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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-159-2

Filed 19 November 2024

Edgecombe County, No. 15 CVD 51

COLONIAL PLAZA PHASE TWO, LLC, d/b/a Colonial Plaza Mall, Plaintiff,

v.

CHERRY'S ELECTRONIC TAX SERVICES, LLC, Defendant.

Appeal by Defendant from judgment entered 3 October 2022 by Judge Pell C. Cooper in Edgecombe County District Court. This case was originally heard in the Court of Appeals on 9 August 2023 and an unpublished decision was issued on 5 September 2023. By order dated 21 August 2024, the North Carolina Supreme Court vacated the opinion and remanded the matter to this Court for reconsideration in light of *Blevins v. Town of W. Jefferson*, 182 N.C. App. 675, 643 S.E.2d 465, *rev'd for reasons stated in the dissent*, 361 N.C. 578, 653 S.E.2d 392 (2007).

Narron & Holdford, P.A., by I. Joe Ivey, for the Plaintiff-Appellee.

Teresa DeLoatch Bryant for the Defendant-Appellant.

WOOD, Judge.

This case is now before us on remand from the Supreme Court of North Carolina for the purpose of considering the merits of Cherry's Electronic Tax Services, LLC's ("CETS") original appeal. CETS appealed from the trial court's judgment following a jury verdict awarding amounts to both CETS and Colonial Plaza Phase Two, LLC ("Colonial") in a commercial lease dispute. On appeal, CETS raised two issues: (1) whether the trial court erred by failing to transfer the case to the Superior Court; and (2) whether CETS was entitled to a new trial because the trial held was not recorded digitally and no court reporter was present for the trial. For the reasons stated below, we affirm the trial court's judgment.

I. Factual and Procedural Background

CETS began leasing commercial space from Colonial, the landlord of the space at issue, around March 2002. A new lease was executed on 1 January 2007, requiring CETS to pay \$800.00 a month due on the first of each month. The 2007 lease agreement required Colonial to maintain the roof, exterior walls, heating, and air conditioning. Following Hurricane Irene, beginning on 27 August 2011, CETS encountered issues with water leaking through the roof and into the rental space. In September 2011, CETS filed an insurance claim due to the damage from the water intrusion; however, the claim was denied. The insurance adjuster determined that the leakage was not a result of Hurricane Irene; but rather, "the roofing material was found to be old and worn, several cracks were found[,] and the roof showed signs of

several coatings of tar being applied” and concluded that Colonial “had not properly maintained the roof.”

Following the denial of CETS’s insurance claim, CETS notified Colonial of the roof leaks and damage to its property. Colonial assured CETS that it would repair the roof and arranged to cover the property damage incurred. From September 2011 to December 2011, CETS was unable to open for business due to the condition of the roof. Thereafter, from 2011 to 2014, CETS also claimed other issues with the premises, specifically: Colonial did not properly repair the roof or reimburse CETS’ damages from the water leaks; loss of air conditioning and heating; a short period of no running water; and squirrels or other rodents in the HVAC system.

On 22 December 2014, Colonial filed a summary ejectment action in small claims court against CETS, seeking possession of the premises and \$3,300.00. Colonial sought \$3,200.00 in unpaid rent, for the four months of August through November 2014, and \$100.00 in late fees. On 23 December 2014, CETS paid two months’ rent after being served with the Complaint; however, a balance remained for the months of October and November and the \$100.00 in late fees. On 5 January 2015, the magistrate in small claims court entered a judgment against CETS in the amount of \$1,700.00, for October and November unpaid rent and late fees, and ordered CETS to vacate the premises. CETS appealed to District Court and demanded trial by jury. On 16 March 2015, Colonial filed a motion for summary judgment and calendared it for hearing on 30 March 2015; however, the motion was

continued to a later date. On 16 April 2015, CETS filed an answer and counterclaim alleging damages in the amount of \$52,153.98.

The motion for summary judgment came on for hearing on 20 April 2015. The trial court denied Colonial's motion for summary judgment.¹ At the hearing, Colonial moved to transfer the matter to the Superior Court pursuant to N.C. Gen. Stat. § 7A-243, which allows a matter to be heard by the Superior Court when "the amount in controversy exceeds twenty-five thousand dollars." On 22 April 2015, Colonial filed a written Motion to Transfer to Proper Division, pursuant to N.C. Gen. Stat. § 7A-258. The Record does not indicate whether the trial court entered an order in response to Colonial's oral motion to transfer to Superior Court during open court or its subsequent written motion.

On 19 September 2022, a jury trial was held in District Court. The jury awarded \$2,475.00 to Colonial for the unpaid rent and \$5,000.00 to CETS for damages due to Colonial's failure to repair the premises. On 20 September 2022, the trial court entered judgment consistent with the jury verdicts. On 19 October 2022, CETS filed written notice of appeal.

This Court dismissed CETS appeal for lack of subject matter jurisdiction due to a Rule 3 violation. *See Colonial Plaza Phase Two, LLC v. Cherry's Elec. Tax Servs., LLC*, 290 N.C. App. 365, 890 S.E.2d 927 (2023), 2023 WL 5689339 (N.C. Ct. App.

¹ The trial court filed its written denial of Colonial's motion for summary judgment on 21 May 2015.

Sept. 5, 2023) (unpublished). CETS sought discretionary review with our Supreme Court. On 21 August 2024, the Court granted CETS petition, vacated the unanimous decision of this Court, and remanded with instructions to reconsider the matter in light of *Blevins v. Town of W. Jefferson*, 361 N.C. 578, 653 S.E.2d 392 (2007). *Colonial Plaza Phase Two, LLC v. Cherry's Elec. Tax Servs., LLC*, 904 S.E.2d 532 (N.C. 2024). Consistent with *Blevins*, we now consider the merits of the issues raised in CETS's appeal.

II. Analysis

On appeal, CETS alleges (1) the trial court erred in failing to transfer the case to the Superior Court based upon the amount of damages at issue in this case; and (2) that CETS is entitled to a new trial because the trial court failed to capture a digital recording of the trial proceedings and no court reporter was present for the trial.

A. Jurisdiction of District Court and Wavier of Proper Division

We first consider CETS's contention that the District Court did not have jurisdiction over the issues in this case because the amount of damages CETS sought exceeded \$25,000.00. CETS argues the amount in controversy exceeds the amount over which the District Court had the authority to preside. CETS filed an answer and counterclaim seeking \$52,153.98 in damages from Colonial. Prior to trial, Colonial made oral and written motions requesting the case to be transferred to the Superior Court, pursuant to N.C. Gen. Stat. § 7A-243; however, the Record reflects

the trial court did not enter a ruling on either. CETS argues the trial court erred by not ruling on the motions and failing to transfer the action to the Superior Court.

“The jurisdiction and powers of the trial court division, which consists of the superior and district courts, are governed by Chapter 7A of our General Statutes.” *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394–95, 823 S.E.2d 122, 124 (2018) (citation omitted). Under N.C. Gen. Stat. § 7A-240, “[S]uperior and [D]istrict [C]ourts possess concurrent jurisdiction of all justiciable matters of a civil nature.” *Wilson v. Jefferson-Green, Inc.*, 136 N.C. App. 824, 826, 526 S.E.2d 506, 507 (2000) (cleaned up). Generally, matters involving a controversy exceeding twenty-five thousand dollars are heard by the Superior Court; whereas, a controversy equal to or less than that amount are heard by the District Court. *See* N.C. Gen. Stat. § 7A-243. Notwithstanding, as noted in *Colonial I*:

no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding.

N.C. Gen. Stat. § 7A-242. Thus, even if the “proper division” under N.C. Gen. Stat. § 7A-243 is the Superior Court because of the amount in controversy, it would not render a judgment by the District Court void, because both divisions have concurrent original jurisdiction. Moreover, “[i]n the absence of a proper objection, an action begun in the wrong division may continue in that division to its conclusion.” *Circle J*.

Farm Ctr., Inc. v. Fulcher, 57 N.C. App. 206, 207, 290 S.E.2d 798, 799 (1982).

Any party may move to transfer an action by giving notice to all parties and by filing a written motion to transfer, containing certain requirements outlined in N.C. Gen. Stat. § 7A-258(d). Further, “[a] motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer.” N.C. Gen. Stat. 7A-258(c). Whereas, “[a] motion to transfer by the plaintiff, if based upon the pleading of any other party, must be filed within 20 days after the pleading has been filed.” *Id.* After the motion is filed, “it is heard and determined by a judge of the [S]uperior [C]ourt division whether the case is pending in that division or not.” N.C. Gen. Stat. § 7A-258(b). In the present case, on 22 April 2015, Colonial timely filed a written Motion to Transfer to Proper Division, pursuant to N.C. Gen. Stat. § 7A-258. After Colonial filed the motion, neither party calendared it for hearing. Further, the Record does not contain any objection or consent to the motion by either party. The matter continued and was eventually tried before a jury on 19 September 2022, approximately seven years after Colonial’s filing of the motion to transfer. There is no indication in the record that Colonial sought a hearing in Superior Court on its motion to transfer. At no time did CETS file a motion to transfer the matter to Superior Court.

CETS now alleges that the trial court erred by failing to transfer the action, notwithstanding its inaction below. However, the “[f]ailure of a party to move for transfer within the time prescribed is a waiver of any objection to the division.” N.C.

Gen. Stat. § 7A-257. Likewise, “[i]n no event is a motion to transfer made or determined after the case has been called for trial. Failure to move for transfer within the required time is a waiver of any objection to the division in which the case is pending.” N.C. Gen. Stat. § 7A-258(c). Therefore, CETS waived any objection to the division in which the case was tried by a jury resulting in the respective judgment. Accordingly, because the District Court and Superior Court have “concurrent original jurisdiction” and CETS waived its objection to transfer the matter, the case was properly heard by the District Court. CETS arguments as to this issue are overruled.

B. Recording Requirement

Next, CETS argues it is entitled to a new trial because the 19 September 2022 trial was not digitally recorded, and no court reporter was present for the trial. CETS argues that it was prejudiced by the trial court’s failure to record the trial because, without a recording, it was unable to determine what objections were preserved for appeal; what evidence may have been improperly omitted or admitted; and what errors may have been made in jury selection or in the jury instructions.

N.C. Gen. Stat. § 7A-198(a) provides, “[c]ourt-reporting personnel shall be utilized, if available, for the reporting of civil trials in the [D]istrict [C]ourt.” Additionally, the “[r]eporting of any trial may be waived by consent of the parties.” N.C. Gen. Stat. § 7A-198(d). This Court has consistently held, “it is not necessarily reversible error for the hearing or trial to go unrecorded.” *Holterman v. Holterman*, 127 N.C. App. 109, 112, 488 S.E.2d 265, 267 (1997) (citations omitted). Further,

“showing a violation of section 7A–198 is not enough; respondent must also show that the error was prejudicial.” *In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222 (1995) (citation omitted). This Court held in *In re Nolen*, “[b]ecause respondent does not argue any error in the unrecorded testimony itself, respondent has failed to show prejudice.” *Id.* Similarly, in *Miller*, this Court held that a violation of the recording statute, standing alone, “does not relieve [a] defendant of [the] burden of . . . showing prejudicial error.” *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988) (citation omitted).

In the present case, CETS has not shown that the failure to record the trial was prejudicial. As in *In re Nolen*, CETS stated that the trial was not recorded, but failed to allege any error which would warrant the finding of prejudice. CETS points to the difficulty in determining what objections were made, what evidence was admitted and on what grounds, and what errors may have occurred in jury selection or on the jury instructions. We cannot conclude that the error was prejudicial on these grounds. Ordinarily, civil trials in District Court are recorded digitally in the normal course of business, unless a party provides for a court reporter. There is no indication in the Record the reason for the trial not being recorded, and neither party provides a reason. Notwithstanding, the burden is on CETS to prove the failure to record was prejudicial, which it has not done.

Furthermore, in *Holterman*, this Court analyzed a similar issue and noted “[a]t trial, appellant never requested a court reporter. In order to preserve a question for

appellate review a party must first raise the issue at trial.” *Holterman*, 127 N.C. App. at 112, 488 S.E.2d at 267. There, this Court cited to North Carolina Rule of Appellate Procedure 10, which states, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). Here, the record does not show that either party requested that the trial be recorded, either digitally or by court reporter. Importantly, CETS did not make an objection at any time concerning the recording of the proceedings; rather, this issue was raised for the first time on appeal. Thus, because CETS failed to comply with the preservation requirement under Rule 10(a)(1), its argument is overruled.

III. Conclusion

For the foregoing reasons, we hold the trial court had jurisdiction and did not err when it failed to transfer the case to the Superior Court, as the matter was properly heard in the District Court. We further hold CETS is not entitled to a new trial based on the trial court’s failure to record the trial. Accordingly, the trial court did not err in its judgment.

NO ERROR.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).