

STATE OF MICHIGAN
COURT OF APPEALS

RETROFIT, INC.,

Plaintiff-Counterdefendant-
Appellee/Cross-Appellant,

v

TERRI HELBICH,

Defendant-Counterplaintiff-
Appellant/Cross-Appellee.

and

WOLFGANG HELBICH and H & H
ENTERPRISES,

Defendants/Counterplaintiffs.

UNPUBLISHED

July 19, 2002

No. 229877

Kent Circuit Court

LC No. 98-007869-CK

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

This case arises from a dispute between defendant Terri Helbich¹ and her father, Fred Nesky, the owner and sole shareholder of plaintiff Retrofit, Inc.² Although the parties asserted various claims and counterclaims, this case essentially involved a claim for breach of contract. Defendant appeals as of right from a judgment for plaintiff, and plaintiff counter appeals. We affirm.

Defendant first argues that the trial court erred in granting partial summary disposition in favor of plaintiff because it erred, when limiting a setoff, in failing to give effect to a written lease agreement in which plaintiff agreed to pay late fees. We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

¹ Because the other two defendants are not parties to this appeal, we refer to Terri Helbich as defendant.

² Because of Nesky's role at Retrofit, hereinafter "plaintiff" refers to both Retrofit and Nesky.

Pursuant to a lease agreement, plaintiff paid \$698 per month until plaintiff abandoned the property roughly one year into the three-year lease term. Soon thereafter, defendant leased the property to someone else for \$640 per month. In assessing damages, the trial court limited damages to past due rents until the space was leased to the new tenant, as well as the monthly \$58 dollar difference between the lease amount and the new tenant's lease amount. Defendant challenges the trial court's denial of a ten percent late charge.³

Both parties agree with, and case law supports, the proposition that a landlord has the duty to mitigate his or her damages in the event the tenant breaches. *M & V Barocas v THC, Inc.*, 216 Mich App 447, 449, 549 NW2d 86 (1996). Here, defendant did so by leasing the property to someone else. Defendant provides no authority for the proposition that a late fee provision of the contract survives reletting of the property. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In the absence of any authority for that proposition, and where defendant's recovery from plaintiff and rents from the new tenant place her in the position she would have been had the original lease agreement not been breached, we find that the trial court did not err in determining the amount of the setoff.

Defendant next challenges the trial court's rulings made after a bench trial. Specifically, defendant argues that the trial court erred in finding defendant liable for payment of extra costs in the absence of her approval, including electrical extras, certain wall and floor covering costs, and certain landscaping and architectural costs, and for payment of additional monies. We review a trial court's findings of fact for clear error. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "A finding of fact is clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

Having reviewed the record, we find evidentiary support for the trial court's findings of fact. The trial court acknowledged that both parties' cases relied heavily on credibility. With issues of the relative credibility of witnesses, this Court defers to the factfinder. MCR 2.613(C); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998) ("this Court may not attempt to resolve credibility questions anew"). Because the record contains evidence to support the trial court's decision and because credibility is left to the factfinder, we find no clear error here.

On cross-appeal, plaintiff argues that the trial court erred in not enforcing the written contract ("contractor agreement") signed by the parties. Instead, the trial court found the parties had made an oral agreement. As a matter of fact, the trial court found that plaintiff failed to establish that the purported written contract represents the agreement between the parties. "Contractual liability is consensual and will not arise unless the parties mutually assent to be bound." *Barber v SMH (US), Inc.*, 202 Mich App 366, 369; 509 NW2d 791 (1993); see *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) (elements of a valid contract). If there is

³ As part of its terms and conditions, the lease contract states "[I]f any rental [sic] specified in this Lease is not paid within seven (7) days from the date on which the rental payment is due, Lessee agrees to pay a late charge of ten (10%) percent per month for each month, or part thereof, that such rental [sic] shall not have been paid."

conflicting evidence, the question of credibility should be left for the factfinder. See *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968).

While some evidence of an agreement was presented, conflicting evidence was also presented that indicated that the parties did not intend to be bound by the written agreement. Among other things, the trial court considered plaintiff's testimony that he did not recall ever signing what he purported was the contract. Although plaintiff stated that the contractor agreement, which purportedly incorporated ten percent of the cost as a contractor fee, was a written contract, defendant testified that she did not intend for the agreement to serve as a contract. Rather, she stated that the ten percent figure was intended only to increase the estimated cost of the building so that she could borrow more money from the bank. Moreover, the trial court observed that plaintiff's argument during discovery was that the terms of agreement were controlled by an oral agreement, and that plaintiff did not remember that the contractor agreement even existed until the bank produced it. Under these circumstances, we find no clear error in the trial court's finding that plaintiff failed to establish that the contractor agreement presented to the bank was the agreement between the parties.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra