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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000886-MR

LOUISVILLE GALLERIA, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 12-CI-005734

KENTUCKY PUB INVESTMENTS, LLC;
WALLACE NICHOLSON SANDERS;
SHEILA S. SANDERS; AND
MARK SMEDAL

APPELLEES

AND

NO. 2017-CA-000979-MR

KENTUCKY PUB INVESTMENTS, LLC

CROSS-APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 12-CI-005734

LOUISVILLE GALLERIA, LLC

CROSS-APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, REVERSING IN PART AND
REMANDING

** ** ** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: This appeal and cross-appeal arise out of a dispute between a landlord, Louisville Galleria, LLC (“Galleria”), and its former tenant, Kentucky Pub Investments, LLC (the “Pub”), concerning obligations of both parties under a lease agreement.¹ Following a thorough review of the record and applicable law, we affirm in part, vacate in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

In July of 2001, Galleria, an affiliate of the Cordish Company, entered into a development agreement with the City of Louisville. Under this development agreement, Galleria was to take over operations and management of the Galleria Mall in downtown Louisville and transform it into what is now Fourth Street Live! (“FSL”). In early 2004, with construction of the FSL project largely completed, Galleria and the Pub began discussing the possibility of the Pub opening a

¹ Wallace Nicholson (“Nick”) Sanders and his wife, Shelia S. Sanders, are personal guarantors under the lease agreement between the parties. Nick Sanders is the president of the Tavern Restaurant Group, LLC, which is the managing member of Kentucky Pub Investments, LLC. Because the circuit court awarded attorney fees to the Pub, its counsel, Mark Smedal, has also been made a party to the appeal.

restaurant in FSL. As part of these discussions, two letters of intent were delivered to the Pub on behalf of Galleria. These informal letters outlined basic terms and conditions pursuant to which Galleria would lease space in FSL to the Pub. One such term, identical in both letters, provided that the Pub would be responsible for paying its *pro rata* share of common area maintenance (“CAM”) charges. Those charges were estimated to total \$5.00 per square foot.

On June 28, 2004, the Pub signed a lease (the “Lease”) with Galleria for a 5,000 square foot premises, which would be operated as a restaurant (the “Premises”).² It is undisputed that, following substantive negotiations of the Lease but prior to execution of the Lease, Galleria informed the Pub that it estimated CAM charges to be \$6.00 per square foot, rather than the initial \$5.00 per square foot estimate. Under the Lease, the Pub was required to make monthly payments for CAM at the estimated rate. However, the Lease indicated that the Pub was responsible for its *pro rata* share of “any and all costs and expenses of any kind incurred by [Galleria] in managing, maintaining, repairing, replacing, improving, operating and insuring the Common Areas, the Project, all improvements within the Shopping Center, without limitations, and an amount equal to twenty percent (20%) of the [CAM] as an administrative fee.” Def. Ex. 1 at § 1003. If the actual

² A second lease was executed in December 2004, which added Sheila Sanders as a personal guarantor of the Lease and changed the name of the tenant from Tavern Restaurant Group to an affiliate entity, Kentucky Pub Investments, LLC. No substantive provisions were altered.

amount of CAM charges apportioned to the Pub for an operating year exceeded what it had paid in monthly installments, the Pub was be required to pay the amount owed within fifteen days from the date it received a reconciliation notice from Galleria. *Id.* at § 1002. Further, the Lease indicated that Galleria could, with notice to the Pub, alter its estimate of total CAM expenses. *Id.* Notably, nothing in the Lease mandated that Galleria bill the Pub for CAM charges over the estimated figure within a certain time frame. Likewise, there was no provision capping total CAM charges; however, the Pub did negotiate terms whereby its percentage of CAM expenses was capped. *Id.* at § 319.

The Pub opened in December of 2004 and began paying its base rent and monthly CAM at the \$6.00 per square foot estimate, largely without issue.³ Several years went by without Galleria sending any notice under Section 1002 of the Lease advising the Pub that actual CAM charges were different than the estimated amount; there is no indication that the Pub questioned this. On August 5, 2010, Galleria sent CAM reconciliation notices to the Pub for operating years 2008 and 2009. The notices informed the Pub that it owed a balance of \$57,490.52 for the 2008 operating year, and a balance of \$38,718.69 for the 2009 operating year.

³ The Pub was chronically late on rent payments, but always paid rent.

Shocked by the drastic increase in CAM charges, the Pub's counsel wrote to Galleria on October 14, 2010, to inquire about the CAM reconciliations. In that letter, counsel acknowledged the Pub was required to pay its "proportionate share of operating expenses in accordance with the terms of the Lease." However, counsel expressed confusion as to the "inordinate increase in expenses" over the estimated CAM costs and as to the "extremely late arrival" of the reconciliations. Accordingly, the Pub requested backup documentation for all costs outlined in the reconciliations for 2008 and 2009, as well as reconciliation sheets with backup for all previous years, before it would make payment. Additionally, the letter raised—for the first time—thirteen concerns the Pub had with regard to Galleria's obligations under the Lease. On November 16, 2010, Galleria sent the Pub CAM reconciliation notices for operating years 2005-07. These reconciliations indicated total amounts due of: \$63,846.88 for operating year 2005; \$58,877.00 for operating year 2006; and \$58,476.79 for operating year 2007. Following these reconciliations, Galleria altered the total estimated CAM for the 2011 operating year from \$6.00 per square foot to \$17.33 per square foot.

The Pub refused to pay the CAM owed for previous years, and, initially, refused to make monthly payments at the new estimated rate. Accordingly, in May of 2011, Galleria sent the Pub a notice to vacate the Premises and filed a forcible detainer action in Jefferson District Court. The action was

ultimately dismissed when the parties agreed that the Pub would pay the new rate of CAM, under protest, from the time it received reconciliation notices going forward. Additionally, the parties agreed that the Pub could arrange for a time to conduct an audit of the CAM reconciliation amounts.

In January of 2012, Brian Malthouse, a CPA retained by the Pub, visited Galleria's management offices for the purpose of reviewing its invoices for cited CAM expenses. Based on his review, Mr. Malthouse concluded that the invoices he examined matched up with the reconciliation balances, except for the amount charged in administrative fees. Malthouse Dep. 26:11-14. However, Mr. Malthouse did not receive an answer as to why the actual CAM costs were so much higher than the estimated CAM costs, or the reason for the delay in sending CAM reconciliations to the Pub. *Id.* at 28:11-23.

Following Mr. Malthouse's review, the Pub made no effort to make payments on any of the back-owed CAM charges. Accordingly, in April of 2012, Galleria began applying the Pub's monthly rent payments to the past-due CAM charges from 2005-09. This was done in accordance with Section 2609 of the Lease, which provides that:

Landlord shall have the right to apply any payments made by Tenant to the satisfaction of any debt or obligation of Tenant to Landlord according to Landlord's sole and absolute discretion and regardless of the instructions of Tenant as to application of any such sum,

whether such instructions be endorsed upon Tenant's check or otherwise.

Nothing in the Lease required Galleria to notify the Pub that it was applying payments received to past-due sums, and it did not do so.

On September 5, 2012, Galleria sent the Pub a notice to vacate the Premises based on the Pub's failure to pay rent when due. Two days later, Galleria initiated a second forcible detainer proceeding in Jefferson District Court. Before the district court action was heard, on October 20, 2012, the Pub filed the underlying action against Galleria in Jefferson Circuit Court. By its complaint, the Pub sought a declaratory judgment that Galleria did not have a right under the Lease to impose "retroactive" CAM charges in the manner in which it was doing, that the Pub was not liable for those CAM charges, and that Galleria owed the Pub all monthly CAM charges it had paid at the new estimated rate under protest. Additionally, the Pub contended that: many actions taken by Galleria in operating FSL—most notably, the fact that Galleria had allowed Ri Ra, a direct competitor of the Pub, to open across the street from it—violated the implied covenant of good faith and fair dealing; Galleria had committed fraud in the inducement by representing to the Pub that CAM charges would be \$5.00-\$6.00 per square foot; Galleria had constructively evicted the Pub by retroactively imposing CAM charges and then miscategorizing rent payments as payments of disputed CAM charges; Galleria had waived its right to collect payments from the Pub; and

Galleria was equitably estopped from imposing “retroactive” CAM charges on the Pub.

On October 25, 2012, the Pub sent a letter to Galleria indicating that it continued to dispute the reconciled CAM assessments, Galleria’s claim that it could apply the monthly rent payments to past-due CAM charges and then claim that the Pub had defaulted, and the increased CAM charges. Nonetheless, the Pub expressed its willingness to remain on the Premises for the remainder of the lease term. The Pub indicated that it was ready, willing, and able to continue making base rent payments and increased CAM payments under protest. Galleria did not respond to this letter.

On November 7, 2012, the District Court held a forcible detainer hearing, ultimately finding that Galleria was entitled to possession of the Premises. Over the following two days, counsel for the Pub contacted Galleria’s counsel to work out an agreement that would allow the Pub to remain on the Premises. The Pub’s counsel was informed that Bob Fowler was the only person who could speak to the matter on behalf of Galleria, and that he was unavailable until the following week. On November 11, 2012, the Pub informed its entire staff that it would be closing, effective immediately. The next day, Galleria’s counsel informed the Pub’s counsel that Galleria had no intention to execute on the writ it had obtained in District Court, so long as the Pub agreed to pay the

CAM reconciliations. Galleria's counsel advised that Galleria would consider reasonable terms for paying the reconciled CAM, provided that Galleria would be adequately protected.

Having already terminated its entire workforce, the Pub decided not to reopen. Over the next few days, the Pub made arrangements to remove its property from the premises. When attempting to do so, however, the Pub was informed that, pursuant to the terms of the Lease, Galleria had claimed a lien on the Pub's equipment and furnishings. Accordingly, Galleria refused to allow the Pub to remove any items from the Premises other than items with the Pub's logo and perishable food. On December 3, 2012, the Pub amended its complaint to include a count of conversion based on Galleria's refusal to allow the Pub to retrieve its property from the Premises.

Galleria filed a motion to dismiss the action on December 13, 2012. In the memorandum accompanying the motion, Galleria argued that the issues raised in the Pub's complaint and first amended complaint had already been fully litigated in the district court action, which the Pub had not appealed. Accordingly, Galleria argued that the doctrine of *res judicata* barred the Pub from relitigating the issues in circuit court. While Galleria acknowledged that the district court's ruling had been limited to a finding that Galleria was entitled to possession of the premises, Galleria contended that, in order to reach that conclusion, the district

court necessarily had to consider the exact issues the Pub was now raising.

Alternatively, Galleria argued that each of the Pub's claims must fail as a matter of law. The circuit court dismissed the case with prejudice on December 21, 2012. That judgment was vacated, however, upon motion by the Pub indicating that the time for it to respond had not yet run. Following the Pub's response, the circuit court denied the motion to dismiss by opinion and order dated May 30, 2013.

On June 28, 2013, Galleria filed an answer and counterclaim. By its counterclaim, Galleria asserted the Pub was in breach of contract. Galleria contended that: the Pub had failed to pay rent when due, which constituted a default and entitled Galleria to all remedies available under the Lease; the Pub had abandoned the leased premises by closing the restaurant prior to the end of the Lease term, which entitled Galleria to recover liquidated damages under Section 26 of the Lease, in addition to other remedies available under the Lease; Galleria was entitled to collect late fees in addition to deficiencies in the rent; Galleria was entitled to collect reasonable attorney fees under Section 27 of the Lease; and that Galleria had performed all obligations under the Lease.

Following some discovery, on October 7, 2014, Galleria was granted leave to amend its counterclaim and add Nick Sanders and Sheila Sanders as defendants. On February 22, 2016, Galleria filed a motion for summary

judgment. The arguments contained therein largely mirrored those in Galleria's motion to dismiss—that the issues raised by the Pub were barred by *res judicata*, the fraud claim should be dismissed as a matter of law, and that every action taken by Galleria with respect to the Pub was supported by the Lease. Galleria additionally noted that Nick Sanders, who had negotiated the Lease on behalf of the Pub, had extensive experience in opening and operating restaurants. Further, Galleria stated that Mr. Malthouse had not found any discrepancies in the calculations for the CAM reconciliations, other than the administrative fee, which had been negotiated in the Lease. Galleria contended that the damages due to it were liquidated and could be calculated as a matter of law. Galleria alleged that it was owed a total of \$2,655,105.80 in damages, calculated as follows: (i) \$309,053.00 in back-rent as of November 2012; (ii) \$585,513.20 in unpaid rent through the remainder of the Lease term; (iii) and \$1,759,539.60 in liquidated damages for the Pub's breach of the Lease.

On July 1, 2016, the Pub filed a memorandum in response to Galleria's motion for summary judgment and in support of its motion for summary judgment.⁴ Therein, the Pub contended that it had been reasonable in

⁴ The Sanderses joined in this motion. All arguments made by the Sanderses throughout the underlying litigation are identical to those made by the Pub; accordingly, to provide more clarity, we refer only to the Pub. The Sanderses have not argued that the personal guarantee executed by them is invalid for any reason.

presuming that Galleria had made a good-faith effort to appropriately review the cost components of CAM charges at FSL before quoting an estimate to the Pub. The Pub alleged that the fact that Galleria had increased the CAM estimate to \$6.00 per square foot shortly before the Lease was executed gave further indication of the reasonableness of this presumption. The Pub contended that there were only two possible explanations for the substantial difference between the CAM estimate and the actual CAM charges: either Galleria had intentionally used a false figure to induce the Pub to enter the Lease, or Galleria had performed no analysis to reach a CAM estimate and concocted it to induce the Pub to enter the Lease. The Pub contended that it had acted reasonably in relying on Galleria's estimate, without requesting backup analysis, because of the experience touted by Galleria. The Pub did not dispute that the CAM estimate was subject to change; however, it argued that it had reasonably believed the CAM charges would increase due to factors such as inflation or general price increases in the labor, services, and materials needed to operate FSL. It contended that the circuit court should find the Lease provisions related to CAM charges unconscionable.

Additionally, the Pub argued that Galleria had acted in bad faith when it applied the Pub's monthly rent payments to the past-due CAM charges. The Pub stated that it had believed that, in "agreeing to disagree" on the Pub's responsibility to pay the past-due CAM charges, Galleria had agreed to set aside

any claim it had for the money owed until the end of the Lease term. The Pub noted that Galleria had a right under the Lease to litigate past-due CAM separately, rather than bring a forcible detainer action. Further, it contended that it was outrageous for Galleria to claim that the Pub had abandoned the Premises and request damages due to that abandonment when Galleria had brought an action to evict the Pub.

Finally, the Pub argued that its property had clearly been converted by Galleria. While the Pub acknowledged that Galleria had a right under the Lease to assert a lien on the Pub's property, it contended that this lien did not give Galleria the right to take the Pub's property and treat it as its own. The Pub noted that Galleria had seized the Pub's property almost three-and-a-half years ago, but had yet to sell it in a commercially reasonable manner. The Pub claimed that the value of the converted property was \$359,089.00, which represented a 25% discount from the original purchase price. On July 5, 2016, the Pub filed an itemization of damages. The damages requested by the Pub were as follows: \$75,788.22 as a refund of overpaid CAM charges; \$359,089.00 for the property converted by Galleria; \$1,337,919.00 in lost income caused by Galleria's failure to honor the Lease and Galleria's failure to act in good faith and deal fairly with

the Pub;⁵ \$1,337,919.00 in damages due to fraud worked upon the Pub to induce it to enter the Lease; punitive damages in an amount to be determined; and attorney fees and costs in an amount to be determined.

Ultimately, both motions for summary judgment were denied by order entered July 27, 2016. The parties proceeded to a three-day bench trial, beginning on February 8, 2017. Mr. Sanders testified first for the Pub. He testified that he had been approached by Galleria representatives about leasing space in the new FSL project. As part of the lease negotiations, Mr. Sanders visited Baltimore, Maryland, where he viewed the Cordish Company headquarters and a project similar to FSL—Power Plant Live! (the “Baltimore Project”)—that the Cordish Company had begun operating a few years earlier. Based on this visit, Mr. Sanders believed that the Cordish Company—including Galleria—was an extremely successful and experienced real-estate developer. Additionally, Mr. Sanders visited the FSL location in Louisville. He stated that progress was still being made on FSL at the time of his visit, but that all major construction had been completed and some businesses located at FSL had already begun operating. Mr. Sanders testified that the CAM estimate quoted to him was important to determine the potential viability of the Pub’s operations at FSL. The initial \$5.00

⁵ The Pub alleged that this figure was reached by averaging its profits for the first four years at the leased premises and applying that to the final four years of occupancy of the leased premises.

per square foot estimate was comparable to CAM charges he paid for the operation of another pub location in Cincinnati, Ohio, so he believed it to be a reasonable figure. Mr. Sanders acknowledged that he had not questioned anyone with Galleria about how the \$5.00 figure was reached; he just assumed as a matter of course that Galleria had “done their [sic] homework.” When the CAM estimate was changed from \$5.00 per square foot to \$6.00 per square foot, Mr. Sanders assumed that someone had reevaluated the numbers and determined the \$6.00 figure to be more accurate. He testified that he would not have gone forward with the deal had he known that the Galleria did not have any research or calculations to support its CAM estimate.

Mr. Sanders testified that when the Pub first began operating in late 2004, it had solid sales and good results. Initially, there had been no major issues or concerns with Galleria. As time went on, however, he became more and more aggravated with the way Galleria operated. Mr. Sanders testified to a variety of issues he had with Galleria: Galleria had decreased the Pub’s patio size without explanation; Galleria did not allow the Pub to have the signage and exterior façade that it requested; Galleria permitted Ri Ra, a very similar restaurant and bar, to open across the street from it; there were times when Galleria charged admission to patrons entering FSL; and most importantly, the CAM reconciliations were late and outrageously high.

Mr. Sanders testified that he was shocked by the amounts the Galleria claimed the Pub owed for CAM reconciliations. He explained that no one had ever informed him about the CAM increase or indicated that the projected CAM the Pub was paying for the first five years was not adequate. While he was aware that the CAM estimate could be adjusted, his prior experience with CAM reconciliations led him to believe that those adjustments would be relatively minor. Mr. Sanders stated that Galleria offered no explanation as to why the CAM charges were so high or why they were so late. He testified that the Pub was simply unable to pay the reconciled amount within fifteen days, as required, and that the adjusted CAM estimate “blew up” the Pub’s ability to be profitable.

Following dismissal of the 2011 eviction action, Mr. Sanders believed that an agreement had been reached between the Pub and Galleria whereby the Pub would pay the escalated CAM charges going forward, but the reconciled CAM charges would be resolved at a later date. However, upon receiving the notice to vacate in September of 2012, he realized that Galleria was claiming default based on the same CAM charges that were disputed in 2011. Mr. Sanders testified that he did not understand why Galleria had applied the Pub’s monthly rent payments to back-CAM charges, and stated that the Pub had received no notice that Galleria had been doing so until receiving the notice to

vacate. While the eviction proceeding was pending, the Pub continued to pay its base rent and CAM at the escalated rate.

Mr. Sanders testified that he had hoped to reach an agreement with Galleria where the Pub could continue on the Premises for the remainder of the Lease term; however, this had not happened. Following the district court's ruling, Mr. Sanders understood that the Pub was required to vacate the Premises within seven days. Instead of waiting for the sheriff to come and force the Pub out of the Premises, he decided to go ahead and close down the business. Mr. Sanders had no idea that Galleria wanted to work out an arrangement where the Pub could remain on the Premises until after he had closed the restaurant. Mr. Sanders testified that the Pub had been told it could not remove any of its property from the Premises. He had assumed that Galleria would sell the contents, with all proceeds accruing to the Pub's benefit; however, he never heard anything about a sale. Mr. Sanders indicated that, overall, the Pub had a negative net income during the years it was operating in FSL.

On cross-examination, Mr. Sanders acknowledged that he has several decades of experience in the restaurant business. He stated that he had been the only individual involved in negotiating the terms of the Lease, and that he understood that the Lease was a binding instrument. Mr. Sanders acknowledged that, under the Lease, the Pub had no exclusive rights in the common area of FSL

and that there was no clause stating that Galleria could not bring a similar concept, such as Ri Ra, into FSL. Additionally, he acknowledged that nothing in the Lease guaranteed that the Pub would have a certain patio size and that the Lease allowed Galleria to host events in FSL where it would charge an admission. Mr. Sanders testified that he did not negotiate a cap on CAM charges and that he had assumed things that did not work out in the Pub's benefit. He understood that there would be CAM reconciliations against the estimated numbers, and that the Pub agreed to be responsible for paying its *pro rata* share of actual CAM charges. Mr. Sanders acknowledged that, more often than not, the Pub was late on its monthly rent payments.

Mr. Sanders testified that Mr. Malthouse had reviewed numbers related to the CAM reconciliations, but that he had not done an actual audit. He acknowledged that, following Mr. Malthouse's review, no additional documentation was requested and that there was no follow-up review by the Pub. However, while Mr. Sanders agreed that Mr. Malthouse's review indicated that the CAM charges were mathematically correct, he disagreed that the Pub was satisfied that the CAM reconciliations were accurate. Mr. Sanders testified that he agreed with the district court's ruling that some amounts may be due to Galleria from the Pub; however, he disputed that the Pub owed the amounts that Galleria claimed.

Danielle Carlisle, the Pub's bookkeeper, testified next. She acknowledged that the Pub was often late on its monthly rent payments, but testified that it always paid rent and along with any assessed late fees. Ms. Carlisle testified that compared to CAM reconciliation notices received for other Pub restaurants, the ones sent from Galleria were unbelievably high. She testified that, after receiving the 2011 notice to vacate, the Pub began paying CAM charges at a higher monthly rate. A document she had prepared indicated that, since the Pub began paying the higher rate of CAM charges, it had paid \$119,687.00 more than if it had continued paying CAM at the initial \$6.00 per square foot estimate. Ms. Carlisle testified that she had been making monthly rent payments on behalf of the Pub for the months of April 2012 through September of 2012. She had not been notified by any person at Galleria that those payments were being applied to past-due CAM charges.

On cross-examination, Ms. Carlisle acknowledged that the Lease gave Galleria the right to apply the Pub's monthly payments to past-due CAM charges. Ms. Carlisle stated, however, that she had assumed that Galleria would be upfront about how it was applying payments received. Ms. Carlisle testified that Mr. Sanders was receiving his full salary during the time that the Pub was behind on its monthly rent payments.

Next, the Pub called David Bell, the Vice President of Tavern Restaurant Group, LLC. Mr. Bell testified that he had not been involved in negotiations of the CAM estimate; however, he had used the estimate to create a *pro forma* for the restaurant. Mr. Bell testified about various issues the Pub had with Galleria's management of FSL, which were the same as those raised by Mr. Sanders. He testified that the Pub had not developed a formal business plan prior to entering the Lease with Galleria, but that it had developed its *pro formas*, forecasts, and budgets—using the CAM estimate. Mr. Bell expressed his shock at receiving the CAM reconciliations for operating years 2005-09. He stated that, prior to receiving the notice to vacate in 2012, he had no indication that Galleria wished to terminate the Lease with the Pub. Mr. Bell testified that, despite the issues he had with Galleria, he had wanted the Pub to stay open through the remainder of the Lease term. He testified that the items located on the Premises had a peculiar value to the Pub and that the Pub would have bid on those items had Galleria put them up for sale. Mr. Bell prepared a chart to determine what the Pub would have paid for those items, based on his knowledge of the items left behind. He concluded that the Pub would have paid \$340,307.00 for all items left on the Premises.

On cross-examination, Mr. Bell testified that while he had not been involved in negotiations of the Lease, he had gone with Mr. Sanders to visit the

Cordish Company headquarters and the Baltimore Project. Mr. Bell stated that, from an operations point of view, the Baltimore Project was very similar to the FSL project. He agreed that there was no cap placed on CAM charges in the Lease and that the Lease itself did not include either the \$5.00 or \$6.00 per square estimates. Mr. Bell testified that, at the time the Pub began moving into the Premises, other tenants were open and operating in FSL. He stated that the street was already open to patrons, so he believed that there would have already been maintenance and security costs, along with costs relating to mall office expenses. Mr. Bell acknowledged that he had not viewed any documentation relating to those expenses or the initial CAM estimates. He testified that Mr. Malthouse had requested preliminary budgets for FSL, and that nothing had been produced.

Mr. Bell testified that he had personally believed the Pub would continue through the end of the Lease and then work out an agreement with Galleria about the back-due CAM charges. He acknowledged, however, that the Pub had never offered to pay past-due CAM charges in a payment plan. While he was aware that Mr. Malthouse had not found any discrepancies in the numbers when he conducted his review, Mr. Bell felt that the CAM reconciliation numbers were fundamentally flawed, as they were unconscionable and unreasonable. This belief was based on the representation that CAM charges would be \$6.00 per

square foot. Mr. Bell agreed that Section 3401 of the Lease states that the Pub cannot rely on any estimate that has been provided by Galleria.

Next, the Pub called Tom Hensley, Chief Financial Officer of the Tavern Restaurant Group, LLC. Mr. Hensley testified that he had done a detailed feasibility analysis prior to the Pub's decision to enter into the Lease with Galleria. Mr. Hensley stated that the estimated CAM charges were in the range of what he had seen for other locations. He had assumed that Galleria had developed the estimated CAM charges through some sort of analysis. To his knowledge, no one with the Pub had asked Galleria to provide any analysis or detail as to how the CAM estimate was reached; however, Galleria had not informed the Pub that there was no backup for the estimated CAM.

Mr. Hensley testified that he understood that the \$6.00 per square foot CAM estimate was subject to change. He had seen CAM increases and decreases based on inflation and cost of living in other leases; he assumed that the same would be true with the Pub's Lease with Galleria. Mr. Hensley stated that he had never before seen an increase in CAM charges at 300% above the estimated number. The Pub had not been in the position to pay the CAM reconciliations within fifteen days of receiving the notices. Mr. Hensley testified that the Pub had already incurred substantial losses at the time it received the reconciliation notices. He stated that, from 2008 to 2009, the Pub's sales went

down by roughly \$700,000.00. He testified that he could not think of any other circumstances that would have caused the decline in sales other than Ri Ra's opening in FSL.

On cross-examination, Mr. Hensley was shown his deposition testimony, during which he had testified that he believed the decline in sales was primarily due to bars and restaurants on Bardstown Road responding to the opening of FSL and drawing people back into that area of town. Mr. Hensley acknowledged that there was no provision in the Lease stating that increases in CAM above the estimated amount would be based on inflation or cost of living; the Lease stated that CAM charges would be based on actual expenses. Mr. Hensley testified that the Pub had never inquired about CAM reconciliation notices. He was aware of provisions in other leases requiring the landlord to give a reconciliation within a certain period of time; but he acknowledged that this Lease did not contain a similar provision.

For its final witness, the Pub called Mr. Fowler. Mr. Fowler stated that he is an attorney for CTR Management, Inc., which provides management services to various real estate projects in which members of the Cordish family have an interest. He testified that CTR receives a management fee from each property management entity affiliated with the Cordish Company, including Galleria. The management fees are determined by contract. Mr. Fowler was

shown the CAM tabulations for FSL. While he was unsure of all the details on the various categories of expenses, Mr. Fowler testified to what expenses he believed generally went into each category. He testified that the administrative fee is determined by the Lease. In this case, the Lease provided that the Pub would be charged an administrative fee of 20% of the CAM charges. This was a negotiable term; some tenants had limited the amount of administrative fees that could be charged, but the Pub had not done so.

Mr. Fowler had been responsible for drafting the Lease. He was unaware why the CAM estimate had changed from \$5.00 per square foot to \$6.00 per square foot. Mr. Fowler testified that, in light of this litigation, he had tried to determine whether anyone knew where the CAM estimate had come from. He was unable to find any evidence to support either that an analysis had been done or that one had not been performed prior to arriving at the estimated CAM. However, Mr. Fowler noted that the CAM estimate was consistent with what CAM charges had been at the Baltimore Project—in 2003, actual CAM charges at the Baltimore Project were approximately \$6.00 per square foot. While he was unaware if the CAM estimate given to the Pub was based on the Baltimore Project, Mr. Fowler testified that it would have been reasonable to do so—the Baltimore Project was the only project the Cordish Company had developed that was similar to the FSL project. Mr. Fowler testified that, because of the

uniqueness of FSL, costs associated with a regional mall or a strip mall would be irrelevant to a CAM estimate analysis.

Mr. Fowler acknowledged that many of the types of expenses that had occurred during the 2005 operating year would have occurred in 2003. However, Mr. Fowler testified that because FSL was still under construction in 2003, those expenses would have been different than expenses anticipated for the years that FSL was operating. Mr. Fowler testified that Galleria began managing the old Galleria Mall in 2001 and received title to the property in December of 2002. He acknowledged that Galleria had received information about CAM costs for stores located in the Galleria Mall; however, Mr. Fowler stated that while these costs were representative of a failing mall, they were not representative of what costs would be at FSL. Mr. Fowler stated that the only explanation he had for why Galleria waited so long to send CAM reconciliation notices to the Pub was because the accounting department was so overwhelmed. Mr. Fowler testified that he does not believe that Galleria evicted the Pub. He stated that the purpose of sending the Pub a notice to vacate was simply to begin the forcible detainer action. Mr. Fowler testified that Galleria had filed the forcible detainer action to persuade the Pub to pay the money owed under the Lease, but that Galleria had not intended to actually evict the Pub. Following Mr. Fowler's

testimony, Galleria moved for a directed verdict on all of the Pub's claims; the motion was denied.

For its first witness, Galleria called Michael LeGrand, the facilities engineer for Galleria from March of 2009 to October of 2015. Mr. LeGrand testified that he met with Mr. Malthouse in 2012 as part of Mr. Malthouse's review. To prepare for Mr. Malthouse's visit, Mr. LeGrand looked over Galleria's general ledgers for the years in question and was able to tie everything charged to the Pub back to the ledger. Mr. LeGrand testified that, following the Pub's vacating the Premises, he had been responsible for making sure the Pub did not remove any property. He stated that various kitchen equipment, restaurant furniture, and bar furniture was left on the Premises. Most of these items appeared to be approximately ten years' old and some of the dining room furniture was in poor repair. To his knowledge, the Pub had never offered to purchase the property. He believed that the property had not yet been sold because it was tied up with this litigation.

Next, Galleria called Mr. Fowler. Mr. Fowler again testified that, prior to 2005, there was no meaningful operating history for FSL. He did not believe that CAM reconciliations had been done for the 2004 operating year because it had been a very short year, with most of the tenants at FSL opening in late 2004. Mr. Fowler stated that, at the time that FSL opened, the Baltimore

Project was the only other entertainment complex operated by the Cordish Company.

On April 28, 2017, the circuit court entered its findings of fact and conclusions of law. Therein, the circuit court concluded that Galleria had committed fraud in the inducement, on the basis that it had made reckless representations concerning CAM estimates to the Pub. Because the circuit court found that the CAM charges were recklessly made, it concluded that the basis for the Pub's eviction had been invalid. The circuit court concluded that it was unreasonable for Galleria to claim that the Pub had breached the Lease by voluntarily vacating the premises when Galleria had brought the eviction action. While the circuit court found that Galleria was authorized under the Lease to apply the Pub's monthly rent payments to the past-due CAM charges, it concluded that Galleria had acted in bad faith in so doing, as Galleria was aware that the Pub was disputing the amount owed. Further, the circuit court found that the Pub had successfully proven that Galleria had converted its property.

However, the circuit court found that Galleria had not breached the covenant of good faith and fair dealing by allowing Ri Ra to open a restaurant across the street from the Pub. The circuit court noted that Section 3401 of the Lease had a "no exclusivity" provision, and that the nature of FSL meant that many bars and restaurants would conduct business there. Further, the Lease had

not contained a “non-compete” clause. While the circuit court noted that Galleria’s estimate of the CAM charges had been reckless, it found that the estimate did not rise to the level of “outrageousness” that would allow the Pub to receive punitive damages.

The circuit court entered a judgment on May 18, 2017. Therein, the circuit court: dismissed Galleria’s counterclaim; dismissed the Pub’s claim for the recovery of additional CAM expenses paid for calendar year 2010 forward, as it found the Pub had agreed to pay those sums; entered judgment in favor of the Pub for \$359,089.00 on its conversion claim; dismissed the Pub’s claim for damages in connection with Galleria’s allowing Ri Ra to operate at FSL; entered judgment in favor of the Pub for lost profits during November 14, 2012 through the end of the Lease term, in an amount of \$39,742.00; and dismissed the Pub’s claim for punitive damages. The Pub was additionally granted its costs and expenses incurred in litigation, including attorney fees of \$95,026.80.

This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

Most of the issues raised in this appeal and cross-appeal arise out of the circuit court’s order following the bench trial. Our review of those issues is governed by CR⁶ 52.01. The circuit court’s findings of fact shall not be set aside

⁶ Kentucky Rules of Civil Procedure.

unless clearly erroneous. *Id.* “If the trial judge’s findings of fact in the underlying action are not clearly erroneous, *i.e.*, are supported by substantial evidence, then [this] court’s role is confined to determining whether those facts support the trial judge’s legal conclusion.” *Commonwealth v. Deloney*, 20 S.W.3d 471-74 (Ky. 2000). We review the circuit court’s legal conclusions *de novo*. *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016) (citing *Sawyers v. Better*, 384 S.W.3d 107, 110 (Ky. 2012)).

Galleria has additionally appealed from the circuit court’s denial of its motion to dismiss and denial of its motion for summary judgment. Because neither an order on a motion to dismiss, nor an order on a motion for summary judgment, involves any findings of fact, but only conclusions of law, we review the circuit court’s rulings *de novo*. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

III. ANALYSIS

On appeal, Galleria contends that the circuit court erred by: failing to grant its motion to dismiss, as Galleria contends that *res judicata* precluded the Pub’s fraud claim and reinforced Galleria’s entitlement to all CAM charges; finding that Galleria had committed fraud in the inducement; finding that Galleria had breached the implied covenant of good faith and fair dealing; failing to award Galleria its claimed damages; and awarding the Pub damages and attorney fees. For its cross-appeal, the Pub contends that the circuit court erred in failing to

award it pre-judgment interest on the conversion and fraud damages it was awarded. We consider each argument in turn.

A. *Res Judicata* as a Bar to the Pub's Claims

In its motion to dismiss, Galleria contended that the Pub was barred from bringing any claim arising out of the Lease against Galleria, as it contended that all issues raised by the Pub had been previously litigated and decided in the forcible detainer action. The circuit court disagreed with Galleria's contention, concluding that—as the district court is a court of limited jurisdiction—the only issue on which it had ruled was whether Galleria was entitled to possession of the Premises.

Res judicata “is an affirmative defense which operates to bar repetitious suits involving the same cause of action.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998). The doctrine is comprised of two subparts: claim preclusion and issue preclusion. *Id.* at 464-65. Galleria contends that issue preclusion is applicable in this case. “Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action.” *Id.* at 465. For issue preclusion to operate as a bar in subsequent litigation, four elements must be present:

First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated. Third, even if the issue was actually litigated in a prior action, issue preclusion will not bar

subsequent litigation unless the issue was actually decided in that action. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.

Id. (citing *Restatement (Second) of Judgments* § 27 (1982)). Accordingly, to determine whether issue preclusion works as a bar in the present case, we must briefly examine the proceedings in district court.

The trial memorandum Galleria filed in the forcible detainer action argued that, based on the explicit terms of the Lease, the Pub was obligated to pay actual CAM charges in addition to its base monthly rent. The Pub had failed to do so, was \$331,611.20 in arrears, and accordingly, had defaulted on the Lease. As in the circuit court action, the Pub's defense was that the terms of the Lease were unconscionable, that Galleria had violated its implied duty of good faith and fair dealing, and that, accordingly, the Pub should be absolved of its obligation to pay reconciled CAM charges.⁷ Indeed, much of the testimony at the forcible detainer hearing was identical to the testimony presented during the bench trial in circuit court. Galleria contends that for the district court to have concluded that Galleria had a right to possession, it must have necessarily concluded that all Lease provisions related to CAM reconciliations were enforceable.

⁷ The Pub did not argue that the Lease had been fraudulently procured.

We disagree. The district court found that under the terms of the Lease as written, the Pub was in default and, therefore, Galleria was entitled to possession. The district court did not—and, indeed, was without jurisdiction to—rule on whether the Lease terms were unconscionable or fraudulently procured, thereby absolving the Pub of its obligations under it. KRS⁸ 24A.010(1) (“The District Court is a court of limited jurisdiction”); *Baker v. Ryan*, 967 S.W.2d 591, 597 (Ky. App. 1997) (“Forcible detainer actions are designed to be summary proceedings. In general, the only issues are possession by the plaintiff and detainer by the defendant [P]leadings are restricted, triable issues are limited, discovery is generally unavailable, and the judgment is promptly operative.”) (citations omitted). In fact, the district court noted that, if the circuit court were to find that the Lease terms related to CAM reconciliation were unconscionable, any eviction would be wrongful. Accordingly, we affirm the circuit court’s denial of Galleria’s motion to dismiss on the issue of *res judicata*.

B. Fraud in the Inducement

Next, Galleria contends that the circuit court erred in finding that it had fraudulently induced the Pub to enter into the Lease. Galleria contends that there was insufficient evidence to support a finding of fraud and that the circuit court’s findings lack a legal or factual basis.

⁸ Kentucky Revised Statutes.

To succeed on a claim of fraud in the inducement, the party bringing the claim must show by clear and convincing evidence that: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant either knew the representation was false, or made it recklessly; (4) the defendant induced the plaintiff to act on the misrepresentation; (5) the plaintiff reasonably relied on the misrepresentation; and (6) the plaintiff was injured as a result of the misrepresentation. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009) (citing *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464 (Ky. 1999)).

To serve as the basis for a fraud claim, the alleged misrepresentation “must relate to a past or present material fact.” *Id.* “A mere statement of opinion or prediction may not be the basis of an action.” *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955). Recognized exceptions to this general rule, known as “deception exceptions,” are “where the opinion either incorporates falsified past or present facts or is so contrary to the true current state of affairs that the purported prediction is an obvious sham.” *Flegles, Inc.*, 289 S.W.3d at 549.

Galleria does not dispute that the Pub considered the CAM estimate to be material to its decision to enter the Lease. What it does dispute, however, is that the CAM estimate can constitute a misrepresentation for the purposes of a fraud action. Galleria contends that the CAM estimate was just what it purported to be—

an estimate, *i.e.*, Galleria's prediction of what CAM costs would be. While the Pub acknowledges that the CAM estimate was only meant to serve as an estimate and not as the actual number it would be charged, it contends that implicit in the Galleria's estimated figure was a representation that Galleria had conducted some sort of analysis to back up its number. The Pub acknowledged at trial that no one from Galleria ever made a representation as to how the CAM estimate was reached, or even represented that any analysis was done.

The circuit court concluded that Galleria's estimation of CAM charges fit within the "deception" exceptions to the general rule that predictions cannot be the basis of a fraud claim, as the actual CAM charges were drastically different than the estimate quoted to the Pub when the parties' were negotiating the Lease. In support of that conclusion, the circuit court relied on the following findings of fact: (1) the adjustment from \$5.00 to \$6.00 was nonsensical and misleading, given that actual CAM expenses were \$13.00 more; (2) testimony at trial established that Galleria did no analysis prior to giving the CAM estimate, and moving the estimate by \$1.00 during negotiations gave the misleading appearance that some calculations had been done to determine the amount; (3) there was testimony that Galleria had shown the Baltimore Project to representatives of the Pub as part of Lease negotiations, which was clear evidence that Galleria had some knowledge as to actual CAM costs for this sort of development; and (4) the Pub

paid CAM at the \$6.00 per square foot rate for at least five years without notice or questioning. The circuit court additionally noted that, had Galleria noticed that the actual CAM fees were significantly higher than the estimate after the first operating year and notified the Pub, the outcome reached by the court may be different.

We agree with Galleria that at least some of the circuit court's findings of fact are not supported by substantial evidence and, further, that these findings do not support the conclusion the circuit court reached. The CAM estimate was increased to \$6.00 per square foot during negotiations of the Lease; at that time, Galleria had no knowledge that actual CAM expenses *in the future* could reach approximately \$18.00 per square foot. Mr. Sanders testified that, when he questioned Blake Cordish as to why the CAM estimate was increased, he was simply told "that is what it needs to be," without further explanation. He was not told that further analysis supported the new estimated CAM.

The evidence at trial did show that—ten years after giving the CAM estimate—Galleria was unable to find any person with knowledge of how the CAM estimate was reached or any documentation reflecting an analysis. No testimony was provided, however, to conclusively show that Galleria had *never* done any analysis to calculate a CAM estimate. Testimony indicated that, at the time the CAM estimate was given, the Pub requested no documentation reflecting

how Galleria reached the CAM estimate. Galleria did not offer any analysis to the Pub in support of its analysis either; however, the Pub has not pleaded that Galleria had a duty to disclose its analysis and failed to do so. *See Gentry v. Noe*, 545 S.W.3d 323, 326 (Ky. App. 2018) (“Fraud by omission and fraud by misrepresentation are different torts and require different elements. . . . Additionally, fraud must be pled with particularity”) (citing *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky. App. 2003); CR 9.02).

The circuit court correctly noted that representatives of the Pub toured the Baltimore Project during Lease negotiations with Galleria. While we agree with the circuit court that this indicates that Galleria had some knowledge as to actual CAM costs for entertainment developments, we cannot agree that this finding supports a claim of fraud. Evidence at trial showed that actual CAM charges for businesses operating in the Baltimore Project ranged from a low of \$2.05 per square foot to a high of \$6.33 per square foot in 2003. Def. Ex. 9. Thus, the actual knowledge that Galleria had concerning CAM costs for entertainment developments indicated that the CAM estimate given to the Pub was a reasonable figure. Prior to 2004, there was no meaningful operating history for FSL from which to derive a CAM estimate.

Further, the fact that Galleria failed to reconcile CAM costs until 2010 does not indicate that it made a fraudulent misrepresentation to the Pub to induce it

to enter the Lease *six years earlier*, in 2004. In hindsight, we now know that the actual CAM costs were considerably higher than what was represented to the Pub as an estimate. However, no one, including Galleria, knew what actual CAM costs would be at the time it made its representation—FSL was not yet fully operational. Actual CAM charges, as the Pub agreed to pay in the Lease, could only be known after they had been incurred. As acknowledged by Mr. Sanders, the Pub subjected itself to an “unknown exposure” when it agreed to pay actual CAM expenses without negotiating a cap on those expenses. T.T. 2/8/17 212:19-20. “[T]he law imposes upon recipients of business representations a duty to exercise common sense. Accordingly, . . . absent misrepresentation of objective data, ‘forward-looking recommendations and opinion are not actionable . . . merely because they are misguided, imprudent, or overly optimistic.’” *Flegles*, 289 S.W.3d at 549 (quoting *In re Salomon Analyst AT&T Litigation*, 350 F.Supp.2d 455, 467 (S.D.N.Y. 2004)).

Based on the above, we cannot find that the CAM estimate given by Galleria falls into the “deception exceptions.” The CAM estimates cannot be the basis of a claim for fraud. Accordingly, we reverse the circuit court as to the Pub’s fraud claim. The Lease should be enforced as written, and, accordingly, Galleria is entitled to a judgment that the Pub owes all past-due CAM charges.

C. Breach of Covenant of Good Faith and Fair Dealing

In its findings of fact and conclusions of law, the circuit court made several references to Galleria's breach of its duty of good faith and fair dealing. In so doing, however, the circuit court did not entirely explain what effect Galleria's breach of its duty had on the outcome of the judgment. We review the circuit court's findings and conclusions in that regard to the extent that they were used to support the circuit court's denial of Galleria's claim for damages.

The circuit court explicitly found that Galleria had breached its duty by waiting five years before sending CAM reconciliations. Additionally, the circuit court found that Galleria had been unreasonable in applying the Pub's monthly payments to past-due CAM without notifying the Pub that it was doing so and in declaring a default of the Lease and filing the forcible detainer action. The Pub contends that, even in the absence of fraud, the circuit court properly declined to award Galleria damages because of Galleria's breach its duty of good faith and fair dealing.

“Within every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out.” *Farmers Bank & Trust Co. of Georgetown, Kentucky, v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) (citing *Ranier v. Mount Sterling Nat'l Bank*, 812 S.W.2d 154, 156 (Ky. 1991)). “A

contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.” *Ligo v. Parr*, 471 S.W.2d 1, 3 (Ky. 1971) (quoting *Gulf, Mobile & Ohio R.R. Co. v. Ill. Cent. R.R. Co.*, 128 F. Supp. 311, 324 (N.D. Ala. 1954)). However, “[a]n implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights.” *Willmott Hardwoods*, 171 S.W.3d at 11 (citing *Hunt Enters., Inc. v. John Deere Indus. Equip., Co.*, 162 F.3d 1161 (6th Cir. 1998)).

Galleria had no contractual duty to send reconciliation notices within a certain time following an operating year and no contractual duty to notify the Pub how it was applying payments received. The extreme “delay” in sending reconciliation notices undoubtedly impeded the Pub’s ability to pay all amounts due within fifteen days following receipt of the notices, as it was required to do under Section 1002 of the Lease. Had Galleria gone through with the 2011 eviction action following the Pub’s failure to pay reconciled CAM pursuant to the Lease, we might be more inclined to find that Galleria had breached the implied covenant of good faith and fair dealing by failing to send more timely reconciliation notices. Galleria, however, did not do so. The record shows that Galleria dropped the 2011 eviction action in lieu of the Pub’s agreeing to pay the higher estimated rate of CAM going forward. It did not require the Pub to

immediately pay all past-due CAM charges. Additionally, failing to send reconciliation notices in a timelier manner was not beneficial to Galleria—it was required to pay fees to vendors without receiving reimbursements from its tenants. Further, we must note that, while the Pub was aware that CAM reconciliations would be forthcoming, it did not inquire about the reconciliations at any point—even after five years had gone by without receiving one.

The Pub has continually argued that an additional component of the parties' verbal agreement in 2011 was that past-due CAM charges would be set aside until the end of the Lease term. However, the Pub has proffered no evidence indicating any such agreement, other than testimony as to assumptions that this would be done. Galleria could have agreed to wait until the Lease term had run to litigate CAM, and it had the option to litigate the past-due CAM by way of a separate action; however, it had no *obligation* to wait until the term of the Lease was over before attempting to collect the amounts it was owed. Galleria's decision to collect past-due CAM and evict the Pub was within its contractual rights—doing so did not violate the implied covenant of good faith and fair dealing.

Additionally, Galleria had no contractual obligation to notify the Pub that it was applying payments to past debts, in accordance with Section 2609 of the Lease. While the Pub disputed that it should have to pay the CAM charges, it

was aware that it had not paid the charges and that Galleria had the right to apply payments received to any amounts due. Further, the Lease explicitly states that the decision of applying payments received to past-due debts is left to Galleria's sole and absolute discretion. The Pub cannot use the duty of good faith and fair dealing to require Galleria to assume obligations outside of the Lease. The Pub may have assumed that it could continue to ignore the past-due CAM charges; however, the Pub, not Galleria, must bear the risk of that assumption.

In sum, we do not find that Galleria breached the implied covenant of good faith and fair dealing in regard to the actions discussed above. The Pub was in default of the Lease, as it failed to pay rent when due. Accordingly, Galleria is entitled to damages caused by that default. However, we agree with the circuit court that Galleria is not entitled to collect liquidated damages under Section 2602(vii) of the Lease. Under that section, Galleria is permitted to collect liquidated damages from the Pub only in the event that the Pub fails to conduct business operations on the Premises for more than three consecutive business days. Galleria claims the fact that the Pub vacated the Premises following final judgment in the forcible detainer action triggers its right to liquidated damages. Galleria, however, filed the writ for forcible detainer, and prosecuted the action to final judgment. We do not dispute the fact that Galleria was within its right in so doing. However, Galleria cannot now claim that the Pub's vacating the Premises

entitles it to liquidated damages, when the Pub would not have left the Premises but for Galleria's filing the writ.

D. Damages Awarded to the Pub

Galleria contends that the circuit court erred in both finding that the Pub had proven its claim for conversion and, assuming the Pub had adequately proved its claim, in calculating the damages the Pub was owed. During the proceedings below, the Pub contended that Galleria had converted its property when it refused to allow the Pub to remove any property—absent a few perishable and logoed items—following the Pub's quitting the Premises. Galleria disputed this contention, and argued that the Lease gave it the right to retain the Pub's property. In finding that Galleria had converted the Pub's property, the circuit court conducted little analysis, merely reciting the elements required for a conversion claim. The Pub was awarded \$359,089.00 in damages, based on the testimony of Mr. Bell.

“Conversion is an intentional tort and is generally defined as ‘the wrongful exercise of dominion and control over the property of another.’” *Jasper v. Blair*, 492 S.W.3d 579, 582 (Ky. App. 2016) (quoting *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 853 (Ky. App. 2014)). In Kentucky, the elements of conversion are as follows:

- (1) the plaintiff had legal title to the converted property;

(2) the plaintiff had possession of the property or the right to possess it at the time of the conversion;

(3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;

(4) the defendant intended to interfere with the plaintiff's possession;

(5) the plaintiff made some demand for the property's return which the defendant refused;

(6) the defendant's act was the legal cause of the plaintiff's loss of the property; and

(7) the plaintiff suffered damage by the loss of the property.

Jones, 454 S.W.3d at 853 (quoting *Ky. Ass'n of Ctys. All Lines Fund Tr. v.*

McClendon, 157 S.W.3d 626, 632 n. 12 (Ky. 2005)).

The only element that is disputed between the parties is element (2)—whether the Pub had a right to possess the property at the time it was allegedly converted by Galleria. Galleria contends that, in the event of default by the Pub, certain provisions in the Lease gave it the right to seize and take possession of the Pub's property. Accordingly, Galleria contends that the Pub had no right to possession of the property and that its claim for conversion must fail. The specific Lease provisions to which Galleria refers state as follows:

1602. All trade fixtures owned by Tenant and installed in the Premises shall remain the property of Tenant and

shall be removed by Tenant at the expiration of the Term, or any renewal or extension hereof, or other termination thereof, provided Tenant shall not at such time be in default under any covenant, agreement or obligation contained herein; and, if in default **Landlord shall have a lien on such trade fixtures as security against loss or damages resulting from any such default by Tenant, and said fixtures shall not be removed by Tenant until such default is cured or Landlord notifies Tenant to remove such trade fixtures (or any items thereof) from the Premises.**

...

2606. Landlord shall have a **lien upon all the personal property and fixtures** of the Tenant in the Premises, as and for security for the Rent and other obligations of Tenant herein provided. **In order to perfect and enforce said lien, Landlord may, at any time after default by Tenant in the payment of Rent or other obligations to be performed or complied with by Tenant under this Lease, seize and taken possession of any and all fixtures and personal property belonging to Tenant which may be found in and upon the Premises.** If Tenant fails to redeem the fixtures and personal property and fixtures [sic] so seized, by payment of whatever sum may be due Landlord under and by virtue of the provisions of this Lease, then, and in that event, Landlord shall have the right, after five (5) days' written notice to Tenant of its intention to do so, to sell such personal property so seized at public or private sale and upon such terms and conditions as to Landlord may appear advantageous, and, after the payment of all proper charges incident to such sale, apply the proceeds thereof to the payment of any balance due to Landlord on account of Rent or other obligation of Tenant pursuant to this Lease. . . .

(Emphases added).

The Pub does not dispute that, following a default on its part, the foregoing provisions of the Lease gave Galleria the right to assert a lien on its personal property and fixtures. However, the Pub contends that the way in which Galleria attempted to do so was improper, and amounted to conversion. The Pub notes that Section 3001 of the Lease states that the Lease constitutes a security agreement under the UCC⁹ of the jurisdiction in which the Premises is located. Under the UCC as it has been codified in Kentucky, secured parties are permitted to “sell, lease, license, or otherwise dispose of any or all of the collateral” following a default. KRS 355.9-610(1). Further, any disposition of collateral must be commercially reasonable. KRS 355.9-610(2). Because Galleria failed to dispose of the Pub’s property, but rather retained it on the premises, the Pub contends that Galleria has breached its obligations under the UCC and must be liable for conversion.

To prevail on a claim of conversion, the plaintiff must establish “the immediate right to possession of the article[s] converted.” 18 C.J.S. *Conversion* § 69 (2004). Because the Pub had defaulted under the Lease, Galleria had the right to possession of all the Pub’s personal property at the time the default occurred under Section 2606 of the Lease and KRS 355.9-609(1), which allows a secured party to take possession of collateral following an event of default. However, this

⁹ Uniform Commercial Code.

right does not allow a secured party to retain the debtor's property in perpetuity. One who "takes possession of collateral upon the default of the debtor has two alternatives in dealing with the collateral." *Herring Min. Co. v. Roberts Bros. Coal Co., Inc.*, 747 S.W.2d 616, 618 (Ky. App. 1988). "He must either sell the property in a 'commercially reasonable' manner with notice provided to the debtor of the sale . . . or he may elect to retain the collateral in satisfaction of the debt." *Id.* at 618-19 (citing KRS 355-9.504(1), (2), (3); KRS 355.9-505(2)).¹⁰ If the latter route is chosen, written notice must be provided to the debtor, who may object to retention of the property and require disposition of the property by sale. *Id.*

Galleria has had possession of the property since November of 2012. At least as of the date of the bench trial, it had not taken efforts to sell the property; there has been no suggestion that Galleria elected to retain the property as partial satisfaction of the Pub's debt to it. One who takes possession of a debtor's property must dispose of that property within a reasonable time. *Commercial Credit Co. v. Cooper*, 246 Ky. 513, 55 S.W.2d 381, 382 (1932). Galleria failed to do so. The testimony at trial indicated that Galleria has simply allowed the Pub's property to sit on the Premises. As such, its retention of the Pub's property appears to be nothing more than a taking, and amounts to conversion. *Id.*

¹⁰ What is now KRS 355.9-610(1), (2) and (3); KRS 355.9-620.

While we agree with the circuit court that Galleria converted the Pub's property, the amount of damages it awarded to the Pub was erroneous. "Recovery for conversion . . . is determined by proof of the fair market value of the property converted at the time of conversion." *Nolin Prod. Credit Ass'n v. Canmer Deposit Bank*, 726 S.W.2d 693, 704 (Ky. App. 1986) (citing *Amlung v. Bankers Bond Co.*, 411 S.W.2d 689 (Ky. 1967)). "And, the burden is upon plaintiff to prove the fair market value of the property at the time of conversion." *Jasper*, 492 S.W.3d at 583. In the instant case, the Pub failed to meet its burden. Rather than establishing what the fair market value of the property was, the Pub introduced evidence, through the testimony of Mr. Bell, of what the property would be worth *to the Pub*. This evidence is insufficient to support the amount of damages awarded to the Pub on its conversion claim. *See Batson v. Clark*, 980 S.W.2d 566, 575 (Ky. App. 1998).

As part of its cross-appeal, the Pub contends that the circuit court erred in failing to award it pre-judgment interest on the value of the converted property. In the proposed judgment the Pub tendered to the circuit court, it included a clause stating that the Pub would be granted prejudgment interest at a rate of 8% per annum on the damages recovered on its conversion claim. While the circuit court generally adopted the Pub's proposed judgment, it elected to omit any portions of the judgment referring to prejudgment interest. An award of pre-

judgment interest for a conversion claim is within the discretion of the finder of fact. *See Amlung*, 411 S.W.2d at 693. While the circuit court would have been within its right had it awarded the Pub prejudgment interest, we do not find that a failure to do so constitutes an abuse of discretion.

Galleria additionally contends that the circuit court erred in awarding the Pub lost profits and attorney fees. Because the award of lost profits was based on the circuit court's conclusion that the Pub had been wrongfully evicted from the premises, we agree with Galleria that that award must be vacated. As to the Pub's attorney fees and costs, "[a]s a general rule, in the absence of contractual or statutory liability, attorneys' fees are not recoverable as an item of damages." *Lyon v. Whitsell*, 245 S.W.2d 926 (Ky. 1951). The Pub acknowledges that neither it nor the circuit court cited to any contractual provision or statutory authority providing for it to receive attorney fees; however, the Pub contends that the general rule against recovery of attorney fees does not abolish the equitable rule that an award of attorney fees is within the discretion of the circuit court, depending on the circumstances of each particular case.

The Pub is correct that "[t]he courts of the Commonwealth were *previously* empowered to award attorneys' fees as an equitable measure, when, within the discretion of the court, it was deemed appropriate." *Seeger v. Lanham*, 542 S.W.3d 286, 294 (Ky. 2018) (citing *Dorman v. Baumlisberger*, 113 S.W.2d

432, 433 (Ky. 1938); *Kentucky State Bank v. AG Servs., Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984)) (emphasis added). “However, in *Bell v. Commonwealth, Cabinet for Health and Family Services*, this Court determined an equitable award of attorneys’ fees was inappropriate.” *Id.* (citing *Bell*, 423 S.W.3d 742, 750 (Ky. 2014)). Attorney fees may be “awarded as a *sanction* but only under limited circumstances.” *Bell*, 423 S.W.3d at 748. The Pub urges that attorneys’ fees are appropriate in this case, based on what it perceives to be Galleria’s egregious conduct. However, in “instances where attorney’s fees are appropriate as a sanction, it is not for the benefit of the individual plaintiff, but because there has been an intrusion on the very power of the court.” *Id.* at 749. Such intrusion has not occurred in this case. Neither the Pub nor the circuit court cited to any contractual provision or statutory authority supporting an award of attorney fees or costs. Accordingly, we agree with Galleria that the award must be vacated.

IV. CONCLUSION

In light of the foregoing, we affirm the circuit court’s order denying Galleria’s motion to dismiss on the basis of *res judicata*; affirm the portion of the order of the circuit court finding that Galleria has converted the Pub’s property; reverse the portions of the order finding that Galleria committed fraud in the inducement and breached the implied covenant of fair dealing; vacate damages awarded to the Pub for conversion, lost profits, and attorney fees and costs; and

remand. On remand, the circuit court shall determine the amount of damages due to Galleria for the Pub's breach of the Lease. Those damages shall be offset by any damages awarded to the Pub for Galleria's conversion of its property, which amount shall be determined based on the fair market value of the Pub's property at the time of conversion. All remaining arguments contained in the Pub's cross-appeal are deemed moot as a result of the foregoing opinion.

CLAYTON, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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