IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1014

Filed: 19 November 2019

Wake County, No. 18 CVD 3821

MORGUARD LODGE APARTMENTS, LLC d/b/a THE LODGE AT CROSSROADS, Plaintiff,

v.

WARREN FOLLUM, Defendant.

Appeal by Defendant from judgment entered 10 May 2018 by Judge Ned Mangum in Wake County District Court. Heard in the Court of Appeals 21 August 2019.

Brownlee Whitlow & Praet, PLLC, by Rhian C. Mayhew, for Plaintiff-Appellee.

Warren R. Follum, pro se.

DILLON, Judge.

Defendant Warren Follum appeals from the trial court's judgment ordering him to vacate and surrender possession of a rental apartment owned by Morguard Lodge Apartments, LLC ("Morguard"). Mr. Follum brings a number of arguments on appeal, contending primarily that Morguard waived its right to terminate his lease. After careful review, we affirm Judge Mangum's order.

I. Background

Morguard owns and operates an apartment community in Cary. Beginning in 2005, Mr. Follum was a tenant residing in one of the apartments. Mr. Follum's most recent lease (the "Lease") provided that Mr. Follum was to pay monthly rent on the first day of the month in the amount of $1,460.00 plus utilities and that the term of the Lease would end on 31 March 2018.

Beginning in May 2014, Mr. Follum began to consistently pay his monthly rent on the third Wednesday of the month, rather than on the first day of the month. And each month Morguard sent Mr. Follum a notice alerting him that his rental payment was late. Nevertheless, Morguard accepted Mr. Follum's late payment for forty-five (45) consecutive months, through January 2018.

In February 2018, Mr. Follum, per his pattern, failed to pay his rent on the first day of the month. Morguard sent Mr. Follum a written notice informing him that he would be required to pay a sum of $1,658.71[1] by 15 February 2018, or he would be subject to eviction. Mr. Follum did not adhere to this warning. Four days later, on 19 February 2018, Morguard informed Mr. Follum that it had begun the eviction process and the only way for Mr. Follum to halt the process was to pay the full amount owed immediately.

[1] This figure consisted of the monthly rental fee of $1,460.00, as per the Lease, plus utilities and a late fee.

On 21 February, Mr. Follum made a *partial* payment to Morguard in the amount of $1,645.08, about $10.00 short of what Morguard had demanded. Morguard returned this payment and notified Mr. Follum that a partial payment would not be accepted. Mr. Follum never tendered the full sum.

Morguard continued with the summary ejectment action, and Mr. Follum chose to represent himself throughout the proceedings.

On 13 March 2018, the small claims court granted Morguard a Judgment for Possession on its summary ejectment claim, giving immediate possession of the property to Morguard and ordering Mr. Follum to vacate the premises. Mr. Follum appealed to the district court.

On 8 May 2018, the matter came on for trial before Judge Mangum. Mr. Follum expressed confusion in open court that the case would be tried on that date, as he assumed the session of court would be to calendar further proceedings. Nonetheless, the district court proceeded with a bench trial on the matter. Two days later, on 10 May 2018, Judge Mangum entered an order affirming the Judgment for Possession in Morguard's favor (the "Possession Order").

Mr. Follum timely appealed to this Court.

II. Analysis

When a trial court holds a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is

competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998). "Although findings of fact supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope its of reviewing powers, findings not supported by competent evidence are not conclusive and will be set aside on appeal." *In re Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457-58 (2017) (internal citations omitted).

"Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Additionally, where an appellant's claim involves an alleged violation of his or her constitutional rights, this Court employs a *de novo* review. *See Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

Mr. Follum brings a number of issues on appeal. We address each issue in turn.

A. Motion to Strike Appellee Brief

We begin by addressing Mr. Follum's motion to strike Morguard's appellee brief. Mr. Follum argues that, though he actually received Morguard's brief, Morguard failed to properly address the mailer containing its appellate brief to Mr. Follum's desired address, thus rendering service untimely and improper.

The materials before this Court contain both a Certificate of Service evidencing service of the appellee brief to Mr. Follum's post office box as well as a receipt of delivery evidencing a FedEx Standard Overnight delivery to Mr. Follum's correct home address. And Mr. Follum confirms in his Motion to Strike that he actually received the documents delivered by FedEx. Further, there is a "presumption of valid service" represented by Morguard's Certificate of Service to Mr. Follum's post office box. *Sellers v. Morton*, 191 N.C. App. 75, 80, 661 S.E.2d 915, 920 (2008) (internal citations omitted). Mr. Follum has presented no evidence to rebut this presumption. Accordingly, Mr. Follum's Motion to Strike is denied. *See Washington v. Cline*, 233 N.C. App. 412, 422-23, 761 S.E.2d 650, 657-58 (2014) (holding that service by FedEx delivery satisfied a party's service requirements, particularly where the recipient admitted to actually receiving the delivered documents).

B. Continuance

Mr. Follum challenges Judge Mangum's failure to continue the 8 May trial to a later date, arguing that not allowing him time to prepare for trial violated his constitutional right to due process. But Mr. Follum never made a due process argument. Rather, on the day of trial, Mr. Follum merely expressed confusion that the trial would be taking place that day, thinking that the purpose of that day's session was to schedule a trial at a later date. And though he expressed confusion in the circumstances, Mr. Follum never requested a continuance.

Appellate review of a motion for continuance is generally inappropriate where the matter was not properly requested, but we have held that "[a]n unrepresented party's failure to formally request a continuance does not preclude review of this issue." *Benton v. Mintz*, 97 N.C. App. 583, 588, 389 S.E.2d 410, 413 (1990). Because Mr. Follum comes to this Court *pro se*, and his claim invokes questions of due process, we will briefly review his claim.

" 'The law of the land' and 'due process of law' provisions of the North Carolina and U. S. Constitutions require notice and an opportunity to be heard before a citizen may be deprived of his property." *McMillan v. Robeson Cty.*, 262 N.C. 413, 417, 137 S.E.2d 105, 108 (1964). An integral aspect of due process is that the parties have an adequate amount of time to prepare for trials and hearings determining their rights. *See Mintz*, 97 N.C. App. at 589, 389 S.E.2d at 414 (1990). "A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat § 1A-1, Rule 40(b) (2018). "[W]here a motion for a continuance raises a constitutional issue, [the decision is] a question of law, not fact, which may be reviewed by an examination of the circumstances of each case." *State v. Williams,* 51 N.C. App. 613, 616, 277 S.E.2d 546, 548 (1981).

In the present case, Mr. Follum has not shown good cause to merit a continuance, much less a violation of his constitutional rights. He cites to a number of cases holding that an unrepresented party's constitutional right to due process was

infringed upon where they were not granted a continuance after being surprised at trial. But these cases are distinguishable from the underlying case. In each of these cases, the party had previously been represented by an attorney, but had been prejudiced by their attorney's withdrawal during trial proceedings. *See Shankle v. Shankle*, 289 N.C. 473, 487, 223 S.E.2d 380, 388-89 (1976) (remanding for a new trial where the record showed that the party's attorney abandoned them just prior to trial); *see also Underwood v. Williams*, 69 N.C. App. 171, 174, 316 S.E.2d 342, 344 (1984) (holding that "an unrepresented litigant cannot be expected to make precisely correct procedural requests when confronted with sudden changes" following his or her attorney's withdrawal); *see also Mintz*, 97 N.C. App. at 588, 389 S.E.2d at 413 (granting a new trial where trial court denied a party's continuance after the party's attorney withdrew immediately prior to trial). In some circumstances, the now-unrepresented party had relied on statements from their attorney, only to be surprised by the opposite at trial. *See Mintz*, 97 N.C. App. at 588, 389 S.E.2d at 413 (allowing a continuance where a withdrawing attorney failed to inform the party that trial would begin immediately after the trial court ruled on his motion to withdraw and "[t]he record contain[ed] no indication that the defendant knew or should have known of the trial").

Our Court has been less understanding where, as here, an unrepresented party is unprepared due to matters under their willful control. *See Pickard Roofing Co. v.*

Barbour, 94 N.C. App. 688, 692, 381 S.E.2d 341, 343-44 (1989) (holding a motion for continuance was rightfully denied where the moving party voluntarily fired his attorney the day before trial); *see also Fungaroli v. Fungaroli,* 40 N.C. App. 397, 399-400, 252 S.E.2d 849, 851 (1979) (affirming the denial of a motion for continuance where the moving party had notice of a pending hearing but still voluntarily let his attorney go three days before trial).

Here, Mr. Follum represented himself from the beginning of the proceedings, was fully engaged at each step of the litigation process, and was on actual notice that a full trial would take place on 8 May 2018. Mr. Follum received a notice on or about 6 April 2018 informing him that "[t]he presiding judge will conduct a TRIAL on [all] claims" on 8 May. Mr. Follum had a full month's notice, if not more, that the trial would take place on 8 May. Therefore, Mr. Follum's confusion on the day of trial was unwarranted and the circumstances did not merit a continuance.

C. Findings of Fact; Claims Not Preserved; Implied Warranty of Habitability

Mr. Follum frames each of his remaining arguments on appeal in the context of Judge Mangum's failure to make appropriate findings of fact to resolve each controversy presented. However, Mr. Follum misconstrues Judge Mangum's duty to make findings of fact. Mr. Follum brings a number of his claims and defenses for the first time on appeal: He contends that Judge Mangum erred by not making findings of fact that (1) Morguard's actions constituted retaliatory eviction, (2) Morguard

breached its implied warranty of habitability by not making timely repairs, and (3) Morguard's actions amounted to unfair and deceptive trade practices.

But the trial court was under no duty to make findings with respect to claims and defenses that were not formerly raised by the parties. In order to preserve appellate review of a claim or defense, the issue must have been raised in the proceedings below so that the trial court could consider the issue and render a decision capable of being reviewed. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008); N.C. R. App. P. 10(b). Likewise, it would be nonsensical to require the trial court to consider and render a decision as to claims not raised at trial. Therefore, Judge Mangum did not err by not making findings with respect to these claims and we decline to address them for the first time on appeal.

We do note discussion during the trial that Morguard may have breached its implied warranty of habitability by failing to provide Mr. Follum with safe, fit, and habitable living conditions. *See* N.C. Gen. Stat. § 42-42 (2018). To the extent that this argument was appropriately raised and preserved, we conclude that any consideration of the warranty of habitability was appropriate only insofar as it would absolve Mr. Follum's obligation to pay rent. Breach of the implied warranty of habitability does not enable a tenant to unilaterally withhold rent and thus, will not operate as a defense to eviction where the landlord seeks possession of the property.

See N.C. Gen. Stat. § 42-44(c) (2018) ("The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so."). Rather, a landlord's breach of the warranty of habitability may be raised as a defense or counterclaim to an action for summary ejectment where the landlord seeks damages for rent unpaid by the tenant. *See Farmville Oil & Fertilizer Co. v. Bowen*, 204 N.C. 375, 376-77, 168 S.E. 211, 212-13 (1933) (explaining that equitable defenses may be considered in a summary ejectment action insofar as they relate to the issue of tenancy); *see also Cronje v. Johnston*, ___ N.C. App. ___, ___, 825 S.E.2d 276, ___ (2019) (recognizing tenant's counterclaim requesting damages for landlord's breach of the implied warranty of habitability); *see also Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987) (explaining that a tenant may not unilaterally withhold rent payments, but may bring an affirmative action to abate rent owed or to recover an overpayment of rent).

In the present action, Morguard requests only possession of the premises and does not claim rent in arrears. *See* N.C. Gen. Stat. § 42-28 (2018). Mr. Follum waives any consideration of the warranty of habitability in this action as a defense to his relinquishment of possession of the rental apartment property. Judge Mangum found and concluded that, based on the greater weight of the evidence, Mr. Follum had breached the Lease. Assuming the issue was properly raised, this finding of fact and conclusion of law were sufficient to resolve Mr. Follum's warranty of habitability

defense. Mr. Follum is, however, free to bring a separate action against Morguard to raise a claim for damages for a breach of the implied warranty of habitability and/or to counterclaim for rent abatement should Morguard bring an action for unpaid rent.

D. Implied Waiver

Principally, Mr. Follum argues that Morguard's pattern of accepting late rent operates as a waiver of its right to require rent on the first of the month and that Judge Mangum failed to make appropriate findings in this respect. We disagree.

Morguard's practice of accepting Mr. Follum's late payments did not *per se* preclude it from acting on a future, similar breach. It is longstanding law in North Carolina that a landlord's acceptance of rent following a tenant's breach of a lease agreement operates as a waiver of the landlord's right to evict for the tenant's *prior* violations. *See Winder v. Martin*, 183 N.C. 410, 412, 111 S.E. 708, 709 (1922); *see also Richburg v. Bartley*, 44 N.C. 418, 419 (1853). Under this common law waiver rule, while the landlord forfeits his right to sue on prior breaches, he or she does not waive the ability to sue on future lease violations. *Long Drive Apartments v. Parker*, 107 N.C. App. 724, 729, 421 S.E.2d 631, 634 (1992). Each future breach is a new instance, independently actionable despite a landlord's previous decision(s) to allow a tenant to cure:

> The fact that plaintiff allowed defendant to cure her breach on two prior occasions would not indicate the relinquishment of its right to terminate for all future violations. If that were the case, a landlord could never give

> a tenant a second chance after an initial breach without risk that the landlord and fellow tenants would be condemned to suffer a series of infinite breaches of their safety and security.

Id.

In any event, there is evidence that Mr. Follum never tendered the *full* amount owed in February 2018. Accordingly, we conclude that there was evidence from which Judge Mangum could determine that Morguard had not waived its right to demand the full rent that was due.

III. Conclusion

We conclude that Judge Mangum did not err in conducting the trial on 8 May 2018 and subsequently affirming Judgment for Possession granting Morguard possession of the premises. The Possession Order resolved each claim and defense properly before Judge Mangum and contained appropriate findings of fact with respect to those issues. Therefore, we affirm.

AFFIRMED.

Judges ZACHARY and YOUNG concur.

Report per Rule 30(e).