

NO. COA14-577

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2015

JEANNE A. CLARK,
Plaintiff,

v.

Wake County
No. 13 CVD 10681

RICHARD J. BICHSEL,
Defendant.

Appeal by defendant from order entered 23 December 2013 by Judge Lori G. Christian in Wake County District Court. Heard in the Court of Appeals 22 October 2014.

No brief filed for plaintiff-appellee.

Heidgerd Law Office, LLP, by Eric D. Edwards and Jason E. Spain, for defendant-appellant.

STEELMAN, Judge.

The trial court's findings of fact were supported by competent evidence, and in turn support the trial court's award of a monetary judgment in favor of plaintiff. Where defendant failed to raise the affirmative defense of mitigation at trial, that argument on appeal is dismissed. The trial court erred in ordering defendant to pay money damages within 60 days.

I. Factual and Procedural Background

Jeanne Clark (plaintiff) and Richard Bichsel (defendant) entered into a lease agreement with a third party for an apartment beginning 1 September 2012 and expiring 1 September 2013. The parties agreed that they would each pay half of the rent. Defendant paid his half of the rent for the months of September, October, November, and December of 2012. In December of 2012, defendant moved out of the apartment. Defendant notified the apartment leasing agency that he would be moving out, and that plaintiff would remain on the premises with her three children and one dog. Neither party attempted to renegotiate the lease. After defendant's departure, plaintiff paid the entire rent.

On 1 July 2013, plaintiff filed a complaint for money owed against defendant in the Small Claims Court for Wake County. On 1 August 2013, the magistrate entered judgment in favor of plaintiff, and ordered defendant to pay \$5,000. Defendant appealed to the District Court of Wake County. The case went to arbitration pursuant to N.C. Gen. Stat. § 7A-37.1. On 7 October 2013, an arbitration award was filed in favor of defendant, awarding nothing to plaintiff. On 1 November 2013, plaintiff appealed this decision to the District Court of Wake County.

The case was heard by the trial court, sitting without a jury. On 23 December 2013, the trial court entered its judgment in favor of plaintiff. Specifically, the trial court found that plaintiff and defendant had an oral contract to split the rent, that defendant breached that contract, and that plaintiff was damaged by the breach. The trial court ordered defendant to pay damages in the amount of \$5,280. The trial court further ordered that "Defendant shall pay Plaintiff within 60 days of receipt of this order."

Defendant appeals.

II. Findings of Fact

In his first argument, defendant contends that the trial court's findings of fact were not supported by the evidence at trial. We disagree.

A. Standard of Review

"'[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)).

B. Analysis

Defendant contends that the trial court's findings of fact numbers 2, 8, 10, 12, and 14 are unsupported by and contrary to the evidence presented at trial. The trial court specifically found that:

2. The parties had a verbal agreement that they would each pay half the rent on said apartment.

. . .

8. Plaintiff relied on Defendant's verbal agreement that the parties would to pay half of the rent for the term of the lease. The lease expired on September 1, 2013.

. . .

10. Plaintiff could not pay the entire rent without Defendant's commitment to pay half the rent.

. . .

12. Plaintiff relied on Defendant's commitment to pay half the rent.

. . .

14. Plaintiff relied on Defendant's commitment to pay half the rent.

At trial, plaintiff stated that:

The defendant and I signed a lease to establish residency together and it was a 12-month lease. And our agreement was to split the rent and expenses, which we did for four months, until he decided to establish residency elsewhere.

Defendant later testified, when discussing how he and plaintiff had planned to divide the rent:

We were gonna split the rent and half the utilities while we were living together.

Given that both plaintiff and defendant testified that they agreed to divide the rent, we hold that there was evidence in the record to support the trial court's finding that the parties made a verbal agreement to divide the rent.

Plaintiff further testified that, after defendant moved out:

I said I wasn't going to move out because I was financially bankrupt at that point. I wasn't -- I didn't have any other option but to stay there. I wasn't --

Q You thought --

A I didn't have the money to establish a new residence.

Q Did you at that point talk to the leasing company, the landlord about trying to get out of the lease?

A No. He did mention that. I can't remember if he paid like three months rent that we could get out of it. But as I just stated, I did not have the cash to do that. And he didn't offer to do that.

Plaintiff's repeated statements that she lacked the funds to move, and that she was financially bankrupt, tend to support a finding that she lacked the funds to pay the remaining rent,

and that she relied on defendant's assurance that he would pay half of the rent. We hold that the trial court's findings were supported by competent evidence.

Defendant further contends that the trial court's conclusions of law based upon these findings were in error, because the findings were improper. As we have held that these findings were supported by competent evidence, we hold that the conclusions of law based thereon were also proper.

This argument is without merit.

III. Failure to Mitigate Damages

In his second argument, defendant contends that the trial court erred in failing to make findings concerning plaintiff's failure to mitigate damages. Because defendant failed to raise this affirmative defense at trial, this argument is dismissed.

A. Standard of Review

"[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008); see also N.C. R. App. P. 28(b)(6).

B. Analysis

Defendant contends that plaintiff should have attempted to renegotiate her lease after defendant's departure, that plaintiff's failure to do so constitutes a failure to mitigate damages, and that the trial court erred in failing to make findings with respect to mitigation.

Failure to mitigate damages is an affirmative defense. See e.g. *Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 762, 663 S.E.2d 874, 875 (2008). "The [breaching] defendants [bear] the burden of proof on [their] affirmative defense that [the nonbreaching party] failed to mitigate its damages." *Kotis Props., Inc. v. Casey's, Inc.*, 183 N.C. App. 617, 623, 645 S.E.2d 138, 142 (2007). In the instant case, defendant made no argument at trial concerning plaintiff's failure to mitigate. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (quoting *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990)); see also N.C. R. App. P. 10(a)(1).

We hold that defendant's failure to raise the issue of mitigation at trial waives that issue for appellate review. This argument is dismissed.

IV. Money Judgment

In his third argument, defendant contends that the trial court erred in ordering defendant to pay a money judgment within 60 days. We agree.

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Plaintiff brought this action against defendant seeking a money judgment. Money judgments are generally controlled by N.C. Gen. Stat. § 1-302, which provides that:

Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.

N.C. Gen. Stat. § 1-302 (2013). We have previously held that, as a general rule, once a judgment fixes the amount due, execution, not contempt, is the appropriate proceeding. *Brown v. Brown*, 171 N.C. App. 358, 361, 615 S.E.2d 39, 41 (2005). In the instant case, the trial court ordered payment within 60

days, which was not authorized by N.C. Gen. Stat. § 1-302, and was in error.

We vacate the portion of the trial court's judgment requiring defendant to pay the judgment within 60 days. Upon remand, plaintiff may attempt to enforce the judgment in accordance with the provisions of Article 28 of Chapter 1 of the General Statutes.¹

AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART.

Judges CALABRIA and McCULLOUGH concur.

¹ We further note that pursuant to N.C. Gen. Stat. § 1-305(b), the Clerk of Superior Court is not authorized to issue execution until the provisions of that statute have been complied with.