

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-758

Filed 02 May 2023

Pender County, Nos. 20 CVD 788, 20 CVD 912

BELL ENTERPRISES, INC., Plaintiff,

v.

SFI GROUP, INC., Defendant.

Appeal by Defendant from judgment entered 28 February 2022 by Judge James H. Faison, III, in Pender County District Court. Heard in the Court of Appeals 8 February 2023.

*The Forge Law Group, by J. Michael Genest, for Plaintiff-Appellee.*

*Chesnutt & Clemmons, P.A., by Gary H. Clemmons and T.R. Cook, IV, for Defendant-Appellant.*

GRIFFIN, Judge.

Defendant SFI Group, Inc., appeals from the trial court's judgment ordering Defendant to pay Plaintiff Bell Enterprises, Inc., unpaid rent accrued under a commercial lease of Plaintiff's property. Defendant argues the trial court erred on the grounds that: (1) the lease was unenforceable because the lease extension was never recorded; (2) Plaintiff failed to submit evidence of a valid lease assignment; (3)

Plaintiff did not have standing to bring its breach of contract claim because it was not a party to the lease; (4) if there was a valid lease, Defendant and Plaintiff entered into a valid oral agreement to terminate the lease early; and (5) Defendant was excused from rent obligations because Plaintiff breached the lease. We vacate and remand the judgment for additional proceedings to determine whether the parties' alleged oral agreement, or their conduct thereafter, constituted a rescission of the lease.

### **I. Factual and Procedural History**

This action arises out of a series of commercial lease agreements between Defendant and Plaintiff. Defendant is an insurance company. Plaintiff is a North Carolina corporation that owns commercial property formerly leased by Defendant.

In September 2006, Defendant signed a commercial lease (the "Lease") for property located at 13500 Highway 50/210, Suite 105, in Surf City (the "Property"), with the intent to operate its insurance sales business therein. The Property was owned by Surf City Gateway Plaza, Inc. ("SCGP"), at this time. The Lease contained a restrictive covenant preventing SCGP, and its assignees, from renting units in the same complex as the Property to other tenants who sold insurance in competition with Defendant. The Lease term was five years, with an option for three additional five-year terms. SCGP never recorded the Lease.

After signing the Lease, the parties executed two valid extensions to the Lease's duration, though all terms and conditions of the original Lease remained in

effect. Defendant renewed the Lease for the second time by signed writing on 15 September 2016 for a term of five years, extending the expiration of the Lease term to 31 January 2022. SCGP never recorded the Lease extension.

On 29 September 2016, Plaintiff purchased the Property from SCGP by warranty deed. Defendant paid Plaintiff timely rent from September 2016 to June 2020.

Some evidence showed that, around May 2019, Defendant and Plaintiff made an oral agreement to modify the Lease duration to end on 30 June 2020, one year and seven months before the Lease's written termination date. This agreement was never reduced to writing. Sometime between then and December 2019, Cape Fear Commercial, a local commercial leasing agency, began listing the Property as available for rent beginning in January 2020. In late April 2020, Defendant notified Plaintiff of its intent to vacate the Property in accordance with the terms of their May 2019 oral agreement. In November 2020, Plaintiff sent Defendant a letter rejecting Defendant's request and warning that, should Defendant default, Plaintiff would take legal action. Defendant vacated the property in June 2020. Defendant paid rent through 30 June 2020 but did not pay rent for July and August 2020.

On 1 July 2020, Defendant notified Plaintiff that it vacated the property. Shortly after, Plaintiff sent two Notices of Default—one in July and one in August—for unpaid rent due under the Lease. In March 2021, roughly seven months after

Defendant vacated the Property, Plaintiff rented another unit two doors down from the Property to another insurance company.

On 31 July 2020, Plaintiff filed a complaint against Defendant in Pender County small claims court to recover money owed due to Defendant's failure to pay its July 2020 rent. In late August 2020, Plaintiff filed a second complaint on the same grounds to recover the unpaid rent for the month of August. The small claims court ruled in favor of Plaintiff on both claims, and Defendant appealed both decisions to Pender County District Court in September and October of 2020, respectively.

The Pender County District Court heard both appeals. On 11 August 2021, the District Court ordered Defendant to pay Plaintiff unpaid rent for the months of July and August 2020. Due to procedural errors, the District Court set aside this judgment and entered a new judgment against Defendant on 28 February 2022 (the "February Judgment"), ordering Defendant to pay Plaintiff a total of \$8,620.18 for the two months of rent owed plus interest. Defendant timely appeals from the February Judgment.

## **II. Analysis**

Defendant contends the trial court erred because it presented evidence of a valid oral agreement to terminate the Lease which was not, as the trial court held, rendered ineffectual under the Statute of Frauds. Defendant also argues the Lease was unenforceable because Plaintiff never recorded the Lease extension and the trial court erred by not entering into evidence a valid Lease assignment; the trial court

erred because Plaintiff did not have standing to bring its breach of contract claim; and Plaintiff breached the Lease because Plaintiff leased a neighboring unit within the complex to a competitor of Defendant. We hold the trial court erred in entering its judgment based upon a misapprehension of law regarding the alleged oral rescission of the Lease.

“When reviewing a judgment from a bench trial, our standard of review 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.” *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 411–12, 720 S.E.2d 785, 792 (2011) (citation and quotation marks omitted). “The trial court’s findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.” *Id.* at 412, 720 S.E.2d at 792. “[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light.” *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citation omitted). “Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

#### **A. The Oral Agreement**

Defendant argues the trial court erred by ordering Defendant to pay Plaintiff rents accrued in July and August 2020 because the parties entered into a valid oral

agreement to terminate the Lease at the end of June 2020.

The Statute of Frauds provides “[a]ll contracts to sell or convey any lands . . . or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.” *Powell v. City of Newton*, 364 N.C. 562, 567, 703 S.E.2d 723, 727 (2010) (citation omitted). A contract for a lease of real property “exceeding in duration three years from the making thereof, shall be void unless said contract . . . be put in writing[.]” N.C. Gen. Stat. § 22-2 (2021). “When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are ineffectual.” *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984) (citations omitted).

However, “[a] lease which is required by the Statute of Frauds to be in writing may be rescinded orally by the mutual assent of both parties.” *Inv. Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 183, 188 S.E.2d 441, 446 (1972) (citations omitted), *vac’d on other grounds*, 283 N.C. 277, 196 S.E.2d 262 (1973); *Bell v. Brown*, 227 N.C. 319, 322, 42 S.E.2d 92, 93–94 (1947) (“It is now well settled that parties to a written contract may by parol, rescind, or by matter in pais abandon the same.” (citations omitted)). This Court has clarified that “a parol offer to surrender a leasehold estate having more than three years to run is within the [S]tatute of [F]rauds and cannot be specifically enforced.” *Herring v. Volume Merch., Inc.*, 249

N.C. 221, 226, 106 S.E.2d 197, 201 (1958). Even then, though, when a party acts in conformity with an alleged termination or surrender of a lease, they may be estopped from denying the legal validity of the termination. *Id.* Indeed, “a written contract, involving an interest in land, may be waived or rescinded by parol, but in the absence of a mutual agreement, an abandonment, or waiver of such a contract is to be inferred only from such positive and unequivocal acts and conduct as are clearly inconsistent with the contract.” *Bell*, 227 N.C. at 322, 42 S.E.2d at 94 (citation omitted).

In this case, the trial court’s judgment found, in relevant part,

10. The Lease Contract and any modifications thereof are governed by the Statute of Frauds, N.C. Gen. Stat. § 22-2. For any modification of the [Lease] to be effective, it must be reduced to writing and signed by [Defendant] and [Plaintiff].

11. No valid written modifications exists which shorten the duration of the [Lease] to June 30, 2020.

The trial court’s Finding of Fact 10 is materially correct. The original term of the Lease was five years, and it was subsequently renewed in writing for an additional term of five years. The Lease was, at all times, for a term of three years or more and was therefore subject to the Statute of Frauds. Any subsequent modifications to the Lease must, then, also have been written. This evidence also supports the ultimate finding in Finding of Fact 11.

However, Findings 10 and 11 are the only findings in the trial court’s judgment which consider the legal effects of the parties’ oral agreement. The trial court

considered only whether the parties' oral agreement constituted a valid written modification. This consideration alone was not sufficient in light of the evidence before the court. It is arguable, from the evidence before the court, that the parties' oral agreement or subsequent behavior constituted a valid rescission of the Lease.

The parties allegedly made their oral agreement regarding the Lease in May 2019. At that time, the Lease had, at most, two years and eight months to run and was not required to be rescinded in writing under the Statute of Frauds. *See Herring*, 249 N.C. at 226, 106 S.E.2d at 201. It is therefore possible that this oral agreement was a mutual and valid agreement to rescind the Lease as of July 2020. The evidence did suggest Plaintiff later repudiated its alleged consent to Defendant's early rescission, but these facts are not necessarily dispositive of the parties' agreement. Defendant presented evidence that it notified Plaintiff of its intent to vacate before and after vacating the Property at the end of June 2020, and that a commercial leasing agency advertised the Property as available for rent as early as January 2020. The validity of the parties' agreement must be determined by considering these facts with rescission in mind for evidence of "mutual agreement" as well as any "positive and unequivocal acts and conduct as are clearly inconsistent with the contract." *Bell*, 227 N.C. at 322, 42 S.E.2d at 94.

We hold the trial court correctly found no valid modification to the Lease existed. Nonetheless, the trial court failed to consider whether the parties' agreed, by mutual agreement or by inconsistent conduct, to rescind the Lease. We therefore



remand to the trial court for further proceedings to determine (1) whether the parties' oral agreement constituted a valid oral rescission of the Lease, and, alternatively, (2) whether the parties' conduct between May 2019 and July 2020 constituted conduct positively and unequivocally inconsistent with the Lease.

### **B. Validity of the Lease Extension**

To the extent the issues presented by Defendant may persist following the trial court's decision on remand, we elect to dispose of Defendant's additional arguments at this time. Defendant argues the trial court erred in denying Defendant's motion to dismiss because the Lease extension was never recorded, rendering the Lease unenforceable against Defendant. We disagree.

Defendant cites N.C. Gen. Stat. § 47-18 to support its argument. The statute provides that “[a] lease for more than three years must, to be enforceable, be in writing, *and to protect it against creditors or subsequent purchasers for value*, [] be recorded.” *See Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965) (emphasis added) (citation omitted); *see also* N.C. Gen. Stat. § 47-18 (2021). “While a lease must be recorded to be valid against a lien creditor or a third-party purchaser for value, recordation is not an element of a valid lease agreement[.]” *Purchase Nursery, Inc. v. Edgerton*, 153 N.C. App. 156, 161, 568 S.E.2d 904, 907 (2002) (citing N.C. Gen. Stat. § 47-18).

The purpose of N.C. Gen. Stat. § 47-18 is to provide notice of any claims to the property to protect subsequent purchasers, not to require recordation to create a valid

lease. *See Whitehurst v. Abbott*, 225 N.C. 1, 5, 33 S.E. 2d 129, 132 (1945). N.C. Gen. Stat. § 47-18 does not require a lease to be recorded to be enforceable against the lessee who is a party to, and by nature on actual notice of, the lease. *See* N.C. Gen. Stat. § 47-18. Plaintiff was, therefore, not required to record the Lease extension for its terms and duration to be enforceable against Defendant.

### **C. Evidence of Assignment to Plaintiff**

Defendant argues the trial court erred because Plaintiff never entered into evidence a Lease assignment, and the trial court did not require Plaintiff to do so. We disagree. Plaintiff obtained the Lease by operation of law when it acquired the Property and was not required to show evidence of a separate assignment of the Lease.

Our Courts have long recognized that “[a] conveyance of land, which is subject to a valid and continuing lease, passes to the purchaser the right to collect the rents thereafter accruing.” *Pearce v. Gay*, 263 N.C. 449, 451, 139 S.E.2d 567, 569 (1965); *Strickland v. Lawrence*, 176 N.C. App. 656, 665–66, 627 S.E.2d 301, 307 (2006). The grantee, in receipt of real property rights, “has the like advantages and remedies by action or entry against [a lessee of] such real property, and their assigns, for nonpayment of rent . . . as the grantor or lessor or his heirs might have.” N.C. Gen. Stat. § 42-8 (2021). “The conveyance need not refer in terms to the lease, a conveyance of the premises by the landlord being necessarily subject to the rights of the tenant.” *Perkins v. Langdon*, 231 N.C. 386, 389, 57 S.E.2d 407, 409 (1950). A conveyance

includes “[a] transfer of title to real property by deed or devise or other instrument transferring title to real property.” N.C. Gen. Stat. § 41-55(1) (2021).

Defendant does not dispute that Plaintiff purchased the Property from SCGP in September 2019. Indeed, Defendant paid rent for nearly four years to Plaintiff as owner of the Property. When Plaintiff purchased the Property from SCGP, they did so subject to Defendant’s rights under the Lease, *Perkins*, 231 N.C. at 389, 57 S.E.2d at 409, and also received “the right to collect the rents thereafter accruing” from Defendant’s existing Lease of the Property, *see Pearce*, 263 N.C. at 451, 139 S.E.2d at 569. Therefore, Plaintiff had the right to collect rents owed under the Lease from Defendant without a separate Lease assignment.

#### **D. Plaintiff’s Standing and Privity of Contract**

Defendant argues the trial court erred in denying its motion to dismiss because “[Plaintiff] did not have standing to bring its breach of contract claim [because Plaintiff] was not a party to the Lease agreement nor was it an intended beneficiary of the contract.” Therefore, Defendant further contends, Plaintiff failed to present a valid claim for a breach of contract. We disagree. Plaintiff was a party to the Lease through its purchase of the Property from SCGP.

“An action [for a breach of contract] may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action.” *In re Wallace*, 212 N.C. 490, 493, 193 S.E. 819, 821 (1937). “A conveyance of land, which is subject to a valid and continuing lease, passes to the purchaser the right to collect the rents thereafter accruing. . . .

When title passes, lessee ceases to hold under the grantor. He then becomes a tenant of grantee, and his possession is grantee's possession." *Strickland*, 176 N.C. App. at 655–66, 627 S.E.2d at 307 (citation omitted). A lease is a contract and, as such, is subject to our normal rules of contract interpretation. *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003). "To withstand a motion to dismiss for failure to state a claim in a breach of contract action, a plaintiff's allegations must either show it was in privity of contract, or it is a direct beneficiary of the contract." *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App 1, 8, 545 S.E.2d 745, 750 (2001).

While Defendant contends that Plaintiff cannot maintain a breach of contract claim because Plaintiff was not a contractual party to the Lease, our case law provides "[a]n action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action." *In re Wallace*, 212 N.C. at 493, 193 S.E. at 821. Here, Plaintiff derived title to the Property from SCGP, and thus stands in SCGP's shoes with all rights possessed by SCGP under the Lease. *See Gillespie v. DeWitt*, 53 N.C. App. 252, 265, 280 S.E.2d 736, 745 (1981). Therefore, Plaintiff had standing and alleged a valid claim for breach of contract.

#### **E. Duties Under a Contract Following a Party's Breach**

Alternatively, in the event that this Court finds that Defendant owes Plaintiff rent under a valid lease, Defendant argues Plaintiff may not collect rents owed under

the Lease because Plaintiff breached the Lease by leasing a neighboring unit to a competitor in violation of the Lease's restrictive covenant. We disagree. Defendant breached the Lease first, releasing Plaintiff from its obligations under the Lease.

“As a general rule, if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further.” *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198, 585 S.E.2d 234, 239 (2003) (citation omitted). A breach is considered material if it “substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform.” *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220–21, 768 S.E.2d 582, 593 (2015) (citation omitted). The materiality of a breach of contract is a question of fact. *Id.* at 221, 768 S.E.2d at 593.

In this case, section 18(a) of the Lease states, “[i]f Tenant shall fail to pay any installment of rent . . . within five (5) days of the date that Landlord provides notice to Tenant that the [rent] is past due[,]” the tenant has committed an “Event of Default.” Section 18 further states that, “[u]pon the happening of any [] Events of Default, Landlord shall have the right, at its sole option, [to] immediately terminate this Lease.”

Defendant committed an “Event of Default” when it vacated the property and withheld rent in June 2020 when the written Lease expiration was January 2022. section 18 makes it clear that collection of rent was a purpose at the very heart of the

Lease. Defendant agreed that a single missed rent payment was a substantial failure of performance such that Plaintiff could terminate the Lease. Defendant does not dispute section 18 of the Lease, or that it vacated the premises and did not pay rent for July 2020. Therefore, Defendant's failure to pay July 2020 rent to Plaintiff constituted a material breach of the Lease. Plaintiff rented a neighboring unit to another insurance agency approximately seven months after Defendant first committed an Event of Default under the Lease. Due to Defendant's prior breach, Plaintiff was excused from its obligation to comply with the Lease's restrictive covenant. Defendant cannot now use Plaintiff's actions to avoid responsibility for its prior breach.

### **III. Conclusion**

We hold that the trial court failed to consider all possible legal effects of the parties' alleged oral agreement. We vacate the judgment and remand to the trial court for further proceedings to consider (1) whether the parties' oral agreement constituted a valid oral rescission of the Lease, and, alternatively, (2) whether the parties' conduct between May 2019 and July 2020 constituted conduct positively and unequivocally inconsistent with the Lease. The trial court is free to hear additional evidence as it deems necessary.

VACATED AND REMANDED.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).