IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-890

Filed: 16 June 2020

Watauga County, No. 17 CVS 16

CAYMUS CONSTRUCTION COMPANY, INC., and KEVIN THOMAS QUICK, Plaintiffs,

v.

JOHN J. JANOWIAK and KATHLEEN L. JANOWIAK, Defendants.

Appeal by defendants from judgment entered 18 February 2019 and orders entered 13 March 2019 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 31 March 2020.

Hedrick Law Office, by Jeffery M. Hedrick, for plaintiffs-appellees.

Reeves DiVenere & Wright, by Anné C. Wright, for defendants-appellants.

DIETZ, Judge.

John and Kathleen Janowiak hired Caymus Construction to renovate and add an addition to their home. A dispute about payment later arose, ultimately leading to a confrontation inside the home. The Janowiaks then contacted Caymus's subcontractors and told them Caymus and its president had committed various acts including assault, battery, embezzlement, and theft.

Both parties later sued each other, asserting various claims. After a trial, the jury found the Janowiaks liable for breach of contract and defamation. The jury rejected the Janowiaks' counterclaims.

On appeal, the Janowiaks challenge the trial court's instructions to the jury and the dismissal of their trespass claim at the close of the evidence. They also challenge portions of the trial court's award of costs. As explained below, the challenges to the jury instructions are not preserved for appellate review because the Janowiaks failed to object to them during the charge conference or at any other point in the trial proceedings. We treat the dismissal of the trespass claim as the grant of a directed verdict and affirm that ruling as proper based on the trial evidence. Finally, the parties agree on appeal that there are errors in the award of costs. We therefore vacate the costs award and remand that issue for further proceedings in the trial court.

Facts and Procedural History

In January 2016, John and Kathleen Janowiak contracted with Caymus Construction Company for remodeling and construction of an addition to their home. The contract provided that the cost of the project would be $194,500.

Kevin Quick is the president of Caymus Construction.[1] During the construction, the Janowiaks requested additional work beyond what was contained

[1] For ease of reference, we refer to Caymus Construction and Quick collectively as "Caymus."

in the initial written contract. The Janowiaks and Caymus dispute what additional work was requested or performed and what agreements were made regarding payment for additional work. The parties did not enter into a written agreement for any additional work.

As the project neared completion, the Janowiaks refused to pay additional amounts requested by Caymus and demanded an accounting. The Janowiaks testified that Quick threatened to lock them out of their home if they did not pay him an additional $30,000.

On 29 July 2016, the Janowiaks entered their home after seeing a locksmith at the property. Mr. Janowiak got into an argument with Quick. The Janowiaks testified that during this argument, Quick choked Mr. Janowiak. Quick denied the allegation, testifying that he only put his hand up to stop Mr. Janowiak from attacking him. At some point, the Janowiaks also called law enforcement. After officers arrived, the Janowiaks gave Quick a letter terminating the contract. The officers remained at the home while Quick gathered his tools and equipment and left. Caymus performed no further work on the Janowiaks' home.

Following the July 2016 incident, the Janowiaks contacted Caymus's subcontractors by phone, email, and letter asserting that Caymus and Quick had committed assault, battery, embezzlement, and theft. Mr. Janowiak also reported to his medical providers that Quick "extorted thousands of dollars" from him.

In 2017, Caymus filed a complaint against the Janowiaks asserting claims for breach of contract, enforcement of a claim of lien, quantum meruit, and defamation. Caymus sought to recover the balance it alleged was due for the construction and remodeling work Caymus performed on the Janowiaks' home and to recover damages for alleged defamatory statements the Janowiaks made to third parties about Caymus.

The Janowiaks filed an answer to the complaint and asserted counterclaims for breach of contract, fraud, trespass to real property, assault, and intentional infliction of emotional distress.

At trial in February 2019, the parties testified about the events described above. At the close of the Janowiaks' evidence, Caymus orally moved to dismiss the trespass to real property claim for insufficiency of the evidence. The trial court granted the motion. The remaining claims went to the jury.

The jury returned a verdict in favor of Caymus on its breach of contract and defamation claims, awarding Caymus $29,040.35 for breach of contract and $200,000 for defamation. The jury did not find for the Janowiaks on any of their counterclaims. The trial court entered judgment on the jury's verdict.

Caymus later filed a motion for costs and attorneys' fees. The Janowiaks also filed a motion for judgment notwithstanding the verdict or for a new trial. Following a hearing on the motions, the trial court entered orders denying the Janowiaks'

motions and awarding Caymus attorneys' fees in the amount of $39,140 and costs in the amount of $8,272.05. The Janowiaks appealed.

Analysis

I. Challenges to jury instructions

The Janowiaks first challenge four separate sections of the trial court's instructions to the jury. We reject these challenges because they are not preserved for appellate review.

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection." N.C. R. App. P. 10(a)(2).

This error preservation rule for jury instructions is particularly strict, and for good reason. Rule 10's preservation requirement "prevents unnecessary new trials caused by errors that the trial court could have corrected if brought to its attention at the proper time." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (brackets and ellipses omitted). Thus, the core purpose of Rule 10(b)(2) "is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Indeed, as this case illustrates, trial courts often devote significant time to crafting these instructions with input from the parties. If litigants could challenge jury instructions on appeal through legal arguments not raised to the trial court, it would permit them to withhold potentially meritorious arguments, await the jury's verdict, and then, if the verdict were unsatisfactory, seek a second bite at the apple. Our error preservations rules are designed to prevent this potential gamesmanship. *See Dogwood*, 362 N.C. at 195, 657 S.E.2d at 363.

Here, as Caymus points out in its appellee brief, the Janowiaks have not provided any record citations to the portion of the trial record where they challenged these jury instructions below. We likewise find none in our independent review of the record.

At the charge conference, after the parties had an opportunity to review the trial court's proposed jury instructions, the Janowiaks' counsel stated, "Your Honor, I'm satisfied with the instructions the way you presented them this morning. I think they are fine. I don't think they need to be modified further."

The following day, shortly before instructing the jury, the trial court gave the parties another opportunity to review the instructions and make any objections or requests for changes. Caymus requested some changes, which the trial court denied. The Janowiaks did not request any changes. To the contrary, in opposing Caymus's proposed changes, the Janowiaks' counsel explained that "I came in here today

basically just to say we're good to go. I don't think we need to change it anymore at this time. I just think – I think it is good the way it is."

Finally, after the trial court instructed the jury, the court asked if either party had "any additions, corrections, modifications to the instructions." The Janowiaks' counsel responded, "Nothing further from the defendants."

The Janowiaks do not argue in their briefing that the trial court's instructions to the jury departed in any way from the proposed instructions it provided the parties in advance. Likewise, in our review of the record and trial transcript, we see no indication that the trial court's instructions differed from those proposed in advance. Thus, by failing to raise any objections to those instructions, either during the two charge conferences or following the jury charge itself, the Janowiaks failed to preserve these arguments and we are unable to review them on appeal. N.C. R. App. P. 10.

II. Ruling on motion to dismiss trespass claim

The Janowiaks next argue that the trial court erred by granting Caymus's motion to dismiss their trespass claim during trial. We reject this argument because, under controlling precedent, we treat that ruling as the grant of a motion for directed verdict. Based on the trial record, the court properly entered a directed verdict on the trespass claim.

"In a jury trial, the motion for a directed verdict is now the only procedure by

which a party can challenge the sufficiency of his adversary's evidence to go to the jury." *Creasman v. First Fed. Sav. & Loan Assoc.*, 279 N.C. 361, 366, 183 S.E.2d 115, 118 (1971). Thus, a motion to dismiss made at trial is "treated as a motion for directed verdict under Rule 50(a). The trial court does not determine the facts, but simply determines whether [the claimant] has made a case for the jury." *Id.*

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

A "motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of [the] claim." *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 31, 795 S.E.2d 253, 257 (2016). By contrast, a "directed verdict is proper when there is no evidence of an essential element of [the] claim." *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 821, 561 S.E.2d 578, 581 (2002).

The essential elements of a claim of trespass to real property are (1) "[t]hat the plaintiff was either actually or constructively in possession of the land at the time the alleged trespass was committed"; (2) "[t]hat the defendant made an unauthorized, and therefore an unlawful, entry on the land"; and (3) "[t]hat the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of possession." *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952).

Here, undisputed evidence established that the parties entered into a contract giving Caymus (and therefore Quick) lawful possession of the property while the construction work was ongoing. Indeed, the contract limited the Janowiaks' rights to enter the property while the contract was in force, providing that they could do so only "in the presence of the builder." Thus, while this contract was in effect, Quick was a lawful occupant of the property.

When the Janowiaks arrived at the property on 29 July 2016, while that contract still was in effect, they got into an argument with Quick. During that argument, Mr. Janowiak yelled at Quick to "get out." That led to an altercation in which Quick allegedly choked Mr. Janowiak. Soon after, law enforcement arrived. In the presence of the officers, Mr. Janowiak gave Quick a letter terminating the contract with Caymus. The officers stayed and observed while Quick collected his tools and equipment and left the property.

To be sure, there are trespass cases holding that when an invitee breaches the

peace and physically assaults the occupants of real property, "although not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises." *Suggs v. Carroll*, 76 N.C. App. 420, 424, 333 S.E.2d 510, 513 (1985). But this case is different. Under the terms of the parties' contract, Quick was a lawful occupant of the property. Thus, the physical altercation, standing alone, is insufficient to support the Janowiaks' trespass claim. And the remaining, undisputed evidence, demonstrates that Quick peacefully left the property once the Janowiaks terminated the contract and revoked his right to occupy it. Accordingly, the trial court properly determined that there was insufficient evidence that Quick engaged in any "unauthorized, and therefore an unlawful, entry on the land." *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Because there was no evidence of this essential element of the claim, the trial court properly entered a directed verdict on that claim as a matter of law.

III. Costs award

Finally, the Janowiaks argue that the trial court erred in its order awarding costs because it awarded various costs that are not permitted by the applicable statute. Caymus concedes error on this issue and we agree.

"While the decision to tax costs is not reviewable absent an abuse of discretion, the discretion to award costs is strictly limited by our statutes." *Overton v. Purvis*, 162 N.C. App. 241, 249, 591 S.E.2d 18, 24 (2004). Section 7A-305 of the General

Statutes provides a list of "[c]osts in civil actions" that are "assessable or recoverable." N.C. Gen. Stat. § 7A-305(d). The statute provides that "[t]he expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs." *Id.* "[T]he trial court does not have discretion to award costs . . . which are not otherwise enumerated in the exhaustive list set out in N.C. Gen. Stat. § 7A-305(d)." *Handex of Carolinas, Inc. v. Cty. of Haywood*, 168 N.C. App. 1, 13, 607 S.E.2d 25, 32 (2005).

The Janowiaks assert, and Caymus concedes, that the trial court's costs award included various costs that are not permitted under Section 7A-305. Specifically, the trial court erroneously awarded the following costs not permitted by the statute: $200 for the filing fee for the complaint, $20 for the fee for filing a motion, $31.28 for blueprints/copies/poster board/foam board, and $907.20 for copying of Caymus's trial notebooks. The trial court also erred by awarding expert witness fees incurred for trial preparation because the statute only permits an award of expert witness fees for time spent testifying at trial or in depositions. N.C. Gen. Stat. § 7A-305(d)(11).

Accordingly, as Caymus concedes, the trial court awarded $5,288.48 in costs not permitted under the applicable statute. We therefore vacate the trial court's award of costs and remand for entry of a costs award consistent with the applicable statutes. *Overton*, 162 N.C. App. at 250, 591 S.E.2d at 25. On remand, the trial court may enter a new costs award on the existing record or, in its discretion, conduct any

further proceedings necessary for the appropriate determination of the costs to be awarded in this action.

Conclusion

For the reasons discussed above, we find no error in the trial court's underlying judgment. We vacate the trial court's order awarding costs and remand for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).