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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1036

Filed: 17 November 2020

Mecklenburg County, No. 18CVD21550

WAYNE BATTLE, Plaintiff,

v.

RICARDO O'NEAL, Defendant.

Appeal by plaintiff and defendant from judgment entered 8 May 2019 by Judge Karen McCallum in District Court, Mecklenburg County. Heard in the Court of Appeals 11 August 2020.

*The Law Group, by Brian W. Tyson, for plaintiff-appellant.*

*Legal Aid of North Carolina, Inc., by Thomas Holderness, O'Shauna Hunter, and Brian O'Shaughnessy, for defendant-cross-appellant.*

STROUD, Judge.

Both parties appeal the trial court judgment dismissing plaintiff's summary ejectment complaint, awarding damages to defendant, and denying defendant's counterclaim; plaintiff also appeals the trial court's denial of his motion for a new trial. Because the trial court's findings of fact are supported by the evidence, we affirm the trial court's order dismissing plaintiff's summary ejectment claim. As to

defendant's appeal, the trial court's findings of fact also establish defendant's unfair or deceptive trade acts or practices claim, so the trial court erred by denying this claim. We therefore affirm in part as to plaintiff's issues on appeal, and reverse and remand in part as to defendant's counterclaim for unfair or deceptive trade acts or practices.

I. Background

On 18 October 2018, plaintiff filed a "COMPLAINT IN SUMMARY EJECTMENT" seeking to evict defendant from a home plaintiff had rented to defendant under a written lease agreement. On 29 October 2018, a magistrate entered an order ejecting defendant and ordered him to pay arrears. Defendant appealed to district court.

On 14 January 2019, defendant filed an answer to plaintiff's complaint and also counterclaimed for breach of implied warranty of habituality in violation of North Carolina General Statute § 42-42 and unfair or deceptive trade acts or practices in violation of North Carolina General Statute § 75-1.1 *et seq.* ("UDTP"). On 22 January 2019, a hearing was held on plaintiff's complaint and defendant's counterclaims, and on 14 February 2019, the district court entered a judgment dismissing plaintiff's summary ejectment complaint with prejudice, awarding defendant damages on the counterclaim for breach of implied warranty of habitability, denying defendant's counterclaim for UDTP, releasing rent bond to defendant, and vacating the

magistrate's judgment. Plaintiff filed a motion for a new trial and to amend and alter the judgment. On 8 May 2019, the trial court denied plaintiff's motion for a new trial; allowed the motion to amend and alter the judgment in part; and entered an amended judgment again dismissing plaintiff's compliant with prejudice, awarding defendant damages on the counterclaim for breach of implied warranty of habitability, denying defendant's counterclaim for UDTP, releasing rent bond to defendant, and vacating the magistrate's judgment.<sup>1</sup> The unchallenged and thus binding findings, *see In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal."), establish<sup>2</sup>:

3. The defendant has resided at the premises at 6618 Misty Morning Dr., Charlotte, NC (the "premises"), from August 2018 through the present pursuant to a written lease with the plaintiff.
4. The plaintiff is the owner of the premises.
5. The lease between the parties specified that the defendant's rate of rent was eight hundred seventy dollars (\$870.00) per month and that the term of the defendant's lease was from August 2018 through August 2020.

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<sup>1</sup> Plaintiff contends that the trial court entered two amended judgments on 8 May 2019. There are two amended judgments from 8 May 2019 in the record. The first amended judgment is 8 pages and incorporates the original judgment with changes; the second amended judgment is only 2 pages and specifies changes to three subsections of findings of fact. But the second amended judgment was not signed by the trial judge. Further, both parties mention only one amended judgment in their notices of appeal, and the description of the judgment only applies to the first amended judgment. Because none of the details in the second amended judgment are at issue on appeal, the alleged second amended judgment is not signed, and neither party specifically appealed from the second amended judgment, we have addressed the only filed and signed, first amended judgment.

<sup>2</sup> These findings of fact are specific to the counterclaim section of the judgment.

6. The property was not habitable when the defendant moved in.
7. From the beginning of the defendant's tenancy, there were certain defects in the premises, including the lack of an operable smoke detector, lack of an operable carbon monoxide detector, lack of floor covering, holes or cracks in the walls, and a leak under the kitchen sink.
8. The defendant walked through the premises in August 2018 with the plaintiff, and the plaintiff pointed out many of the defective conditions in the house.
9. In August 2018, there was a flea infestation at the premises.
10. The defendant hired an exterminator to remove the fleas and paid \$350 for the extermination services.
11. The defendant and the plaintiff agreed to a reduced rate of rent of seven hundred dollars (\$700.00) for the month of September due to the fleas.
12. The defendant notified the plaintiff of a leak in the ceiling of the premises in October 2018.
13. The plaintiff made a reasonable effort to make repairs to the premises, but ultimately failed to make repairs to the premises until January 2019.
14. In December of 2018 the defendant called the housing code enforcement division of the City of Charlotte to schedule a housing code inspection at the premises.
15. On or around December 19, 2018 a City Housing Code inspector for the City of Charlotte inspected

the premises and noted several defects that were present at the premises. The code inspector created a report noting his observation that these defects existed at the premises and were in violation of the housing code. A copy of the code inspection report is attached to this judgment, and the defects noted thereon are incorporated into these findings by reference. The inspector sent a copy of his report to the plaintiffs and the defendant.

16. The defendant was harmed and the defendant's use and enjoyment of the leased premises was seriously affected by the aforementioned defects.
17. Among other concerns, the defendant worried about the uncovered flooring in the residence.
18. The defendant also express[ed] concerns to the plaintiff about the stability of the ceiling and water leaks caused by the rain.
19. The defendant had to leave a bucket under the kitchen sink to catch liquid from a leak under the sink.
20. The plaintiff was given notice of these defects, as described above, and failed to remedy the defects within a reasonable amount of time.
21. The defendant paid a total of three thousand nine hundred and two dollars (\$3,902.00) in rent to the plaintiff from the beginning of the defendant's tenancy through February 2019. The defendant paid this sum to the plaintiff as follows: three hundred and ninety-two dollars (\$392.00) in August 2018, seven hundred dollars (\$700.00) in September 2018, eight hundred and seventy dollars (\$870.00) in November 2018, December 2018, and January 2019; two hundred dollars (\$200.00) paid in advance for February 2019.

22. The defendant paid rent for the months of November 2018, December 2018, January 2019, and a portion of February 2019 to the Court as rent bond.
23. The defendant did not pay rent in October 2018.
24. The premises is a three bedroom, two bathroom home located in East Charlotte, NC. The fair rental value of the premises in a warranted condition was twelve hundred fifty dollars (\$1250.00) per month.
25. The fair rental value of the premises in its unfit condition for the months of August 2018 through the present was three hundred fifty dollars (\$350.00) per month.

As to plaintiff's claims the district court concluded,

2. The duration of the defendant's leasehold estate in the premises was for a term of years, the term of which was from August 2018 through August 2020.
3. The only ground for summary ejectment asserted by the plaintiff in his complaint was that the defendant failed to pay rent due after the plaintiff made a demand for payment and waited ten days prior to filing the summary ejectment action.
4. The plaintiff failed to produce evidence that the plaintiff made a demand for payment and waited ten days prior to filing the summary ejectment action and, therefore, the plaintiff's summary ejectment action should be denied.
5. The plaintiff has shown no right to relief under the facts and the law; the defendant's [oral] motion to dismiss pursuant to Rule

41(b) should be granted and the plaintiff[]s complaint in summary ejectment should be dismissed with prejudice.

As to defendant's counterclaims the trial court concluded,

2. By failing to put and keep the leased premises in a fit and habitable condition, the plaintiff breached the implied warranty of habitability owed to the defendant.
3. The defendant is entitled to a judgment against the plaintiff in the amount of the difference between the fair rental value of the premises in a warranted condition and the fair rental value of the premises in its unfit condition for the period in which the defendant occupied the premises, limited by the amount of rent paid by the defendant to the plaintiff. The total amount of the difference between the fair rental value of the premises as warranted and the fair rental value in its unfit condition is five thousand, four hundred dollars (\$5,400.00), which exceeds the total amount of rent paid by the defendant. The defendant has paid three thousand nine hundred and two dollars (\$3,902.00) to the plaintiff in rent, and, therefore, the defendant is entitled to a judgment in the amount of three thousand nine hundred and two dollars (\$3,902.00).
4. As the plaintiff made a reasonable effort to make repairs, the plaintiff's actions in this matter did not constitute unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 et seq.; accordingly, the defendant's actual damages should not be trebled, the defendant should not be awarded attorney's fees, and the defendant's claim for unfair and deceptive trade practices should be denied.
5. Any rent bond held by the Court to stay the execution of the magistrate's judgment in this action

should be released to the defendant and shall be credited against the three thousand nine hundred and two dollars (\$3,902.00) awarded to the defendant.

Ultimately, the trial court decreed:

1. The defendant's motion for an involuntary dismissal of the plaintiff's complaint pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure is granted and the plaintiff's complaint in this action is hereby dismissed with prejudice.
2. The defendant shall have and recover from the plaintiff, three thousand nine hundred and two dollars (\$3,902.00) for breach of the implied warranty of habitability, together with interest at the lawful rate from the date of this judgment.
3. The defendant's claim for unfair and deceptive trade practices is denied.
4. Any rent bond held by the Court to stay the execution of the magistrate's judgment in this action should be released to the defendant and credited against the three thousand nine hundred and two dollars (\$3,902.00) awarded to the defendant.
5. The magistrate's judgment in File No. 18-CVM-25978 is hereby vacated, and the Clerk of Court of Mecklenburg County shall note next to such judgment that it is null, void and unenforceable.
6. The rate of rent for the Premises shall return to eight hundred and seventy dollars (\$870.00) upon plaintiff's completion of all necessary repairs and correction of all City Code Violations noted in the December 19, 2018 inspection report.



7. The parties shall bear their own respective costs in this action.

Plaintiff appeals the amended judgment. Defendant cross-appeals.

## II. Plaintiff's Appeal

Plaintiff raises four issues on appeal.

### A. Involuntary Dismissal under Rule 41(b)

Plaintiff first contends “the trial court erred in dismissing plaintiff’s complaint pursuant to Rule 41(b) on the basis that plaintiff failed to produce evidence of a written demand.” (Original in all caps.) During the hearing, defendant made an oral motion to dismiss plaintiff’s complaint under Rule of Civil Procedure 41(b).

Rule 41(b) provides,

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court

specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). “The standard of review for an involuntary dismissal under Rule 41(b) is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court’s conclusions of law and its judgment.” *Ray v. Greer*, 212 N.C. App. 358, 362, 713 S.E.2d 93, 96 (2011) (citation and quotation marks omitted).

Plaintiff contends that he was not required to make a written demand for payment because here the “Rental Agreement’s forfeiture clause and . . . testimony that Plaintiff had a right to file his Complaint following Defendant’s failure to pay” were sufficient evidence to withstand a Rule 41(b) motion to dismiss. We first note that while plaintiff challenges “[t]he trial court’s finding that Plaintiff failed to produce a *written* demand” because such a finding “is inaccurate and inapplicable[.]” in actuality the trial court did not find that a written demand was required. The trial court concluded that “plaintiff failed to produce evidence that the plaintiff made a demand for payment and waited ten days prior to filing the summary ejectment action[.]” The trial court did not find the demand needed to be written.

On plaintiff’s “COMPLAINT IN SUMMARY EJECTMENT[.]” form AOC-CVM-201, Rev. 8/17 (“form”), plaintiff did not seek to evict defendant using the lease

terms but instead pled as grounds for eviction that “[t]he defendant failed to pay the rent due on the above date *and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.*”<sup>3</sup> (Emphasis added.) Plaintiff could have checked a different box to indicate he was alleging a breach of the lease and put defendant on notice of such a claim and eviction based upon those terms, but he did not. Thus, the only allegations to support ejectment stated in the complaint were a failure to pay rent, plaintiff’s demand for rent, and expiration of the 10-day waiting period. Defendant did not have notice of a claim based upon the lease agreement. *See generally Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 485–86 (2014) (“Pursuant to General Statutes, section 1A–1, Rule 8, a pleading which sets forth a claim for relief shall contain (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief and (2) A demand for judgment for the relief to which he deems himself entitled. By enacting section 1A–1, Rule 8(a), our General Assembly adopted the concept of notice pleading. Under notice pleading, *a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial*, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. Such simplified notice

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<sup>3</sup> Because plaintiff did not plead the terms of the lease as a basis for summary ejectment, we do not address whether the lease forfeiture provision was valid.

pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim.* (emphasis added) (citations, quotation marks, ellipses, and brackets omitted)).

When the lease does not control forfeiture, North Carolina General Statute § 42-3 does. *See generally Stanley v. Harvey*, 90 N.C. App. 535, 537–38, 369 S.E.2d 382, 384 (1988) (“[S]tatutory forfeitures under Section 42–3 are not implied where the lease itself provides for termination upon non-payment of rent.”). North Carolina General Statute § 42-3 provides,

In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

N.C. Gen. Stat. § 42-3 (2017).

This Court noted in *Snipes v. Snipes* that a clear and unequivocal demand for the lessee to pay all past due rent is required under North Carolina General Statute § 42-3:

We hold that to constitute a demand under N.C.G.S. 42–3, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary. A demand is a peremptory claim to a thing as a matter of right. The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise his or her statutory right to forfeiture for nonpayment of rent.

55 N.C. App. 498, 504, 286 S.E.2d 591, 595 (citations and quotation marks omitted), *aff'd per curiam*, 306 N.C. 373, 293 S.E.2d 187 (1982). “Demand is a necessary prerequisite to forfeiture for nonpayment of rent.” *Id.* at 504, 286 S.E.2d at 594.

Plaintiff now argues to this Court he made a demand, but he cites to no evidence, including his own testimony, supporting this contention. Plaintiff did testify that upon defendant missing a payment he “wrote him a letter for Crisis[,]” saying “he needed to go to Crisis early. Crisis is going to give you \$600, you’re going to have to prove that you have a job and you’re to have to prove that you can pay the next payment” but plaintiff did not say the letter demanded payment and the letter was not part of evidence at trial.<sup>4</sup> After defendant moved for dismissal, plaintiff, who appeared *pro se*, argued to the trial court, “there was a demand for rent when we went outside[,]” but plaintiff never testified to this. As there was no evidence of a demand, the trial court did not err in allowing defendant’s motion to dismiss as “upon the facts and the law the plaintiff has shown no right to relief.” N.C. Gen. Stat. § 1A-1, Rule

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<sup>4</sup> “Crisis” was not fully described at the hearing but appears to be an organization that would help defendant pay rent.

41(b); *see Snipes*, 55 N.C. App. at 504, 286 S.E.2d at 594-95. This argument is overruled.

B. Due Process Rights

Plaintiff next contends his due process rights were violated because he did not have enough time to prepare for defendant's counterclaims. Plaintiff argues that "[t]he trial court erred in granting defendant's counterclaim for rent abatement for violation of the Residential Rental Agreement Act, when defendant's counterclaim was untimely and improperly before the court." (Original in all caps.) We disagree.

Defendant filed his answer and counterclaims on 14 January 2019. On 16 January 2019, defendant filed a motion to continue the hearing, which was scheduled for 22 January 2019, because he needed more time "to review the discovery and prepare for trial." Plaintiff's response to the motion to continue was "that he needed more time to consider this matter, [the matter of a continuance], and has not yet provided his position." In other words, plaintiff's response to defendant's motion to continue was that he needed more time to consider the motion; had plaintiff simply consented to defendant's motion to continue, plaintiff also would have had more time to prepare for trial, but he did not. The trial court then denied defendant's motion to continue. *Plaintiff* did not move to continue.

Plaintiff argues his due process rights were violated because the trial was held only a few days after defendant filed his counterclaims. But "a constitutional issue

not raised at trial will generally not be considered for the first time on appeal.” *Fields v. McMahan*, 218 N.C. App. 417, 419, 722 S.E.2d 793, 794 (2012) (citation, quotation marks, and brackets omitted). Further, plaintiff failed to make a motion to continue before the trial court *and* argues before this Court he was not given enough time to prepare before the trial court, despite the fact that he took no position on defendant’s requested continuance. If defendant’s motion to continue had been allowed, plaintiff also would have had more time to prepare for defendant’s counterclaims. Plaintiff waived review of this issue, and we decline to address it.

C. Rent Abatement and Amount

Plaintiff next contends that “the trial court erred in granting defendant’s relief in an amount that was unsupported by evidence, findings of fact, and/or conclusions of law.” (Original in all caps.) Plaintiff contends “[i]n the present case, the trial court has failed to establish why the remedy of rent abatement and the amount awarded is appropriate and how the award for rent abatement was calculated.” Plaintiff’s two main contentions are the sufficiency of the findings determining that rent abatement is a proper remedy and the amount of the abatement.

1. Rent Abatement

Plaintiff acknowledges that rent abatement is the proper remedy when premises are uninhabitable but contends the trial court failed to make findings of fact regarding the uninhabitable state of the premises and cites case law where “[t]he

trial court made no finding that the Premises was unfit or uninhabitable during the period in which Defendant-Tenant paid rent. *Broadway*, 242 N.C App. 507, 519.” But plaintiff’s contention is simply not accurate, as the trial court made detailed findings of fact as to the uninhabitability of the premises. Plaintiff does not actually challenge any of the findings of fact as unsupported by the evidence but instead argues various points he believes are unclear. Rather than re-quote the findings of fact we summarize them: from the day defendant moved in the premises were “not habitable” “including the lack of an operable smoke detector, lack of an operable carbon monoxide detector, lack of floor covering, holes or cracks in the walls, and a leak under the kitchen sink.” Defendant hired an exterminator to address the flea infestation. Despite plaintiff’s attempts to make repairs, repairs were not actually made until January 2019. Plaintiff also attempts to argue that abatement is not appropriate unless the premises are entirely unusable but cites no law for this contention. Plaintiff’s argument that the trial court failed to make findings of fact that the premises were uninhabitable for purposes of defendant receiving rent abatement is without merit.

2. Amount

As to the amount of rent abatement plaintiff argues that the trial court failed to explain how it arrived at an award of \$3,902 to defendant. But it is clear how the trial court arrived at the number because he also notes, defendant “essentially



received a full refund of all payments made during his possession of the Premises[.]” which is exactly what the trial court stated.

Plaintiff himself testified that the fair market value of the premises in a fit condition was \$1200, and the trial court made a finding more favorable to plaintiff of \$1250:

24. The premises is a three bedroom, two bathroom home located in East Charlotte, NC. The fair rental value of the premises in a warranted condition was twelve hundred fifty dollars (\$1250.00) per month.

Plaintiff presented no evidence of the rental value of the premises in their uninhabitable state, but defendant valued it at \$350 to \$300 though he “really want[ed] to give a zero” due to the condition of the premises. The only evidence of the value of monthly rent of the premises in their uninhabitable state was from defendant, and the trial court’s findings of fact was supported by defendant’s evidence:

25. The fair rental value of the premises in its unfit condition for the months of August 2018 through the present was three hundred fifty dollars (\$350.00) per month.

The trial court then used the difference in these two numbers, \$1250 and \$350 to calculate an amount owed:

The defendant is entitled to a judgment against the plaintiff in the amount of the difference between the fair rental value of the premises in a warranted condition and the fair rental value of the premises in

its unfit condition for the period in which the defendant occupied the premises, limited by the amount of rent paid by the defendant to the plaintiff. The total amount of the difference between the fair rental value of the premises as warranted and the fair rental value in its unfit condition is five thousand, four hundred dollars (\$5,400.00), which exceeds the total amount of rent paid by the defendant. The defendant has paid three thousand nine hundred and two dollars (\$3,902.00) to the plaintiff in rent, and, therefore, the defendant is entitled to a judgment in the amount of three thousand nine hundred and two dollars (\$3,902.00).

Thus, again plaintiff's argument that the trial court failed to make proper findings of fact and explain its conclusion as to the amount is simply incorrect, and this argument is without merit. Plaintiff also attempts to make an argument regarding "unclean hands" which we do not address as this was not raised before the trial court. *See generally Fields*, 218 N.C. App. at 419, 722 S.E.2d at 794.

D. New Trial

Last, plaintiff contends "the trial court erred in dismissing plaintiff's motion for a new trial." (Original in all caps.) Plaintiff addresses no ground for a new trial beyond those we have already addressed, as plaintiff has failed to prevail on any of his issues, we need not review this issue. *See generally* N.C. Gen. Stat. § 1A-1, Rule 59 (2017) (regarding motions for new trial).

III. Defendant's Cross-Appeal

Defendant's only argument on appeal is that the trial court erred in denying his unfair or deceptive trade practices claim. Defendant contends "[t]he trial court erred as a matter of law by denying" his UDTP claim since the trial court found plaintiff had continued to charge rent despite his failure to repair the home, and in particular, his knowledge of a dangerous code violation, a lack of a smoke detector.

In *Dean v. Hill*, this Court agreed with the defendant that the trial court had erred in dismissing his UDTP claim when the evidence established the plaintiff was aware of the uninhabitable nature of the premises but continued to collect rent:

Defendant also contends that the trial court erred in dismissing his counterclaim for unfair and deceptive trade practices. We apply the same standard of review as we did *supra*. Having held the findings of fact are supported by competent evidence, we also hold that the trial court's findings of fact do not support its conclusion of law that there was insufficient evidence to show plaintiff knew the leased premises were uninhabitable and continued to demand rent payments.

North Carolina General Statutes, section 75–1.1 (2003), provides that it is unlawful to participate in unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. Our courts previously have considered a trade practice to be unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Residential rental agreements fall within Chapter 75 because the rental of residential housing is considered commerce pursuant to N.C. Gen. Stat. § 75–1.1. In determining what type of conduct falls within the purview of Chapter 75, our Courts have stated that conduct is unfair or deceptive if it has the capacity or tendency to deceive the average consumer. This rule, however, does

not require proof of actual deception. Whether a party has committed an unfair and deceptive trade practice will depend upon the facts of each case and the impact the practice has in the marketplace.

*In the instant case, defendant's evidence established that his residential rental premises were uninhabitable and that plaintiff knew that the premises needed repair, but failed to correct the defects and continued to demand rent payments.* This evidence supports a factual finding that plaintiff committed an unfair and deceptive trade practice. The record clearly indicates that defendant's premises were uninhabitable and violated the Gaston Housing Building Code. The trial court listed numerous defects that existed on the premises prior to and during defendant's living in those premises and incorporated those defects into its findings of facts in making its determination that the premises were uninhabitable. Defendant specifically alleged in his counterclaim that plaintiff repeatedly refused to repair any of those defects the trial court found to have existed in and about the leased premises.

*Plaintiff's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house constituted unfair trade practices and was thus a violation of North Carolina General Statutes, section 75-1.1. Pierce, 163 N.C. App. at 302, 593 S.E.2d at 792. See Allen v. Simmons, 99 N.C. App. 636, 645, 394 S.E.2d 478, 484 (1990) (where defendant's evidence tended to show that plaintiff leased him a residential home containing defects which rendered the home uninhabitable, a jury could find plaintiff committed an unfair trade practice); Foy v. Spinks, 105 N.C. App. 534, 540, 414 S.E.2d 87, 89-90 (1992) ("where a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was aware of the needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding that the landlord committed an unfair or deceptive trade practice"). Accordingly, we hold that plaintiff's conduct was immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Therefore, the*

trial court erred in dismissing defendant's counterclaim for unfair and deceptive trade practice, and on remand, it must enter judgment for defendant consistent with this holding.

171 N.C. App. 479, 484–86, 615 S.E.2d 699, 702–03 (2005) (emphasis added) (citations, quotation marks, and brackets omitted).

As to the smoke detector, plaintiff contends in his reply brief he “corrected the defect on the Premises well within the thirty day period following notice from City of Charlotte Code Enforcement” in December of 2018. But the findings of fact demonstrate there was *never* a smoke detector in the home, and thus plaintiff was on notice from the moment the lease began in 2018. We must contrast this case with *Stikeleather Realty & Investments Co. v. Broadway*, which determined that the tenant was not entitled to rent abatement where a new property owner and manager was not notified in compliance with the Residential Rental Agreements Act of the prior issues on the premises, and the tenant did not allow him access to inspect. 242 N.C. App. 507, 515-20, 775 S.E.2d 373, 378–81 (2015) (“While N.C. Gen. Stat. § 42–42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of its needed repair or replacement, or if it is the beginning of a tenancy. Here, Defendant–Tenant never notified Plaintiff–Landlord in writing, as required, the alarm provided by Mr. Kluth was defective or inoperable. Regardless of whether Plaintiff–Landlord discovered during the second pre-sale inspection the property did not have an alarm,

there was no finding Plaintiff–Landlord knew or should have known the alarm provided by Mr. Kluth was not operable. Nor was there a finding Plaintiff–Landlord was notified about its inoperability. Furthermore, the trial court failed to make any finding as to when, if ever, a new tenancy was created after Plaintiff–Landlord became the new property owner and manager. Lacking the essential findings that Defendant–Tenant notified Plaintiff–Landlord the alarm provided by Mr. Kluth needed replacement or repair, or that a new tenancy was created after Plaintiff–Landlord became the property’s owner and manager, the trial court’s findings of fact do not support its conclusion that Plaintiff–Landlord breached the RRAA.”). Here, the lack of a smoke detector, as well as many other issues, existed from the beginning of defendant’s tenancy, and plaintiff was aware of all of the problems.

Plaintiff further contends the *only* remedy for a lack of a smoke detector would be a \$250.00 fine “to which [d]efendant is not entitled” under North Carolina General Statute §42-44(a1). But the lack of a smoke detector was not the only condition making the premises uninhabitable; it was just one of the more dangerous ones. The trial court also found there was a lack of a working carbon monoxide detector, missing flooring, holes and cracks in the wall, and a leak under the kitchen sink. The trial court further incorporated the code violation inspection report into its findings of fact and those included the lack of a functioning carbon monoxide detector; the specifics of the many places with missing or problematic flooring including in the bathroom,

bedrooms, hallway and kitchen; moisture damage in the ceiling; a broken bedroom window; various holes and cracks in the ceiling and walls; and a leak in the kitchen. Accordingly, based upon the trial court's findings of fact, "[p]laintiff's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house constituted unfair trade practices and was thus a violation of North Carolina General Statutes, section 75-1.1." *Dean*, 171 N.C. App. at 486, 615 S.E.2d at 703. We conclude as a matter of law the findings of fact establish defendant's counterclaim for UDTP, and, therefore, we reverse and remand as to this counterclaim.

#### IV. Conclusion

As to plaintiff's issues on appeal, we affirm the trial court's judgment. As to the trial court's denial of defendant's claim for UDTP, we reverse and remand for entry of an order consistent with this opinion.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).