RENDERED: NOVEMBER 25, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000686-MR
&
NO. 2008-CA-000810-MR

DARRELL MILLS AND
JENNIE MILLS — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CI-01118

DON MILLS AND
ALYDIA JANE MILLS — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

KELLER, JUDGE: Darrell and Jennie Mills (Darrell and Jennie respectively), appeal from the final judgment of the Laurel Circuit Court awarding Don and Alydia Mills (Don and Alydia respectively), rents following the sale of property Darrell, Don, and Alydia owned as tenants in common. Don and Alydia cross-

appeal from the circuit court's finding that the rents were unliquidated damages. For the reasons set forth below, we affirm.

FACTS

In 1985, Darrell, Don, and Alydia purchased a lot in Laurel County as tenants in common.[1] Following the purchase, three buildings were constructed on the property. At the time, Darrel and Don co-owned and operated Prestige Marble Products, Inc. (Prestige), which occupied the largest of those buildings (the Prestige Building). One of the two smaller buildings contained three apartments, which were rented to third parties, and the other was used for storage. During all times at issue tenants in the apartments paid rent to Prestige, and Prestige paid the mortgage, taxes on the real estate, and for all utilities.

In late 1999, the Mills brothers moved Prestige to another location. In 2000, Jennie opened Fabric World & Quilting (Fabric World), in the Prestige building. Jennie and Darrell testified that, before opening Fabric World, Jennie made improvements to the Prestige building which included painting and installing lighting, air conditioning, heaters, and wallboard. However, neither Jennie nor Darrell could produce any contemporaneous documentation supporting the amounts expended to make those improvements.

In July 2004, Don sold his shares in Prestige to Darrell. In October 2004, Don and Alydia filed suit alleging that they had not received any rent from

[1] We note that the deed listed Don and Alydia as tenants in common with right of survivorship and that the parties are not contesting on appeal the trial court's finding that Darrell had a fifty percent ownership interest and Don and Alydia had a fifty percent ownership interest.

Fabric World. Don and Alydia asked the court to order a sale of the property and disposition of the proceeds from that sale, taking into account their claim for rent. On November 22, 2004, Darrell and Jennie filed an answer and counter-claim, asking for reimbursement for the improvements they made to the Prestige building. On November 26, 2004, approximately one month after Don and Alydia filed their complaint, the Prestige building, which was not insured, was damaged in a fire. A contractor testified at trial that it would cost $25,585.15 to repair the fire damage to the building. It does not appear that any repairs were made and, on September 9, 2005, the property was sold at auction for $205,000. After deducting expenses associated with the auction, $201,583.32 remained for distribution. The parties could not agree on how to distribute the proceeds from the sale; therefore, the court conducted a bench trial on December 13, 2007. We note that, in 2007, Don and Alydia amended their complaint to add a demand for a portion of the rent collected by Darrell and Jennie from the tenants in the apartments.

At trial, Darrell and Jennie testified that Darrell provided financing for Fabric World but neither could produce any documentation to support how much financing Darrell had provided. Both agreed that Jennie was listed as the sole proprietor of Fabric World.

As to rents, Darrell testified that neither Don nor Alydia asked for rent from him, Jennie, or Fabric World for its use of the space in the Prestige building. Darrell also testified that neither Don nor Alydia asked for any share of the rent

collected by Prestige from the tenants of the apartments. Don testified that he did ask for rent, but that neither he nor Alydia received any payments.

Darrell testified that Don had keys to the premises, stored personal property on the premises, had access to the property, and often visited the property. Don contested the accuracy of this testimony, stating that he had only limited access to the property after Fabric World moved into the Prestige building and that he tried to stay away from the property.

Finally, at trial, D.L. Lynch (Lynch), testified regarding the amount of rent Fabric World should have paid.

The trial court, after making some corrections in its findings based on the parties' motions to alter, amend, or vacate, found in pertinent part that: (1) Jennie was the sole owner of Fabric World; (2) Fabric World occupied 6,000 square feet of space in the Prestige building; (3) Jennie paid no rent for use of that space; (4) Don and Alydia asked Jennie for rent; (5) based on Lynch's testimony the value of the rent was $1,200.00 per month; (6) Jennie owed $56,400.00 in rent; and (7) Darrell collected $13,175.00 in rent from the apartments. Based on those findings, the trial court concluded that Don and Alydia were entitled to half of the value of the rent Jennie should have paid and half of the value of the rent Darrell collected from the tenants of the apartments. Furthermore, the trial court determined that the rent due from Jennie was unliquidated damages but that the rent collected from the tenants was liquidated damages.

STANDARD OF REVIEW

Findings of fact by the trial court following a bench trial "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." Kentucky Rule of Civil Procedure (CR) 52.01; *see also Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009). We review issues related to questions of law *de novo. Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky. App. 2001). With these standards in mind, we will analyze the issues raised by Darrell and Jennie herein.

ANALYSIS

Darrell and Jennie make several arguments with regard to the trial court's award to Don and Alydia of rent from the apartments and of rent owed by Jennie. We will address these arguments separately, although not necessarily in the order argued. We will then address Don and Alydia's argument regarding the trial court's characterization of the rent owed by Jennie as unliquidated damages.

Before directly addressing the arguments of the parties, we first note the following. As noted above, the trial court found that Jennie was the sole owner and operator of Fabric World; that Don and Alydia requested rent from Jennie and/or Fabric World; and that Jennie had no ownership interest in the real property. Those findings of fact are supported by evidence of substance and are not clearly erroneous. Therefore, we accept them as correct and reject any arguments by Darrell and Jennie to the contrary. Having determined the preceding, we turn our attention to the arguments of the parties.

1. Entitlement to Rent from Apartments

Darrell and Jennie argue that Don and Alydia had no entitlement to any of the rent from the apartments because: (1) they abandoned the premises; (2) any such rents were generated through the efforts of Darrell and Jennie; and (3) that Darrell and Jennie took no actions that could be construed as an ouster of Don and Alydia, absent which Darrell and Jennie had no obligation to pay rent or account to Don and Alydia. We disagree.

In support of their arguments, Darrell and Jennie cite to *Howell v. Bach*, 580 S.W.2d 711 (Ky. App. 1978). In *Howell*, cotenants entered into an agreement to lease mineral rights to a third party in exchange for payment of twenty cents a ton for all coal mined on the leasehold. Without the knowledge of the other cotenants, the Howells entered into a separate and secret agreement with the third party to receive an additional five cents per ton. This Court found that the Howells were liable to their cotenants for the additional amount. In doing so, this Court held that:

> "the law will not permit one co-tenant, *where all must act in unison,* to obtain a secret profit to the disadvantage of his co-tenants. . . ." Such a principle is consistent with our common law rule requiring a cotenant to account for rents and profits. The secret profit he is able to obtain as a result of an agreement made by all of the cotenants acting together, in effect, gives him an extra profit from all of the interests in the property, not just from his own. But for the joint act of all he would have no secret profit. This profit is obtained to the detriment of his cotenants who are unaware that a lessee, purchaser, etc., is in fact willing to pay more for the interests he seeks. Such secret profits are not countenanced by our law.

Id. at 713. (Emphasis in original) (internal citation omitted).

According to Darrell and Jennie, because there was no evidence that the parties acted in unison or that there were any secret profits, Don and Alydia were not entitled to any share of the rent from the apartments. Darrell and Jennie may be correct with regard to the absence of joint action and secret profits; however, their argument misconstrues the holding in *Howell.* In *Howell*, this Court held that, when cotenants must act in unison in order to derive income from property, some of the cotenants cannot act unilaterally to obtain greater income to the exclusion of the other cotenants. *Id.* This Court did not hold that this is the only instance wherein cotenants are entitled to share in income generated from their jointly held property. In fact, this Court noted "that the common law in this jurisdiction is that one is liable to his cotenants for any rents and profits he collects from the joint property." *Id.* at 712. The holding with regard to acting in unison and obtaining secret profits did nothing to alter that basic common law rule, which applies to this case. Therefore, we are not persuaded by Darrell and Jennie's "acting in unison/secret profits" argument.

We find Darrell and Jennie's argument with regard to ouster to be equally unpersuasive. In support of this argument, Darrell and Jennie cite *Martin v. Martin*, 878 S.W.2d 30 (Ky. App. 1994), for the proposition that cotenants are only entitled to receive a portion of rental income if there has been an ouster. We have reviewed *Martin* and do not read it as supporting the preceding proposition. In fact, we believe that *Martin*, if anything, favors Don and Alydia.

In *Martin*, Garis and Peggy Martin (Garis and Peggy), owned a parcel of land as tenants in common with Charles and Mary Martin (Charles and Mary). Charles built a mobile home park on a portion of the property. Garis and Peggy moved their mobile home into that park and refused to pay rent. The trial court ordered an accounting and ordered Garis and Peggy to pay rent to Charles and Mary. This Court reversed, holding that, absent an ouster, one cotenant cannot be held liable to pay rent to another cotenant.

As to this issue, Don and Alydia did not seek to collect rent from their cotenant, Darrell; they sought to collect from Darrell their proportionate share of the rent he collected from third parties. Therefore, whether an ouster occurred is irrelevant. Furthermore, as noted by this Court in *Martin*, "[t]he prevailing view is that an occupying cotenant must account for *outside* rental income received for use of the land, offset by credits for maintenance and other appropriate expenses." *Id.* at 31. (Emphasis in original). The trial court, in awarding Don and Alydia half of the rent collected by Darrell from the "outside" tenants of the apartments, simply followed the dictates of *Martin*. For the foregoing reasons, we discern no error in the trial court's award of half of the rent from the apartments to Don and Alydia.

2. Rent from Jennie

As noted above, the trial court found that Jennie was the sole owner and operator of Fabric World and that she had no ownership interest in the real estate. Jennie, as owner and operator of Fabric World, was not a cotenant, but an "outside" tenant just as the tenants in the apartments were. Therefore, the analysis

that applies to Don and Alydia's entitlement to rent from the apartments, also applies to their entitlement to rent from Jennie. We will not reiterate that analysis.

However, that does not end our analysis of this issue, because Darrell and Jennie also challenge the trial court's finding of the fair market rental value of the Prestige building as occupied by Fabric World. Other than reiterating their arguments regarding ouster and the holding in *Howell v. Bach,* it appears that Darrell and Jennie are arguing that the trial court's determination of fair market rental value was not supported by evidence of substance. Furthermore, it appears that Darrell and Jennie are arguing that, because Don stored personal property on the site and did not pay rent and because there was no evidence regarding the fair market rental value of the two smaller buildings, he and Alydia are foreclosed from recovering rent from Jennie.

As to the adequacy of the evidence, Lynch testified at length regarding the fair market rental value of the Prestige building. Darrell and Jennie are correct that Lynch based his opinions on measurements of the building that differed from theirs. However, whether Lynch used the correct measurements is a matter of fact left to the sound discretion of the trial court. Furthermore, the existence of two different measurements goes to the weight to be afforded Lynch's testimony, not its sufficiency. The trial court was free to rely on Lynch's testimony, which it chose to do. We discern no error in the court's choice, particularly when Darrell and Jennie offered no evidence of fair market rental value to the contrary.

Darrell and Jennie also argue that Lynch's testimony was not substantial evidence because he determined fair market rental value based on the pre-fire condition of the Prestige building. However, because Don and Alydia were claiming entitlement to rent attributable to "pre-fire" occupancy of the Prestige Building by Fabric World, that was the correct timeframe within which to determine value. Any determination of fair market rental value after the fire would have been irrelevant because Fabric World did not occupy the Prestige building after the fire.

We also are not persuaded by the argument that Don's failure to pay rent foreclosed a claim for rent from Jennie. As noted above, this Court held in *Martin* that one cotenant can occupy a portion of jointly owned real estate rent free absent an ouster of the other cotenants. There is no evidence that Don's use of a portion of the property interfered with Darrell's use of the property, let alone that Don's use of the property acted as an ouster for Darrell. Therefore, Darrell had no right to claim rent from Don, and Don's failure to pay what he did not owe could have no impact on his right to entitlement to rent from Jennie.

Finally, Darrell and Jennie argue that, based on CR 8.01(2), Don and Alydia were required to set forth the amount they were claiming in unliquidated damages relative to the amount of rent attributable to Fabric World's use of the Prestige building. We have reviewed the record and note that Don and Alydia stated in their complaint that they were seeking rent from Darrell and Jennie for their occupancy of the property but did not specify a dollar amount. In their

response to interrogatories, Don and Alydia stated that they were seeking "[f]ifty [sic] of fair market value of the real estate as valued before the fire, insurance premiums paid on the apartments, court costs, attorney's fees, one-half of rent collected since July 15, 2004 by the defendants." This response does not include the amount Don and Alydia claimed as rent from Jennie, and Don and Alydia did not amend this response prior to trial.

In their opening statement, Darrell and Jennie noted Don and Alydia's response to interrogatories and stated that Don and Alydia should be limited to the amounts they listed in their response to interrogatories. However, Darrell and Jennie did not specifically object or make a motion in limine seeking to prevent Don and Alydia from introducing into evidence a dollar amount related to rent from Jennie. Furthermore, Darrell and Jennie did not object to or move to strike Lynch's testimony during trial regarding the fair market rental value of the property. Finally, we note that, in their motion to alter, amend, or vacate, Darrell and Jennie did not argue that Lynch's testimony or the trial court's finding regarding fair market rental value violated CR 8.02.

"The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase,* 690 S.W.2d 761, 763 (Ky. App. 1985). As noted above, Darrell and Jennie did not specifically raise this issue before the trial court; therefore, it is not preserved for our review and we will not further address it.

3. Don and Alydia's Cross-Appeal

Don and Alydia argue that the trial court incorrectly characterized the amount of rent owed by Jennie as unliquidated damages, thus depriving them of pre-judgment interest.

> The longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands.
>
> . . .
>
> Liquidated claims are 'of such a nature that the amount is capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values.'

3D Enters. Contracting Corp. v. Louisville and Jefferson County Metropo. Sewer Dist., 174 S.W.3d 440, 450 (Ky. 2005)(*citing* 22 Am. Jur. 2d *Damages* § 469 (2004))(internal citation omitted).

The trial court determined the amount of the fair market rental value of the space occupied by Fabric World based on Lynch's testimony. Lynch testified that he calculated the total square footage and, based on his experience leasing similar property, he opined that a fair market rental value would be $3.00 per square foot for one portion of the building and $5.00 per square foot for another portion. In determining the fair market rental value, Lynch took into consideration rents for properties he owned and/or managed, rents for similar properties near the one in question, the location of the property, and his years of

experience. Although this Court does not doubt Lynch's expertise, the values he generated were not based on known standards of value or well-established market values which could be easily ascertained or computed. They were based on his opinions of fair market value, which is defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." *Black's Law Dictionary* 1587 (8th ed. 2004). While fair market value may be easily established in hindsight, as with the rents Darrell had already collected from the tenants of the apartments, it is not so easily established otherwise. As noted above, a number of factors, including to a substantial degree Lynch's experience and his opinion based on that experience, went into the calculation of fair market rental value. Those factors are, by their nature, not subject to easy ascertainment or simple computation. Therefore, we discern no error in the trial court's determination that the fair market rental value of the space occupied by Fabric World was not liquidated damages.

CONCLUSION

For the reasons set forth above, we affirm the trial court's judgment as to issues raised by the parties in their appeal and cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANTS/
CROSS-APPELLEES:

Scott M. Webster
London, Kentucky

BRIEF FOR APPELLEES/CROSS-
APPELLANTS:

Robert Stivers
London, Kentucky