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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-102

No. COA21-334

Filed 15 February 2022

Durham County, No. 20 CVD 3149

GRACE RIDGE GATEWAY TERRACE DURHAM, LLC and GRACE RIDGE OF HIGH POINT, LLC, Plaintiffs,

v.

MATTRESS FIRM, INC., Defendant.

Appeal by Plaintiffs from orders entered 28 January 2021 and 5 March 2021 by Judge Shamieka Rhinehart in Durham County District Court. Heard in the Court of Appeals 12 January 2022.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiffs-appellants.

Burr & Forman LLP, by Amanda A. Bailey, Ellen T. Mathews, & G. Wade Leach, III, for defendant-appellee.

MURPHY, Judge.

¶ 1 Pursuant to N.C.G.S. § 42-26, a landlord is entitled to summary ejectment when a tenant breaches a lease and the lease provides for termination upon such breach. However, a landlord waives its right to summary ejectment by accepting payment for rent from a tenant with full knowledge that the tenant is in material breach of the lease.

¶ 2 Here, Landlords were entitled to summary ejectment pursuant to N.C.G.S. § 42-26 when Tenant failed to pay rent for April and May 2020 because the Lease provided that it could be terminated in the event that Tenant failed to pay rent. However, Landlords waived their right to possession when they accepted Tenant's June 2020 rent payment after they had given Tenant notice of default. We affirm the trial court's grant of summary judgment in favor of Tenant.

BACKGROUND

¶ 3 On 26 September 2012, Defendant Mattress Firm, Inc. ("Tenant") entered into an agreement ("Lease") with MJM Gateway Terrace RE, LLC to lease the real property located at 3219 Watkins Road, Suite 104, Durham, NC 27707 ("Premises"). Prior to March 2020, MJM Gateway Terrace RE, LLC conveyed the Lease to Plaintiffs Grace Ridge Gateway Terrace Durham, LLC and Grace Ridge of High Point, LLC ("Landlords").

¶ 4 Pursuant to Section 2.1 of the Lease, "Tenant shall pay to Landlord[s] . . . the [b]ase [r]ent set forth [in the Lease] in equal monthly installments, in advance, on the first day of each calendar month" Section 10.1 of the Lease provides that, if Tenant fails "to pay any installment of [r]ent when due and such continues for ten (10) days after Tenant's receipt of written notice thereof," it "shall constitute an [e]vent of [d]efault." Section 10.2 provides that, upon the occurrence of any event of default, Landlords are entitled to "[t]erminate [the] Lease by giving Tenant notice of

termination, in which event [the] Lease shall expire and terminate on the date specified in such notice of termination”

¶ 5 On 23 March 2020, Tenant mailed a letter to Landlords that stated:

This letter shall serve as notice to you of a force majeure event (store closures relating to the COVID-19 crisis) that will prevent or prohibit us from performing ongoing covenants under the [L]ease, including continuous operations and maintenance at the [] [P]remises.

[Tenant] recognizes that all businesses are struggling with the economic and physical effects of the crisis. In order to maintain the minimum financial health of our company and ensure that we will emerge from this crisis as a worthy tenant at all 2,500 Mattress Firm locations, we are not able to pay rent in full for at least the next four months.

In light of the foregoing, we are processing April 2020 rent. However, the payment that will be made to you will reflect only a portion of our normal rental obligation. We expect to follow the same protocol for May, June and July 2020 rent, and possibly beyond if the impact of this situation continues. If we are able to pay a greater portion in any of those months while maintaining the minimum financial health for our business, we will do so. We will work with you on the other end of this crisis to resume normal operations as quickly as possible.

Tenant did not timely pay April 2020 rent. On 3 April 2020, Landlords sent a letter to Tenant that stated:

Pursuant to your Lease, notice is hereby given of your default for past due rent. Currently, you owe \$15,983.30.

We will need the amount of \$15,983.30 in a money order or cashier’s check **NO LATER THAN 5:00 P.M. ON Monday, [13 April 2020]** or [] Landlord[s] will pursue the

remedies per the [L]ease

After Tenant failed to pay the past due rent by 13 April 2020, Landlords sent another letter to Tenant, dated 17 April 2020, indicating that if Tenant did not pay the past due rent by 27 April 2020, “Landlord[s] [would] pursue the remedies” under the Lease. Tenant failed to pay the past due rent by this date, and also failed to timely pay May 2020 rent.

¶ 6 On 12 May 2020, Landlords sent another letter to Tenant that stated that they “cannot accept Tenant’s simple failure to pay the rent when due.” This letter also gave notice to Tenant that, if the past due amount was not paid in full within ten days of the receipt of the letter, Tenant would “be declared in default of the Lease.” As of 12 May 2020, the amount owed for past due rent was \$32,563.04.

¶ 7 On 8 June 2020, Tenant paid the June 2020 rent in full and Landlords accepted this payment. However, Tenant still owed a balance of \$32,573.04 for the past due rent for April 2020 and May 2020. Due to this default and Tenant’s failure to cure the default, Landlords terminated the Lease on 29 June 2020 by sending a letter to Tenant that stated “[p]lease accept this letter as notice that Landlord[s] . . . hereby terminate[] the Lease, effective immediately. Tenant is directed to surrender possession by close of business on [3 July 2020].” Tenant received this letter on 30 June 2020. On 2 July 2020, Tenant paid the July 2020 rent, leaving the April 2020 and May 2020 rent still unpaid. Landlords accepted this payment.

¶ 8 Landlords subsequently filed a *Complaint in Summary Ejectment* on 22 July 2020 in Durham County Small Claims Court. The *Magistrate Summons* and *Complaint in Summary Ejectment* were served on Tenant on 27 July 2020. Tenant paid the formerly outstanding past due rent amounts for April 2020 and May 2020 on 28 July 2020. Landlords accepted this payment.

¶ 9 Tenant filed its answer on 28 July 2020, generally denying Landlords’ right to possession of the Premises and raising multiple affirmative defenses. The Durham County Small Claims Court dismissed the *Complaint in Summary Ejectment* with prejudice. Landlords appealed to the Durham County District Court.

¶ 10 On 11 September 2020, Landlords filed a *Motion for Summary Judgment*, arguing they were entitled to judgment granting possession of the Premises. After a hearing on 16 November 2020, the trial court denied Landlords’ *Motion for Summary Judgment*, both orally and in a written order entered 28 January 2021 (“First Order”), concluding “that there are genuine issues of material fact precluding summary judgment[.]”

¶ 11 On 5 January 2021, Tenant filed a *Motion for Summary Judgment*, arguing Landlords “waived the right to terminate [Tenant’s] rights under the [L]ease and recover possession [of the Premises] by accepting [Tenant’s] payment of rent and recognizing the continued existence of the [L]ease, and under [N.C.G.S. § 42-33], [the] ejectment case must cease.” After a hearing on 25 February 2021, in an order entered

5 March 2021 (“Second Order”), the trial court granted Tenant’s *Motion for Summary Judgment* and dismissed Landlords’ *Complaint in Summary Ejectment* with prejudice. Landlords appeal from both the First Order and the Second Order.

ANALYSIS

¶ 12 Landlords argue that the trial court erred by (A) denying their *Motion for Summary Judgment*, and (B) granting Tenant’s *Motion for Summary Judgment*. For the reasons set forth below, we disagree and affirm the First Order and Second Order.

¶ 13 Summary judgment is proper “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.” N.C.G.S. § 1A-1, Rule 56(c) (2021). The purpose of summary judgment is “to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed.” *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001).

¶ 14 “A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant’s favor.” *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680, 821 S.E.2d 360, 366 (2018). “[T]he party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. “Our standard of review of an appeal from summary judgment is de novo[.]” *In re Will of Jones*, 362

N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

A. Landlords' *Motion for Summary Judgment*

¶ 15 Landlords argue the trial court erred by denying their *Motion for Summary Judgment* because (1) under the undisputed material facts, Landlords were entitled to summary ejectment and possession of the Premises under N.C.G.S. § 42-26(a); (2) Landlords did not waive their right to terminate the Lease and recover possession of the Premises; and (3) their right to summary ejectment was not barred by any of the affirmative defenses raised by Tenant.

1. N.C.G.S. § 42-26(a)

¶ 16 Landlords first argue that, under the provisions of N.C.G.S. § 42-26(a)(2), they are entitled to summary ejectment and possession of the Premises.

¶ 17 “Summary ejectment proceedings are purely statutory[.]” *Marantz Piano Co. v. Kincaid*, 108 N.C. App. 693, 696, 424 S.E.2d 671, 672 (1993). N.C.G.S. § 42-26(a) lists the circumstances under which a plaintiff may bring an action for summary ejectment. N.C.G.S. § 42-26(a) (2021). Specifically, N.C.G.S. § 42-26(a)(2) provides:

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases: . . . *When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the*

stipulations of the lease, his estate has ceased.

N.C.G.S. § 42-26(a)(2) (2021) (emphasis added).

¶ 18

“Under [N.C.G.S. § 42-26(a)(2)], a breach of the lease cannot be made the basis of summary ejectment unless the lease itself provides for termination by such breach or reserves a right of reentry for such breach.” *Stanley v. Harvey*, 90 N.C. App. 535, 537, 369 S.E.2d 382, 384 (1988). The Lease in this case provides for termination of the Lease when Tenant breaches the Lease by failure to pay rent. The relevant provisions of the Lease provide:

Any of the following shall constitute an Event of Default under this Lease: . . . The failure of Tenant to pay any installment of Rent when due and such continues for ten (10) days after Tenant’s receipt of written notice thereof, provided that in no event shall Landlord be required to give notice of failure to make a payment of Rent more than two (2) times in any twelve month period and thereafter the failure to pay any installment of Rent when due shall constitute an Event of Default[.]

. . . .

Upon the occurrence of any one or more of the aforesaid Events of Default, Landlord[s] may, at Landlord[s]’ option, without any demand or notice whatsoever (except as expressly required in this Section 10.2): . . . Terminate this Lease by giving Tenant notice of termination, in which event this Lease shall expire and terminate on the date specified in such notice of termination with the same force and effect as though the date so specified were the date herein originally fixed as the termination date of the Term of this Lease, and all rights of Tenant under this Lease and in and to the Premises shall expire and terminate and Tenant shall remain liable for all obligations under this

Lease arising up to the date of such termination and Tenant shall surrender the Premises to Landlord[s] on the date specified in such notice, and if Tenant fails to so surrender Landlord[s] shall have the right, without notice, to enter upon and take possession of the Premises and to expel or remove Tenant and its effects without being liable for prosecution of any claim for damages therefor[.]

¶ 19 Here, it is undisputed that Landlords notified Tenant of its default due to failure to pay rent on three separate occasions; on 29 June 2020, Landlords gave written notice to Tenant that it would be terminating the Lease due to Tenant's default and demanded that Tenant surrender the Premises; Tenant received this written notice on 30 June 2020; after Tenant still had not paid the outstanding balance due, Landlords commenced the action for summary ejectment on 22 July 2020. When viewing these facts, the Lease provisions, and N.C.G.S. § 42-26(a)(2) in a vacuum, it would appear Landlords were entitled to recover possession of the Premises. However, just because Landlords met the statutory requirements for summary ejectment did not mean that they had not waived this right.

2. Waiver

¶ 20 Landlords argue they did not waive their right to possession. Tenant relies on *Winder v. Martin* to argue that when “a landlord accepts payment from a tenant with full knowledge that the tenant is in material breach of a lease[,] [the landlord] is considered to waive its right to forfeiture.” *See Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922) (finding the landlord waived its right to possession).

According to Tenant, when Landlords accepted the June 2020 payment, Landlords waived their right to summary ejectment.

¶ 21 The facts of *Winder* are remarkably similar to the facts of the case here.¹ In *Winder*, the tenant and landlord executed a lease permitting the tenant to use the landlord's premises, which reserved the landlord a right to re-enter the premises and eject the tenant in the event the tenant failed to comply with a provision of the lease. *Id.* at 411, 111 S.E. at 708. On 10 October 1921, the tenant failed to comply with a provision of the lease. *Id.* The landlord instituted an action for summary ejectment on 18 November 1921. *Id.* at 411, 111 S.E. at 709. However, the tenant paid, and the landlord accepted, the rent payment for November 1921 prior to the institution of the summary ejectment proceeding. *Id.* The tenant's rent payments for December 1921

¹ "It was stipulated as a condition of the rental contract that the [tenant], while occupying [the leased] premises and conducting a filling station thereon, should purchase all gasoline used by them in their business, from the Todd Oil Company, a copartnership in which the [landlord] was interested; and, upon failure to comply with this provision, the [landlord] reserved the right to '[re-enter] the said premises and to expel the lessees therefrom without prejudice to other remedies.' The jury found that this stipulation, or covenant, was breached by the [tenant] on [10 October 1921]; but his Honor entered judgment for the [tenant] *non obstante veredicto*, because the [landlord], or his duly authorized agent, thereafter accepted and received the rent for said premises for the months of November and December, 1921, and January, 1922. This [summary proceeding in ejectment] was instituted on [18 November 1921], and tried on appeal in the Superior Court of Guilford [C]ounty, [24 January 1922]. The rent for November, 1921, was accepted and received after the alleged breach on 10 October, and before the institution of [the summary proceeding in ejectment] on 18 November[.] The December rent and the January rent were received after suit had been filed and during its pendency." *Id.* at 411, 111 S.E. at 708-09.

and January 1922 were accepted by the landlord after the suit was filed and during its pendency. *Id.*

¶ 22 In *Winder*, our Supreme Court established the common law waiver rule, stating:

It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof.

Id. The landlord in *Winder* argued the above waiver rule was inapplicable to the facts of that case “because the rents for the months of December and January were accepted after the institution of the [] suit.” *Id.* Our Supreme Court disagreed, holding:

[H]owever sound [the landlord’s argument] may be with respect to the acceptance of the December and January rents, under the circumstances here disclosed, the fact remains that the November rent was accepted after the breach, and with full knowledge thereof, and before suit was brought. This would constitute a waiver of the only breach

Id. at 412-13, 111 S.E. at 709. The rule from *Winder*, that “[w]here forfeiture of a lease is incurred by nonpayment of rent, if the lessor receive from the lessee rent subsequently accruing the forfeiture is thereby waived[,]” *id.*, has been applied consistently in our jurisprudence over the last century. *See, e.g., Winston Affordable Hous., LLC v. Roberts*, 374 N.C. 395, 404, 841 S.E.2d 267, 274 (2020) (quoting *Winder*, 183 N.C. at 411, 111 S.E. at 709); *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 466, 98 S.E.2d 871, 877 (1957) (quoting *Winder*, 183 N.C. at 410, 111 S.E. at 709); *Community Housing Alternatives, Inc. v. Latta*, 87 N.C. App. 616, 618, 362 S.E.2d 1, 2 (1987) (quoting *Winder*, 183 N.C. at 411, 111 S.E. at 709).

¶ 23 Here, pursuant to Sections 10.1 and 10.2 of the Lease, Landlords were entitled to terminate the Lease by giving written notice of termination after Tenant breached the Lease by failing to pay rent and did not cure the breach as specified in Landlords’ notice of default. Tenant was in default of the Lease due to failure to pay April and May 2020 rent as of May 2020. However, on 8 June 2020, Tenant paid, and Landlord accepted, payment for June 2020 rent. Landlords then purported to terminate the Lease on 29 June 2020. According to *Winder*, this purported termination was ineffective because Landlords waived their right to terminate the Lease when they accepted the June 2020 rent payment. This waiver was binding even though the April and May 2020 rent payments were still outstanding. “[T]he fact remains that the [June] rent was accepted after the breach, and with full knowledge thereof, and

before suit was brought.” *Winder*, 183 N.C. at 412, 111 S.E. at 709. This constituted waiver of Landlords’ right to possession.

¶ 24 Landlords also argue that, based on *Woodridge Homes L.P. v. Gregory*, 205 N.C. App. 365, 697 S.E.2d 370 (2010), the rule from *Winder* applies only where a lease has not been terminated. In *Woodridge Homes*, we restated the common law waiver rule from *Winder*, but clarified under what circumstances the rule applies:

“It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of reentry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture.” *In order for the common law waiver rule to apply, however, there must be both a breach of the condition of a lease for which the landlord has a right of reentry and a subsequent acceptance of rent.* In other words, [the landlord] was not precluded from seeking to have [the tenant] ejected under the common law waiver rule until (1) it was entitled to terminate the lease, and (2) after becoming entitled to terminate the lease, it accepted rent payments with knowledge of its ability to declare the lease forfeited.

Id. at 372-73, 697 S.E.2d at 376 (quoting *Winder*, 183 N.C. at 412, 111 S.E. at 709) (citations omitted) (emphasis added). Landlords misstate the holding from *Woodridge Homes*. The common law waiver rule did not apply in *Woodridge Homes* because the landlord

did not have the right to terminate the lease For that reason, the mere fact that [the landlord] continued to accept rent . . . did not suffice, in our opinion, to trigger the application of the common law waiver rule, since [the

landlord] would not have had the right to terminate the lease

Id. Here, Landlords had a right to terminate the Lease due to Tenant’s failure to pay April and May 2020 rent. The common law waiver rule therefore applies in this case; and, by their actions and conduct in accepting rent from Tenant, Landlords acknowledged that the Lease was still in effect and the obligations created thereunder were still binding on the parties. By accepting June 2020 rent after the breach and before instituting suit for summary ejectment, Landlords waived their right to possession of the Premises.

3. Tenant’s Equitable Defenses

¶ 25 Landlords argue that the several equitable defenses Tenant raised to the summary ejectment action must fail. However, because we hold that Landlords waived their right to possession, their argument regarding Tenant’s equitable defenses is moot, and we need not reach the merits of this argument. *See Roberts v. Madison Cty. Realtors Ass’n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citations omitted) (“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law.”).

B. Tenant’s *Motion for Summary Judgment*

¶ 26 Both Landlords’ *Motion for Summary Judgment* and Tenant’s *Motion for Summary Judgment* address the same issues and involve the same arguments.² Landlords argue that “[b]ecause the [t]rial [c]ourt should have entered summary judgment in Landlords’ favor, the [t]rial [c]ourt erred in entering [s]ummary [j]udgment, granting Tenant’s [Motion for Summary Judgment].” Having held that the trial court did not err by denying Landlords’ *Motion for Summary Judgment*, we also hold that the trial court did not err by granting Tenant’s *Motion for Summary Judgment*.

CONCLUSION

¶ 27 Under the undisputed facts, Landlords would have been entitled to summary ejectment pursuant to N.C.G.S. § 42-26(a)(2) had they not waived their right to possession when they accepted Tenant’s June 2020 rent payment after the breach and before instituting the summary ejectment action. The trial court did not err when

² We note that in the Second Order, the trial court ruled that “there are no genuine issues as to any material fact, and that [Tenant] is entitled to summary judgment as a matter of law. In that regard, [the] [c]ourt notes that ‘the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof’, *Winder v. Martin*, 183 N.C. 410, 111 S.E. 708, 709 (1922), and concludes that since, as of [29 June 2020], the date of [Landlords’] purported termination of the Lease, had been paid rent for June and July 2020, [Landlords] waived their right to terminate on the basis of the alleged breaches arising from [Tenant’s] missed April and May 2020 rent payments.” The Second Order did not address Tenant’s affirmative defenses.

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Opinion of the Court

it denied Landlords' *Motion for Summary Judgment* and granted Tenant's *Motion for Summary Judgment*.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).