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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-669

Filed: 17 March 2020

Guilford County, No. 19-CVS-489

4000 PIEDMONT PARKWAY ASSOCIATES, LLC, Plaintiff,

v.

EASTWOOD CONSTRUCTION CO., INC. and EASTWOOD CONSTRUCTION, LLC, Defendants.

Appeal by Defendants from order entered 13 May 2019 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 8 January 2020.

Womble Bond Dickinson (US) LLP, by Ronald R. Davis and Brent F. Powell, for Plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse and James C. Adams, II, for Defendants.

DILLON, Judge.

Defendants Eastwood Construction Co. Inc. and Eastwood Construction, LLC, (“Tenant”) appeal from an order granting summary judgment in favor of Plaintiff 4000 Piedmont Parkway Associates, LLC, (“Landlord”) and denying Tenant’s Motion for Continuance pursuant to Rule 56(f).

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I. Background

The issue confronted in this appeal is whether Tenant gave timely notice of its desire to exercise an option to extend the term of its lease (the “Lease”) with Landlord.

Tenant was a tenant of certain commercial real estate (the “Property”) pursuant to the Lease originally executed in 2009. The term of the Lease was set to expire at the end of February 2019, but contained a provision which allowed Tenant to extend the Lease term by three years, as follows:

Tenant shall have the right and option to extend the Term for one (1) three (3) year option, exercisable by giving Landlord prior written notice, *at least six (6) months in advance of Expiration Date, or Tenant’s election to extend the term*; it being agreed that time is of the essence and that this option is personal to Tenant and to any entity controlled by Tenant . . . and is non-transferrable to any other assignee or to any sublessee . . . or other party.

(Emphasis added.) It is this provision which is the subject matter of this appeal.

In December 2018, well within six (6) months of the Lease expiration, Tenant finally provided written notice to Landlord of its intent to exercise the aforementioned option provision. Landlord rejected the renewal, as untimely.

On 4 March 2019, Landlord sent Tenant a notice demanding that Tenant vacate the premises. Tenant, however, refused to vacate, becoming a holdover tenant.

Landlord filed a Complaint in Summary Ejectment. Landlord consented to Tenant’s motion to transfer the case to superior court, where Landlord moved for summary judgment. Tenant responded with a motion to continue pursuant to Rule

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56(f). In May 2019, after a hearing on the matter, the superior court denied Tenant's motion but granted Landlord's summary judgment motion. Tenant timely appealed.

II. Analysis

A. Summary Judgment

Tenant argues that the superior court erred in granting summary judgment on Landlord's summary ejectment claim.¹ The standard of review for an appeal from summary judgment is *de novo*. See *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Granting a motion for summary judgment "is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 523-24, 649 S.E.2d at 385 (internal quotation marks omitted) (citation omitted).

Tenant alleges that the option provision contained in the Lease is ambiguous. Tenant believes that the language, that notice be provided by Tenant "at least six (6) months in advance of Expiration Date, or Tenant's election to extend the term" somehow provides two options for providing notice to the Landlord about enacting the option, based on the word "or." However, we conclude that the inclusion of the word "or" was a typographical error and that Landlord's intended word was "of." The

¹ Our superior courts have concurrent jurisdiction over matters concerning summary ejectment, as held by our Supreme Court. See *Stonestreet v. Means*, 228 N.C. 113, 115, 44 S.E.2d 600, 601 (1947).

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provision makes no sense with the word “or” in place. That is, under Tenant’s construction, the provision would be contradictory, allowing Tenant to exercise the option by *either* giving Landlord six months advance notice *or* no advanced notice. This is nonsensical. This is not a case which involves some mutual mistake, where the parties’ intentions were misunderstood or improperly stated in the contract. This case is simply about a typo. We note the fact that the letter “r” is right above the letter “f” on a standard keyboard. Further, our holding is reinforced by the presence of the “time is of the essence” language in the option provision.

As the evidence is uncontradicted that Tenant gave notice less than three months before the expiration of the term of the Lease, the superior court correctly concluded that there was no “genuine issue of material fact,” and properly granted Landlord summary judgment.

B. Motion for Continuance Pursuant to Rule 56

Given the superior court’s conclusion that Landlord was entitled to summary judgment, the superior court properly denied Tenant’s motion for a continuance. There was no need to conduct unnecessary discovery for a case where there was “no genuine issue of material fact” regarding the timeliness of Tenant’s notice.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).