STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 07-CVD-002976

TOMMY AND ELIZABETH NEWBER, DBA WELLS ENTERPRISES,

Plaintiffs/Appellees,

vs.

LYNNE SHEFFIELD AND MICHAEL SASSER,

Defendants/Appellants

BRIEF OF DEFENDANT-APPELLANTS

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TABLE OF AUTHORITIES

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NATURE OF THE CASE

This is an appeal from a judgment for summary ejectment.

FACTS AND PROCEDURAL HISTORY

The parties in this case are Tommy and Elizabeth Newber dba Wells Enterprises (hereinafter "Plaintiffs" or "the Newbers") and Lynne Sheffield and Michael Sasser (hereinafter "Defendants" or "Tiki Mon"). The parties executed a lease for 5809 Oleander Drive in Wilmington on August 15, 2005. Defendants sought the lease in order to operate their business, Tiki Mon, a company which sells and rents Tiki-style furniture, bar sets, beach accessories, and other tropical-themed products.

Section 3.C of the lease called for rent payments on the first day of the month. Tiki Mon's rent payments were paid on or about October 3, November 2, and December 2 of 2005. Despite the late payments, the lease was renewed on March 1, 2006.

After the renewal, Tiki Mon continued paying its rent late on a regular basis. Plaintiffs continued to accept these late rent payments, and took no action other than negotiating the payments. During 2006, Tiki Mon paid its April rent on the 11th of that month, the May rent on the 5th, June rent on the 5th, August rent on the 5th, September rent on the 5th, October rent on the 15th, November rent on the 16th, and the December rent on the 8th. Plaintiffs have also been accepted Tiki Mon's rent after the first of the month at various times in 2007, including payments tendered on February 6, March 12, April 20. Tiki Mon has made all of its rent payments, including the payment due for the current month, August 2007.

On January 3, 2007, Tiki Mon constructed a thatched-roof awning on one side of the premises. Tiki Mon has also placed various signs in the windows of the premises, advertising its goods and services to the public. With full knowledge that these signs were in place, Plaintiffs

renewed Tiki Mon's lease on March 1, 2007, on the same terms and conditions which had governed the previous leases.

After several more late payments from Tiki Mon, Plaintiff Elizabeth Newber sent a letter to Defendants, stating, in relevant part:

> For the last four months I have contacted you… regarding delinquent payments. As of May 1, 2007 any rent received after the 10th of the month shall be assessed an additional $30 late fee.

See Letter from Elizabeth Newber to Tiki Mon, dated April 30, 2007, attached hereto as Exhibit A.

On June 21, 2007, Plaintiffs filed an action for Summary Ejectment in the District Court for New Hanover County, Small Claims Division. In that action, Plaintiffs alleged that Defendants had been late paying rent; that Defendants had constructed an awning in violation of the lease; and that Defendants had been late in making utilities payments. The case was heard on June 28, and judgment was entered in favor of Plaintiffs. It is from that entry of judgment that Defendants now appeal.

ARGUMENT

A. Plaintiffs Have Waived Any Right to Declare a Forfeiture of the Lease For Late Payment of Rent.

The rule governing the central issue in this case is more than one hundred fifty years old. In *Richburg v. Bartle*y, Busb. 418, 44 N.C. 418 (1853) the North Carolina Supreme Court stated the rule succinctly: "Where forfeiture of a lease is incurred by nonpayment of rent, if the lessor receives from the lessee rent subsequently accruing, the forfeiture is thereby waived."

Elaborating on this rule nearly seventy years later, the state Supreme Court, in *Winder v. Martin*, 183 N.C. 410, 111 S.E. 708 (1922), stated:

> '. . . It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or, to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof. . . .'

Winder, 183 N.C. at 410, 111 S.E. at 708.

More than fifty years after Winder, the rule was again affirmed. In *Office Enterprises, Inc. v Pappas*, 19 N.C. App. 725, 200 S.E.2d 205 (1973), a lessor's summary proceeding in ejectment to evict its tenants from a leasehold for failure to make timely rent payments was held to have been properly dismissed. There the court found that the lessor corporation was estopped from claiming a forfeiture of the lease for untimely payments when its officers received a check from the tenants in satisfaction of the past-due rent. While not cashing that check, the landlords had retained it in their possession and never returned it to the tenants. It was held that the acceptance of rent by a landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as a waiver of the forfeiture, or as an affirmation by him that the lease was still in force, estopping him from claiming a breach in any of the conditions of the lease and demanding a forfeiture thereof.

Relying on the *Pappas* decision, the Court of Appeals in *Mewborn v. Haddock* (1974) 22 N.C. App. 285, 206 S.E.2d 336, *cert. denied* 285 N.C. 660, 207 S.E.2d 755, similarly held that landlords were not entitled to evict their tenants for failure to pay rent on time, and accordingly affirmed the dismissal of their action for summary ejectment, because they had accepted a late payment, apparently tendered long before they notified the tenants to vacate the premises:

> This case is controlled by what was said in *Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E.2d 205 (1973). When the tenant Haddock failed to pay the $2,600 rental payment for the agricultural year commencing December 1, 1972, on or before January 2, 1973, he was in breach of a condition of the lease; and the landlord Mewborn had the right to terminate the lease. The landlord Mewborn did not do so, however, ***and with full notice or knowledge of the breach for which a forfeiture might have been declared, accepted 27 days late the rental payment*** which not only amounted to $2,600 but exceeded it and was in the amount of $3,000. ***This constituted a waiver of the forfeiture*** and was an affirmation by the landlord that the contract of lease was still in force; ***and the landlord thereby became estopped from setting up a breach of any of the conditions of the lease prior thereto***.

Mewborn, 22 NC App. at 288, 206 S.E.2d at 338. Subsequent cases have yielded the same result. *See Community Housing Alternatives, Inc. v. Latta*, 362 S.E.2d 1 (1987); *Culler v. Watts*, 67 N.C. App. 735, 313 S.E.2d 917 (1984); *Price v. Conley*, 204 S.E.2d 178 (1974); *see also* 39 A.L.R. 4th 1204, LESSOR'S RETENTION OF PAST-DUE RENTAL PAYMENTS AS PRECLUDING TERMINATION OF LEASE AND DISPOSSESSION OF LESSEE FOR NONPAYMENT OF RENT, § 3A (1985 & 2007 Supplement).

In this case, it is undisputed that Tiki Mon had been late paying its rent on numerous occasions. In fact, this has been the case since virtually the time Tiki Mon first took possession of the premises in August 2005. However, because the Newbers have always accepted these late payments, they have waived any right they may have otherwise had to forfeit the lease on that basis.

B. Plaintiffs Expressly Waived the Right to Forfeit the Lease For Late Payment of Rent.

Elizabeth Newber expressly waived the operation of Section 3.6. in her April 30 letter to Tiki Mon. In that letter, she stated that payments received after the 10th of the month would be

assessed a $30 late fee. See Exhibit A. She made this statement with full knowledge that the lease required payments on the first of the month. Nowhere in that letter is there an indication that the Newbers intended to reserve the right to enforce the provisions of Section 3.C beyond the $30 assessment. Accordingly, as of April 30, 2007, the Newbers had *expressly* waived the operation of Section 3.6, along with any right they may have otherwise had to forfeit the lease under that section.

C. The Lease Does Not Provide for Termination in the Event of Late Rent Payment.

The lease states that rent is due on the first of each month. See Lease § 3.C. There is no provision for termination of the lease if rent is late. Under North Carolina law, a breach of a lease cannot be made the basis for summary ejectment unless the lease expressly provides for termination upon such a breach. See *ARE-100/800/801 Capitola, LLC v. Triangle Labs., Inc.*, 144 N.C. App. 212, 218-19, 550 S.E.2d 31 (2001). Because the lease does not provide for termination upon late payment of rent, plaintiffs' complaint that rent has paid late cannot stand as the basis for summary ejectment.

D. Lessee's Tender of Rent Payment, Even Though Lessor Does Not Cash or Negotiate the Payment, Is Sufficient to Estop a Lessor From Establishing a Breach of Lease

Tiki Mon has tendered all allegedly past-due rent payments. In fact, on the day of their small claims hearing, Defendant Lynne Sheffield sent a letter to the Plaintiffs, along with a $2,400.00 payment[1], which payment was for that month's rent, as well as the next two months thereafter. The Newbers have never, to Defendants' knowledge, negotiated that check. More

[1] A copy of the cover letter accompanying the payment is attached hereto as Exhibit B.

importantly, the Newbers have never returned the check, or otherwise rejected the payment. They have instead retained control over, and possession of, the check ever since.

It is well established in North Carolina that when a Lessee tenders payment of late rent, a lessor is estopped from declaring the Lessee in breach. In Pappas, the landlord received a check for overdue rent. Instead of cashing the check, the landlord turned the check over to his attorney, who held the check for safekeeping. The Court of Appeals, in holding that the landlord had "received" the payment by not returning it to the Lessee, stated:

> the plaintiff had received the May payment and retained it even though the check itself was not cashed and was placed in the hands of plaintiff's attorney. This still constituted a receipt by the plaintiff, and the rent was still in the plaintiff's possession when the letter of May 26 was written. In fact the payment was never returned to the defendant, and the plaintiff at all times had it in its control. The plaintiff was thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof.

Pappas, 19 N.C. App. At 728, 200 S.E.2d at 207-08. *See also* 39 A.L.R. 4th 1204, LESSOR'S RETENTION OF PAST-DUE RENTAL PAYMENTS AS PRECLUDING TERMINATION OF LEASE AND DISPOSSESSION OF LESSEE FOR NONPAYMENT OF RENT, § 3A (1985 & 2007 Supplement).

E. None of the Alleged Breaches of the Lease Operate as a Forfeiture of the Lease.

The Newbers have alleged variously that Tiki Mon has damaged its property, erected unauthorized signs and awnings, and undertaken to use the property for purposes not permitted in the lease.

The factual question of whether or not such actions took place need not even be reached. Even if these alleged violations were all proven true, Plaintiffs would nonetheless be barred from forfeiting the lease. Two crucial facts are sufficient to decide this issue. (1) The Newbers renewed Tiki Mon's lease on March 1, 2007, a date after which most, if not all, of the alleged

lease violations took place. (2) The Newbers have, at all times relevant herein, chosen to accept Tiki Mon's rent payments, instead of proceeding to evict Tiki Mon. They have continued to do so long after the alleged lease violations, of which they now complain, took place.

These facts, taken together, establish that Plaintiffs cannot now evict Defendants for any of the alleged breaches. This is so because the rule in *Winder* applies not only to late rent payments, but to *any* violation of the lease:

> It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, ***or any other breach which occurred prior to the acceptance of the rent***.

Winder, 183 N.C. at 410, 111 S.E. at 708. Because the Newbers have accepted rent payments from Tiki Mon subsequent to the occurrence of the alleged breaches of which they now complain, they have waived the opportunity to assert a forfeiture for *any* alleged breach.

F. Neither The Awning Erected by Tiki Mon, Nor Signs in the Windows Are Grounds for Termination of the Lease.

Section Thirteen of the lease governs "Signs, Awnings and Marquees Installed by Lessee." Among Plaintiffs' complaints is that Tiki Mon erected a straw roof awning on one side of the subject premises.

However, Section Thirteen, subsection B of the lease expressly provides for plaintiff's remedy in the event it finds that a sign, awning, marquee or other structure is "offensive or otherwise objectionable:"

> If lessee fails to remove such signs, displays, advertisements, or decorations within 10 days after receiving written notice from lessor to remove them, lessor reserves the right to enter the demised premises and remove them at the expense of the lessee.

See Lease § 13.B. Nowhere does the lease state that the Lessor has the right to terminate the lease in such a situation. Moreover, any general right the Lessor may have otherwise had to do so would be extinguished by the inclusion of an express remedy.

Additionally, Section 10 provides as follows: "Lessee shall surrender the demised premises at the end of the lease term [and]… shall remove all business signs placed on the demised premises by lessee and restore the portion of the demised premises on which they were placed in the same condition as when received." In other words, the contract expressly contemplates the use of signs by the Defendants, and requires Defendants to make repairs to the property for any alterations to the property resulting from the placement of signs. According to the express terms of the lease, Defendants have until the expiration of the lease terms to remove their signs, and fix any holes, remove any markings, or otherwise repair any incidental wear caused by the placement of their signs.

Accordingly, Tiki Mon's placement of a thatched roof awning along the side of the premises is not grounds for eviction. The lease fails to state that unapproved awning is grounds for eviction, it provides for the remedy of removal, and further allows the tenants the opportunity to repair any damage their signs might cause – damage which the contract clearly contemplates occurring.

CONCLUSION

For the foregoing reasons, Tiki Mon respectfully requests this court to overrule the judgment of the Small Claims Court and enter judgment in favor of Defendant-Appellants, Lynne Sheffield and Michael Sasser.

Respectfully submitted,

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AUGUST 13, 2007