STATE OF MICHIGAN

COURT OF APPEALS

GIORGIO VOZZA and LAURIE VOZZA, d/b/a G.L. INVESTMENTS,

Plaintiffs-Appellees,

v

ROBERT L. GARROW and SHERRON L. GARROW,

Defendants-Appellants,

and

GARROW & ASSOCIATES,

Defendant.

UNPUBLISHED
October 5, 1999

No. 209893
Grand Traverse Circuit Court
LC No. 96-015563 CK

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

This case involves defendant tenants' alleged breach of a lease agreement for premises used in the operation of an ice cream shop. Following a bench trial, the court entered a judgment in favor of plaintiff lessors in the amount of $47,748.38, including attorney and accountant fees. Defendants appeal as of right from the judgment and a pretrial decision partially denying their motion for summary disposition. We affirm.

Defendants first contend that the trial court erred in concluding that a consent judgment entered in a prior lawsuit between the parties was not res judicata with regard to this action and that the terms of the consent judgment did not preclude the trial court from awarding plaintiffs attorney and accountant fees in this case. We find no error. For res judicata to apply, defendants must establish that: (1) the former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies. *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998).

Here, the former lawsuit was decided on the merits and both the former and present lawsuits involved the same parties. Thus elements (1) and (3) were established. However, unlike this case, the former lawsuit only involved the collection of rents due and owing under an ongoing lease agreement. "A landlord's action for rent has been recognized as a distinct cause of action that differs from other available remedies for breach of a lease contract." *M & V Barocas v THC, Inc*, 216 Mich App 447, 450; 549 NW2d 86 (1996). In the instant case, defendants not only failed to pay rent, but they also vacated the premises and attempted unsuccessfully to obtain plaintiffs' agreement to terminate the lease. Plaintiffs accordingly sued for damages associated with defendants' breach of the lease agreement, including defendants' anticipatory repudiation of their future rent obligations and their abandonment of the premises, as well as for termination of the lease. Because this case was a substantively different cause of action involving issues that had not been resolved in the former proceeding, res judicata did not bar plaintiffs' lawsuit. *Id.*

Further, because defendants disputed their obligations under the lease by claiming their obligations were terminated by the operation of a legal surrender, legal proceedings were necessary to settle the nature of defendants' obligations. For the court to decide this issue, plaintiffs hired an accountant to certify that the records of the ice cream business were properly kept and that the business was run separately and apart from plaintiffs' other businesses. These expenditures were reasonably related to the termination of the lease, rather than to the mere collection of unpaid rent. Therefore, the doctrine of res judicata did not bar plaintiffs from seeking reimbursement for fees paid to their attorneys and accountants in the present action, and we remand for a determination by the trial court of reasonable fees, including attorney's fees attributable to the instant appeal.[1]

Defendants also contend that the trial court erred in rejecting defendants' theory that plaintiffs possession of the leasehold following defendants' abandonment constituted a legal surrender and waived any rent due under the lease. Again, we disagree. This issue involves review of the trial court's application of the law to the facts. The trial court's findings of fact are reviewed for clear error and its legal determination is reviewed de novo. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 128 (1997).

The trial court ruled that plaintiffs' act of taking possession of and continuing to operate the ice cream business "was a reasonable attempt on [their] part to mitigate [their] damages and did not operate as a surrender."

> Surrender of a lease involves more than mere abandonment of the premises by the tenant; it requires a mutual agreement between landlord and tenant to terminate the lease. . . . No surrender occurs where the landlord refused to accept the tenant's surrender of the premises. . . . The burden of proving surrender is on the party asserting surrender. . . . [*M & V Barocas, supra* at 450; citations omitted.]

In this case, when plaintiffs were notified that defendants' sub-lessee was quitting the property, plaintiffs responded by notifying the sub-lessee's attorney that they still considered defendants, not the sub-lessee, responsible for complying with the terms and obligations of the lease. During the pendency of plaintiffs lawsuit for unpaid rent, defendants informed plaintiffs that defendants were not asserting a

claim to possession of the premises; plaintiffs responded by advising defendants they were in default under the lease, that plaintiffs regarded this as a breach of contract and an anticipatory repudiation of the lease agreement, and that action would be necessary to terminate the lease. Plaintiffs were unable to find a new lessee, and were finally forced to operate the business themselves. Under these circumstances, defendants did not demonstrate a mutual agreement between the parties to terminate the lease; instead plaintiffs refused to accept surrender of the premises and only occupied them in a reasonable effort to mitigate their damages. As the trial court noted, plaintiffs were, in effect, acting as agents for defendants in re-letting the premises to their corporation in order to generate revenue and thereby reduce defendants' liability on the lease. *Stewart v Sprague,* 71 Mich 50, 52-7; 38 NW 673 (1988); *Briarwood v Faber's Fabrics Inc,* 163 Mich App 784, 787-89; 415 NW2d 310 (1987). Further, plaintiffs kept the business records associated with the ice cream business completely separate from those relating to their other businesses. The trial court therefore correctly held that there was no legal surrender of the leasehold. Defendants did not demonstrate a mutual agreement between the parties to terminate the lease; instead plaintiffs refused to accept surrender of the premises and only occupied them in an effort to mitigate their damages.

Defendants also argue that the trial court erred in determining that plaintiffs' new "lease" between their two closely held corporations was undertaken merely to mitigate damages because the court previously ruled that plaintiffs' occupation and operation of the business without an arrangement to pay themselves rent would constitute a waiver of any rent due from defendants. However, this mischaracterizes the court's original ruling. Rather, the initial ruling was simply an indication that evidence or authority would have to be presented on this issue.[2] Plaintiffs' presentation of uncontroverted evidence on this point at trial resolved the issue. Accordingly, the trial court correctly concluded, after considering the evidence at trial, that plaintiffs properly attempted to mitigate their damages by operating the ice cream business, that they paid themselves no rent because no profits were generated, and that no waiver of rent owed by defendants resulted.

Affirmed in all respects, except that we remand for a determination of attorney's fees in accordance with the terms of this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter

[1] Paragraph 23 of the lease agreement provides that "[u]pon termination of this lease, the Landlord . . . shall be entitled to reimbursement from Tenant for any costs it may incur, including attorney fees, in the enforcement of the terms of this Lease." We believe that this paragraph is applicable to the instant action which clearly seeks to terminate the lease, in contrast to the prior District Court action which was directed toward the enforcement of the lease through the collection of unpaid rent. When the prior civil action was concluded, plaintiffs collected unpaid rents but defendants remained the assignees of the lease with the right to possess the premises, and they continued to be liable for the payment of rent in the future. We agree with plaintiffs that, if the prior consent judgment controlled this case, defendants here would not have denied that they were liable under the lease and the present action would not have

needed to be commenced. We also agree that the costs recovered by plaintiffs, including the accountant costs, were reasonably connected to the termination of the lease, rather than to the mere collection of unpaid rent.

[2] The trial court stated in this regard:

> The Court believes that there are these then remaining factual issues regarding the absence of a rental payment and legal questions regarding the ability to pursue differential rent where the landlord charges none to his own corporation, that at least at this point the Court is not going to grant either motion as it relates to surrender or abandonment, but will require that the parties brief that specific issue further.
>
> In the absence of authority for the landlord to collect differential damages without charging his own corporation rent, the Court would advise the parties it is inclined to find if not an accepted surrender of the premises, estoppel from the ability to claim the damages where the landlord has not charged its own corporation rent.

The trial court thus did not rule that plaintiffs' failure to collect rent from its corporation absolved defendants from any liability for unpaid rent, but rather only indicated that this was its "inclination" in the absence of any other evidence or authority. At trial, plaintiffs presented the testimony of their accountant, Lane, who stated that there were no irregularities or improprieties in plaintiffs' bookkeeping, that there was no evidence that the business was being operated to avoid or hide income, that the gross profits generated were typical for this type of business, and that the business incurred net operating losses in 1996 and 1997. Lane further stated that, although it was not an ideal situation from the standpoint of the IRS, the business arrangement chosen by plaintiffs was an acceptable process under the circumstances-- those circumstances being that it was futile to make journal entries for rent that would not be paid because there was no profit from which to pay it. Defendants failed to present any evidence to contravene Lane's testimony. The trial court's original ruling was simply an expression of its inclination and an indication that evidence or authority would have to be presented on this issue.