ATTORNEY FOR APPELLANT:

BRIAN J. HURLEY
Douglas Koeppen & Hurley
Valparaiso, Indiana

ATTORNEY FOR APPELLEES:

KEVIN E. STEELE
Burke Costanza & Cuppy LLP
Valparaiso, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EAST VALPARAISO, LLC,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 64A05-1004-PL-222
	)	
PHYSICIANS FOR WOMEN, P.C., CHRISTOPHER M. WIRSING, MARY ANN MEYER JONES, and MICHELLE WIRSING,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Special Judge
Cause No. 64D02-0903-PL-3195

October 20, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff East Valparaiso, LLC (East Valparaiso) brings this interlocutory appeal challenging the trial court's denial of its request for a preliminary injunction. Specifically, East Valparaiso argues that it was entitled to injunctive relief against the appellees-defendants Physicians for Women, P.C. (PFW), Christopher M. Wirsing, D.O.[1], Mary Ann Meyer Jones, M.D., and Michelle Wirsing (collectively, the Defendants) because the Defendants sublet the premises that they rented from East Valparaiso in violation of a written lease agreement. As a result, East Valparaiso claims that the Defendants' purported breach of the lease agreement entitled it to an order of eviction. We conclude that the trial court properly denied East Valparaiso's request for injunctive relief. However, we remand this case for further proceedings consistent with this opinion regarding the parties' remaining claims and counterclaims.

FACTS

George Uzelac is the sole owner of East Valparaiso's two buildings in the City of Valparaiso. PFW operates its business at one of the East Valparaiso locations. Drs. Wirsing and Jones practice medicine at that location and are employed by, and hold ownership in, PFW. Michelle Wirsing, who is Dr. Wirsing's wife, is also employed by PFW and works as the manager and agent for the owners of the practice.

Sometime in 2008, PFW sought to relocate its medical practice. During negotiations with East Valparaiso, Drs. Jones and Wirsing engaged in discussions with Uzelac about having laboratory and radiology services on the premises. According to Dr.

[1] Doctor of Osteopathy.

Jones, such services were "important to running [the business]." Appellee's App. p. 29. Uzelac responded that he had no problem with those additional services at the site. Moreover, Dr. Wirsing made it clear that he would not have leased the building had Uzelac indicated that he would not allow laboratory and radiology services at the location.

Following these negotiations, East Valparaiso and PFW executed a lease that became effective on October 6, 2008. The Wirsings and Dr. Jones signed as guarantors on the lease. A provision of the lease stated that notice would need to be given to East Valparaiso, followed by its written permission, before any assignment or sublease would be permitted. More particularly, section 12.1 of the lease agreement provided that

> Tenant agrees that neither this Lease nor any rights under this Lease may be assigned, nor may any portion of the Leased Premises be sublet, without the prior written consent of Landlord, which consent will not be unreasonably withheld. . . . Any transfer of this Lease from Tenant by merger, consolidation, liquidation or otherwise by operation of law will constitute an assignment for the purpose of this Lease and will require the written consent of Landlord. Tenant will not permit any business to be operated in or from the premises by any concessionaire or licensee without the prior written consent of Landlord.

Appellant's Ex. A at 48-49.

In December 2008, PFW—through Michelle Wirsing—entered into a Technical Services Agreement (TSA) with Quest Diagnostics, LLC (Quest). It is undisputed that Michelle had the authority to enter into contracts on PFW's behalf. The TSA required PFW to provide space for a phlebotomist, hired by Quest, to be on the premises to perform blood draws. PFW desired Quest to provide various onsite lab services for the

convenience of its patients. The blood draws would be for PFW's patients and Quest would pay no rent or utility expenses. However, Quest would bill the patients for the phlebotomy and lab services separately from the services that PFW provided. Moreover, Quest was to pay its own employee. The TSA stated that PFW would provide Quest with a work area, use of the restroom and common areas in the building, and access to and from the leased premises during PFW's regular business hours.

PFW opened a new location at the Belden Office Park in Valparaiso on February 16, 2009. PFW's patients were referred to Quest for onsite phlebotomy services and were billed directly by Quest.

At some point, Uzelac reconsidered his previous assent to Quest's presence at the site after the TSA had been executed. Uzelac had begun negotiations with Lab Corporation of America (Lab Corp.) for it to lease one of the other units adjacent to PFW's rented space. However, Lab Corp. would not agree to a lease if Quest was present on PFW's premises. As a result, East Valparaiso subsequently asserted that Quest's presence at the site violated the terms of the lease and impaired the value of the other units adjacent to the leased premises.

On February 18, 2009, East Valparaiso's legal counsel sent a letter to PFW's attorney, advising that Quest's presence on the site constituted a violation of the lease. However, Quest continued to provide phlebotomy services on the leased premises at PFW's direction.

On April 2, 2009, East Valparaiso filed a complaint against the Defendants for breach of the lease, money owed, and interference with a business relationship. More particularly, Count I alleged that Quest's presence on the leased premises constituted a violation of the contractual relationship between East Valparaiso and PFW. Moreover, East Valparaiso sought to evict PFW and remove Quest from the premises. East Valparaiso also sought damages for breach of the lease and any resulting injuries that were related to the claims of third parties that were caused by PFW or Quest.

As for Count II, East Valparaiso claimed that it was entitled to an amount sufficient to compensate it for expenses, fees, labor, and material costs associated with PFW's improvements of the leased premises. The improvements consisted of construction fees for the installation of a security system, window shades, an audio system, and a 10% oversight and management administrative fee to be added to all material and labor costs. PFW has not disputed that it owes East Valparaiso for the items that were installed on the premises. In fact, PFW filed documentation with the trial court that it intended to deposit the amount that it believed was due and owing to East Valparaiso.

Finally, under Count III, East Valparaiso sought an order mandating that Dr. Wirsing cease and desist from making threats or engaging in coercive communication with Lab Corp. regarding any proposed leasing arrangement or determent of the leasing arrangement with East Valparaiso.

On April 3, 2009, East Valparaiso moved to enjoin the Defendants from allowing Quest on the leased premises and ordering Michelle Wirsing to cease and desist from interfering with its business interests. More particularly, East Valparaiso presented the following reasons for the grant of injunctive relief: 1) the entry into a TSA between PFW and Quest; 2) failure to properly dispose of medical waste; and 3) PFW's failure to reimburse it for certain build-out expenses.

Although the trial court conducted a hearing on April 22, 2009, it did not rule on East Valparaiso's request for injunctive relief. Thereafter, PFW answered the original complaint and filed a counterclaim against East Valparaiso on May 11, 2009. Count I alleged that East Valparaiso had breached the contract. Count II asserted, among other things, that in order to induce PFW to sign a ten-year lease that it would not have entered into otherwise, East Valparaiso agreed to permit lab services at the leased premises. And Count III contended that if a mutual mistake was found to exist as to the provision of lab services on the leased premises, the contract must be rescinded and all expenses and lease payments that PFW made should be refunded and PFW would surrender the leased premises.

Thereafter, East Valparaiso amended its motion for a preliminary injunction, alleging that the evidence presented at the prior hearing established that the defendants breached the lease. Thus, East Valparaiso claimed that it was entitled to an order of eviction.

On March 10, 2010, the trial court denied East Valparaiso's request for injunctive relief. In its order, the trial court determined that the relationship between Quest and PFW did not violate the lease provisions because Quest was providing a service. Therefore, Quest's services did not constitute a "business" under the lease agreement, and the evidence demonstrated that PFW was not subletting the premises. Appellant's App. p. 9. Moreover, the trial court pointed out that Quest neither advertised nor operated as a public business. Quest also did not own any possessory rights in the leased premises and its representatives had no keys to the building when PFW owners and employees were not present. As a result, the trial court concluded that East Valparaiso was not entitled to injunctive relief on this claim.

The trial court next determined that the failure to dispose of medical waste is not a topic that is subject to injunctive relief. Although there were allegations that needles had been discovered in nonhazardous waste garbage cans and an employee of the janitorial service had been injured with an improperly discarded needle, the trial court noted that the remedy of damages was available. Moreover, it was determined that injunctive relief could not be granted because the alleged activity had ceased.

Finally, the trial court denied East Valparaiso's request for injunctive relief on its claim that PFW had failed to reimburse it for various build-out expenses. The trial court determined that East Valparaiso did not establish a successful prima facie case regarding the nonpayment of build-out expenses because the evidence established that it refused to accept the initial payment that PFW had offered.

East Valparaiso now appeals, claiming that its request for injunctive relief should have been granted because the evidence established that the Defendants breached the lease.

DISCUSSION AND DECISION

I. Standard of Review

Because East Valparaiso is appealing from the denial of its request for a preliminary injunction, we review the trial court's decision for an abuse of discretion. Mercho-Roushdi-Shoemaker-Dilley-Thoraco-Vascular Corp. v. Blatchford, 742 N.E.2d 519, 524 (Ind. Ct. App. 2001). More particularly:

> A party appealing from the trial court's denial of an injunction appeals from a negative judgment and must demonstrate that the trial court's judgment is contrary to law; that is, the evidence of record and the reasonable inferences drawn therefrom are without conflict and lead unerringly to a conclusion opposite that reached by the trial court. [PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C., 824 N.E.2d 376, 380 (Ind. Ct. App. 2005)]. We cannot reweigh the evidence or judge the credibility of any witness. Id. Further, while we defer substantially to the trial court's findings of fact, we evaluate questions of law de novo. Id.
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> When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. [Bigley v. MSD of Wayne Twp. Sch., 823 N.E.2d 278, 281-82 (Ind.Ct.App.2004)]. When findings and conclusions are made, the reviewing court must determine if the trial court's findings support the judgment. Id. at 282. The trial court's judgment will be reversed only when clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We consider the evidence only in the light most favorable

> to the judgment and construe findings together liberally in favor of the judgment. Id.

Zimmer, Inc. v. Davis, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010).

II. East Valparaiso's Claims

East Valparaiso claims that the trial court erred in granting its request for injunctive relief because East Valparaiso purportedly breached the lease by maintaining another business on the premises and subleasing to Quest without its written permission. As a result, East Valparaiso maintains that it is entitled to an order of eviction.

As noted above, East Valparaiso relies on the following provision of the lease in support of its contention:

> Tenant agrees that neither this Lease, nor any rights under this Lease, may be assigned, nor may any portion of the Leased Premises be sublet, without the prior written consent of Landlord, which consent will not be unreasonably withheld. . . . Tenant will not permit any business to be operated in or from the premises by any concessionaire or licensee without the prior written consent of Landlord.

Appellant's App. p. 48-49.

Pursuant to Haywood Trustee v. Fulmer, 158 Ind. 658, 659 32 N.E. 574, 575 (1892), a lease requires one person to divest himself of the possession of land. And a subletting "vests only a partial estate in the under-lessee, a reversion being left in the lessor. . . ." Indianapolis Mfg. & Carpenters Union v. Cleveland C., C., & I Ry.Co., 45 Ind. 281, 287 (1873). In other words, the original lessee remains liable to the landlord for the payment of rent under a sublease. Shadeland Dev. Corp. v. Meek, 489 N.E.2d 1192, 1199 (Ind. Ct. App. 1986).

In this case, the TSA specifically states that Quest provides services to PFW's patients as an "independent contractor." Appellant's App. p. 66. And the agreement makes it clear that Quest has no right to possess any particular portion of the leased premises. Moreover, Quest does not even have the right to occupy the premises when PFW's representatives are not present and pays no rent, taxes, or utility expenses. Id. at 66-67, 77. Additionally, the evidence shows that Quest was retained to draw blood from patients directed to it by Drs. Wirsing and Jones. There is no advertising for Quest at PFW and no members of the public or patients of other physicians were being served by Quest. Appellees' App. p. 11, 15. In light of these circumstances, the trial court properly concluded that PFW did not sublet the premises to Quest in violation of the lease agreement.

As an aside, we also note that while East Valparaiso claims that a violation of the lease occurred because it necessarily faced additional liability as a result of Quest's performance of laboratory services on the premises, a different section of the lease between PFW and East Valparaiso provides that PFW

> will indemnify . . . [East Valparaiso] from and against any and all liabilities, liens, claims, demands, damages, expenses, attorneys' fees, costs, fines, penalties, suits, proceedings, actions and causes of action of any and every kind and nature arising or growing out of, or in any way connected with, Tenant's use, occupancy, management or control of the Leased Premises and the Common Areas or Tenant's operations, conduct or activities in the Leasing Center or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its invitees, agents, employees or servants.

Appellant's App. p. 45. In light this indemnification provision, East Valparaiso's argument that it could incur additional liability based upon PFW's use of Quest to perform phlebotomy on the leased premises fails.

In sum, the evidence demonstrated that the agreement between PFW and Quest did not amount to a sublease. Rather, it is apparent that PFW retained Quest solely as an independent contractor to perform laboratory work on the premises. Therefore, East Valparaiso does not prevail on this basis.

Finally, even assuming solely for the sake of argument that the Quest/PFW agreement amounted to a sublease, the evidence also supports the trial court's determination that East Valparaiso agreed that PFW could enter into an agreement with Quest to permit it to provide phlebotomoy and laboratory services on the leased premises.

As discussed above, the record shows that during the lease negotiations, Dr. Wirsing asked Uzelac if he would permit Quest to provide phlebotomy services to PFW's patients on the premises. Appellees' App. p. 29. Uzelak voiced no objection to that proposition. Id. Moreover, at a meeting on February 2, 2009, which occurred after the lease had been executed, Dr. Wirsing again asked Uzelak about entering into an agreement with Quest. Dr. Wirsing testified that he "left [the] meeting with a very clear impression that Mr. Uzelac didn't have any objections to having . . . Quest . . . in our office." Id. at 25. And, as noted above, Dr. Wirsing testified that he would not have entered into the lease with East Valparaiso had Uzelac stated that Quest would not be

permitted to provide laboratory and radiology services at the site. Id. at 24. Dr. Wirsing then directed Michelle to enter into the TSA with Quest. Id.

Although Uzelac subsequently changed his mind about Quest—presumably because of the negotiations with Lab Corp.—Uzelac admitted to PFW's legal counsel that he had initially given his verbal permission to allow Quest on the premises. Appellee's App. p. 29. According to PFW's counsel, Uzelac stated

> I told Dr. Wirsing he could go ahead and have Quest in there, but I might change my mind because I've got a tenant who wants the remainder of unleased space on that floor of the building. . . . I had no idea what Mr. Uzelac was talking about. I was unaware of any issue involving Quest.

Id.

Inasmuch as East Valparaiso does not challenge the trial court's finding that East Valparaiso orally agreed to allow Quest on the premises, we note that a landlord may waive strict compliance with the terms of a lease. More particularly,

> It is well settled that where one party has by his representations or conduct induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he will not in a court of justice be permitted to avail himself of that advantage. [Citations omitted]. The rule stated is uniformly applied in insurance cases as appears from the authorities cited; but it is a rule of general application, based on good morals and sound reason, and its enforcement tends to uphold good faith and fair dealing. It is therefore applicable in cases arising between landlords and tenants.

Whitcomb v. Indianapolis Traction and Terminal Co., 64 Ind.App. 605, 618-19, 116 N.E. 444, 448 (1917).

In this case, based upon East Valparaiso's assent to the presence of Quest, the evidence shows that PFW executed the TSA with Quest. As a result, we will not permit East Valparaiso to avail itself of the advantage that was gained by its own representations.

For all these reasons, we conclude that East Valparaiso has failed to show that the evidence in the record leads unerringly to a conclusion opposite that reached by the trial court. PrimeCare Home Health, 824 N.E.2d at 380. As a result, we decline to set aside the denial of East Valparaiso's request for injunctive relief. While we affirm the trial court's judgment, we also remand this case for further proceedings consistent with this opinion regarding the parties' remaining claims and counterclaims.

The judgment of the trial court is affirmed and remanded.

ROBB, J., and MAY, J., concur.