

By letter sent 10 March 2009, LCD notified plaintiff that plaintiff's leases would terminate effective 31 May 2009. When plaintiff remained in possession of the lots after 31 May 2009, LCD commenced an action for possession in small claims court, which resulted in the magistrate awarding possession of the lots to LCD. Defendant appealed to Henderson County District Court and the matter came on for trial before the Honorable Athena F. Brooks on 4 August 2009. Over plaintiff's assertion of retaliatory eviction, on 14 August 2009, the trial court entered orders and judgment awarding LCD possession of the lots and past due rent from 1 June 2009 forward, as permitted by law.

On 13 October 2009, the Deputy Clerk of Henderson County Superior Court issued a writ of possession for the lots and the Henderson County Sheriff's Office ("HCSO") provided notice of eviction to plaintiff. LCD was later placed in legal possession of the lots when the writ of possession was executed by the HCSO on 20 October 2009. Pursuant to N.C. Gen. Stat. § 44A-2(e2), and as acknowledged in agreements signed by Annis, plaintiff had the right to retrieve the MHUs within twenty-one days of the execution of the writ of possession before LCD acquired a lien on the MHUs for the amounts owed for past due rent. Thus, plaintiff had through 10 November 2009 to retrieve the MHUs from the Park.

Pertinent to the present case, the MHU at 7 Dovetree Lane and portions of the MHU at 83 Dickens Lane remained on the respective lots past 10 November 2009.

On 9 November 2012, plaintiff initiated the present action by filing a complaint against LCD, Annis (the manager of LCD), and York (the Park's property manager). In the complaint, plaintiff asserted causes of action for (1) tortious interference with contractual relations against Annis and York, (2) unfair and deceptive trade practices against all defendants, and (3) conversion and unjust enrichment against LCD and Annis. As provided in the complaint, these claims were based on plaintiff's assertions that LCD and Annis refused to authorize potential buyers into the Park and interfered with the removal of the MHUs prior to 11 November 2009.[1]

Defendants responded to plaintiff's complaint by filing an answer and affirmative defenses on 7 March 2013. Defendants then filed a motion for summary judgment on 14 May 2014 following discovery.

Defendants' motion for summary judgment came on to be heard by the Honorable Martin B. McGee in Henderson County Superior Court on 27 May 2014. At the hearing, defendants admitted that there was a factual dispute as to whether or not plaintiff was kept from retrieving the MHUs from the Park on 10 November 2009. Defendants, however, asserted that the issue was not material for purposes of ruling on the motion for summary judgment. Defendants instead argued various defenses precluding each claim.

On 30 July 2014, the trial court entered an order signed 24 July 2014 granting summary judgment in favor of defendants. Plaintiff filed notice of appeal from the summary judgment order on 25 August 2014.

II. <u>Discussion</u>

[1] The original complaint incorrectly stated the date as 12 November 2009. A consent order amending the complaint to change the date from 12 November 2009 to 11 November 2009 was filed on 27 May 2014.

On appeal, plaintiff contends the trial court erred in granting summary judgment in favor of defendants.[2] "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)). Initially, "[t]he movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *S. Nat'l Bank of N.C. v. B & E Const. Co., Inc.*, 46 N.C. App. 736, 737, 266 S.E.2d 1, 2 (1980). "This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the claim." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008). If the moving party satisfies its burden, it is up to the non-moving party to forecast evidence demonstrating the existence of a *prima facie* case. *Id.*

<u>Tortious Interference with Contractual Relations & Conversion</u>

[2] The issues on appeal concern only the MHUs located at 83 Dickens Lane and 7 Dovetree Lane. In regards to the MHU at 63 Dickens Lane, plaintiff voluntarily dismissed all claims in this action because that property was the subject of a prior small claims action by plaintiff. In regards to the MHU at 80 Dickens Lane, plaintiff concedes that no damages can be proven because he sold the MHU to an individual who continues to reside in the MHU at 80 Dickens Lane.

Plaintiff first argues defendants' defenses to his claims for tortious interference with contractual relations and conversion are mutually exclusive. Therefore, plaintiff avers the trial court erred in entering summary judgment as to both claims.

We begin our analysis with a review of plaintiff's tortious interference with contractual relations and conversion claims and defendants' defenses. In plaintiff's first cause of action for tortious interference with contractual relations against Annis and York, plaintiff alleged Annis and York "knowingly, intentionally, and unjustifiably" induced a prospective buyer with whom plaintiff had a valid purchase contract for the MHU at 7 Dovetree Lane to breach the contract by intimidating and bullying the prospective buyer and threatening eviction in a deliberate attempt to cause breach of the purchase contract.[3] Then in plaintiff's third cause of action for conversion and unjust enrichment against LCD and Annis, plaintiff alleged LCD and Annis interfered with the removal of the MHU at 7 Dovetree Lane and portions of the MHU at 83 Dickens Lane prior to 11 November 2009. Plaintiff further alleged in the third cause of action that LCD and Annis "currently rent the [MHU] located at 7 Dovetree Lane to third-party tenants despite not having lawful title to the property[]" and, as a result of renting the MHU, have converted the property to their own use and have been unjustly enriched by the receipt of rental payments.[4]

[3] Plaintiff also alleged interference with a purchase contract for the MHU located at 63 Dickens Lane. Yet, as previously noted, plaintiff voluntarily dismissed his claims related to 63 Dickens Lane.

[4] Again, plaintiff also alleged conversion and unjust enrichment related to the MHU located at 63 Dickens Lane. Plaintiff, however, voluntarily dismissed those claims.

In defense against the tortious interference with contractual relations claim related to the purchase contract for 7 Dovetree Lane, defendants argued at the summary judgment hearing that the last evidence of any interference, if it constituted interference at all, was on 5 November 2009. Because plaintiff did not file the complaint asserting the tortious interference with contract claim until more than three years after the last evidence of interference, defendants argued the tortious interference with contract claim was barred by the applicable three year statute of limitations. *See* N.C. Gen. Stat. § 1-52(5) (2013). In response, plaintiff argued he wasn't damaged until 10 November 2009 when he was allegedly refused entry into the Park while attempting to retrieve the MHUs, or parts thereof, at 7 Dovetree Lane and 83 Dickens Lane. Plaintiff asserts "[t]hat's when he became damaged because that's when he lost his personal property."

In defense against plaintiff's conversion claim, and in addition to arguing *res judicata* as a consequence of the separate small claims action concerning 63 Dickens Lane, defendants argued the evidence was that plaintiff no longer owned the MHUs at 83 Dickens Lane and 7 Dovetree Lane on 10 November 2009. Therefore, defendants reasoned that, even if there was a conversion, the conversion was not of plaintiff's property and plaintiff is not a proper plaintiff. In response, plaintiff argued there was at least a question of fact as to whether or not he owned the MHUs because "if he can't deliver the property to the buyer, then the contract fails and he hasn't been able to sell them."

Upon considering the arguments, the trial court entered summary judgment in favor of defendants.

Now on appeal, plaintiff argues defendants'

> defenses are internally inconsistent, in that if [plaintiff] had sold the units by contract to Mr. Higgins, [d]efendants tortiously interfered with [plaintiff's] ability to perform under the contract on 10 November 2009, by unlawfully preventing him from retrieving the property to deliver to his buyer.
>
> Conversely, if the sale was frustrated through actions by [d]efendants ending 5 November 2009, then a question-of-fact exists as to whether the units were still effectively sold to Higgins on 10 November 2009, or the contract rescinded and the ownership returned to [plaintiff] at that time. If [plaintiff] was the owner of 83 Dickens and 7 Dovetree on 10 November 2009, his conversion claim must go to the jury. If he was not the owner, his contract to sell was subject to [d]efendants' tortious interference [on] 10 November 2009.
>
> Defendants' interference with [plaintiff] and Mr. Higgins' contact involved more than their refusal to approve Mr. Higgins as a tenant for two separate lots and MHUs.

We are not persuaded by plaintiff's arguments.

We first address the trial court's grant of summary judgment on plaintiff's tortious interference with contractual relations claim against Annis and York. At the outset, we note that plaintiff's theory of tortious interference argued at the summary judgment hearing, and now on appeal, is different than that pleaded in the complaint. In the complaint, plaintiff alleged "A[nnis] and Y[ork] intimidated and bullied the . . . prospective . . . buyer[] . . . and threatened . . . eviction if [the buyer] closed on the purchase . . . in a deliberate attempt to cause [the buyer] to breach [the] purchase contract[;]" whereas the interference now alleged by plaintiff in an attempt to preclude summary judgment is that defendants interfered with plaintiff's ability to perform under the contract, thereby frustrating the contract. Reviewing the evidence of tortious interference in light of plaintiff's complaint, there is no evidence of interference by Annis or York within the three years preceding the filing of plaintiff's complaint on 9 November 2012.

The evidence shows that plaintiff and Fred A. Higgins entered into and signed an "Installment Sales Agreement" for the MHU at 7 Dovetree Lane on 30 September 2009. Both parties then signed what appears to be an addendum to that agreement on 7 October 2009. Higgins signed the addendum as the "new owner 7 Dovetree Lane" and Plaintiff signed the addendum as the "former owner 7 Dovetree Lane[.]" Sometime before 8 October 2009, Higgins wrote to Annis stating that he had purchased the MHUs at 83 Dickens Lane and 7 Dovetree Lane from plaintiff. Annis responded to Higgins by note memorializing an earlier telephone conversation on 8 October 2009. In the note, Annis indicated that subletting was not allowed in the Park, Higgins had not been approved by the Park, and Higgins had not yet received title. Higgins later addressed Annis' concerns in an undated letter. Specifically, Higgins identified himself as a "possible renter" who "would prefer to stay and rent [the] lots, saving the expense of moving the trailers to another park." Higgins further explained that he was including a copy of the title for the MHU at 7 Dovetree Lane.

Although the letter was undated, it is evident the letter was sent prior to 16 October 2009 because on that date, York made a notation that Higgins had not been approved by the Park on a copy of a State of North Carolina Registration Card for the MHU at 7 Dovetree Lane showing the MHU was registered to Higgins. Plaintiff thereafter detailed instances of "meddling" that could be considered interference in a letter to York dated 28 October 2009.

While all the above evidence demonstrates instances of potential interference by defendants as alleged in plaintiff's claim for tortious interference with contractual relations, the instances of potential interference occurred more than three years before the filing of plaintiff's complaint. Plaintiff has failed to forecast any evidence of interference occurring within the three years prior to the filing of his complaint besides asserting that defendants refused him entry into the park to retrieve the MHU at 7 Dovetree Lane on 10 November 2009. That refusal, however, was not alleged as a basis for the tortious interference with contract claim; it was asserted as the basis of plaintiff's conversion claim. As a result, we hold the trial court did not err in granting summary judgment in favor of defendants on plaintiff's claim for tortious interference with contract.

Moreover, even if the statute of limitations had not run, the evidence is insufficient to support plaintiff's tortious interference claim.

> The tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against

> a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954)). Although the evidence supports the first two elements, the evidence does not support the third and fourth elements of the tort. Specifically, the evidence shows that title to the MHU at 7 Dovetree Lane did in fact pass to the buyer, as demonstrated by the State of North Carolina Registration Card for the MHU at 7 Dovetree Lane showing the MHU registered to Higgins. Thus, the evidence is that Higgins, the third person, did perform the contract. Plaintiff has not identified any evidence to the contrary. Furthermore, there is no evidence that defendants acted without justification in representing to Higgins he would not be approved by the Park, as Higgins was attempting to purchase two MHUs and the R&Rs clearly establish that subletting of MHUs is not allowed.

We next address the trial court's grant of summary judgment on plaintiff's conversion claim against LCD and Annis.

> This Court has stated that the tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. . . . There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant.

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (internal quotation marks, citations, and alterations in original omitted).

In this case, plaintiff has not identified any evidence that he retained ownership of the MHUs at 83 Dickens Lane and 7 Dovetree Lane at the time the alleged conversion occurred. In fact, the evidence at the summary judgment hearing tended to show plaintiff sold the MHUs to Higgins prior to the alleged conversion of the property on 10 November 2009. Therefore, as defendants assert, plaintiff had no interest in the MHUs to be converted.

Although plaintiff argues the agreements for the sale of the MHUs at 83 Dickens Lane and 7 Dovetree Lane to Higgins were defeated when LCD refused Higgins as a tenant in the Park and, therefore, created an issue of fact as to who owned the MHUs on 10 November 2009, plaintiff does not identify any evidence that supports his argument that he retained or reacquired title to the MHUs. As discussed above, Higgins communications with defendants in October 2009 indicate that Higgins purchased the MHUs from plaintiff. Higgins even forwarded a copy of the State of North Carolina Registration Card for the MHU at 7 Dovetree Lane to defendants demonstrating ownership. Moreover, there is nothing in the agreements for the sale of the MHUs indicating the purchase of the MHUs by Higgins was conditioned on the approval of Higgins as a tenant by the Park. The agreements signed by both plaintiff and Higgins explicitly state in Section B that "[Higgins] acknowledges that he has received the property . . . in good condition[]" and "promises to pay the total purchase price . . . in accordance with the payment schedule[.]" Lastly, Higgins communicated to Annis that he would prefer to rent the lots in the Park to avoid the expense of moving the MHUs, indicating his purchase was not conditioned on approval by the Park. Because defendant did not identify any evidence to the contrary, the evidence before the trial court was that Higgins purchased the MHUs.

Considering defendants' defenses to plaintiff's claims for tortious interference with contractual relations and conversion together, we hold defendants' defenses were not mutually exclusive and the trial court did not err in entering summary judgement in favor of defendants on both claims.

<u>Unfair and Deceptive Trade Practices</u>

In plaintiff's second issue on appeal, plaintiff contends he adequately pleaded an unfair and deceptive trade practices claim per N.C. Gen. Stat. § 75.1-1 ("UDTPA") and forecasted evidence to preclude resolution of the claim as a matter of law. We disagree and hold plaintiff did not adequately plead a UDTPA claim.

This Court has recently explained that

> To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business. A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. The statute does not apply to

> every transaction that might be viewed as unfair or deceptive, but applies only if the alleged violator is engaged in commerce. Our legislature has defined commerce very broadly, however, to include all business activities, however denominated, with the exception of professional services rendered by a member of a learned profession.

Faucette v. 6303 Carmel Road, LLC, __ N.C. App. __, __, 775 S.E.2d 316, 323-24 (2015) (internal quotation marks and citations omitted).

At the summary judgment hearing, plaintiff argued the general theory of the case, including the UDTPA claim, was an uneven application and the inconsistent enforcement of the R&Rs promulgated by the Park. Plaintiff asserted defendants knew there were substantial barriers to removing MHUs from the Park and enforced the R&Rs when convenient and to their advantage in order to "acquire his personal property under color of law after the 21st day." *See* N.C. Gen. Stat. § 44A-2(e2). In response, defendants asserted plaintiff's theory of inconsistent application of the R&Rs was not pleaded.

Now on appeal, plaintiff similarly asserts as follows:

> [T]he apparently fluctuating policies for and against allowing residents of the Park to rent and sublease additional lots with their own MHUs was crafted by LCD and Annis with an ulterior motive . . . . Specifically, that these MHUs are exceedingly difficult to move due to age, roadworthiness, and permitting issues. So once someone like [plaintiff] purchases several MHUs he is vulnerable to the landlord's designs.
>
> [Plaintiff] contends the policies and procedures were used as a pretext to initiate eviction proceedings, but Annis anticipated the process would end in her capture of his MHUs because he would simply be unable to remove them.

> [Plaintiff], . . . contends this was an established pattern of behavior on LCD and Annis' part with other tenants. (Citations to the record omitted).

Upon review of the pleadings, we agree with defendants that plaintiff did not plead a history or practice of uneven application or inconsistent enforcement of the R&Rs. In plaintiff's second cause of action, plaintiff did not specifically identify any act or practice by defendants that was unfair or deceptive, but instead incorporated the alleged facts and the basis for his tortious interference with contractual relations claim by reference. Plaintiff then merely asserted as follows:

> 20. That LCD, Annis and York's actions described herein were in or affecting commerce.
>
> 21. That Plaintiff was a lessee of Defendants, and by virtue of this fact Defendants enjoyed a position of authority over Plaintiff.
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> 22. That Defendants abused the above-described authority to the detriment of Plaintiff.
>
> 23. That this constitutes a violation of N.C. Gen. Stat. § 75-1 *et seq.*, and among other things, entitles the plaintiff's to an award of his reasonable attorney's fees in the prosecution of this matter.

We hold these pleadings were inadequate to support a UDTPA claim based on a history or practice of uneven application and inconsistent enforcement of the R&Rs.

Plaintiff additionally argues that if he can prove the elements of tortious interference with contract, he may be entitled to relief under his UDTPA claim. While tortious interference may serve as the basis for a UDTPA claim, *see Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 41, 392 S.E.2d 663, 670 (1990) (citing *Kuykendall*, 322 N.C. at 664, 370 S.E.2d at 389), as discussed above, plaintiff failed to forecast sufficient evidence at the summary judgment hearing to avoid summary judgment on his claim for tortious interference with contractual relations. Thus, we hold the allegations incorporated by reference in plaintiff's UDTPA claim were insufficient to support the UDTPA claim and the trial court did not err in granting summary judgment in favor of defendants.

Res Judicata

In plaintiff's final argument on appeal, plaintiff contends his claims concerning the MHUs at 83 Dickens Lane and 7 Dovetree Lane are not barred on *res judicata* grounds by a conversion claim he pursued in a prior small claims action concerning the MHU at 63 Dickens Lane. Because we hold summary judgment was appropriate on other grounds, we need not address the *res judicata* argument.

III. Conclusion

For the reasons discussed, the trial court did not err in granting summary judgment in favor of the defendants.

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).