

STATE OF MICHIGAN
COURT OF APPEALS

CHRIS FASNAKIS and RENEE FASNAKIS,

Plaintiffs/Counterdefendants-
Appellees,

v

HARBHAJAN SINGH,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED

February 4, 2000

No. 210113

Oakland Circuit Court

LC No. 95-493972-CH

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ

PER CURIAM.

Harbhajan Singh appeals as of right the trial court's order granting injunctive relief to Chris and Renee Fasnakis regarding a building they own in the City of Clawson, which they leased to Singh. At issue is whether Singh effectively assigned his interest in the leased premises to a third party, Afhiq Hussain.¹ We affirm.

I. Basic Facts And Procedural History

On July 10, 1990, Singh leased a portion of a commercial building in the City of Clawson, which the Fasnakis owned, to operate a gas service station, "C" store,² and automobile repair facility. The written lease was for five years, with two conditional, five-year options to renew and an assignment provision that stated:

ASSIGNMENT - The Tenant covenants not to assign or transfer this lease or hypothecate or mortgage the same or sublet said premises or any part thereof without the written consent of the Landlord. Any assignment, transfer, hypothecation, mortgage or subletting without said written consent shall give the Landlord the right to terminate his [sic] lease and to re-enter and repossess the leased premises. Consent shall not unreasonably [sic] withheld.

Subsequently, Singh sold his business and agreed to assign his interest in the leased premises to Hussain. On January 3, 1995, Hussain took possession of the leased premises, subject to the lease. Whether

Chris and/or Renee Fasnakis orally assented to assigning the lease to Hussain is in dispute. However, the parties agree that, on or about March 15, 1995, the Fasnakises notified Singh in writing that they were terminating the lease because of Singh's breach of the lease assignment provision. The Fasnakises then changed the locks on the doors of the gas station, denying Hussain entry. It is unclear whether Singh ever received a set of keys to the leased premises after the Fasnakises changed the locks, although the Fasnakises contend that they offered to give a set of keys to him.

Chris and Renee Fasnakis filed a complaint alleging that they did not consent to Singh's assignment of the lease to Hussain and seeking injunctive relief that would bar Hussain from the premises. Singh filed a countercomplaint contending that the Fasnakises orally consented to the lease assignment and that they then unreasonably withheld consent for that assignment, evidently by changing the locks. Singh asked the trial court to order the Fasnakises to give consent to the assignment.

After holding an evidentiary hearing on the matter, the trial court made several, explicit findings of fact, including: (1) the Fasnakises did not consent to the assignment in writing; (2) Singh did not approach them about agreeing to an assignment until *after* Hussain had already taken possession of the premises, failing to obtain advance consent in writing as the lease required; (3) the Fasnakises had never met Hussain, nor did they have any financial information about him, such as a credit report; (4) the Fasnakises did not unreasonably withhold consent to the assignment without this financial information; (5) the Fasnakises did not consent to the assignment or create a license by giving the keys to Hussain at the March 15 meeting because, by refusing to accept rent from Hussain on several occasions, they demonstrated their unwillingness to accept him as a tenant; (6) there was waste on the property, including accumulated refuse and doors removed from their hinges; and (7) what the Fasnakises did³ was an effort to mitigate damages. On the basis of those findings, the trial court found in favor of the Fasnakises on the complaint and countercomplaint. With regard to Hussain's status on the property, the trial court concluded that, without a proper assignment, he was a trespasser. Accordingly, the trial court declared the assignment to Hussain "void" and ordered Hussain "and his respective agents, attorneys, and those persons who act in concert with him, including Defendant Harbhajan Singh, . . . permanently enjoined from trespassing or remaining in possession of the premises" The trial court also dismissed Singh's countercomplaint.

The trial court, however, permitted the Fasnakises to file a supplemental complaint seeking to terminate Singh's lease and a writ of restitution in order to regain possession of the premises. Although it is not clear that he received leave to do so, Singh also filed an additional countercomplaint for damages alleging illegal lockout, tortious interference with contractual relations, denial of civil rights, and seeking return of a security deposit. After a considerable period of litigation on these supplemental complaints, including an attempted appeal as of right to this Court, which was dismissed for lack of jurisdiction, the parties stipulated to dismiss this case without prejudice in order to appeal the trial court's injunction.

II. Issues On Appeal

On appeal, Singh presents only a single issue for this Court to resolve:

Did the trial court commit reversible error when it issued an injunction enjoining appellant's assignee from operating at the leasehold where there was a lease provision requiring appellees' written consent to an assignment, but the record established verbal consent to the assignment?

Substantively, Singh challenges the trial court's failure or refusal to find oral consent to the assignment. He contends that the trial court did not acknowledge that, even though the lease required written consent to an assignment, foreign case law makes oral consent binding under an estoppel theory, especially when economic gain⁴ is the motivation for withholding consent. Singh also argues that trial court erred when ruling on the motions for summary disposition on the supplemental complaints filed in this case. For the reasons outlined below, we only address whether the trial court properly issued the original injunction in this case in light of Singh's argument that the record demonstrates oral consent to the assignment.

III. Preservation And Presentation Of The Issues

To preserve an issue for this Court's review, a party must raise the issue in the lower court. *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 235; 553 NW2d 371 (1996). Here, Singh opposed the complaint for injunctive relief. Therefore, Singh preserved his challenge to the injunction.

Insofar as Singh claims that the trial court erred by granting partial summary disposition, he has not properly presented that argument to this Court for review. Ordinarily, this Court will not address an issue if the appellant does not set it forth in the statement of questions involved. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). As noted above, Singh's statement of the issue on appeal only challenges the trial court's decision to issue the injunction without contesting the trial court's later ruling granting partial summary disposition. Thus, Singh's argument that the trial court erred in granting partial summary disposition does not conform to MCR 7.212(C)(5) and we do not address it.

IV. Standard of Review

"A trial court's decision to grant injunctive relief is reviewed under an abuse of discretion standard." *Michigan State AFL-CIO v Secretary of State*, 230 Mich App 1, 14; 583 NW2d 701 (1998). An abuse of discretion is found only in extreme cases in which the court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

To the extent that this issue requires us to examine the trial court's findings of fact, we review those findings for clear error. MCR 2.613(C). "[A] finding is clearly erroneous when, on review of the

whole record, this Court is left with the definite and firm conviction that a mistake has been made.” *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).

V. The Assignment Of The Leased Premises

A. Findings On Oral Consent

Preliminarily, we must note that the trial court did not make any *explicit* findings regarding oral consent. However, after reading the trial court’s extensive findings, we have no choice but to conclude that the trial court *implicitly* found that neither Chris nor Renee Fasnakis orally consented to the assignment. Specifically, the trial court found that

the Fasnakis’s [sic] have not unreasonably withheld their consent. It is not unreasonable that you not give a consent to a lease which has an ongoing obligation by another party when you’ve never met them, whether you’ve never had financial – or that you have not had a credit history. . . . [T]he Fasnakis’s [sic] have not unreasonably withheld their consent.

The factual predicate to this conclusion is a finding that they did not consent to assignment in any manner, whether written or oral. The trial court’s failure to make this finding explicit does not, in any sense, render it less apparent on the record and in the context of the findings as a whole.

B. Evidence Of Oral Consent

The record bears out the trial court’s conclusion that there was no oral consent. At the January 1996 evidentiary hearing, from which the trial court made its findings of fact, Singh testified that he gave Chris Fasnakis papers regarding the lease assignment to Hussain and that Chris Fasnakis verbally consented to the assignment. However, Renee Fasnakis unequivocally testified that she never consented to the assignment in writing or orally, which Singh never disputed. When defense counsel examined Chris Fasnakis, he testified to the following with respect to oral consent:

Defense Counsel: Did you tell him [Singh] that he could assign the lease to Mr. Hussain?

Chris Fasnakis: I go home and I take it to my wife to discuss, you know. I told him this, yes.

Defense Counsel: You didn’t tell him there was no problem, that he could assign it?

Chris Fasnakis: No, I didn’t tell him no problem. I didn’t tell him nothing.

Defense Counsel: Have you given him permission in the past to assign the lease?

Chris Fasnakis: (Inaudible) yes, I mean, if he told me he was going to sell. He brought a lot of people to work, I mean, that we were seeing and some guy was supposed to rent, I don't know what happened, then the first thing I see, before even –

Defense Counsel: Well, okay, answer my question please.

Trial Court: Let's move on.

Chris Fasnakis: Did you every verbally tell Doctor Singh that he couldn't assign the property?

Defense Counsel: That he what?

At this point, it became clear that Chris Fasnakis did not understand defense counsel. To help the examination go more smoothly, the trial court asked the following questions.

Trial Court: Am I correct, he [Singh] came to you.

Chris Fasnakis: Yes.

Trial Court: He gave you the papers.

Chris Fasnakis: Yes.

Trial Court: You said you wanted your wife.

Chris Fasnakis: Yes.

Trial Court: What else did you say.

Chris Fasnakis: Nothing, nothing else.

Given the trial court's opportunity to hear this testimony by the parties and to weigh their credibility as witnesses to resolve their conflict account of the consent issue, MCR 2.613(C), we have no basis on which to conclude that the trial court clearly erred in finding that neither Chris nor Renee Fasnakis orally consented to the lease assignment. Accordingly, it is not necessary to determine whether Michigan law holds that oral consent may waive an express provision of a lease to require assignment in writing. Even if that rule does exist in Michigan, it would not apply to the facts of this case.

C. The Injunction

In *Senior Accountants, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996), we explained that

[a]n injunction represents an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. *Reed v Burton*, 344 Mich 126, 132; 73 NW2d 333 (1955). As a consequence, the courts have fashioned an array of principles designed to clarify when such extraordinary powers are appropriately exercised. Generally, three core elements must be established by a party seeking an injunction: (1) justice requires that the court grant the injunction; (2) a real and imminent danger of irreparable injury arises if an injunction is not issued; and (3) there exists no adequate remedy at law. *Peninsula Sanitation, Inc v Manistique*, 208 Mich App 34, 43; 526 NW2d 607 (1994).

After examining the record, we have no doubt that the trial court acted within the proper scope of its discretion in issuing the injunction. The stakes in this case are, to the Fasnakis, extremely high in that Singh attempted to force a new tenant on them without giving them any opportunity to inquire about Hussain's fitness as a tenant. Moreover, there was evidence that Hussain's tenancy was not necessarily harmless to the Fasnakis. In particular, they introduced photographic evidence at trial that apparently demonstrated that the premises were not being kept in good repair and free from refuse during his tenancy. Most critically, as the trial court noted, Hussain had no right to be on the property because there was no assignment of the lease. Justice required this equitable relief.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra

¹ Hussain was also a defendant in one of the actions below, but is not a party to the present appeal.

² Evidently, a "C" store is a convenience store.

³ Presumably, the trial court was referring to the decision to change the locks.

⁴ Singh contends that the Fasnakis wanted higher rent payments in return for consenting to the assignment.