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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1041

Filed 05 July 2023

Davie County, No. 21CVS335

NANCY MONDA, Plaintiff,

v.

TIMOTHY L. MATTHEWS, JR. and KELLY BANIGAN, Defendants.

Appeal by plaintiff from judgment entered 16 August 2022 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 24 May 2023.

Wagner Hicks, PLLC, by Tyler Bates Peacock, for plaintiff-appellant.

Davis & Hamrick, L.L.P., by Kent L. Hamrick, Ann C. Rowe, and Jillliann L. Tate, for defendants-appellees.

GORE, Judge.

Plaintiff, Nancy Monda, appeals the trial court's judgment on the pleadings dismissing her claim with prejudice. Plaintiff argues the trial court erred because the judgment on the pleadings had the effect of overruling the previous denial of the motion to dismiss, and alternatively the trial court erred by entering the judgment because disputed material facts exist to overcome a Rule 12(c) judgment. Upon review of the parties' briefs and the record, we affirm.

I.

The facts in this case offshoot from a fire that occurred between January and February 2017. Plaintiff and defendants have neighboring homes. Five windows on the side of defendants' home reflect sunlight onto plaintiff's property and house. The Clemmons Fire Department, Davie County Fire Marshal's Office, and the North Carolina Forest Service all concluded the fires, which destroyed a doghouse, pine needles, and vegetation on plaintiff's property, started from the sunlight's reflection upon some of the five energy-efficient, low emission glass windows. In response to these fires, plaintiff asserts she spent thousands of dollars on materials to prevent future fires on her property. Defendants replaced three of the five windows with a different type of glass.

Approximately a year later, plaintiff asserts she "felt a highly concentrated and extremely hot beam, radiating down from the [w]indows." In December 2018, plaintiff saw a reflection from one of defendants' windows on her roof, which she asserts was the same reflective pattern as was seen prior to the fires. Due to these two experiences, plaintiff requested defendants change the glass for the remaining two windows and offered to cover the full cost, but defendants refused.

Thereafter, plaintiff initiated a lawsuit in the district court and hired an engineer, Curt Freedman, to evaluate the condition of the windows and sunlight

reflection. Freedman completed a report based upon his evaluation of the windows and property, in which he recommended defendants install a different type of glass in the two windows that still had the energy efficient low emissions glass to “eliminate the risk of fires.” He also recommended defendants install stainless steel screens on all five windows to decrease the reflected sunlight. Freedman included an observation that the reflected sunlight from one of the energy efficient low emission windows was “approximately 75% more than typical direct sunlight and would be profoundly dangerous to human eye safety.” Once again, plaintiff offered to pay the cost to replace the windows and input screens, but defendants refused.

On 20 July 2021, plaintiff filed a voluntary dismissal without prejudice to dismiss the district court lawsuit. Plaintiff filed the present lawsuit on appeal in the superior court on the same day. Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) and a Motion to Strike pursuant to Rule 12(f) contemporaneously with their Answer and specified these motions were entered “prior to answering the Complaint.” These motions came before the trial court on 24 January 2022.

The trial court denied both motions, “[a]fter reviewing the Motion, the submissions of counsel, and the [c]ourt’s file, and after considering the arguments of all who appeared.” On 21 June 2022, defendants moved for judgment on the pleadings pursuant to Rule 12(c) and were heard before the trial court on 1 August 2022. The trial court entered a judgment on 16 August 2022, granting defendants’ motion after considering the pleadings and determining defendants were entitled to

judgment as a matter of law. Plaintiff timely appealed the judgment pursuant to section 7A-27(b)(1).

II.

Plaintiff raises two issues in opposition to the trial court's granting the judgment on the pleadings. Plaintiff argues the judgment "overruled" the previous order denying defendant's Rule 12(b)(6) motion to dismiss, and alternatively, the trial court erred in granting the judgment because there are disputed material facts that prevent judgment as a matter of law. We review challenges to a Rule 12(c) judgment on the pleadings de novo. *Fox v. Johnson*, 243 N.C. App. 274, 284, 777 S.E.2d 314, 323 (2015).

A.

In arguing the trial court effectively "overruled" the prior order denying the 12(b)(6) motion to dismiss, plaintiff claims the trial court reviewed all of the pleadings prior to ruling upon the motion to dismiss. Plaintiff reminds this Court of the following established rule: "[N]o appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Both parties also cite the factors to distinguish one order from another. These factors are: "(1) the subsequent order was rendered at a different stage of the proceeding, [(2)] the materials considered by

[the second judge] were not the same, and [(3)] the [first] motion . . . did not present the same question as that raised by the later motion” *Fox*, 243 N.C. App. at 282, 777 S.E.2d at 322 (alteration in original) (internal quotation marks and citation omitted). We disagree with plaintiff’s application of these rules in the present case.

In *Cash v. State Farm Mut. Auto. Ins. Co.*, we addressed a similar issue of contention between a prior judge’s Rule 12(b)(6) order and a later judge’s Rule 12(c) order. 137 N.C. App. 192, 528 S.E.2d 372 (2000). We articulated the following distinctions between a 12(b)(6) motion and a 12(c) motion:

As we have recognized, a complaint is subject to dismissal under Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Neither rule employs the same standard. It is plainly evident under our Rules of Civil Procedure that because a plaintiff has survived a 12(b)(6) motion, and thus has alleged a claim for which relief may be granted, his survival in the action is not the equivalent of the court determining that conflicting issues of fact exist and no party is entitled to judgment as a matter of law under Rule 12(c).

Id. at 201–02, 528 S.E.2d at 378 (internal quotation marks and citations omitted).

We also have recognized that if the trial court makes its Rule 12(b)(6) determination by reviewing all of the pleadings rather than limiting its decision to the four corners of the complaint, it “effectively convert[s] the . . . Rule 12(b)(6) motion to dismiss into a Rule 12(c) motion for judgment on the pleadings. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 618, 659 S.E.2d 442, 454 (2008).

Plaintiff argues the trial court considered defendants' answer, because it was within the later portion of the pleading addressing the motion to dismiss and the motion to strike, and because the order stated the following, "After reviewing the Motion, the submissions of counsel, and the [c]ourt's file, and after considering the arguments of all who appeared, the [c]ourt determines that Defendants' Motion should be denied." However, this involves a reading of the trial court's determination beyond what is stated and requires an expansive reading to apply plaintiff's interpretation. There must be more in the record to demonstrate the trial court converted a 12(b)(6) motion to a 12(c) motion such as in *S.N.R. Mgmt. Corp.*, when we noted that "the trial court considered the third amendment which was appended to [the defendants'] answer." *Id.*

In the present case, the trial court not only considered the 12(b)(6) motion, but it also considered a motion to strike pursuant to Rule 12(f). Without further evidence on the record, we determine the trial court properly considered the Rule 12(b)(6) motion, and therefore, the latter Rule 12(c) motion under review does not have the effect of overruling the order denying the 12(b)(6) and 12(f) motions.

B.

Next, plaintiff argues the trial court improperly granted the judgment on the pleadings, because there are disputed material facts. We disagree.

A Rule 12(c) judgment on the pleadings is disfavored and should only be granted if "the movant clearly establishes that no material issue of fact remains to be

resolved and that [movant] is entitled to judgment as a matter of law.” *Carpenter v. Carpenter*, 189 N.C. App. 755, 761, 659 S.E.2d 762, 767 (2008). “After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” N.C. R. Civ. P. 12(c). When a trial court considers a 12(c) motion, it is limited to reviewing only the pleadings and their attached exhibits. *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984). Moreover,

[j]udgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party’s pleadings are taken as true and all contravening assertions in the movant’s pleadings are taken as false. All allegations in the nonmovant’s pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). Accordingly, we consider the judgment within this standard.

Plaintiff brought a nuisance *per accidens* claim against defendants. She argues there are material facts in dispute, and specifically argues the central “factual issue” is “whether the Windows continue to pose a threat to [plaintiff] and/or [plaintiff’s] Property.” Conversely, defendants argue this is a conclusion of law rather than a material fact.

A nuisance *per accidens* claim comprises of the following elements: “(1) that the defendant[s] use of its property, under the circumstances, unreasonably invaded or interfered with the plaintiff’s use and enjoyment of the plaintiff’s property; and (2) because of the unreasonable invasion or interference, the plaintiff suffered substantial injury.” *Elliott v. Muehlbach*, 173 N.C. App. 709, 712, 620 S.E.2d 266, 269 (2005) (citation omitted).

Our Supreme Court previously articulated what an unreasonable invasion or interference is, and how the invasion or interference causes substantial injury.

Intentional private nuisances *per accidens* are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed, maintained or operated. It is the unreasonable operation and maintenance that produces the nuisance. And for liability to exist there must be a substantial non-trespassory invasion of another’s interest in the private use and enjoyment of property. It must affect the health, comfort or property of those who live near. It must work some substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property.

...

Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.

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Watts v. Pama Mfg. Co., 256 N.C. 611, 617, 619, 124 S.E.2d 809, 813–15 (1962) (internal quotation marks and citations omitted). “The anticipated injuries must be more than conjectural and amount to actual interference with her use and enjoyment of her property. Mere diminution in market value will not suffice.” *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 369 (M.D.N.C. 1997) (citing *Twitty v. State*, 85 N.C. App. 42, 55, 354 S.E.2d 296, 304–05, rev. denied, 320 N.C. 201, 236 S.E.2d 787 (1987); *Moody v. Lundy Packing Co.*, 7 N.C. App. 463, 467, 172 S.E.2d 905, 908 (1970)).

Considering the facts and all related inferences in her favor, plaintiff’s claim fails as a matter of law. Even if plaintiff could factually prove an unreasonable interference of her use and enjoyment of the property due to the reflected sunlight, plaintiff lacks material issues of fact that this interference caused a substantial injury. Plaintiff’s claim is not based upon the previous fires, but rather the continuing “fear of future fires” remaining after three of the five windows were replaced.

The substantial injury, according to plaintiff, is comprised of the report suggesting how to “eliminate the risk of fire,” the hot beam of light felt upon her face, potential eye damage from increased sun exposure, and the concern of a future difficulty in selling her property. While we do not minimize the difficulty and concerns felt by plaintiff, reliance upon these facts as proof of an ongoing threat to her property are anticipated and conjectural, not material, and thus as a matter of law, plaintiff cannot overcome the second element of nuisance *per accidens*.

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Therefore, as a matter of law, the trial court did not err in determining defendants were entitled to judgment on the pleadings.

III.

For the foregoing reasons, we conclude the trial court did not err in granting judgment on the pleadings in favor of defendants.

AFFIRMED.

Judge ARROWOOD and Judge WOOD concur.

Report per Rule 30(e).