RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001624-MR

RAMSEY ENTERPRISES, A KENTUCKY PARTNERSHIP;
WILLIAM N. RAMSEY JR, CHILDREN'S TRUST, PARTNER;
G. FRANK RAMSEY, TRUSTEE, PARTNER;
THE G. FRANK RAMSEY CHILDREN'S TRUST, PARTNER;
WILLIAM RAMSEY SR, TRUSTEE, PARTNER;
SUSAN RAMSEY ALDRIDGE, PARTNER;
G. FRANK RAMSEY, INDIVIDUALLY;
AND WILLIAM N. RAMSEY JR, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 98-CI-00647

JOHNNIE LEMASTER SPORTS, INC.,
A KENTUCKY CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Ramsey Enterprises ("Ramsey"), appeals from a judgment of the Pike Circuit Court entered upon a jury verdict in favor of Appellee, Johnnie LeMaster Sports, Inc. ("LeMaster"). Ramsey owned a shopping center and leased space to LeMaster to operate a retail sporting goods store. The jury determined that Ramsey had breached a restrictive covenant in the lease by subsequently leasing property in the same shopping center to another retail sporting goods store and awarded $427,000.00 in damages.

On appeal, Ramsey contends that the trial court erred in denying its motions for directed verdict, judgment notwithstanding verdict and/or for a new trial because Ramsey did not breach the lease, and/or the evidence was insufficient to support the damages awarded. Ramsey also argues that it is entitled to a new trial because the trial court gave a "highly erroneous" and misleading instruction on damages. Finding no error, we affirm.

The lease, between Ramsey and LeMaster, executed March 16, 1992, was for an initial term of three years with an automatic extension for two additional terms of five years each. The lease provides, in pertinent part:

> The tenant [LeMaster] desires to lease from the Landlord [Ramsey] certain property located [at Weddington Square Shopping Center] in Pikeville, Kentucky, for the operation of a Retail Sporting Goods Store, and the Landlord desires to lease such property to the Tenant; NOW THEREFORE, in consideration of the mutual covenants and agreements of the parties herein contained, and for other good and valuable consideration, the receipt of which are hereby acknowledged by the parties hereto, the parties agree as follows:
>
> . . . .
>
> 25(j) Exclusivity. Tenant agrees that at all times during the Term of this Lease, it will not directly or indirectly, or through a subsidiary or affiliate, operate any business similar to the Retail Store within a radius of five (5) miles of the Square. **Landlord agrees that during the term of this Lease that Landlord shall not lease space in the Weddington Square to another "Sporting Goods" store that derives the majority of its sales from the sale of sporting goods. Tenant agrees and understands that there may be Men's or Ladies' Clothing Stores in the**

> **Weddington Square that derive a portion of their sales from sporting apparel and footwear.** (Emphasis added.)

In January 1998, Ramsey entered into a lease with another business, Acton Enterprises, d/b/a Sports Sensation, for the operation of a "FOOTWEAR AND APPEARL [sic] STORE."

On May 12, 1998, LeMaster filed a complaint against Ramsey in Pike Circuit Court alleging, *inter alia*, that Ramsey had breached the lease by leasing space at Weddington Square to Sports Sensation for the purpose of operating a business engaged in the selling of sporting goods. On May 1, 2000, the case proceeded to trial. The jury rendered a verdict in favor of LeMaster awarding $427,000.00 in damages for violation of the subject provision of the lease. On May 8, 2000, the trial court entered judgment on the jury verdict. On May 17, 2000, Ramsey filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial which was denied by order entered June 30, 2000. On July 5, 2000, Ramsey filed a notice of appeal to this court.

On appeal, Ramsey first contends that the trial court should have granted its motions for directed verdict and for judgment notwithstanding the verdict, because "as a matter of law" Ramsey did not breach the lease.

> [The] purpose of a motion for judgment notwithstanding the verdict is the same as that of [a] motion for directed verdict; when either motion is made, the trial court must consider [the] evidence in its strongest light in favor of [the] nonmoving party and must give that party the advantage of every fair and reasonable intendment that the

> evidence can justify. Appellate court considers the evidence in the same light . . . .

Lovins v. Napier, Ky., 814 S.W.2d 921,922 (1991).

According to Ramsey, it is uncontroverted that Sports Sensation sells primarily "sporting apparel and footwear." Ramsey maintains that "sporting apparel and footwear" should not be construed as "sporting goods" erroneously relying upon Keyes v. Carrick, Ky. App., 268 S.W.2d 397 (1954).

In Keyes, the lease had been assigned to a jewelry store provided that "[l]essors will not rent to any person, firm or corporation premises in the same building . . . during the period of this lease **for any purpose inimical to the purpose herein granted lessees**." *Id.* at 399. (Emphasis added.) Another tenant subsequently opened a retail jewelry business in the same building. At issue was the construction of the term, "inimical."

> It would have been easy to insert in the [first] lease a covenant whereby the lessor agreed not to lease any other portion of the premises for a jewelry store, or for a business competitive to that of the lessee. Certainly the word "inimical" does not clearly mean or include "competitive," and applying the strict construction rule must be construed as not preventing a competitive business.

Id. at 402.

Here, the LeMaster lease does contain a covenant whereby Ramsey agreed not to lease any other space in Weddington Square to "another Sporting Goods store that derives the majority of its sales from the sale of sporting goods." Kentucky courts have consistently upheld the enforceability of a restrictive

covenant in a lease, when it is limited as to territory and duration. Mendell v. Golden-Farley of Hopkinsville, Inc., Ky. App., 573 S.W.2d 346, 348 (1978).

Ramsey also relies upon Pulliam v. Wiggins, Ky. App., 580 S.W.2d 228 (1978). Pulliam does not involve the issue we are asked to decide. There, the lessee agreed to build a "drive-in restaurant of the Frisch's Big Boy type." A covenant in the lease provided that the lessors agreed not to lease, assign, or sell any other property for a similar type business. The lessors specifically reserved the right to have other restaurants with inside service, provided that they were located in the shopping square proper. A dispute arose over subsequent plans to build a free-standing Bonanza Restaurant. The issue, in Pulliam, was whether Bonanza was within the shopping center proper, *not* whether Bonanza was a "similar-type" business to Frisch's.

We agree with LeMaster that this case is more in accord with Buckaway v. J-Town Center, Inc., Ky., 475 S.W.2d 642 (1972). There, plaintiffs operated a beauty shop in a shopping center owned by the defendant, J-Town Center, Inc. The lease agreement between the parties contained a covenant in which the lessor agreed "not to lease any other property within the shopping center for a beauty shop during the term of the lease." *Id.* at 643. A dispute arose after J'town leased space to a beauty school. The Court distinguished Keyes, supra, and explained:

> [T]he crucial question of whether the operation of a "beauty school" is in violation of the restriction against other "beauty shops" in the shopping center. Under the circumstances of this case we hold that

> it is. A strong argument could be made to the contrary in view of the strict construction position we have taken in the past concerning covenants in restraint of trade. Cf. Keyes v. Carrick, Ky., 268 S.W.2d 397 (1954). However, it is clear that the purpose of the restrictive covenant in this lease and the intention of the parties were to prohibit competition with the beauty shop, and the evidence is abundant that the beauty school was in fact competing with the beauty shop. Therefore, we find it unnecessary to utilize a rule of construction and find that there has been a breach of the restrictive covenant in the lease.

Buckaway v. J-Town Center, Inc., supra, at 644.

In reviewing the evidence supporting a judgment entered upon a jury verdict, our role is limited to determining whether the trial court erred in failing to grant the motion for directed verdict:

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. Kentucky and Indiana Terminal R. Co. v. Cantrell, 298 Ky. 743, 184 S.W.2d 111 (1944) and Cochran v. Downing, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Lewis v. Bledsoe, Ky., 798 S.W.2d 459,461-62 (1990).

Here, evidence was presented that the majority of Sports Sensation's sales derive from sporting apparel and footwear. There was evidence that Sports Sensation sells the same lines of apparel and footwear as LeMaster. Thomas Doyle, vice president of the National Sporting Goods Association ("NSGA"), testified that such apparel and footwear are classified as sporting goods by the NSGA. There was evidence presented that the intention of the parties was to prohibit competition with LeMaster's Weddington Square store. We conclude, based upon our review of the record, that the jury's verdict is based upon substantial evidence, and it was not reached as a result of passion or prejudice. The trial court did not err in denying Ramsey's motions for directed verdict and judgment notwithstanding the verdict.

Ramsey also contends that the trial court erred in denying its motions for directed verdict, for judgment notwithstanding the verdict, or alternatively, for a new trial, because the evidence was insufficient to support the damages awarded.

Ramsey maintains that LeMaster's evidence of lost profits was "inherently flawed and highly misleading," in part, because LeMaster failed to include sales data for Weddington Square for June and July 1999. Ramsey attempts to persuade us that, as a result of this error, the testimony of LeMaster's expert, Marc Ray, should have been disregarded. John Petot, a CPA, was Ramsey's expert. Petot explained that the omitted sales data had been attributed to LeMaster's other store in Paintsville

in error. Petot testified that this was apparently due to a computer glitch. Clearly, this information was brought to the attention of the jury. It was the jury's prerogative to determine the weight and credibility of the evidence.

LeMaster responds that Ray is a CPA, certified in Accredited Business Valuation with substantial experience performing lost profits analyses. LeMaster notes that Petot did not criticize Ray's methodology, nor did Petot provide his own estimate of damages sustained. LeMaster contends — and we agree — that if Ramsey believed Marc Ray's opinion was based upon faulty financial data, one would have expected an "attack" at trial, but there was none.

We have reviewed the testimony of the two CPAs. Ramsey had every opportunity to cross-examine Ray and to expose the jury to any inaccuracy in his testimony. Ramsey also had the opportunity to present his own expert's estimate of damages. Ramsey chose not to do so. He cannot now be heard to complain about the jury's reliance upon Ray's testimony.

Ramsey also complains that LeMaster "further exacerbated" the unreliability of its damages proof by including Ray's figure of $150,000.00 for lost gross margin. Ramsey contends that these damages were speculative. Ray testified, based upon a "reasonable professional certainty," that LeMaster had sustained damages in the total amount of $670,000.00 as a result of Sports Sensation's opening a business next door. Ray's opinion was based upon: (1) future projected loss of profits from unrealized sales for the duration of the lease term in the amount

of $520,000.00 and (2) lost gross margin or a decline in profitability against the "sales we do have" (reduced profit on the sales that were not lost) in the amount of $150,000.00.

Kentucky law holds that:

> Loss of anticipated profits as an element of recoverable damages for breach of contract is fully recognized in Kentucky. Graves v. Winer, Ky., 351 S.W.2d 193 (1961). Mere uncertainty as to the amount will not preclude recovery. Roadway Express, Inc. v. Don Stohlman & Assoc., Inc., Ky., 436 S.W.2d 63 (1968). There must be presented, however, sufficient evidence on which a reasonable inference as to the amount of damage can be based. McCormick, Handbook on the Law of Damages, Sec. 28, 106-06 (1935). In proving a claim of loss of profits of an established business, the record of past profits is usually the best available evidence.

Illinois Valley Asphalt, Inc. v. Harry Berry Inc., Ky., 578 S.W.2d 244, 245-46 (1979).

Ray reviewed and relied upon historical business data in formulating his opinion — sales tax returns from 1992-1999, annual financial statements from 1992-1998, monthly financial statements by store, a breakdown of retail versus organizational sales, an analysis of hard goods versus soft goods, as well as the corporate tax returns. Sufficient evidence was presented from which a reasonable inference as to the amount of damage could be based. Moreover, as LeMaster notes, the point raised about gross profit margin was not presented to the trial court in the motion for directed verdict. We find no error.

Ramsey also argues that the trial court should have granted its motion for a new trial under Kentucky Rules of Civil Procedure (CR) 59.01. Ramsey again argues that LeMaster's

evidence of lost profits was flawed and contends that the "maximum" damages the jury should have awarded was $286,694.01. This figure represents Ramsey's own "reconstructed" lost profits analysis. LeMaster notes that Ramsey did not present this analysis at the trial court level. The jury awarded LeMaster less than its expert calculated. The verdict has a substantial evidentiary foundation. The trial court did not abuse its discretion in denying the motion for a new trial.

Ramsey also claims entitlement to a new trial on ground that the "highly erroneous and misleading damages instruction" constituted reversible error. Ramsey cites no authority but contends that the instruction "undoubtedly influenced" the jury to award a "grossly high sum." The argument is without merit. The jury was instructed that it could award damages in a sum not to exceed $670,000. The instruction was consistent with LeMaster's proof; moreover, the jury awarded substantially less than the instruction allowed. There was no error.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Herman W. Lester
Pikeville, Kentucky

John K. Bush
Christy A. Ames
Greenebaum, Doll & McDonald
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

John K. Bush
Greenebaum, Doll & McDonald
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Jim Vanover
Vanover, Hall & Bartley
Pikeville, Kentucky