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Public Contracts; Lease; Expiration; Termination; Summary Ejectment; Renewal Term; Waiver; Novation

Mount Airy-Surry Cty. Airport Auth. v. Angel, ___ N.C. App. ___ (No. COA18-1019, Surry— 10/1/19)

- ***Holding*— In proceeding for summary ejectment action wherein defendants leased a hangar at an airport for more than ten (10) years and where, with little more than a week's notice, the airport announced that the lease was terminated, trial court properly entered summary judgment for plaintiff-airport, as, applying settled contract law principles, defendants failed to forecast sufficient evidence to create any genuine issues of material fact given that parties' lease arrangement was on a month-to-month basis at time of termination.**

- ***Key Excerpt*—** Defendants first argued that there were genuine issues of material fact because they have evidence that they continued to pay rent long after the lease term's initial expiration and accordingly that the airport's acceptance of those monthly rental payments constituted a series of one-year renewals under the terms of the agreement's renewal provision. In support thereof, defendants attempted to cite case law stating that "if the lease provides for an additional term at an increased rental, and after the expiration of the lease the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term." Coulter v. Capitol Fin. Co., 266 N.C. 214, 218, 146 S.E.2d 97, 101 (1966) (where contract required tenant to notify landlord of the intent to renew by registered mail at least 30 days before the end of the original lease term, Supreme Court held that the lease was renewed when the tenant held over and paid the increased rent). In rejecting defendants' arguments, the Court observed, "On the surface, this case appears quite similar to Coulter. But there is a key distinction. In Coulter, the rent increase already was negotiated and built into the original lease agreement, which stated that the rent for the additional two-year term would increase from $175 to $225 per month. Here, by contrast, the contract provides that any one-year extension would be accompanied by a new rental

payment 'at a negotiated amount.'"

"There is no evidence that the Angels and the airport negotiated a new rental payment amount after the original contract term expired. Instead, the record indicates that the Angels simply held over and paid the same rent as before. The lease agreement has an express provision governing this situation. It provides that 'continued occupancy of the premises beyond the initial lease period, or beyond any renewal period, shall be on a month-to-month basis."

"To be sure, the Angels contend that they paid increased rent beginning in 2017. But by then, it was too late. The original lease agreement expressly provides that it can be renewed only for two additional one-year terms. In other words, the contract cannot be extended beyond mid-2016 under any circumstances. Occupancy that continues beyond that time period necessarily must be month-to-month under the agreement. By 2017, when the Angels allegedly paid increased rent, they had held over well past that two-year mark and thus could not renew the contract—either expressly or impliedly—for further one-year terms."

"In sum, as Coulter explained, although our courts have created common law rules to help address recurring tenant holdover issues, '[t]he parties to the lease may, of course, agree upon a different relationship.' *Id.* at 217, 146 S.E.2d at 100. That is what occurred here. The parties agreed that, if the tenant held over and the parties did not negotiate a new rental payment, then the tenant's occupancy was on a month-to-month basis. Accordingly, we reject the Angels' argument that their payment of rent after holding over constituted a renewal of the original lease agreement for successive one-year terms."

As to defendants' contentions pertaining to waiver of the renewal terms (including arguments as to the requirement that renewals be in writing; the requirement that renewals occur before the expiration of the existing lease term; and the provision limiting renewals to no more than two additional one-year terms beyond the original three-year term), the Court observed, "Here, there is no express evidence of waiver. Dennis Dwain Angel's affidavit states that '[a]fter May of 2014, I was informed and believed that our lease would be renewed.' But this statement is missing a critical fact: informed *by whom*? To create a material issue of fact, the Angels must have evidence that *airport officials* told them the lease would be renewed. That evidence is not in the record before us." (Emphasis in original.)

"Similarly, Dennis Dwain Angel's affidavit states that the airport 'had a practice or policy of renewing everyone's leases as long as they were making rental payments.' But, again, this assertion is missing key pieces of evidence necessary to overcome summary judgment. For example, we do not know if 'everyone'—which presumably means similarly situated tenants—had discussions or negotiations about the renewals that did not occur here. And, more importantly, we do not know that those tenants had lease agreements with terms similar to the agreement here. Indeed, the airport might have different contracts with different tenants, with different renewal terms."

"In sum, the record does not contain evidence of conduct by the airport that might naturally have led the Angels to believe there was an express or implied waiver. The lease agreement contains a holdover provision that permits the Angels to continue to occupy the hangar on a 'month-to-month basis.' The airport's conduct is consistent with that term of the contract, and there is no evidence that the airport expressly or implicitly took steps indicating it would waive those contract terms."

Finally, addressing defendants' arguments pertaining to novation and a new unwritten lease agreement, the Court stated, "Again, this argument has a fatal flaw. A novation is 'a substitution of a new contract or obligation for an old one which is thereby extinguished. The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.' Bank of Am., N.A. v. Rice, 230 N.C. App. 450, 458, 750 S.E.2d 205, 210 (2013) (ellipses and emphasis omitted). 'The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms.' Southeast Caissons, LLC v. Choate Const. Co., 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016)."

"Here, the time frame of the alleged unwritten lease agreement—which the Angels contend is one year—is an essential term. Thus, there must be evidence of the parties' mutual assent to that term. There is none. Dennis Dwain Angel's affidavit states that 'in April or May 2017, Plaintiff increased the rent to $215.00 per month. I made all monthly rental payments of $215.00.' That is the only evidence to indicate the parties negotiated a different contractual relationship at that time. Because there is no evidence that the parties mutually assented to abandon their existing month-to-month lease term and form a new lease agreement with a one-year term, the trial court properly rejected the Angels' novation argument."

- ***Synopsis*—** Appeal by defendants from May 2018 order. Affirmed. Opinion by Judge Dietz, with Judge Tyson and Judge Hampson concurring.

Land Use; Permits; Grocery Store; Shopping Center

Jubilee Carolina, LLC v. Town of Carolina Beach, ___ N.C. App. ___ (No. COA18-1108, New Hanover— 10/15/19)

- ***Holding*— Court of Appeals upholds trial court's decision affirming respondent-Town's approval of a conditional use permit for respondent-Carolina Beach Development Company 1, LLC ("CBDC") to develop a Publix grocery store in a shopping center owned by respondent-Wilmington Holding Company ("WHC") (collectively referred to as "respondents"), which affected the adjacent commercial parcel owned by petitioner-Jubilee Carolina, LLC ("Jubilee").**

- ***Key Excerpt*—** Respondents argued that petitioner-Jubilee failed to assert the vested rights argument before the Council, and thus the Court did not have jurisdiction to analyze the issue. The Court agreed with respondents. "[T]he record reveals that Jubilee raised the issue of vested rights for the first time before the superior court in their petition for writ of certiorari. Jubilee did not argue that it had a vested right to interconnectivity at the CBDC Permit hearing before the Town Council. Rather, Jubilee presented evidence of their site plan and argued that without interconnectivity, the Harris Teeter site plan would need to be redesigned. As such, the issue of vested rights was not properly raised before the Town Council at the CBDC Permit hearing, and therefore, no necessary findings of fact were entered."

"Given that the decision to grant the CBDC Permit never addressed whether Jubilee acquired a statutory vested right, it was improper for Jubilee to assert the

issue for the first time before the superior court as the review was limited to 'errors of law appearing on the face of the record.' Godfrey [v. Zoning Bd. of Adjustment of Union Cty.], 317 N.C. [51] at 62, 344 S.E.2d [272] at 279 [(1986)]. Moreover, as the superior court was without jurisdiction to hear this issue, this Court is, likewise, without jurisdiction."

Petitioner-Jubilee also argued that the trial court erred in affirming respondent-Town's decision to grant the CBDC Permit because the findings of fact were not supported by substantial evidence and the Council's decision was arbitrary and capricious. The Court disagreed. "On appeal, '[t]his Court's task on review of the superior court's order is twofold: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' SBA [,Inc. v. City of Asheville City Council], 141 N.C. App. [19] at 23, 539 S.E.2d [18] at 20 [(2000)] (citation and internal quotation marks omitted). 'Our review is whether the [superior] court, in applying the "whole record test," properly determined that the [Town Council] made sufficient findings of fact which were supported by the evidence in an effort to prevent decisions from being arbitrary and capricious.' Robertson v. Zoning Bd. of Adjustment for City of Charlotte, 167 N.C. App. 531, 534, 605 S.E.2d 723, 725 (2004). 'The [superior] court's decision may be reversed as arbitrary and capricious if petitioners establish that the [Town Council]'s decision was whimsical, made patently in bad faith, indicate[d] a lack of fair and careful consideration, or fail[s] to indicate any course of reasoning and the exercise of judgment.' *Id*. (alterations in original) (citation and quotation marks omitted)."

. . . .

"Based on the superior court's findings, it is apparent that the superior court properly reviewed the allegations under the whole record test. There was substantial evidence to support the superior court's findings as the weight of the evidence established that CBDC met the requirements to receive the CBDC Permit and Jubilee did not present any evidence to rebut its issuance. *See* Davidson Cty. Broad., Inc. v. Rowan Cty. Bd. of Comm'rs, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007) ('If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit [as] *prima facie*[,] he is entitled to it. If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record' (citation omitted)). Jubilee stated that it was 'in support of the project' as long as interconnectivity was required. However, the Town Council found that the requirement for interconnectivity was not enforced during the deliberation for the Jubilee Permit, and therefore, to require interconnectivity for the CBDC Permit would be improper. While Jubilee contends that the Town Council was motivated by a discriminatory purpose to favor the CBDC Permit because CBDC might use the fill dirt in the possession of the Town, we reject that contention as the evidence supports that Jubilee was offered the same opportunity to use the fill dirt by the Town. Thus, on this record, the superior court properly applied the whole record test and did not err in finding and concluding that the Town Council's decision was based on competent, material, and substantial evidence in the record and was not arbitrary and capricious." (Note: a portion of the trial court's findings of fact and conclusions of law appear in the opinion.)

- ***Synopsis***— Appeal by petitioner from May 2018 order. Affirmed. Opinion by Judge Bryant, with Judge Stroud and Judge Collins concurring.

Nota Bene (N.B.)
Other Recent Decision of Note

Land Use; Rezoning; Standing Brinkley Props. of Kings Mountain, LLC v. City of Kings Mountain, ___ N.C. App. ___ (No. COA18-615, Cleveland– 12/18/18) (***unpublished***), *disc. review denied*, ___ N.C. ___ (No. 23P19, 9/27/19) (Upon noting that plaintiffs presented two issues on appeal (namely that the rezoning was invalid because the City violated various procedural requirements of the zoning ordinance and because defendant-City violated state law by allowing substantial changes to defendant Orchard Trace's rezoning application on the same day it was approved by the City Council), the Court of Appeals stated that it was unnecessary to reach either of these issues because plaintiffs did not have standing to maintain this action. "Mr. Killian [the Director of the Planning and Economic Development Department] presented the rezoning application [requesting that 120-acres of land owned by defendant] Orchard Trace be rezoned from residential to conditional use property, enabling Orchard Trace to proceed with plans to develop multi-family market rate apartments, active living housing, neighborhood offices and retail space, and single-family, detached homes] to the … Planning and Zoning Board … at a public meeting on 13 December 2016. The Planning and Zoning Board voted to recommend that the … City Council … approve the application. The City Council considered and approved the rezoning application on 20 December 2016." In February 2017, plaintiff Brinkley Properties initiated an action for declaratory judgment, requesting a declaration that the rezoning amendment authorized by the Council was invalid and an injunction to bar proceeding with the development because: (1) the rezoning was submitted by a non-existent entity; (2) the properties did not qualify to be a planned unit development; (3) the incompleteness of the rezoning application; (4) the Board did not hold a public hearing; (5) the public hearing before the Council was not sufficiently noticed; (6) the project's site plan was improperly changed just before the public hearing; (7) the Council failed to properly identify the properties that it purported to rezone; and (8) the Council gave contradictory instructions regarding the project and failed to make key findings. Determining that there was a lack of standing, the Court affirmed the trial court's order granting summary judgment for defendants, denying plaintiffs' motion for summary judgment, and dismissing its second amended complaint. (Appeal by plaintiffs from March 2018 order. Affirmed. Opinion by Judge Arrowood, with Judge Tyson and Judge Inman concurring. On September 27, 2019. the Supreme Court of North Carolina denied plaintiffs' petition for discretionary review.))