RENDERED: MAY 2, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002144-MR

JOHN MASON, D.M.D., GENERAL MANAGING PARTNER OF MASON/ PARKLAND, LTD.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NOS. 97-CI-005977 & 97-CI-005978

JEFF UNDERHILL; TODD UNDERHILL; GEORGE T. UNDERHILL & ASSOCIATES LLC, D/B/A UNDERHILL ASSOCIATES (GENERAL PARTNER OF MASON/PARKLAND, LTD.); MASON/PARKLAND, LTD.; AND NADAR G. SHUNNARAH

APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING
AND REMANDING IN PART

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: John Mason, D.M.D., general managing partner of Mason/Parkland, Ltd., appeals from the Jefferson Circuit Court's second amended judgment[2] awarding damages for his breach of a lease agreement to appellees,

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] The second amended judgment resulted from an initial judgment followed by changes in light of several motions to reconsider.

including Mason/Parkland, Ltd. and Underhill Associates. We affirm in part, and reverse and remand in part.

I. Facts

Mason/Parkland, Ltd. is a Kentucky limited partnership which was formed in 1993 to develop property commonly referred to as the "Parkland Project." Pursuant to the limited partnership agreement, the general partners in Mason/Parkland are Underhill Associates and John Mason. The Housing Partnership, Inc. is the special limited partner, and National City Bank and Jack Daniels Distillery are the limited partners.

Mason, as the managing partner, was vested with "control and management of the business of the Partnership[.]" Further, pursuant to the limited partnership agreement, the partnership contracted with Underhill Associates to provide "[a]ll rental and maintenance services[.]" In that capacity, Underhill Associates had the duty of, *inter alia*, collecting rents and maintaining an operating bank account and tenant escrow account.

Mason/Parkland leased to Mason the property where he operated his dental office. Pursuant to the parties' lease agreement, Mason was to pay $29,875 per year ($2,489.59 per month) for a five-year term ending December 31, 1998, after which Mason had the option of renewing for another five-year term at $13,125 per year ($1,093.75 per month), provided that he was "not in default of any term, covenant, condition or agreement" of the lease. The lease agreement also contemplated a second similar five-year renewal term with an adjustment tied to the Consumer Price Index.

Mason initially made the monthly rent payments; however, Underhill Associates did not receive any payments from him after January 1996. As set forth in

the trial court's findings of fact, Mason ceased paying rent due to his concern with Underhill Associates' "accounting practice of combining accounts from several commercial/residential projects into a single trust account as opposed to maintaining a separate account for each project."[3] As the trial court further explained, "[t]he cessation of rental payments coincided with a deterioration of the working relationship between Dr. Mason and Underhill Associates[']] management representatives[.]" Underhill Associates' management sought removal of Mason as managing partner; however, The Housing Partnership refused to assent to his removal as required by the limited partnership agreement.

In July 1997 Dr. Mason sold his dental practice to Bryan Lawrence, D.D.S. He also entered into an agreement to lease his dental office to Lawrence for a ten-year term beginning August 1, 1997, for $2,489.59 per month plus a common area maintenance (CAM) fee of $200 per month.

In September 1997, Underhill Associates served Mason with a thirty-day notice to vacate the rental property, asserting that he owed in excess of $63,000. Mason responded that he had continued making the rent payments as due by paying them into a Mason/Parkland account which he had established as managing partner. Mason further indicated his intent to transfer management of the property to another company, and to collect commercial rent himself through a corporation known as J. Mason Development, Inc. The trial court found that "[t]his never occurred."

Underhill Associates filed suit in October 1997 seeking, *inter alia*, Mason's monthly rent payments. The trial court granted summary judgment in Underhill Associates' favor

[3] As set forth in the trial court's findings of fact, "[a]n audit of Mason/Parkland for the year ended December 31, 1995 revealed some material weaknesses in accounting procedures but no irregularities."

> for the rent owed by Dr. Mason from February 1996 through November 2002 at the initial rate of $29,875 per year until November 1998 and the minimum renewal rate of $13,125 per year from November 1998 through November 2002. The issue of whether the rent should accrue at a higher rate was reserved for trial.

After a bench trial and several motions to reconsider, the trial court found that Underhill Associates was entitled to the following on behalf of Mason/Parkland:

> 1) $523,041.50 representing rent plus a 10% penalty and 18% interest as of July 1, 2006. The court concluded that Mason was not entitled to the lower renewal rental rate because he was in default at the time of renewal.
>
> 2) $28,163.39 representing a monthly CAM fee plus the legal judgment interest rate from November 10, 2003, until July 1, 2006. Although the amount for this expense was left blank in the parties' lease agreement, the trial court awarded these damages *quantum meruit*.
>
> 3) Attorneys' fees in the amount of $21,168.50.
>
> 4) Assignment of the sublease between Mason and Lawrence to Mason/Parkland, Ltd. and all payments thereunder to be made to Underhill Associates.

This appeal followed.

II. Standard of Review

We note at the outset that because a bench trial was held below in this matter, CR[4] 52.01 governs our review. Under this rule, the trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." However, the "construction and interpretation of a written instrument are questions of law for the court. We review questions of law de novo and, thus, without deference to the interpretation afforded by the circuit court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998) (internal citation omitted).

III. Breach of Lease Agreement

[4] Kentucky Rules of Civil Procedure.

First, Mason argues that the trial court erred by finding that he breached his lease agreement by failing to pay rent, since he paid rent into an account he established as the managing partner of Mason/Parkland. We disagree.

Mason concedes that pursuant to the management agreement between Mason/Parkland and Underhill Associates, Underhill Associates was authorized to collect rent on the partnership's behalf. Indeed, the management agreement provides for Underhill Associates to perform "[a]ll rental and maintenance services[,]" specifically including collecting rent. However, Mason points out that his obligation pursuant to the lease agreement was to pay monthly rent to "Landlord," i.e., Mason/Parkland at 100 Kentucky Towers, Louisville, "or to such other address as Landlord may designate." He argues that he acted within his capacity as managing partner of Mason/Parkland by designating another address when he "gave written notice that he would be placing his rent into a separate Partnership account[.]"

The trial court found that any disagreements between Mason and Underhill Associates did not 1) displace or nullify the management agreement, or 2) obviate Mason's legal obligations under his lease agreement with the partnership. Moreover, Mason's argument emphasized his role as managing partner of the partnership and minimized his obligations as a tenant. The trial court continued:

> [I]f Dr. Mason's argument is accepted as true, his role as managing partner of Mason/Parkland gave him the authority not only to unilaterally change the terms of his private Lease Agreement, but also to unilaterally alter the terms of the partnership's Management Agreement with Underhill. This Court finds no basis for allowing Dr. Mason such a sweeping power. Because he did not have the unfettered authority to change the terms of his Lease Agreement or the provisions of the Management Agreement, the only logical conclusion is that reached previously by this Court – that his actions resulted in a breach of the former contract.

While we note that the limited partnership agreement vests broad powers in the managing partner,[5] we also recognize that there is "no relation of trust or confidence known to the law that requires of the parties a higher degree of good faith than that of a partnership. *Nothing less than absolute fairness will suffice*." *Monin v. Monin*, 785 S.W.2d 499, 500 (Ky.App. 1989) (citing *Van Hooser v. Keenon*, 271 S.W.2d 270, 273 (Ky. 1954)). As Chief Judge Cardozo explained, copartners

> owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (internal citation omitted). To be sure, some courts have even applied a heightened fiduciary duty on managing or senior partners. 59A Am.Jur.2d *Partnership* §281 (2003).

Here, Mason deposited his monthly rental payments into an account he established, over which only he had access and control. While Mason paid from this account his own legal and accounting fees and one $94 invoice with which he was presented, the trial court found that in the meantime, "Mason/Parkland's balance sheets reflected negative cash balances for several years due to the absence of tenant income including rental payments owed by Dr. Mason. The partnership continued to meet

[5] For instance, the agreement expressly states that "the Partnership shall have the power to do any and all things whatsoever necessary, appropriate, or advisable in the discretion of the Managing Partner in connection with" the partnership's purposes, among which is to "own, operate and/or lease the Project[.]"

expenses because cash receipts from other Underhill Associates projects paid the partnership obligations." Under these circumstances, we cannot disturb the trial court's findings that Mason acted outside the scope of his authority.

IV. Monthly Rate

Next, Mason argues that the trial court erred by holding that he did not renew his lease agreement at the lower rental rate. We disagree.

Again, Mason's lease agreement provided that if he was

> not in default of any term, covenant, condition or agreement of this Lease, and shall prior to one hundred eighty (180) days from end of the initial term of this Lease so request, in writing, Landlord shall grant to Tenant the following renewal term: 5 years at the annual rent of $13,125.00 or $1,093.75/month.

The trial court held that Mason was "not entitled to the lower rental rate of $1,093.75 per month beginning November 1998 because he was in default of the Lease Agreement."

As the trial court did not err by finding that Mason was in default at the time he could have renewed his lease pursuant to the lease agreement, it follows that he was neither entitled to the lower rental rate nor entitled to renew his lease at all. As such, the terms of his tenancy were governed by KRS 383.160(1), which relates to holdover tenancy. Pursuant to that statute,

> where the lease is for a term of a year or more and after the expiration thereof the tenant holds over for ninety days, the lease is renewed for a year from the date the lease expired; and at the end of that year if the tenant again holds over for ninety days, the lease is extended for another year, and so on from year to year until the tenant abandons the premises, is turned out of possession or makes a new contract.

Cass v. Home Tobacco Warehouse Co., 223 S.W.2d 569, 571 (Ky. 1949). Moreover, "[w]here the lease is thus renewed by holding over under this statute, it is presumed that the terms of the original lease are carried over into the extension provided by the statute." *Id.* Thus, it is without question that Mason's year-to-year holdover tenancies

were at the rate of $2,489.59 per month, and any discussion of why the parties originally set the monthly rate at this amount is irrelevant.

V. CAM Fees

Next, Mason argues that the trial court erred by requiring him to pay CAM fees. We disagree.

The lease agreement between Mason and Mason/Parkland addressed Mason's share of the CAM fees as follows:

> As its contribution to the payment of common Area Expenses Tenant agrees to pay to Landlord as additional rent the sum of _____ Dollars ($_____) per month for each of the first _____ Lease Years. Prior to the _____ Lease Year, Landlord shall provide Tenant with an adjustment to the foregoing amount, reflecting the anticipated increase of Landlord's Common Area Expenses for the remainder of the Lease Term. Landlord's failure to so provide the adjustment shall not excuse Tenant's payment of said adjusted amount when provided.

The trial court held that while these blanks were never completed, Mason was required to pay a monthly CAM fee *quantum meruit* because the lease contemplated such payments, and Mason benefited from the maintenance of the common areas. Indeed, the sublease required Lawrence to pay Mason CAM fees of $200 per month.

As this court explained in *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky.App. 1987):

> A contract implied by law allows for recovery *quantum meruit* for another's unjust enrichment. It is not based upon a contract but a legal fiction invented to permit recovery where the law of natural justice says there should be a recovery as if promises were made. The courts supply the fiction of the promise to permit the recovery. Furthermore recovery *quantum meruit* may be had irrespective of the intentions of the parties, and sometimes even in violation of them.

However, this court has also held that "unjust enrichment has no application in a situation where there is an explicit contract which has been performed." *Codell Constr.*

Co. v. Commonwealth, 566 S.W.2d 161, 165 (Ky.App. 1977). Further, Kentucky's then-highest court held that "there can be no implied contract or presumed agreement where there is an express one between the parties in reference to the same subject matter." *Fruit Growers Express Co. v. Citizens Ice & Fuel Co.*, 112 S.W.2d 54, 56 (Ky. 1937).

Obviously the parties here entered into a lease agreement; however, the agreement had an uncompleted section relating to the rate and term of CAM fees. Thus there was no express contract between the parties regarding this issue. When a contract is missing a term not vital to the formation of the general agreement, but otherwise necessary to the determination of the rights of the parties in a dispute, the courts will imply a reasonable term. *See e.g.*, *Humphreys v. Central Ky. Natural Gas Co.*, 229 S.W. 117, 119 (Ky. 1920). As that is what the trial court did here, we will not disturb its judgment.

VI. Calculations in Second Amended Judgment

Mason also argues that the calculations in the trial court's second amended judgment are incorrect. We agree in part.

A. Rent

Both parties submitted calculations below reflecting the amounts Mason owed for rent, penalties, and interest. While the parties' figures were largely the same, the trial court adopted Underhill Associates' calculations. We agree with Mason's argument that these calculations incorrectly applied an 18% annual interest rate to all amounts he owed in 1996, even though he did not miss his first payment until February of that year. On remand, Underhill Associates is entitled to only 11/12 of the 18% annual interest calculated on the amounts due in 1996.

Mason's proposed calculations below applied the 18% per annum interest rate through the end of June 2006, while Underhill Associates' calculations applied the

interest rate through the end of September 2006. Mason argues that the trial court erred by adopting Underhill Associates' calculations in this regard because Underhill Associates should have tendered its amended judgment to the trial court by June 8, 2006. However, regardless of when Underhill Associates should have tendered its amended judgment, the trial court ultimately directed Mason to pay:

> [r]ent plus 18% interest as of July 1, 2006 $523,041.50
>
> . . . .
>
> . . . plus post judgment interest for rent at the contract rate of 18% per annum **until paid in full**[.]

(Emphasis added.) This is consistent with the lease agreement, which provides that "[a]ny sums owing to landlord . . . shall bear interest at the rate of eighteen percent (18%) per annum from the date the same are due or expended **until paid**" (emphasis added). The judgment shall be amended on remand to reflect interest accordingly.

Finally, although not fleshed out in his brief on appeal, Mason refers to his argument below that the trial court erred by failing to award him credit for his alleged 2005 payment of $1,093.73 to the Receiver for his December 2003 rent, since Lawrence also paid $2,489.50 for that month's rent. Underhill Associates' calculations reflect no such payment. Although Mason provides a citation to evidence of Lawrence's payment,[6] he fails to provide a citation to evidence of his own payment other than "Check No. 1021." Mason has provided an inadequate reference to the record, *see* CR 76.12(4)(c)(iv), and we are unwilling to search the record to find evidence to support his claim, *see Horn v. Horn*, 430 S.W.2d 342, 344 (Ky. 1968). Accordingly, we shall not disturb the trial court's judgment in this regard.

B. CAM

[6] Mason provides the following citation: "See Ledger from Receiver, attached as Exhibit 1 to Dr. Mason's Motion to Reconsider[.]"

As with the amount owed in rent, both parties submitted calculations below regarding the amount Mason owed in CAM fees and post-judgment interest. The parties agree that Mason initially owed a CAM fee of $123 per month and at some point the CAM fee was raised to $200 per month. However, Mason argues that the higher rate was not applicable until August 1, 1997, while Underhill Associates' calculations reflect that the higher rate was applicable beginning July 1, 1997. We agree with Mason that the higher rate was not applicable until August 1, 1997, since the higher rate was based upon Lawrence's sublease, which began on that date. On remand, the judgment shall be amended accordingly.

Mason also argues that Underhill Associates incorrectly calculated interest on the CAM fee beginning in January 2004, as opposed to June 24, 2004, when the judgment against Mason was entered. We agree since KRS 360.040 provides that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." Further, as with the amount of rent Mason owes, as discussed above, the trial court's judgment provides that the legal judgment interest rate shall apply to the CAM fees "until paid in full[.]" On remand, the interest on the CAM fees shall be calculated accordingly.

VII. Sublease

Next, Mason argues that the trial court erred by assigning his sublease with Lawrence to Mason/Parkland and ordering that all payments thereunder be made to Underhill Associates. We disagree.

Mason's lease agreement with Mason/Parkland prohibited Mason from assigning the lease or subletting any portion of the premises without Mason/Parkland's written consent. Prior to the end of his first five-year rental term, Mason entered into a ten-year sublease of the premises with Lawrence. In Article 1 of the lease, Mason

"represented and warranted" that he had permission from Mason/Parkland to enter into the sublease with Lawrence.

Regardless of the form of Lawrence's leasehold interest, it is clear that the rent Lawrence pays ultimately belongs to Mason/Parkland. After all, as Mason concedes in his brief, if we held that the sublease was valid, Lawrence would be obligated under landlord-tenant law to pay Mason, who then would be obligated to pay Mason/Parkland. *See Venters v. Reynolds*, 354 S.W.2d 521, 523 (Ky. 1961) (assignee under a lease is liable to the landlord for the payment of rent; sublessee is liable to the lessee). And under partnership law, Mason owes to Mason/Parkland any monetary benefits which he might attain from his sublease with Lawrence. *See generally* 59A *Partnership* Am.Jur.2d §295 (2003) ("partner has a duty to share with the partnership those business opportunities clearly related to the subject of its operations"). Further, if we instead held that the sublease was invalid, Mason/Parkland would be, as it notes in its brief, "free to transact[] business with any reputable tenant." There is no indication that Mason/Parkland desires to evict Lawrence; of course, that is not the subject of this litigation. Under these different scenarios, the expedient and equitable course of action is to assign the lease to Mason/Parkland, which the trial court did. We will not disturb its decision in this regard.

VIII. Attorneys' Fees

Finally, Mason argues that the trial court erred by awarding attorneys' fees to Underhill Associates. We disagree.

The lease agreement expressly provides as follows:

> If Landlord places the enforcement of this Lease or any part of the same, or the collection of any rent or other sums due or to become due hereunder, or the recovery of possession of the Premises, in the hands of an attorney, or files suit upon the same, Tenant agrees to pay to Landlord the reasonable fees of Landlord's attorney as additional rent and

> the failure to promptly pay the same shall give rise to Landlord's remedies for failure to pay rent.

Since we held above that the trial court did not err by finding that Mason was in default of the lease, and it is undisputed that an attorney filed suit on Underhill Associates' behalf to collect Mason's rent, the trial court did not err by awarding attorneys' fees in the matter.

The Jefferson Circuit Court's second amended judgment is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views expressed herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

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T. Morgan Ward, Jr.
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