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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-146

Filed: 18 December 2018

Mecklenburg County, No. 17CVD14143

STEVEN GEE, Plaintiff,

v.

PAUL DENZER, Defendant.

Appeal by Defendant Paul Denzer from order entered 13 September 2017 by Judge Becky T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 23 August 2018.

No brief filed on behalf of Plaintiff-Appellee.

Paul H. Denzer, pro se, for Defendant-Appellant.

INMAN, Judge.

Defendant Paul Denzer appeals from the district court's 13 September 2017 order awarding Plaintiff Steven Gee possession of the property and \$1,711.90 in damages. Denzer argues that the district court erred in (1) failing to offset Gee's damage award by the amount of damages Gee was ordered to pay Denzer in a prior district court proceeding; and (2) failing to recognize a rent abatement due to Gee's

breaches of the lease agreement. After careful review of the record and applicable law, we affirm the district court's order.

Factual and Procedural Background

The record¹ and Denzer's brief reflect the following factual and procedural background:

Denzer and Gee entered into a residential lease agreement in September 2015, providing that Denzer would pay \$800 per month to Gee, who would rent to Denzer a furnished house and provide utilities including, but not limited to, trash collection, wi-fi, and lawn services. When Denzer initially moved in, the residence was "dirty," had a "cock roach infestation, rotting wood and trim," and had a number of overgrown trees abutting the home. Gee also stopped service of the utilities and, in the fall of 2016, attempted to evict Denzer without a court order.

In November 2016, Denzer filed an action in Mecklenburg County District Court, 16 CVD 20269, complaining that Gee had breached the lease agreement. The parties apparently resolved the dispute through court-ordered arbitration and, on 5 April 2017, Denzer obtained an arbitration award and judgment of \$1,350 in damages. The record does not indicate that Gee filed a motion for trial *de novo* following the arbitration award.

¹ The record is incomplete and unclear in many respects. Because Gee did not file an appellee brief, the only narrative of the procedural background is provided by Denzer.

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In January 2017, Gee sued Denzer in Mecklenburg County Small Claims Court for nonpayment of rent and summary ejectment. The magistrate found that Gee had failed to prove his case and dismissed the action with prejudice.

Denzer continued to refuse to pay rent and Gee continued to file actions in small claims court. On 2 May 2017, in 17 CVM 7912, the magistrate again found that Gee had failed to prove his case and dismissed the action. The magistrate order contains notations including “res judicata” and the case numbers of the January 2017 small claims proceeding and the district court proceeding in which Denzer had obtained the arbitration award and judgment.

On 19 May 2017, a magistrate again dismissed Gee’s third small claims action against Denzer, noting that Gee was seeking rent for April 2017, a period prior to Gee’s second small claims proceeding, which was dismissed. The magistrate noted that in light of the 2 May 2017 order, “res judicata bars this claim.”

On 2 June 2017, Gee filed a fourth complaint for summary ejectment and past due rent against Denzer in small claims court, alleging Denzer had failed to pay the May 2017 rent. On 21 July 2017, the magistrate entered judgment in Gee’s favor, ordering that Denzer be removed from the residence. The magistrate calculated a gross amount of \$2,139.51 rent in arrears, which equals \$800 per month for May, June, and 21 days in July 2017. The magistrate offset that amount by \$950 for lack of utilities, lack of furniture, and poor conditions of the premises, and added \$75 for

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a late fee, and ultimately ordered Denzer to pay Gee \$1,114.59 for unpaid rent. The magistrate denied Denzer's counterclaim for defects in the premises prior to May 2017, noting that those claims had previously been adjudicated in an arbitration award and had been applied as an offset against rent owed prior to May 2017.

Denzer appealed the magistrate 21 July 2017 order to the district court. By order entered 13 September 2017 (the "District Court Judgment"), the district court concluded that, because Denzer had already obtained an offset in a prior action, he could not "have the same set off applied again." Further, although Gee, since May 2017, had failed to provide utilities to Denzer pursuant to their rental agreement, the district court found and concluded that Denzer was not entitled to any rent abatement because he had paid no rent.

On 18 September 2017, Denzer mailed a letter to the district court stating that he was providing "notice that [he] will appeal this case." On 22 September 2017, Denzer filed a motion for new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. The district court dismissed the motion for new trial on 6 November 2017, concluding that Denzer's letter constituted notice of appeal that deprived the district court of jurisdiction. On 27 November 2017, Denzer filed a notice of appeal with the clerk of superior court, stating that he was appealing both the District Court Judgment and the dismissal of his Rule 59 motion to this Court.

Analysis

I. Notice of Appeal and Motion for New Trial

As a threshold issue, we must consider whether Denzer properly and timely filed and served a notice of appeal and, by extension, whether this Court has jurisdiction to hear this appeal. Rule 3 of the North Carolina Rules of Appellate Procedure requires the appealing party to file notice of appeal “with the clerk of superior court and serv[e] copies thereof upon all other parties” within 30 days upon judgment or order. N.C. R. App. P. 3(a), (c) (2017).

Although Denzer’s 18 September 2017 letter declared his intent to “appeal this case,” the letter was not addressed to the superior court and the record on appeal does not reflect that Denzer filed the letter with the clerk of superior court or served it on Gee, as required by Rule 3. So the letter did not constitute a valid notice of appeal.

On 22 September 2017, Denzer timely filed in the district court a motion for new trial, which, if proper, tolled the time limit provided by Rule 3 for noticing appeal from the District Court Judgment. N.C. R. App. P. 3(c)(3).

For a motion for new trial to trigger tolling “within the meaning of Rule 3 . . . the motion must ‘state the grounds therefor’ and the grounds stated must be among those listed in Rule 59(a).” *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (citations omitted). The motion “must supply information revealing the basis of the motion,” and is insufficient if there is “mere recitation of the rule number relied upon by the movant.” *Id.* at 606, 481 S.E.2d at 417.

Here, Denzer's motion requested a "new trial with new proceedings" pursuant to Rule 59(a)(1), (7), (8), and (9), with Denzer quoting the Rule's applicable language. Rule 59(a) provides that a new trial may be granted on the basis of several grounds, including "(7) [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law" and "(8) [e]rror in law occurring at the trial and objected to by the party making the motion." N.C. R. Civ. P. 59(a)(7), (8). Though hard to understand, Denzer's motion for new trial meets the criteria for a Rule 59 motion that tolls the 30-day time limit for appealing an order pursuant to Rule 3. For example, the motion alleges the District Court Judgment lacked sufficient evidence to justify the order, and that the district court judge made "abstract statement[s] appear[ing] as findings of fact."

Because portions of the motion present valid grounds for a new trial, we hold that the motion tolled the 30-day window for noticing an appeal until the motion was dismissed on 6 November 2017.

Denzer's 27 November 2017 letter noticing his appeal was properly filed with the clerk of superior court and was served on Gee within 30 days of the district court's dismissal of Denzer's motion for new trial. Rule 3 also provides that the notice of appeal must "specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed . . . by any such party not represented by counsel of record." N.C.

R. App. P. 3(d). The 27 November 2017 letter states that Denzer is appealing from the District Court Judgment and the dismissal order on 6 November 2017 to this Court and, because he is appealing *pro se*, Denzer signed it himself.

In sum, we hold that Denzer properly and timely filed a notice of appeal within the time and content parameters provided by Rule 3. While Denzer's 18 September 2017 letter was not a valid notice of appeal, his Rule 59 motion for new trial on 22 September 2017 tolled the 30-day time limit to file a notice of appeal until 6 November 2017, so his 27 November 2017 notice of appeal was timely and sufficient to vest this Court with appellate jurisdiction.

II. The Merits of Denzer's Appeal

In his brief, Denzer refers to the order dismissing his Rule 59 motion only once and provides no argument or legal authority regarding that issue, as required by Rule 28(b)(6). *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. . . . The body of the argument . . . shall contain citations of the authorities upon which the appellant relies."). Therefore, we need not address Denzer's appeal from the district court's order dismissing his motion for new trial.

Denzer raises nine additional arguments on appeal, which we construe to present two issues as the basis for his appeal from the District Court Judgment.

A. Relitigation of Damages Claims

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Denzer argues that he is entitled to offset any rent owed to Gee by the amount of damages awarded to Denzer in arbitration as a result of Gee's earlier breaches. The district court rejected this argument based on the doctrine of *res judicata*. An entry of "final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties." *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). The doctrine of *res judicata*, otherwise known as claim preclusion, applies when: (1) there is a prior final judgment on the merits; (2) the causes of action are the same; and (3) the identities of the parties are the same. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 262 (2005).

We agree with Denzer that the district court erred in some of its findings of fact regarding the procedural history of this case, but we hold that those findings are not material to the disposition of this case. The district court's finding that Denzer had previously been allowed an offset against Gee's claims for unpaid rent based on the arbitration award is not supported by the record on appeal. The district court found that in the 2 May 2017 small claims judgment, the magistrate had offset Gee's claim for unpaid rent by the amount of Denzer's arbitration award. The 2 May 2017 small claims judgment reflects no such offset. This error is immaterial, however, because the doctrine of *res judicata* bars applying Denzer's damages accrued as of

April 2017 and adjudicated in an arbitration award in a prior district court action to offset Gee's damages for unpaid rent for the months of May, June, and July 2017.

When the trial court confirms an arbitration award, pursuant to N.C. Gen. Stat. § 1-569.22, the award becomes a judgment so that *res judicata* bars later litigation of the same matter. *Futrelle v. Duke Univ.*, 127 N.C. App. 244, 250-51, 488 S.E.2d 635, 640 (1997); N.C. Gen. Stat. § 1-569.22 (2017). If the losing party in an arbitration does not file a demand for trial *de novo* within 30 days after the arbitration award, the clerk or the court shall enter judgment on the award, "which shall have the same effect as a consent judgment." N.C. R. Arb. 8(b) (2017). Consent judgments are final judgments on the merits for the purposes of *res judicata*. *NationsBank of N.C., N.A. v. Am. Doubloon Corp.*, 125 N.C. App. 494, 503-04, 481 S.E.2d 387, 393 (1997); *McLeod v. McLeod*, 266 N.C. 144, 153, 146 S.E.2d 65, 71 (1966). Determining the "scope of an arbitration award and its *res judicata* effect are matters for judicial determination." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985) (emphasis added).

The immaterial nature of the error in the district court's finding regarding the arbitration award being offset in a prior small claims proceeding is reflected in the transcript of the district court trial in this action. After Denzer asked the district court to offset any damages awarded to Gee by the amount of the arbitration award for Gee's prior breaches, the district court explained to Denzer:

You can't bootstrap on all this stuff Sir, you have a judgment out there for \$1350 against this gentleman here. Then you have to follow post-judgment proceedings, supplemental proceedings, get the Sheriff to serve a writ, try and collect on the debt. But that is done and it is over and it's done. So, you are seeking a modification of the rent. You can't use a prior judgment to now seek a modification of your rent in this current case.

Because Denzer had previously obtained an arbitration award and judgment for Gee's breaches prior to 5 April 2017, we hold that the district court did not err in precluding Denzer's counterclaim for rent abatement for those breaches.

B. Rent Abatement for Period After 5 April 2017

Denzer also contends that he is entitled to a rent abatement because, even after 5 April 2017, Gee continued to breach their rental agreement.

The district court concluded that Denzer was "not entitled to any offset or abatement" for later breaches by Gee because Denzer paid no rent during that time period. We agree.

A landlord has a duty to provide fit premises for tenants. N.C. Gen. Stat. § 42-42 (2017). If the landlord fails to act accordingly and a tenant has a cause of action, "damages for rent abatement can only include those amounts actually paid by [the tenant] for substandard housing." *Surratt v. Newton*, 99 N.C. App. 396, 407, 393 S.E.2d 554, 560 (1990) (citing *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987)); see also *Foy v. Spinks*, 105 N.C. App. 534, 540, 414 S.E.2d 87, 90 (1992) (holding the same). Here, because Denzer has failed to pay

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rent, dating as far back as September 2016, the district court did not err in concluding that Gee's alleged breaches after April 2017 did not entitle Denzer to any rent abatement.

AFFIRMED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).