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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-186

Filed: 1 October 2019

Mecklenburg County, No. 17 CVS 19102

CARL R. BAKER, Plaintiff,

v.

KENNETH V. WARNER, Defendant.

Appeal by Defendant from an order entered 26 June 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 September 2019.

*James, McElroy & Diehl, P.A., by Christopher T. Hood and Edward T. Hinson, Jr., for Plaintiff-Appellee.*

*The Crews Law Firm, PLLC, by Shawntae Crews, for Defendant-Appellant.*

INMAN, Judge.

Defendant Kenneth V. Warner appeals from an order granting summary judgment in favor of Plaintiff Carl R. Baker. After careful review, we reverse the trial court's grant of summary judgment on Baker's claim for breach of contract and remand for further proceedings.

**I. FACTUAL AND PROCEDURAL HISTORY**

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The record below discloses the following:

Baker, who owns a property on Lake Wylie in Charlotte, North Carolina, agreed to lease the property to Warner for a two-year term in August of 2015. They signed a written lease that included several provisions governing surrender, default, and abandonment of the premises. The lease provided that in the event Warner abandoned the premises, Baker could enter the property as Warner's agent, re-let the property, and collect any ensuing negative difference in rents from Warner for the remainder of the contract's two-year term. The contract did not include a merger clause, a modification provision, or any promises by Baker to make improvements on the property. By a separate contract, the parties agreed that Warner could purchase the property at any point during the lease for \$799,000.

In January of 2016, Warner informed Baker that his elderly father would be moving in with him and they would need to leave the property. The parties met at the property to discuss Warner's departure later that month and, on 29 February 2016, Warner vacated the home. Warner ceased paying rent following his departure.

Baker took some steps to re-let the property. Within a month of Warner leaving the property, Baker placed "for rent" signs at the corner of the street and a large "for sale" sign in the front yard which would be visible to visitors on the way to a nearby marina. He also listed the property as a rental on the real estate website Zillow and, in August 2016, retained a realtor to sell or rent the property. These

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efforts ultimately failed, however, and Baker was unable to sell or lease the property prior to the expiration of Warner's lease period.

On 9 October 2017, Baker filed suit against Warner for breach of the lease agreement. Warner responded by filing a combined answer, motion to dismiss, and counterclaim for breach of contract. After further pleading and discovery, Baker filed a motion for summary judgment on all claims. Baker's motion was supported by an affidavit attesting that Warner had been in breach since he vacated the premises and ceased paying rent in February 2016. In opposition to Baker's motion, Warner filed two affidavits—one sworn by him and the other by his sister—attesting that Baker had orally agreed at a meeting in January 2016 to let Warner out of the lease as of February of 2016. The affidavits by Warner and his sister also state that Baker had agreed that Warner would not be responsible for any further lease payments after he vacated the premises.

The trial court heard Baker's motion on 12 June 2018 and, by order entered 26 June 2018, granted summary judgment in favor of Baker on his breach of contract claim, dismissed Warner's counterclaim for breach of contract, and left open Baker's remaining claim for property damage against Warner. Baker then voluntarily dismissed the remaining claim with prejudice on 30 July 2018 and, on 15 August 2018, Warner filed notice of appeal from the trial court's order for summary judgment.

## II. ANALYSIS

### A. *Standard of Review*

“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.’” *DeBaun v. Kuszaj*, 238 N.C. App. 36, 38, 767 S.E.2d 353, 355 (2014) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)). “[A]n issue is genuine if it is supported by substantial evidence,” and “is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]” *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference[.]” *Id.* (internal quotation marks and citations omitted).

### B. *A Genuine Issue of Fact Exists Regarding Baker’s Breach of Contract Claim*

Warner asserts on appeal that summary judgment was improper for three reasons: (1) the affidavits before the trial court disclose a genuine issue of material fact regarding whether Baker released him from the lease as of February 2016; (2) the parties presented contradictory evidence concerning whether Baker induced

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Warner to enter into the lease by promising improvements to the property that never materialized; and (3) there is a genuine issue of material fact as to whether Baker made reasonable efforts to mitigate his damages. We agree with Warner's first argument and hold that summary judgment in favor of Baker on his breach of contract claim was improper. Because summary judgment on this claim was improper, we need not address Warner's remaining arguments for reversal. However, because Warner does not argue on appeal that summary judgment on his counterclaim was in error, we affirm that portion of the trial court's order.<sup>1</sup>

It is well established in North Carolina that the movant seeking summary judgment "has the burden of establishing the lack of any triable issue of fact." *Brooks v. Mount Airy Rainbow Farms Center, Inc.*, 48 N.C. App. 726, 728, 269 S.E.2d 704, 705 (1980). It is equally well established that "summary judgment must be denied the party with the burden of proof *if his opponent submits affidavits* and other supporting materials which cast doubt upon the existence of a material fact[.]" *Id.* at 729-30, 269 S.E.2d at 706 (emphasis added). Here, Warner filed two affidavits attesting that Baker agreed to let him out of the lease and that he would not be liable for any rents after February 2016.

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<sup>1</sup> Warner's brief addresses the evidence raised below solely in the context of defenses to Baker's breach of contract claim and does not present argument concerning his counterclaim. Indeed, the word "counterclaim," or any other language acknowledging the counterclaim's existence, does not appear anywhere in Warner's brief.

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Baker does not argue on appeal that Warner’s affidavits were inadmissible or that, if the conversation they describe occurred, the defense of release would not be available as a matter of law. Instead, Baker relies on decisions from federal courts and the North Carolina Business Court for the proposition that Warner’s affidavits are simply too nondescript and general to prevent summary judgment. None of the cases cited by Baker, however, is binding on this Court. Nor does any of those cases address the issue of whether an affidavit offered in support of a defense was too unspecific to constitute evidence creating a genuine issue of material fact under North Carolina law. Absent binding or persuasive authority on this question, we fail to see how the affidavits’ omissions of, for example, the time of day or identity of other persons who may have witnessed the conversation, remove the affidavit from the realm of evidence sufficient to preclude summary judgment into the realm of inadequate allegations. *Compare Agalotis v. Agalotis*, 38 N.C. App. 42, 44, 247 S.E.2d 28, 30 (1978) (noting that a non-movant “may not rely upon the mere *allegations of his pleadings*” in opposing summary judgment when the movant meets her initial burden of proof (emphasis added)) *with Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972) (“When there is a motion for summary judgment pursuant to Rule 56, the court may consider *evidence* consisting of . . . *affidavits*[.]” (emphasis added)). As a result, we hold that the trial court erred

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in granting summary judgment on Baker's breach of contract claim and reverse that portion of its order.

**III. CONCLUSION**

For the foregoing reasons, we reverse the trial court's grant of summary judgment on Baker's breach of contract claim, affirm the portion of the order dismissing Warner's counterclaim, and remand for further proceedings.

REVERSED IN PART; AFFIRMED IN PART; REMANDED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).