RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NOS. 2001-CA-000056-MR, 2001-CA-000097-MR,
2001-CA-000099-MR and 2001-CA-000131-MR

CONVENIENT INDUSTRIES OF AMERICA,
INC. and CONNA CORPORATION — APPELLANTS/CROSS-APPELLEES

APPEALS AND CROSS-APPEALS FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 90-CI-006010

LAWRENCE ROSEN, SUSAN ROSEN,
WILLIAM J. LEWIN, PATRICIA J. LEWIN,
STACEY A. ROSEN, JOHN G. SCHOUTEN,
CAROLINE W. SCHOUTEN, DENNIS LAKNER,
JEAN MARC SNYERS, and
MARIE MAGDELENA SNYERS-LEMAIRE — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING ON APPEAL
AND
AFFIRMING ON CROSS-APPEAL

** ** ** ** **

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. Convenient Industries of America, Inc., (Convenient) and Conna Corporation appeal from the final judgment of the Jefferson Circuit Court awarding the appellees, Lawrence Rosen, *et al*. (Rosen), the sum of $168,543.80. This is

the third appeal involving these same parties concerning litigation as to the terms of a 1966 lease agreement between Convenient and Rosen's predecessor-in-title, Levi Tyler. The sole issue for our review is whether the trial court's most recent judgment is consistent with the previous decisions and directives of this Court.

Convenient argues that the trial court erred in awarding pre-judgment interest; in awarding post-judgment interest from December 21, 1994; and in granting Rosen's motion for costs. Rosen contends that this Court's 1999 opinion is erroneous and contrary to our first opinion rendered in 1997. He argues that the trial court erred in following the 1999 opinion and in denying him rent which he alleges is owed by Convenient for the period 1975 to 1983. We conclude that the trial court's judgment correctly complies with the directives contained in this Court's two previous opinions with one exception -- the date as to which Rosen is entitled to post-judgment interest. Thus, we reverse only that portion of the judgment which conflicts with our earlier mandate as to setting post-judgment interest. In all other respects, we affirm.

The facts and the procedural history of this case have been recited twice before.[1] We will attempt to avoid unnecessary

[1] See, Rosen v. Convenient Industries of American, Inc., No. 95-CA-000354-MR, opinion rendered January 10, 1997, and Convenient

repetition and will recount here that portion of the factual and procedural background relevant to a resolution of this appeal.

In 1966, Convenient leased property from Tyler for a food mart. The lease provided for the payment of rent calculated by adding a percentage of the store's gross sales to a fixed amount. In 1967, Convenient installed gasoline pumps on the property. Tyler and Convenient agreed to factor in only the commission that Convenient received on the sale of the gasoline rather than using gross gasoline sales in figuring the gross store sales portion of the rental equation.

In 1983, Rosen and a group of investors purchased the property -- including the lease with Convenient. Rosen was unaware of the agreement and practice to exclude the gross gasoline sales from the rent calculations. It was not until 1989 that Rosen discovered that gasoline commissions (instead of gross sales) were utilized in the formula according to which Convenient paid its rent. In 1990, Rosen filed a lawsuit seeking an award for rent calculated pursuant to the precise, written terms of the lease agreement. At the conclusion of the trial, the lower court directed a verdict for Convenient, finding that the parties to the 1966 lease had not anticipated gasoline sales to be included in "gross sales" for the purpose

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Industries of America, Inc. v. Rosen, No. 1998-CA-001229-MR, opinion rendered July 16, 1999, motion for discretionary review denied by the Supreme Court of Kentucky on August 16, 2000.

of computing the amount of rent because gasoline pumps were not installed until a year after the lease was negotiated.

In the first appeal of this matter, this Court held: (1) that the 1966 lease was not ambiguous; (2) that the term "gross sales" included the sale of gasoline; and (3) that although Rosen's predecessor had waived the right to have rent calculated by agreeing to the use of commissions instead of the gross sales of gasoline, Rosen had "a right to assert a claim for percentage rent based upon the unmodified and unambiguous 1966 lease." The matter was remanded with directions that the trial court enter a summary judgment in favor of Rosen on the sole issue of the proper interpretation of the lease. This Court did not determine the amount of Rosen's damages, nor did it address the time period for which he was entitled to claim damages.

On April 20, 1998, the trial court awarded Rosen damages totalling $102,745. This sum included back rent beginning in 1975, pre-judgment interest compounded annually, post-judgment interest from December 4, 1994, and costs. In the second appeal, Convenient argued that the trial court erred in awarding back rent before Rosen's acquisition date of 1983 and in awarding post-judgment interest before a final judgment in Rosen's favor had been entered. Convenient prevailed on both issues.

In the second opinion rendered in this matter, the Court held as follows:

> In essence, the Court [in its 1997 opinion] concluded that Levi Tyler's waiver was not binding upon Rosen. As Levi Tyler waived entitlement to increased rental payments, we cannot see how Rosen could possibly be entitled to back rental payments before 1983. Hence, we believe implicit in the Court's opinion is that Rosen may collect back rent commencing only in 1983.
>
> Addressing the issue of post-judgment interest, we note that an "arrearage" is a liquidated sum. As such, we are of the opinion that prejudgment interest is mandated. [Citation omitted.] We are further of the opinion that post-judgment interest, under KRS[2] 360.040, shall not commence to run until entry of a new judgment conforming to this opinion. [Emphasis added.]

In the judgment currently before us, the trial court awarded Rosen the sum of $168,543.80, including: $47,882.87 in back rent for the period from 1983 until 1991, pre-judgment interest (8%) compounded annually, post-judgment interest (12%) from December 1994, and costs. The appeals and cross-appeals that followed have been consolidated for our review.

We first address Rosen's cross-appeal. He argues that the trial court erred in refusing to make its award for back rent retroactive to 1975 -– the date from which he alleges that he is entitled to pursue back rent under the statute of

[2] Kentucky Revised Statutes.

limitations applicable to contract disputes. The thrust of Rosen's argument is that the 1999 opinion is legally flawed and inconsistent with the 1997 opinion. We do not find any inconsistency between the two previous opinions of this Court.

The 1997 opinion established Rosen's right to rent based on the gross amount of gasoline sales rather than on the lower amount of commissions. However, we did not hold that Rosen was entitled to collect rent accruing during his predecessor's ownership and prior to his acquisition of the property in 1983. This Court agreed that while Tyler had waived any right to rent calculated on the gross sales of gasoline, his waiver did not bind Rosen, who was entitled to enforce the terms of the written lease.

The 1999 opinion addressed the issue of <u>when</u> Rosen became entitled to enforce the contract. It concluded that Rosen was not entitled to the rent waived by his predecessor prior to 1983 and that Rosen's entitlement to the rent commenced only in 1983, the time at which he acquired an interest in the property and the commercial agreement. It also concluded that Rosen was not entitled to rent waived by his predecessor prior to 1983. The two opinions deal with two separate issues and are wholly consistent with one another.

The general rule in Kentucky is that a decision rendered by an appellate court on a particular issue between the

same parties in the same case -- whether "right or wrong" -- is binding on the parties and the trial court. Martin v. Frasure, Ky., 352 S.W.2d 817, 818 (1962); see also, William v. Commonwealth, Ky., 767 S.W.2d 323 (1989). Relief from this Court's 1999 opinion (that Rosen could not be awarded any amount for rents owed prior to 1983) could only have been obtained by further review in the Kentucky Supreme Court, which denied Rosen's motion for discretionary review. See, note 1, infra. Since the trial court's judgment limiting its award for rent conforms to the previous rulings of this Court, it cannot be disturbed.

In its appeal, Convenient is correct in arguing that the trial court's judgment does not comply with this Court's mandate on the issue of the commencement of post-judgment interest. As stated above, this Court determined that post-judgment interest should not commence to run until entry of a judgment in conformity with this Court's opinion: "... post judgment interest, under KRS 360.040, shall not commence to run until entry of a new judgment conforming to this opinion." (Emphasis added.) Opinion of July 16, 1999. Nevertheless, the trial court awarded post-judgment interest from December 1994. The trial court is bound by this Court's 1999 decision and may award post-judgment interest only after a judgment in favor of Rosen consistent with the 1999 opinion has been entered. So

far, there has been no judgment entered which wholly complies with the directives of this Court. Rosen is not entitled to post-judgment interest until entry of a judgment conforming to the directives of the 1999 opinion of this Court.

Convenient also argues that the trial court erred in awarding pre-judgment interest. It reasons that an award of pre-judgment interest is appropriate when the damages are liquidated; that is, "made certain or fixed by agreement . . . or by operation of law." Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (1991). Convenient contends that Rosen's claim for damages "has been anything but certain or fixed."

In Kentucky, pre-judgment interest may be awarded "where justified by the facts of a particular case." State Farm Mutual Auto Insurance Co. v. Reeder, Ky., 763 S.W.2d 116, 119 (1988). Regardless of whether the damages are liquidated, the trial court has discretion in awarding pre-judgment interest. Nucor, supra. This issue was addressed and decided in this Court's previous opinion. See Opinion of July 16, 1999, at p. 5. The trial court was directed to include pre-judgment interest in its award. Therefore, we affirm on this argument.

Finally, Convenient argues that the trial court erred in awarding Rosen his costs. Stating that neither party "has been entirely successful," Convenient contends that "it is equitable and appropriate that each party" bear its own costs.

Again, we find no error. While it is true that Convenient was successful in the second appeal in limiting Rosen's damages, it cannot seriously be argued that Rosen was not the "prevailing party" in the over-all context of this protracted litigation. See, Lewis v. Grange Mutual Casualty Company, Ky., 11 S.W.3d 591 (2000). We find no abuse of the broad discretion of the trial court in awarding costs. See, CR[3] 54.04(1); KRS 453.040(1).

The judgment of the Jefferson Circuit Court is reversed only with respect to the time of the commencement of post-judgment interest, and the case is remanded for entry of a judgment consistent with this Court's opinions. In all other respects, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-APPELLEES:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
Robert Y. Gwin Ann E. Georgehead Louisville, Kentucky	Dan Siebert Louisville, Kentucky

[3] Kentucky Rules of Civil Procedure.