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NO. COA04-218

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2005

TONY RAY MABE

Plaintiff

v. SUSAN T. MONTAGUE

Defendant

Stokes County

No. 02 CVS 164

Appeal by defendant from judgment dated 3 October 2003 by the Honorable W. Douglas Albright in Stokes County Superior Court. Heard in the Court of Appeals 21 October 2004.

R. Michael Bruce for plaintiff-appellee/cross-appellant.

Craige, Brawley, Liipfert & Walker, LLP, by William W. Walker, for defendant-appellant/cross-appellee.

BRYANT, Judge.

Tony Ray Mabe (plaintiff) and Susan T. Montague (defendant) both appeal from a judgment dated 3 October 2003 which ordered defendant to pay plaintiff \$4,125.94 in damages and entitled defendant to have possession of approximately 13,487 pounds of tobacco.

Plaintiff is a tobacco farmer who operated under the United States Department of Agriculture, Farm Service Agency (FSA) allotments of poundage and acreage of tobacco. Defendant owned a tract of land in Stokes County which had a tobacco allotment. Defendant rented the land to plaintiff starting in 1994 under an oral agreement. Rent was based on a division of gross proceeds from the sale of tobacco, with plaintiff receiving 75% the defendant receiving 25%. On 20 June 1994 defendant executed a power of attorney for plaintiff to act on defendant's behalf with respect to the crop allotment and the warehouse designated for the sale of the tobacco. The government issued marketing cards in the spring of each year to reflect the tobacco allotment. The parties operated under this agreement without incident until 2000.

In June 2000, defendant discovered that checks had been written to plaintiff for the

sale of the 1999 crop for 100% of gross proceeds from the sale of the tobacco rather than the agreed upon 75%. Consequently, defendant revoked plaintiff's power of attorney.

On 13 December 2000, defendant's attorney sent a letter to plaintiff to terminate the tenancy. On 17 May 2001, plaintiff obtained a preliminary injunction enjoining defendant from interfering with plaintiff's tending of defendant's land during the 2001 crop year and directing defendant to sign any documents necessary for plaintiff to market the tobacco crop. The injunction was later modified to eliminate defendant's signature on the marketing cards. During 2001, plaintiff grew a crop of tobacco on defendant's land, harvested it, cured it and under FSA instructions, stored it because it could not be sold except on a marketing card issued to defendant's farm. For the first time, in 2001, plaintiff contracted directly with Phillip Morris for the purchase of tobacco. The tobacco grown in 2001 could be sold with defendant's marketing cards to the extent of defendant's allotment during the 2002 or 2003 crop years.

Plaintiff tendered the 2001 tobacco crop to defendant, demanding payment of 75% of his share of the crop. Defendant rejected plaintiff's offer; plaintiff filed suit, defendant filed a counterclaim. Defendant then discovered checks for the 2000 crop year for sale of defendant's tobacco had been written to plaintiff for 100% or \$2,284.00, and that defendant should have received 25% or \$571.00 from that sale.

The trial was held 11 August 2003 in Stokes County, the Honorable W. Douglas Albright presiding. The trial court found plaintiff had been damaged in the amount of \$19,259.94 based on 75% of the 2001 crop, and defendant had the following damages: \$571.00 unpaid in 2001; \$2,057.00 in legal fees paid by defendant to collect the amount due for 1999 crop; and \$750.00 for emotional distress. Defendant's damages were trebled to \$10,134.00 and defendant was awarded \$5,000.00 attorney's fees for a total of \$15,134.00. After setting off the damages awarded defendant for her claim of unfair and deceptive trade practices and attorney's fees, judgment was entered for plaintiff for \$4,125.94 and defendant was permitted to take possession of the tobacco.

Both parties appeal.

Defendant raises several issues on appeal, however we determine the dispositive issue to be whether the trial court erred in finding the agreement between the parties was a year to year periodic tenancy .

In his cross-appeal, plaintiff raises the issue of whether the trial court erred in concluding as a matter of law that N.C.G.S. § 75-1.1 applied to plaintiff. Because plaintiff has not cited any authority for his remaining assignments of error in his cross-appeal, they are deemed abandoned. N.C. R. App. P. 28 (b)(6).

Standard of Review

On appeal from a judgment entered after a non-jury trial, the standard of review is whether competent evidence exists to support the trial court's findings of fact, whether the findings support the conclusions and whether the conclusions support the judgment. *Whitaker v. Earnhardt*, 289 N.C. 260, 262-63, 221 S.E.2d 316, 318 (1976). The findings of fact are binding as long as competent evidence supports them, despite evidence to the contrary. *Id.* However, the appellate court decides whether the findings support the conclusions and the judgment. *Id.*

Defendant's Appeal

Defendant argues the trial court erred in finding the agreement between plaintiff and defendant was a year to year periodic tenancy.

When a tenant for a year or longer holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes a tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. *Scheelky v. Koch*, 119 N.C. 80, 25 S.E. 713 (1896); *Harty v. Harris*, 120 N.C. 408, 27 S.E. 90 (1897); *Holton v. Andrews*, 151 N.C. 340, 66 S.E. 212 (1909); *Murrill v. Palmer*, 164 N.C. 50, 80 S.E. 55 (1913). “[B]y presumption of law. . . [s]uch a [year to year] tenancy may be terminated by either party at the end of any year thereof by giving notice of [either parties'] intent . . . to terminate it thirty days before the end of such year.” *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 638-39 (1965); N.C. Gen. Stat. § 42-14 (2003). The Statute of Frauds (N.C.G.S. . 22-2) requires that “leases and contracts for leasing land exceeding in duration of three years from the making thereof . . . be put in writing and signed by the party to be charged therewith.” *Computer Decisions v. Rouse Office Mgmt.*, 124 N.C. App. 383, 388, 477 S.E.2d 262, 265 (1996).

The uncontradicted evidence shows plaintiff paid rent annually after the tobacco was sold, at the rate of 25% of the proceeds from the sale. Since 1994, plaintiff planted, harvested, cultivated, and sold tobacco using defendant's marketing card and land. A periodic tenancy from year to year between the parties ran from 1 January through 31 December. See N.C.G.S. § 42-14 (2003). This tenancy is not within the statute of frauds because the tenancy was renewable annually, although the oral agreement to farm did not exceed three years from its making. Therefore, one month is sufficient notice to terminate the agreement for this year to year periodic tenancy.

Defendant argues plaintiff is not a tenant, but rather a cropper who is entitled to notice to vacate the land. See *State v. Burwell*, 63 N.C. 661, --- S.E. --- (1869) (Cropper is one who is compensated by retaining a portion of the cultivated crops). We disagree. “If the occupier is to pay a money rent, the title to the crop must necessarily be in him in order that he may convert it into money. He is, therefore, strictly a tenant.” *Hall v. Odom*, 240 N.C. 66, 69, 81 S.E.2d 129, 131 (1954). We affirm the trial court's conclusion that plaintiff was a tenant, not a cropper. Defendant further argues the trial court erred in denying her motion to dismiss at the conclusion of plaintiff's evidence pursuant to N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 41. On appeal from the denial of a motion to dismiss under Rule 41, the issue is whether any findings of fact could be made from the evidence to support a recovery. *Sanders v. Walker*, 39 N.C. App. 355, 358, 250 S.E.2d 84, 86 (1979). As shown herein the parties clearly had a year to year periodic tenancy, which agreement did constitute a lease. Moreover, the agreement was not barred by the statute of frauds. This assignment of error is overruled.

Plaintiff's Cross-Appeal

On cross-appeal plaintiff argues the trial court erred in concluding as a matter of law that N.C.G.S. § 75-1.1 applied to plaintiff. We disagree.

N.C.G.S. § 75-1.1 states:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. (b) For purposes of this section, “commerce” includes all business activities, however denominated, but does not include professional services rendered by a member of a

learned profession.

N.C. Gen. Stat. § 75-1.1 (2003). The purpose of N.C.G.S. § 75-1.1 is to provide a civil means to maintain ethical standards of dealing between persons engaged in business and the consuming public within this State, and it applies to dealings between buyers and sellers at all levels of commerce. *United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (1986) .

The trial court found that “[p]laintiff had a fiduciary relationship with defendant [and therefore had] a duty to see that the tobacco warehouse . . . received accurate information on the division of sales proceeds” from tobacco sales and that the warehouse wrote checks accordingly. The trial court also found “plaintiff acted deliberately, in breach of fiduciary duty to defendant; and his behavior was wilful and wanton and amounted to constructive fraud.” The trial court then concluded “[p]laintiff’s acts, . . . were unfair and deceptive trade practices in or affecting commerce, in violation of N.C.G.S. § 75-1.1 *et seq.*” We agree with the trial court that this activity is in and affecting commerce.

In sum, because defendant breached her lease agreement with plaintiff by leasing the premises to another lessee in 2001, plaintiff was entitled to damages assessed by the trial court in the amount of \$19,259.94, offset by \$15,134.00 (or 75% of the market value of the 2001 tobacco crop). Therefore, the trial court’s entry of judgment in plaintiff’s favor for \$4,125.94 was proper. This assignment of error is overruled.

We affirm the trial court’s judgment as to defendant’s appeal and plaintiff’s cross-appeal.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).