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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-218

Filed 19 September 2023

Mecklenburg County, No. 21CVS9629

SHEILA VENABLE, Plaintiff,

v.

GREP SOUTHEAST LLC, TR VINOY LLC, and BEL VINOY LP, Defendants.

Appeal by plaintiff from order entered 29 July 2022 by Judge Kimberly Y. Best in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2023.

Sheila Venable, Pro Se, for Plaintiff.

McAngus Goudelock & Courie, PLLC by Jeffrey B. Kuykendal, for TR Vinoy LLC.

Fisher Broyles, LLP by Deborah L. Fletcher and Mukti N. Patel, Pro Hac Vice for Bel Vinoy, LP and GREP Southeast, LLC.

DILLON, Judge.

This case involves a settlement agreement between a tenant and a landlord entered during litigation.

I. Background

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Plaintiff Sheila Venable was a tenant in an apartment building owned by Defendant TR Vinoy, LLC, (“TR Vinoy”) and later by Defendant Bel Vinoy, LP, (“Bel Vinoy”). Defendant GREP Southeast, LLC, (“GREP”) is the property manager.

In August 2016, a leak broke through Plaintiff’s apartment ceiling, and the ceiling was left wet for 2-4 weeks. A year later, Plaintiff discovered mold and notified GREP. In 2021, Plaintiff filed a complaint against Defendants for rent abatement and damages for personal injuries based on the mold in her apartment.

In April 2022, at the conclusion of a mediation, Plaintiff and Defendants executed a settlement agreement (the “Agreement”), which the trial court found “clearly, unambiguously and fully resolved all claims in this case for payment to Plaintiff in the sum of \$35,000.” The Agreement provided that 50% of settlement was to be paid by TR Vinoy and 50% to be paid by GREP and Bel Vinoy, within 30 days of the agreement.

GREP and Bel Vinoy issued a check for \$17,500 to Plaintiff within 30 days of the execution of the Settlement Agreement.

TR Vinoy also paid \$17,500, but not within 30 days. Rather, TR Vinoy initially refused to pay over its portion of the settlement *until* Plaintiff provided it a completed W-9 form. The W-9 form would contain Plaintiff’s social security number and would allow TR Vinoy to properly report the payment on its tax returns. Plaintiff refused to provide a W-9. TR Vinoy filed a motion to compel Plaintiff to provide the W-9 per the Agreement. However, Judge Bridges, the trial court judge presiding, denied the

motion, concluding there was no requirement that Plaintiff provide a W-9 as a condition of receiving the settlement.

Though Plaintiff had received and accepted the \$35,000 settlement, she did not dismiss her claims. Accordingly, Defendants moved for an order to enforce the Agreement and for summary judgment on Plaintiff's claims, based on the Agreement. After a hearing on the matter, Judge Best granted Defendants' motions. Plaintiff appeals.

II. Analysis

On appeal, Plaintiff asks that we reverse the order. For the reasoning below, we affirm the order.

A. Motion for Summary Judgment

Plaintiff first argues the trial court erred by granting Defendants' motion because Plaintiff stated a claim for rent abatement. We disagree.

We review an appeal from summary judgment *de novo*, and such judgments are appropriate only when "there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); N.C. R. Civ. P. 56(c) (2022).

In the instant case, we agree that there are no genuine issues of material fact. All claims, which includes any claim Plaintiff may otherwise have had for rent abatement, have been released by Plaintiff through the Agreement. The parties agreed that after Defendants paid the settlement, all claims, counterclaims, and

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third-party claims would be dismissed in their entirety.

According to the record, Plaintiff has been paid in full. Plaintiff, though, points to the fact that TR Vinoy did not pay its half of the settlement within 30 days of the Agreement. By making an untimely payment, TR Vinoy arguably breached the Agreement. However, its failure to make a timely payment did not constitute a material breach under North Carolina law.

Our courts have consistently held that when there is a material breach of a contract, the non-breaching party may elect to rescind the contract or seek relief at law by an award for damages. *See Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242 (1964); *See, e.g., Carrow v. Weston*, 247 N.C. 735, 102 S.E.2d 134 (1958). However, “[t]he right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement.” *Wilson*, 261 N.C. at 43, 134 S.E.2d at 243 (citing *Childress v. C.W. Myers*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957)) (“[n]ot every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract.”)

It could be that the late payment was not a breach since the Agreement did not contain a “time is of the essence” provision. *See Johnson v. Smith, Scott & Associates, Inc.*, 77 N.C. App. 386, 390, 335 S.E.2d 205, 207 (1985) (holding that summary judgment was appropriate because contract did not expressly provide time was of the essence and there was nothing in the parties’ actions demonstrating an intent to make time of the essence, and as a result, the plaintiff did not have grounds for

rescinding contract); *Harris v. Stewart*, 193 N.C. App. 142, 146, 666 S.E.2d 804, 807 (2008) (holding that with respect to real property sales contracts it has long been held that “in the absence of a ‘time is of the essence’ provision, time is not of the essence,” and the dates stated serve only as guidelines); *D.G. II, LLC v. Nix*, 211 N.C. App. 332, 340, 712 S.E.2d 335, 341 (2011) (“[t]he general rule at common law is that, unless a contract expressly provides otherwise, time is not of the essence in the performance of a contract of purchase and sale.”) But assuming the late payment was a breach, we conclude that the breach was not material, and that Plaintiff otherwise waived any claim for breach when she accepted the late payment.

B. Motion to Enforce the Settlement Agreement

Plaintiff also argues the trial court erred by granting Defendants’ motion because TR Vinoy’s motion to enforce the Agreement was denied by Judge Bridges. We disagree.

When the matter came before Judge Best, she granted Defendants’ motion to enforce because Defendants had paid the Settlement Proceeds of \$35,000 in full to Plaintiff. Accordingly, she held that this case should be dismissed with prejudice according to the terms under Paragraph 3 of the Settlement Agreement.

In response, Plaintiff essentially argues that Judge Best overturned Judge Bridge’s order denying TR Vinoy’s prior motion.

“One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2)

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discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order.” *Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189, 697 S.E.2d 449, 456 (2010). “A substantial change in circumstances exists if since the entry of the prior order, there has been an ‘intervention of new facts which bear upon the propriety’ of the previous order.” *Calloway v. Ford Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972). A determination of substantial change in circumstances is made by the subsequent judge as expressed by their findings. *See Crooks*, 206 N.C. App. at 190, 697 S.E.2d at 456.

In the instant case, Judge Best concluded that there had been a substantial change in circumstances because when the matter came before her, TR Vinoy had delivered a check to Plaintiff for its 50% portion of the Settlement Proceeds and Plaintiff had received payments totaling \$35,000 for the entire amount of the Settlement Proceeds. As a result, Plaintiff has been fully compensated now, under the original terms of the Agreement.

Accordingly, we hold that the trial court did not err by granting Defendants’ motion to enforce the Agreement.

III. Conclusion

For the reasons set forth above, we affirm the trial court’s order granting Defendants’ Motion for Summary Judgment and Motion to Enforce the Settlement Agreement.

AFFIRMED.

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Judges ZACHARY and WOOD concur.

Report per Rule 30(e).