Civil Law Update & Review

Domestic Violence

Gibson v. Lopez, NC COA (filed Oct. 6, 2020).

Facts: Defendant-Lopez was plaintiff's 14-year-old stepson. Plaintiff-Gibson moved in with, and later married, Lopez's father in 2015, when Lopez was ten years old and his sister was twelve. Plaintiff quit her job to take care of the children at the request of her husband. Lopez resided in court-ordered treatment facilities from 2016-2018, but otherwise resided with his father and step-mother. During this time, plaintiff cooked, cleaned, transported the children to appointments and school, refereed their arguments, and attended therapy sessions "to help set boundaries" for defendant. In 2018, when defendant returned to the family home, plaintiff obtained a DVPO against defendant and her husband.

Legal Issue: Was plaintiff acting *in loco parentis* to the defendant and thus barred from obtaining a DVPO against defendant because of his age (under 16)?

Law: GS 50B-1(a)(3) provides an eligible relationship for protection under that Ch. includes persons who

Are related as parents and children, including others acting in loco parentis to a minor child . . For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandparent under the age of 16.

A person stands *in loco parentis* if they have taken on the obligations incidental to the parental relationship, particularly that of support and maintenance. That determination depends in part on the intention of the person, taking into consideration the facts and circumstances of the individual case. That status is subject to modification; for example, a divorce typically – but not necessarily – terminates the status for a step-parent. A temporary placement does not generally create an *in loco parentis* relationship, but again that is subject to modification depending upon circumstances and the party's intention.

Holding: Plaintiff's argument that she was "not ever able to act *in loco parentis*" due to defendant's violence and threatening behavior misunderstands the law. There is certainly evidence in the record that would support a finding that plaintiff was *in loco parentis* with the defendant, but that conclusion is not compelled. The case is remanded for an evidentiary hearing focused on the "the critical window from Defendant's . . . return to the house to plaintiff's . . . filing of the complaint."

Also of note: The Court notes that parents and grandparents are not subject to the "change in circumstances" rule, and are simply barred from obtaining a DVPO against their children or grandchildren. Nor is the alternative ground of "current or former household members" available to them.

Ramirez v. Parker NC COA (filed November 5, 2019, unpublished).

Facts: Ex parte dvpo was issued based on plaintiff's statements that defendant had been molesting her daughter ["A.R."], causing her to "feel unsafe." She also stated that she feared A.R. would "suffer a lot of emotional pain," and that defendant "still [had] an attraction" to her daughter. Based on this evidence, court found "defendant intentionally caused bodily injury" to A.R.

Evidence at trial showed that defendant had been investigated for and charged with two counts of indecent liberties against A.R., and the county DSS had also conducted an investigation. No additional evidence about either investigation was provided. Plaintiff's testimony at trial was that she had not personally witnessed the alleged assaults, but that A.R. had been "gloomy" and was not sleeping well since the allegations had come to light.

Held: "No competent evidence was presented tending to show that Defendant attempted to cause bodily injury to A.R. We are mindful the evidence tends to show that A.R.'s allegations form the basis of both the DVPO and Defendant's pending criminal charges. However, [testimony] that charges merely exist would not – absent any evidence of Defendant's actions – sustain a DVPO."

Bankruptcy

In re Kimbler 618 B.R. 437 (2020) (US Bankruptcy Ct, E.D., New Bern Division)

Facts: Debtor opened an antique business in Havelock, renting booths to outside vendors. When business closed, dispute arose between her and particular vendor about money owed between them. Vendor filed small claims action against debtor, who filed bankruptcy petition prior to trial. Magistrate (correctly) refused to proceed due to automatic stay. Vendor then filed criminal complaint against debtor for felony embezzlement.

Vendor claimed that he was advised by magistrate "and others in the State Court" to seek criminal charges." Debtor was arrested and – unable to make bail of $4500 – served 16 days in jail before being released with an ankle monitor (for which she paid $883) which she wore for 120 days. The criminal charges are still pending.

Legal Issue: Did vendor violate the automatic stay provision by initiating the criminal action for the primary purpose of collecting a dischargeable debt?"

Law: The automatic stay provision bars any act to collect a debt arising before the bankruptcy petition is filed. While it does not bar authorities from initiating criminal proceedings against a debtor, it does apply to creditors who initiate such a proceeding if the primary purpose is to recover a dischargeable debt. Willful violations of the stay by a creditor are subject to the imposition of sanctions consisting of the imposition of actual damages – including costs and attorney fees – as well as punitive damages.

Holding: At the hearing on sanctions, the vendor repeatedly admitted that he sought criminal charges in order to force the debtor to pay him "his money," leaving little doubt that this was

his primary purpose in initiating such charges. In a remarkable opinion, the Court characterized the vendor's behavior in scorching terms, ending with, "Today the court saw malicious evil sprinkled with reckless indifference." The Court awarded total damages in the amount of $40,979.50.

Also of note: In a footnote the Court stated: "No other evidence [besides the testimony of the vendor] corroborated that the magistrate provided legal advice; however, if that assertion is true, the action by the magistrate is improper. In North Carolina a magistrate is an officer of the state's district court. . . . A judicial officer should not provide legal advice and counsel which is a violation of Canon 2(A) of the NC Code of Judicial Conduct."

In re Nocek (April 7, 2020) (US Bankruptcy Ct, E.D., Raleigh Division).

Law: Violation of the automatic stay provision requires 4 things: (1) bankruptcy petition was filed; (2) debtor is an individual; (3) creditor received notice of petition being filed; and (4) creditor willfully violated stay.

Notice is presumed complete upon mailing, but presumption may be rebutted. Mere allegations of non-receipt are not sufficient to rebut presumption, but testimony about specific dates showing insufficient time between mailing and alleged violation may be sufficient.

Held: Email by creditor to debtor of intent to obtain a lien on debtor's house was violation of stay.

No violation of stay by disparaging remarks on social media to effect that he wondered whether debtor "found any money on that trail" during bike ride. Similar "mildly crude . . . juvenile expressions of dislike for the the debtor" were not attempts to collect debt and did not violate stay.

Failure to dismiss small claims action was not violation of stay where creditor did not appear for trial nor take additional action to pursue litigation after receiving notice that bankruptcy petition had been filed.

Damages for attorney fees in amount of $2,653 upheld; punitive damages denied because "lien" email was not egregious or vindictive.

Contract Law

4000 Piedmont Parkway v. Eastwood Construction, NC COA (filed March 17, 2020, unpublished).

Facts: Dispute about whether tenant exercised right to renew lease in timely manner. Lease provided: *Tenant shall have the right and option to extend the Term for one three year option, exercisable by giving Landlord prior written notice, at least six months in advance of Expiration Date, or Tenant's election to extend the term; it being agreed that time is of the essence, and that this option is personal to Tenant . . . .*

Lease had expiration date of February 28, 2019. Tenant gave notice of intent to renew in December, 2018.

Held: Tenant failed to give timely notice of intent to renew. Tenant's assertion that lease created two options for renewal, one requiring six months notice and the other no notice at all, "makes no sense." The Court stated that the lease was intended by both parties to require Tenant to provide six months notice "**of** Tenant's election to extend the term." Noting that *r* is located right above *s* on a standard keyboard, the Court stated "This case is simply about a typo."

Landlord-Tenant Law

Wallace v. Geter, NC COA (filed February 18, 2020, unpublished).

Facts: Plaintiff and defendant worked together for six years, during which time plaintiff made defendant a number of small loans, which defendant promptly repaid. Eventually plaintiff agreed to loan defendant $800, secured by a deed on defendant's home. The loan was to be repaid by April 1, but it was not and plaintiff recorded his deed on April 2. Two weeks later plaintiff filed this action for summary ejectment. The magistrate ruled in favor of plaintiff, as did the district court judge on appeal.

Held: The record contains no evidence of a landlord-tenant relationship between the parties, but instead reveals a creditor-debtor relationship. "Therefore, summary ejectment was not the appropriate remedy, and the trial court did not have subject matter jurisdiction to grant such remedy."

Winston Affordable Housing v. Roberts, NC Sup Ct (filed May 1, 2020).

Facts: Plaintiff-LL is a project-based Section 8 housing property. Defendant-Roberts has lived there for more than 20 years. She is a 62-year-old woman with cognitive disabilities who paid $139/month for rent out of a monthly fixed income of $755 and food stamps. Plaintiff had a lease from year-to-year which automatically renewed at the beginning of each year. In October, 2016, LL notified T that her lease would be terminated effective Dec. 31, due to repeated lease violations which included harassing staff about various issues, spreading pest control powder in common areas, smoking on the premises, and failing to keep premises in a clean and safe condition. T paid rent as usual for the months of November and December and had not vacated the property by Jan. 1st.

On Jan. 4, the on-site property manager saw T at the mailboxes and asked her to come sign a document amending her lease to require monthly rental in the amount of $532/month. The following day LL filed a SE action. Several days later LL delivered a "Ten Day Pay or Quit Notice" to T. The small claims magistrate awarded judgment for possession to LL, and T appealed, staying execution on the judgment pending appeal.

Legal Issue: Did LL waive the right to eviction based on T's breaches occurring prior to Jan. 1 by accepting rent for November and December?

Law: The general rule is that a landlord who accepts rent payments after learning of T's breach waives the right to recover possession. (Note that this law does not apply to evictions for criminal activity, nor to evictions by PHA.) This type of subsidized housing lease differs from the usual, however, in that it may be terminated – or not renewed – only for good cause.

Held: A LL does not – by accepting rent payments -- waive the right to terminate an automatically-renewing lease at the end of the term for breaches if (1) the LL notifies the T of the breaches; (2) notifies the T of the decision not to renew; and (3) non-renewal of the lease is specifically identified in the lease as a remedy in case of breach. NOTE that the LL may not thereafter seek immediate eviction.

Law: The T's lease and subsidy payments may be terminated only if LL complied with applicable federal regulations. In particular, federal law provides that T may be evicted only for those grounds specifically identified in the required termination notice.

Held: Because the trial judge awarded possession based on failure to pay rent – having held the LL waived the right to rely on the earlier grounds – the case must be remanded for the trial judge to consider whether LL is entitled to refuse to renew the lease, including determination of whether the alleged breaches occurred and were sufficient to constitute good cause under the lease, and whether the LL complied in other respects with the requirements of federal regulations.

Legal Issue: Was the LL entitled to eviction for failure to pay rent?

Held: This ground was not cited in the Notice of Termination and thus cannot constitute the basis for eviction. Further, LL does not appear to have complied with federal regulations – as outlined in the lease – in attempting to increase T's rent to $532/month. Additional evidence is required to resolve these issues.

Miscellaneous

Andrews v. Thomas 2020 WL 2322616 (filed May 11, 2020, in US District Court, M.D./Magistrate Judge Memorandum)

Facts: Pro se litigant filed §1983/civil rights action in federal court against magistrate and district court judge for actions taken in connection with trial of summary ejectment action in which plaintiff was defendant.

Held: Both magistrate and district court judge have absolute immunity from civil liability for *judicial acts* performed within their jurisdiction. This is so even if such acts are alleged to have been done maliciously or corruptly. Such immunity is not limited to ultimate assessment of damages but is instead immunity from suit. A *judicial act* is one normally performed by a judge, and immunity applies when parties were dealing with judge in that judge's judicial capacity.