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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001391-MR

SHAFER PLAZA VI, LTD. — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 05-CI-00424

TIMOTHY LANG; AND
REM LANG — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Shafer Plaza VI, Ltd., appeals from a jury verdict awarding Timothy Lang and Rem Lang damages for wrongful eviction from commercial property. Shafer Plaza contends the trial court erred by: (1) failing to

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

enforce the choice of law and forum-selection clauses in the contract; (2) denying its motion for directed verdict on the basis that the Langs were delinquent in their rent payments; and (3) denying its motion to vacate, alter, or amend the judgment on the basis that the damage award was not supported by competent evidence.

On November 6, 2000, the Langs executed a five-year lease with Shafer Plaza, a Texas limited partnership, for commercial property located in Bowling Green, Warren County, Kentucky. The lease contained a choice of law provision and forum-selection clause, which specified:

> The laws of the State of Texas shall govern the interpretation, validity, performance and enforcement of this lease. Venue for any action under this lease shall be the county in which Rental is to be paid pursuant to Section 4.2 and Section 1.1 of this lease.

Section 4.2 provides that the rental payments shall be made at the landlord's address as set forth in Section 1.1. Section 1.1. states the landlord's address as located in Dallas, Texas.

Apparently, the parties' contractual relationship was fraught with difficulty from the outset. The Langs were penalized for late payments on numerous occasions. In 2003, Shafer locked out the Langs from the premises for failure to make timely payment. However, Shafer permitted the Langs to continue operating the restaurant when payment was made. On March 14, 2005, Shafer sent agents to lock out the Langs from the property for nonpayment. The agents ordered the Langs and their employees to vacate the premises and the locks were changed. The Langs were not permitted to remove any of their property from the

building. The Langs never reoccupied the property and filed suit in Warren Circuit Court alleging breach of contract and wrongful eviction.

Shafer filed a motion to dismiss the suit on the basis of the forum-selection clause. The trial court denied the motion and found that it would be unfair and unreasonable to enforce the provision. Trial was held before a jury. The jury found in favor of the Langs and awarded them $10,000.00 for lost profits, $80,000.00 for mental distress, humiliation, and embarrassment, and $50,000.00 for lost or destroyed property. This appeal followed.

Shafer argues that the trial court erred by failing to enforce the choice of law and forum-selection clauses in the lease and denying its motion to dismiss the suit. The Langs filed a response and affidavit in opposition to the motion.

The rule in Kentucky is that forum-selection clauses shall be enforced as *prima facie* valid unless the party opposing enforcement can demonstrate circumstances that would render the clause unfair or unreasonable. *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997). In determining whether a forum-selection clause is unreasonable, the trial court should consider the following factors: "the inconvenience created by holding the trial in the specified forum; the disparity of bargaining power between the two parties; and whether the state in which the incident occurred has a minimal interest in the lawsuit." *Id.* Appellate decisions in this Commonwealth have uniformly applied Kentucky law in the interpretation of forum-selection clauses. *Wilder v. Absorption Corp.*, 107 S.W.3d 181 (Ky. 2003); *Prezocki v. Bullock Garages, Inc., supra*; *Prudential*

Resources Corp. v. Plunkett, 583 S.W.2d 97 (Ky.App. 1979). Moreover, we believe that the Texas rule governing the interpretation of forum-selection clauses is virtually identical to our own: "enforcement of forum-selection clauses is mandatory unless the party opposing enforcement 'clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *In re Automated Collection Technologies, Inc.*, 156 S.W.3d 557, 559 (Tex. 2004).

Applying the *Prezocki* factors, we believe, as did the trial court, that enforcement of the forum-selection clause under these circumstances would constitute an unreasonable hardship. As small business owners, the time and expense of travelling to Texas to pursue their suit would essentially deprive the Langs of their day in court. There was a disparity of bargaining power between the parties in that the lease was a complicated eighteen-page pre-printed document that was offered on a "take it or leave it" basis. The only connection to Texas is that it is the location of Shafer Plaza's residence. Except for Shafer Plaza, the absentee owner, every witness to this matter resided in Warren County. The Langs' business is located in Kentucky and the lease was signed in Kentucky. Shafer Plaza's action of locking the Langs from the property occurred in Kentucky. The trial court did not err by finding that the forum-selection clause was unenforceable.

Next, Shafer Plaza argues that it was entitled to a directed verdict because the Langs were delinquent in their rent payments. The standard of review for a motion for directed verdict is well established:

> when an appellate court is reviewing evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a 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. 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 the result of passion or prejudice.

Bierman v. Klaphehe, 967 S.W.2d 16, 17 (Ky. 1998).

The Langs did not make a rental payment in March 2005. However, their theory of the case was that they had paid the rent in advance by overpayment. Shafer Plaza introduced a ledger into evidence which both parties relied on to demonstrate the history of payments made by the Langs. During his testimony, Mr. Lang counted out the number of payments he made using the ledger as a reference. Mr. Lang testified that he was three months ahead on his rent payments. Additionally, Mr. Lang testified that Shafer Plaza demanded a payment of $12,000.00 after the first lockout, which he paid, and was not accounted for in the ledger. The evidence presents a close question; however, issues of weight and credibility are left to the trier of fact. This Court cannot conclude that there was such an absence of proof as to compel a directed verdict in favor of Shafer Plaza.

Nor can this Court conclude that the verdict reached by the jury was so flagrantly against the evidence as to be the result of passion or prejudice.

Finally, Shafer Plaza argues that the damages for lost profits and loss of property awarded in this case were not supported by the evidence.

> Loss of anticipated profits as an element of recoverable damages for breach of contract is fully recognized in Kentucky. Mere uncertainty as to the amount will not preclude recovery. There must be presented, however, sufficient evidence on which a reasonable inference as to the amount of damage can be based. In proving a claim of loss of profits of an established business, the record of past profits is usually the best available evidence. Mere "estimates" of witnesses will not serve, if books were kept. McCormick states: "Opinions of witnesses as to the amount of profits that would have been gained are not admissible, except where the opinion is that of an expert based upon relevant facts."

Illinois Valley Asphalt, Inc. v. Harry Berry, Inc., 578 S.W.2d 244, 246 (Ky. 1979)(internal citations omitted). There is no single definition of "reasonable certainty" and the issue of whether reasonable certainty has been established must be considered on a case-by-case basis. *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985).

While the Langs did not present any expert testimony, Mr. Lang testified as to his approximate monthly earnings at the restaurant in the past rather than to a future expectancy of profits. This testimony was supported by ledger sheets for the restaurant as well as the Langs' tax returns. We find that there was sufficient evidence to sustain the jury's award for lost profits.

Finally, Shafer Plaza argues that the Langs relied upon an improper measure of damage to support their claim for loss of personal property. Shafer Plaza argues that there was only evidence of replacement cost rather than the fair market of the damaged property. The law in Kentucky is "that the proper measure of damages for injury to personal property is the difference in the fair market value of the property before and after the accident." *McCarty v. Hall*, 697 S.W.2d 955 (Ky. App. 1985). Expert testimony is not required to establish fair market value. *Id.*

Mr. Lang testified as to the fair market value of his food inventory and equipment on the date the business was locked out. These figures were supported by an inventory summary sheet. The weight and credibility of this testimony was subject to attack under cross-examination. We find that the evidence was sufficient to withstand a motion for directed verdict. The trial court did not err in submitting the case to the jury.

For the foregoing reasons, the judgment entered by the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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