IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-780

Filed 6 February 2024

Chatham County, No. 20 CVS 418

FREDERICK J. PAYNE, CATHERINE PAYNE, AND PAYNE'S INTERNATIONAL, INC., Plaintiffs,

v.

MAURICE RAYNOR, JR., a/k/a MARTY RAYNOR, MARY RAYNOR, AND M&M DEVELOPMENTS, INC., Defendants.

Appeal by defendants from revised judgment entered 25 January 2023 by Judge Alyson Adams Grine in Superior Court, Chatham County. Heard in the Court of Appeals 23 January 2024.

Bagwell Holt & Smith, P.A., by Nathaniel C. Smith, for plaintiffs-appellees.

Davis Hartman Wright, LLP, by R. Daniel Gibson, for defendants-appellants.

ARROWOOD, Judge.

Maurice "Marty" Raynor, Mary Raynor, and M & M Developments ("defendants") appeal from judgment entered on 27 June 2022 and revised judgment entered on 25 January 2023. For the following reasons, we affirm the trial court's revised judgment.

I. Background

Frederick "John" Payne, Catherine Payne, and Payne's International, Inc. ("plaintiffs") own six acres of land off Highway 64 in Chatham County, North Carolina. Defendants contracted with plaintiffs to lease "the northern half of [plaintiffs'] property known as Chatham County tax parcel 76151 [and] containing approximately three acres" starting on 1 January 2018. The lease provided that defendants "shall not make any alterations, additions, or improvements to the [leased property] without [plaintiffs'] prior written consent. All permanent alterations, additions and improvements shall become [plaintiffs'] property and shall be surrendered to [plaintiff] upon the termination of the Lease."

In 2019, an agreement was struck for defendants to purchase approximately one of the three acres of leased land. Defendants alleged that based on their plans to buy the acre, they made several improvements to the land. Similarly, plaintiffs alleged that, in reliance on the sale agreement, they "spent several thousand dollars having a surveyor draw up a new plat of the property and refinanced their loan with the bank." Nonetheless, the purchase contract failed when it became known that there was a commercial septic tank on the contracted-for property that would frustrate defendants' intended use of the land and prevent defendants from obtaining clear title.

Around February 2020, plaintiffs returned to North Carolina after having been out of the state for a few months. Upon their return, plaintiffs claimed that the

"entire property—not just the three leased acres, areas well outside the leased tract—had been dramatically transformed." Plaintiffs filed a complaint in July 2020 alleging defendants had: (1) "scraped off and removed a large quantity . . . of topsoil and dirt from [p]laintiffs' property"; (2) "seriously damaged/largely destroyed [p]laintiffs' septic system for their home"; (3) "built a gravel road across a portion of [p]laintiffs' property, and in the process cut down and removed trees and bushes"; (4) "built a series of greenhouses on [p]laintiffs' property, including one directly on top of [p]laintiffs' septic field"; and (5) "removed sections of fencing . . . ." Plaintiffs' claims for relief included trespass, breach of lease, damage to real and personal property, illegal taking and cutting of trees and lumber, conversion, breach of contract, and punitive damages.

Defendants denied plaintiffs' allegations, asserting the affirmative defenses of "estoppel, failure to mitigate, frustration of purpose, impossibility, laches, license, the statute of limitations, and waiver . . . ." Defendants further alleged that their actions were either done with plaintiffs' consent or "caused by [p]laintiffs' concealments or misrepresentations about the location of the septic system[.]" Defendants also asserted counterclaims of negligence, nuisance, fraud, and negligent misrepresentation. Defendants' lease of the three acres ended 31 December 2020.[1]

[1] After defendants exited the property, plaintiffs filed a supplemental pleading in February 2021, alleging additional harm to the property caused by defendants, including damage to plaintiffs' chicken shack and a section of driveway. The trial court allowed the filing of the supplemental pleading in a consent order signed 15 February 2021.

The case came on for non-jury trial on 6 June 2022. The affirmative defense of setoff was raised by defendants for the first-time during plaintiffs' renewed motion for a directed verdict at the close of evidence. Specifically, defendants argued they were entitled to a setoff for the improvements they had made to the property.

The trial court entered a judgment in favor of plaintiffs on 27 June 2022, awarding them $18,603.00 in damages and $10,000.00 in attorney fees. On 6 July 2022, defendants moved to amend the judgment under Rule 52 and moved for a new trial and to alter or amend the judgment under Rule 59. At a 7 November 2022 hearing, the trial court denied the motion to alter or amend the judgment or grant a new trial but "found merit in [d]efendants' argument that they should have opportunity to put on additional evidence regarding damages" not previously introduced at trial.

An evidentiary hearing on damages was thus held on 28 November 2022 where defendants alleged they made $67,792.34 in improvements to the property while leasing it. This included spending $27,659.10 to replace the chicken shack's roof, $12,845.00 to spray insulation, $22,282.00 to add rock and soil, and $5,006.24 to repair block work. Thus, defendants argued that, even if the trial court ruled for the plaintiffs, they were still entitled to a setoff—or "decrease of the amount of the plaintiffs' damages to the extent the that the value of the plaintiffs' property went up as a result of the work that the defendants did."

The trial court entered a revised judgment on 25 January 2023, which included

the following relevant findings of fact and conclusions of law:

> **FINDINGS OF FACT**:
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> . . . .
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> 3. The Plaintiffs own a 6-acre tract on land in Chatham County, located west of Pittsboro and North of Highway 64.
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> 5. In 2017, Defendant Marty Raynor asked [Plaintiff] John Payne if he could rent a portion of Plaintiffs' property. The parties executed a Farm Lease Agreement ("the Lease") in December 2017, pursuant to which the Plaintiffs leased the northern half of their property to [defendants]. The Lease also stated that the tenants would keep all structures, pastures, and watercourses in good repair and not make alterations, additions, or improvements without Plaintiffs' consent. Further, the Lease provided that all permanent improvements made by the tenant would become the landlord's property and be surrendered to the landlord when the Lease terminated. The term of the Lease was twelve months, beginning 1 January 2018 and ending 31 December 2018. A holding over clause in the Lease provided that if the tenant remained in possession after the term expired, the tenant would become a tenant at will, required to pay monthly rent.
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> . . . .
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> 10. Plaintiffs continued to lease the northern half of the Plaintiffs' land beyond the term of the Lease until 31 December 2020 pursuant to the holding over clause.
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> 11. Plaintiffs were traveling for business between November 2019 and February 2020. Upon their return, they noticed changes to their property. In the backyard of their house, over an acre of land had been scraped with several feet of topsoil having been removed. The septic system serving Plaintiffs' home was damaged extensively

by this excavation. [Defendants] scraped the land using an excavator, a tractor, and two skid steers to fill in a pond on the leased parcel. [Defendant] Marty Raynor wanted to fill in the pond to make the land more suitable for farming. [Plaintiff] John Payne told [Defendant] Mary Raynor he could fill in the pond but believed that [Defendant] Marty Raynor would accomplish this by pushing the dirt piles around the pond—created when the pond was dug out—into the pond. [Plaintiff] John Payne did not give [Defendant] Marty Raynor permission to scrape soil from the [plaintiffs'] backyard, nor did any Plaintiff. The area that was scraped included land outside of the leased parcel.

. . . .

18. When the Defendants asked about the location of the commercial septic system and drain field, [Plaintiff] John Payne said he did not know on multiple occasions.

21. The Plaintiffs did not know the location of the commercial septic drain field until May of 2020. The Court considered [Defendant] Mary Raynor's testimony that [Plaintiff] John Payne said that he did not know or that it was in that area, and that he meant the area where the chicken shack was located. The statement is ambiguous. [Plaintiff] John Payne's statements that he did not know the location of the commercial septic system until May of 2020 are supported by the facts that he allowed the Defendants to put up greenhouses and drive vehicles in the area, which could have damaged his system and would have been contrary to his interest. [Plaintiff] John Payne willingly signed the form to assist the Defendants in discovering the location of the commercial septic field the first time they made a formal inquiry. [Plaintiff] John Payne had spent money in anticipation of the land sale; it is reasonable to infer that he would not have pursued the sale had he known his septic system was located on the parcel.

. . . .

CONCLUSIONS OF LAW:

. . . .

3. Plaintiffs proved by the greater weight of the evidence that the Defendants trespassed by: 1) clearing trees and brush from an area of Plaintiffs' land that was near Highway 64 and beyond the boundaries of the area the Defendants were leasing; 2) creating a driveway by driving ATVs and RTVs along the western border of the Plaintiffs' land, said driveway running north to south from the rented parcel to within 20 feet of Highway 64, and by placing gravel on portions of the driveway, including areas that were outside the leased parcel; 3) excavating soil from the Plaintiffs' land near the Plaintiffs' house, including from an area beyond the boundaries of the leased area, which damaged the Plaintiffs' residential septic system; and 4) building fencing, a small portion of which encroached on the Plaintiffs' land. By the greater weight of the evidence, the Plaintiffs were in possession of the property at the time of the trespass in that they had title to it with the right to immediate actual possession, the Defendants intentionally entered and caused entry upon the Plaintiffs' property, and the entry was unauthorized. The Plaintiffs are entitled to recover nominal damages for the trespass.

4. Plaintiffs proved by the greater weight of the evidence that the Defendants breached a material term of the Farm Lease Agreement. Specifically, Plaintiffs proved the Farm Lease Agreement was a valid contract, the Plaintiffs performed their obligations under it, there were no conditions precedent to Defendants' obligation to perform, it was a material term of the contract that the tenant would not remove permanent improvements to the landlord's property (i.e., all permanent improvements made by the tenant would become the landlord's property and be surrendered to the landlord when the lease terminated), and the Defendants breached the material term by removing some improvements that were permanent in nature, namely: the pipe in the streambed, the switchboxes for electric wiring in the chicken shack, and

> the doorframe and exterior doors to the chicken shack . . . . The improvements that the Defendants made to the roof and foundation of the chicken shack were permanent in nature and became the property of the Plaintiffs when the Lease ended.

Based on the revised findings of fact and conclusions of law, the trial court ruled in favor of plaintiffs but reduced the damage award from $18,603.00 to $15,154.00. On 24 February 2023, defendants filed a notice of appeal from the trial court's 27 June 2022 judgment and 25 January 2023 revised judgment.

II. Discussion

On appeal, defendants contend the trial court erred by not considering defendants' affirmative defense of setoff or by not determining what land defendants leased from plaintiffs. Defendants also contend the trial court erred in that three of its findings of fact were not based on competent evidence. We take each argument in turn.

A. Trial Court's Consideration of Defendants' setoff defense

A claim of setoff is an affirmative defense where a defendant seeks affirmative relief. *See Perry v. First Citizens Bank & Tr. Co.*, 223 N.C. 642, 644 (1943). If a defendant fails to plead such defense, the defense is generally considered waived. *Robinson v. Powell*, 348 N.C. 562, 566 (1998) (citation omitted). However, "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C.G.S. § 1A-1, Rule 15(b) (2023).

Here, defendants failed to raise the setoff defense in their answer; consequently, there is a question of whether they waived the right to raise it on appeal. However, even assuming arguendo that the setoff defense is proper before this Court, defendants' contention fails because the trial court sufficiently determined the setoff issue in its revised judgment.

"When the judge tries a case without a jury, he must find the facts specially and state separately his conclusions of law and thereby determine the issues raised by the pleadings and the evidence." *Davis v. Vintage Enterprises, Inc.*, 23 N.C. App. 581, 585–86 (1974) (citing N.C.G.S. § 1A-1, Rule 52(a)(1)). "To comport with Rule 52(a)(1), the trial court must make a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Chem. Realty Corp. v. Home Fed. Sav. & Loan Ass'n of Hollywood*, 65 N.C. App. 242, 249 (1983) (citations and internal quotation marks omitted).

"Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense . . . ." *Woodard v. Mordecai*, 234 N.C. 463, 470 (1951) (citations omitted). Although Rule 52(a)(1) does not require the trial court to recite subsidiary facts, "it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc.*, 307

N.C. 342, 346 (1983) (alterations in original).

Here, the trial court sufficiently addressed defendants' setoff defense in finding of fact 5 and conclusion of law 4 of the revised judgment. Specifically, finding of fact 5 explains that defendants' lease expressly "provided that all permanent improvements made by the tenant would become the landlord's property and be surrendered to the landlord when the Lease terminated." On the basis of that fact, conclusion of law 4 states that because defendants' alleged improvements to the property "were permanent in nature[,]" they "became the property of the [p]laintiffs when the [l]ease ended." Thus, the revised judgment makes clear that defendants' setoff defense is without merit because such permanent improvements—that became plaintiffs' property under the contract—are incapable of reducing plaintiffs' damages.

Defendants further contend that the trial court's judgment failed to resolve what particular part of plaintiffs' land was leased by defendants. Defendants argue that because this question affects whether defendants trespassed, "the trial court did not resolve this material conflict." We disagree as the issue of trespass was sufficiently made clear by the trial court in findings of fact 3, 5, and 10, and conclusion of law 3. Accordingly, the trial court did not err because it sufficiently addressed defendants' setoff defense and the trespass issue.

B. Findings of Fact 11, 18, and 21

Defendants contend that the trial court's findings of fact 11, 18, and 21 were not based on competent evidence. We disagree. "[T]he standard of review for a

decision rendered in a non-jury trial is whether there existed competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110 (1987) (citation omitted). Even if contradictory evidence is present, the findings and conclusions remain binding on appeal so long as there is competent evidence to support them. *Id.* (citation omitted).

Here, competent evidence adduced at trial supports all three findings at issue. Finding of fact 21 in part states that "it is reasonable to infer that [plaintiff John Payne] would not have pursued the sale had he known his septic system was located on the parcel." Similarly, finding of fact 18 states that when asked by defendants where the commercial septic system was located, plaintiff "John Payne said he did not know on multiple occasions."

As detailed in the trial court's revised judgment, findings 18 and 21 are supported by the fact that plaintiffs (1) authorized defendants "to put up greenhouses and drive vehicles in the area, which could have damaged his system and would have been contrary to his interest"; (2) "willingly signed the form to assist the [d]efendants in discovering the location of the commercial septic field the first time they made a formal inquiry"; and (3) spent "money in anticipation of the landsale[.]"

Lastly, finding of fact 11, which states in part that plaintiffs did not give defendant Marty Raynor permission to scrape soil from plaintiffs' backyard, is supported by plaintiff John Payne's testimony that he never gave such permission.

Specifically, plaintiff John Payne testified that although he gave defendants permission to "fill in th[e] pond[,]" he never gave defendants permission to scrape soil from his property as a means to fill it. Accordingly, the trial court did not err as these findings were sufficiently supported by competent evidence.

III. Conclusion

For the foregoing reasons, the trial court's judgment is affirmed.

AFFIRMED.

Judges CARPENTER AND FLOOD concur.

Report per Rule 30(e).