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NO. COA01-1331

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

RICHARD GREEN and
DEBORAH DABNEY GREEN,
Plaintiffs

v.

Guilford County
No. 00 CVD 10371

PICKERING & COMPANY,
Defendant

Appeal by defendant from judgment entered 23 March 2001 by Judge J. Bruce Morton in Guilford County District Court. Heard in the Court of Appeals 21 August 2002.

Richard Green and Deborah Dabney Green, pro se, for plaintiff-appellees.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Brady A. Yntema, for defendant-appellant.

CAMPBELL, Judge.

Defendant, Pickering & Company ("Pickering") appeals a judgment entered in plaintiffs' favor and an order denying its motion for judgment notwithstanding the verdict ("JNOV") and motion for new trial. For the reasons stated herein, we affirm.

In response to a newspaper advertisement, Deborah Green ("Mrs. Green") met with Pickering representative Ken Baucom ("Mr. Baucom") in July 2000 regarding a house rental in Greensboro, North Carolina. After viewing the house, Mr. Baucom gave Mrs. Green a

Rental Application ("Application"), which Mrs. Green took home with her to discuss with her husband, Richard Green ("Mr. Green"). On 20 July 2000, Mr. and Mrs. Green ("the Greens") submitted the completed, signed Application to Pickering along with a deposit of \$1,100.00 in order to secure the house for their tenancy. Upon receipt of the Greens' deposit, Pickering ceased any further advertising of the house.

When Mrs. Green arrived on 18 August 2000 to sign the lease agreement and receive the keys to the house, a dispute arose over the amount of rent owed to Pickering on that date. Mrs. Green did not agree that she owed Pickering the prorated amount of rent for the month of August as well as the September rent. Upon failing to agree on any of the discussed options to remedy the rent dispute, the Greens did not move into the house on 18 August or thereafter. Pickering then retained the Greens' \$1,100.00 deposit, re-advertised the house in the newspaper and rented the house to tenants who moved in on 15 September 2000. After deducting from the deposit the prorated amount of lost rents that Pickering incurred from 18 August 2000 through 14 September 2000, Pickering then provided a refund check to the Greens for \$146.68.

At a non-jury trial on plaintiffs' suit to recover their deposit, the trial court entered an order in favor of plaintiffs for defendant to pay plaintiffs \$1,100.00 plus court costs, including the cost of arbitration. Defendant's subsequent motion for JNOV and alternative motion for new trial were both denied in an order entered 27 June 2001. Defendant appeals the trial court's

judgment granted for plaintiffs. Defendant also appeals the denial of his post-trial motions. Since we resolve defendant's appeal of the final judgment in plaintiffs' favor, we conclude that the appeal of the denial of his post-trial motions would not withstand the applicable higher standard of review. Therefore, we dismiss defendant's assignments of error to the trial court's ruling on defendant's post-trial motions.

On appeal of the judgment, defendant argues that the trial court's findings of fact are not supported by the evidence presented at trial and the conclusions of law are not in accordance with law. Thus, the judgment for plaintiffs is erroneous. We disagree.

Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.'" *Cartin v. Harrison*, ___ N.C. App. ___, 567 S.E.2d 174 (2002), review denied, ___ N.C. App. ___, ___ S.E.2d ___ (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, disc. review denied, 354 N.C. 365, 556 S.E.2d 577 (2001)). "If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Pineda-Lopez v. North Carolina Growers Ass'n, Inc.*, ___ N.C. App. ___, 566 S.E.2d 162 (2002) (citations omitted).

Findings of Fact

Defendant argues that the trial court based its judgment for plaintiffs on erroneous findings of fact regarding the terms of a refund of the deposit and regarding the plaintiffs' belief of what the \$1,100.00 represented. The trial court found "that the Plaintiff's filled out a rental application which did not state a rental amount, the terms of the proration for a partial month, [and] the terms for a refund of a deposit[.]"

Prospective tenants of Pickering signed a Rental Application that states in relevant part:

I hereby deposit: Security Deposit \$_____, Application Fee (non refundable) \$_____, Other \$_____, for a total deposit of \$_____ on_____, 19____. . . . If for any reason Management decides to decline my application, then Management will refund this good faith deposit to me except for the non-refundable application fee.

I understand I may cancel this application within seventy-two (72) hours and receive a full refund except for application fee of this good faith deposit. If I cancel after seventy-two (72) hours, or fail to execute the attached rental agreement or refuse to occupy the premises on the agreed upon date, I understand this deposit will be held until Management can determine if it has incurred any expenses or rent loss due to my cancellation. These costs will be deducted from this deposit and the balance will be refunded to me.

The Application, admitted as evidence at trial, does not make it clear that the \$1,100.00 submitted to Pickering by the Greens was a non-refundable security deposit. The Application did not contain any writing in the blank spaces indicating amounts paid by applicants. At the top of the Application, "Dep 1100" is written underneath a printed portion that says "Rental Rate: ____."

Written on the line is "1100." Thus, it is unclear whether Mrs. Green submitted a deposit that would be credited as her first month's rent or as a non-refundable security deposit if she did not cancel within seventy-two hours of the Application. This evidence supports the trial court's finding that the Application did not state the terms for a refund of the deposit because it is unclear how Pickering applied the \$1,100.00 payment by the Greens.

Secondly, the trial court's finding that the plaintiffs believed that their \$1,100.00 payment represented their first month's rent rather than a deposit is supported by the evidence. Taking the Application alone as evidence of the Greens' belief with respect to their \$1,100.00 payment, it is not completely clear what that payment represented. Mrs. Green's testimony at trial, however, indicates her understanding that the \$1,100.00 check that she submitted with the completed, signed Rental Application to Pickering on 20 July 2000 represented a deposit towards the first month's rent. At trial, Mrs. Green testified on cross-examination as follows:

Q. But to your knowledge, there was no discussion as to how much rent would be due when you first took over that . . .

A. A proration amount was never discussed.

Q. Was an initial rent amount discussed?

A. Just eleven hundred. That was the only thing discussed.

Q. And so your testimony today and what your

memory is, is that you never had any discussion as to a prorated amount---

A. Exactly.

The trial court found as a matter of fact that plaintiffs paid eleven hundred dollars, "which the [p]laintiff believed to be the first month's rent." We conclude that the testimony during the bench trial supports this finding.

Conclusions of Law

Defendant's second argument is that the court erred in entering judgment for plaintiffs on the grounds that the conclusions of law made by the court are not in accordance with law. We disagree.

The trial court concluded "that the [d]efendant's refusal to return the entire \$1,100.00 deposit is unjustified" and entered judgment in favor of the plaintiffs. In the order, the trial court stated this conclusion of law as a finding of fact. This Court has held that "[i]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.'" *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000), review denied, 353 N.C. 381, 547 S.E.2d 435 (2001), and aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001) (quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984)). We conclude that the trial court's decision that the defendant was unjustified in retaining plaintiffs' security deposit is a

conclusion of law, which is supported by the findings of fact, and based on the evidence presented at trial.

First, we note that Pickering's Rental Application is in accordance with the North Carolina Tenant Security Deposit Act. N.C. Gen. Stat. § 42-51 limits the permitted landlord's uses of a tenant's security deposit. In relevant part, § 42-51 states:

Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of base rent, . . . nonfulfillment of rental period, . . . [and] costs of re-renting the premises after breach by the tenant . . .

N.C. Gen. Stat. § 42-51 (2001). Pickering complied with this statute insofar as it included terms for refund of a security deposit in its Rental Application. Pickering, however, withheld plaintiffs' \$1,100.00 payment that was not specifically identified to be a security deposit. Defendant was not justified in applying plaintiffs' deposit to lost rent and the cost of re-renting the premises when defendant did not specify as to what the Greens' \$1,100.00 check applied.

Upon deducting the amount due for costs, defendant returned the balance to plaintiffs along with a detailed accounting of how defendant calculated the remaining amount. Defendant argues that it complied with § 42-52, which states:

Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in G.S. 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after

termination of the tenancy and delivery of possession by the tenant.

Id. Defendant's Rental Application complied with the Tenant Security Deposit Act regarding the authority to collect security deposits and the limitation regarding how the deposits may be applied. However, based on the evidence presented at trial regarding the Greens' \$1,100.00 payment, the trial court correctly concluded that defendant was unjustified in failing to return the full \$1,100.00 deposit to the Greens.

Applying the standard of review stated above, we conclude that the evidence supports the trial court's findings that the Application does not state terms for a refund of the deposit and that plaintiffs believed that their \$1,100.00 payment was the first month's rent. The findings of fact support the conclusion that defendant was unjustified in withholding plaintiffs' security deposit. Thus, the judgment entered in favor of plaintiffs was correct.

Affirmed.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).