

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001265-MR

MARKET PLUS WINE, LLC;
and KRIM BOUGHALEM

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 16-CI-04482

WALKER PROPERTIES OF
CENTRAL KENTUCKY, LLC

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

KRAMER, JUDGE: On or about May 3, 2011, Walker Properties of Central Kentucky, LLC (“Walker”) entered into a commercial lease agreement with Market Plus Wine, LLC, and Krim Boughalem (collectively, “Market”) for real property located at 710 National Avenue and 264 Walton Avenue, Lexington, Kentucky (the “Premises”). The lease was for a primary term of ten years, running from December 1, 2011 through November 30, 2021; and the business that the

appellants eventually operated on the Premises, “National Provisions,” functioned as a restaurant, bakery, and grocery store.

The relationship between Walker and Market deteriorated about five years later, to the point that by December 2016, each party had accused the other of breaching the lease. Walker accused Market of violating the terms of the lease by being chronically late in paying monthly rent; violating health codes; becoming insolvent; and by closing National Provisions to the public and effectively vacating the premises. Market, on the other hand, asserted that if it had defaulted in any respect, Walker had waived its alleged defaults by continuing to accept its payments of rent at all relevant times. And considering Walker’s repeated waivers, Market asserted Walker had been the first to actionably default under the terms of the lease by refusing to consent to Market assigning the lease to a prospective purchaser of National Provisions and then evicting it from the Premises.

The parties proceeded to litigate their disagreements in Fayette Circuit Court, and a total of four claims¹ were presented: (1) Walker’s breach of contract

¹ Market also asserted a “claim” against Walker for “breach of implied covenant of good faith and fair dealing.” To be sure, Kentucky recognizes that every contract contains an implied covenant of good faith and fair dealing. *Ranier v. Mount Sterling Nat’l Bank*, 812 S.W.2d 154, 156 (Ky. 1991) (citations omitted). However, Kentucky has only ever recognized a breach of the implied covenant of good faith and fair dealing as tortious (*e.g.*, as a violation of a general duty owed independently of a contract) where the situation has involved parties in a special relationship not found in ordinary commercial settings, such as between an insurer and an insured, where distinct elements are present such as unequal bargaining power, vulnerability and trust among the parties. *See Hulda Schoening Family Tr. v. Powertel/Kentucky, Inc.*, 275 F. Supp. 2d 793, 797-98 (W.D. Ky. 2004) (citing *Ennes v. H & R Block E. Tax Serv., Inc.*, Civ. A.

action against Market; (2) Market's breach of contract action against Walker; (3) a claim of intentional interference with contractual relations (IICR) that Market asserted against Walker, in which Market claimed Walker's alleged breach had cost it the sale of its business to a prospective buyer; and (4) a declaration of rights action with regard to the ownership of various improvements Market had added to the Premises during the term of the lease.

The circuit court adjudicated only the latter three of the parties' four claims. Specifically, the circuit court summarily dismissed the appellants' breach of contract claim against Walker; it summarily dismissed the appellants' IICR claim against Walker; and it summarily resolved the declaratory action in favor of Walker. But, regarding Walker's claim against Market, the circuit court only made a finding that Market was liable for breach; it made no decision regarding damages. Thereafter, Market appealed. However, the circuit court's retention of jurisdiction over Walker's breach of contract action against Market is problematic.

To explain, the circuit court disposed of Market's breach of contract and IICR claims against Walker on the same basis – its determination that Walker

No. 3:01CV-447-H, Not Reported in F. Supp. 2d, 2002 WL 226345, at *2-*3 (W.D. Ky. Jan. 11, 2002)). Here, even if Walker had breached the implied covenant of good faith in the lease, no such special relationship between Walker and the appellants was present under the circumstances of this case, nor is one even alleged to have existed. Therefore, any alleged violation by Walker of the implied covenant of good faith and fair dealing could not have served as the basis of any claim apart from breach of contract.

could not be held liable on either claim because *Market breached the contract first*. It held that because Market had breached first and had consequently forfeited the lease, Market had lost any right to insist upon Walker's consent to any subsequent assignment of the lease or to complain about being evicted from the leased premises. *See, e.g., Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 759 (Ky. App. 1999) ("A party who commits the first breach of a contract is deprived of the right to complain of a subsequent breach by the other party.") (Citation omitted).

With respect to Market's IICR claim, the circuit court likewise held that because *Market breached the contract first*, at least one element of that claim necessarily failed: Market's claim was based upon the notion that by evicting it from the leased premises and refusing to consent to an assignment, Walker had interfered with a prospective contract. But, because Market had breached first and had consequently forfeited the lease, Walker had an absolute right to evict Market from the leased premises and refuse its consent to an assignment, and Walker thus lacked any improper motive.²

² In *Nat'l Coll. Athletic Ass'n v. Hornung*, 754 S.W.2d 855 (Ky. 1988), the Supreme Court of Kentucky set forth the principles governing the tort of intentional interference with a prospective contractual relationship. It held that Sections 766B, 767 and 773 of the Restatement (Second) of Torts reflect the prevailing law in Kentucky. To recover under this cause of action, a claimant must plead and prove the following elements: (1) the existence of a valid business relationship or its expectancy; (2) a defendant's knowledge thereof; (3) an intentional act of interference; (4) an improper motive; (5) causation; and (6) special damages. In deciding whether the actor's actions were improper, a court must consider the factors set forth in Section 767 of the

Accordingly, the central issue we are asked to address in this appeal is whether, for purposes of *Market's* claims against *Walker*, the circuit court correctly determined *Walker* was not liable because *Market breached the contract first*. However, while the circuit court has certified pursuant to CR³ 54.02 that appellate review is appropriate regarding its determination that *Market breached the contract first* in the context of *Market's* claims against *Walker*, it has effectively reserved the right to revisit that issue in the opposite context; namely, in the context of *Walker's* claim against *Market*. This is because *Walker's* claim against *Market* – a claim that asserts *Market* is liable to *Walker* because *Market breached the contract first* – remains unadjudicated and interlocutory. See *Tax Ease Lien Invs. 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011) (“A judgment on liability reserving for later determination the issue of damages is not final and appealable even though it includes the Rule 54.02 recitations.”) (citation and quotation omitted).

Restatement (Second) of Torts; *Hornung*, 754 S.W.2d at 858. Those factors are (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. Though a defendant's actions may be “improper,” he may nevertheless not be liable, if he acted in good faith in asserting a legally protected interest. *Hornung*, 754 S.W.2d at 858.

³ Kentucky Rule of Civil Procedure.

At the onset of this appeal, Walker filed a motion to dismiss. There, Walker acknowledged the circuit court had utilized the requisite appealability language that allows for review of an order adjudicating less than all the claims presented. *See* CR 54.02(1). That aside, Walker argued appellate review was inappropriate because, in failing to adjudicate its breach of contract claim, the circuit court gave rise to the possibility that this Court would be obliged to review the issue of “who breached first” a *second* time. In that vein, Walker noted that when the circuit court ultimately ruled on its breach of contract claim against Market, Market would be free to appeal and raise the issue again.

With that said, we agree with Walker’s reasoning that the circuit court abused its discretion in certifying this matter as final and appealable.^{4,5} As stated in *Jackson v. Metcalf*, 404 S.W.2d 793, 794-95 (Ky. 1966),

In the exercise of that discretion the trial judge must balance this Court’s historic policy against piecemeal appeals and the practical needs of the particular case before him. The entering of certification under CR 54.02

⁴ In *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722, 727 (Ky. 2008), the Kentucky Supreme Court explained that if a party believes a trial court erred in certifying claims as final and appealable, the issue must be raised on appeal and will be reviewed under the abuse of discretion standard.

⁵ A motion panel of this Court previously entered an order overruling Walker’s motion to dismiss. However, “there is neither reason nor authority for treating decisions on [the Court of Appeals’] motion panel which make no final disposition of the case any differently than interlocutory orders in the trial court.” *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 329 (Ky. 1993). “Such an order is by its nature subject to further review in the court where the case is still pending, either at the request of a party or *sua sponte*, until a final, appealable decision has been entered, whether by judgment, order or opinion.” *Id.*

is no more automatic than is an extension of time to file a record on appeal under CR 73.08. The trial judge should always determine in entering a certification under CR 54.02 that the order being certified is sufficiently important and severable to entitle a party to an immediate appellate review.

(Internal citations omitted).

And in the exercise of that discretion, two of the factors that must be considered in certifying an adjudication as final and appealable are “whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.” *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8, 100 S. Ct. 1460, 1465, 64 L. Ed. 2d 1 (1980).⁶

Here, Market’s breach of contract and IICR claims against Walker were not separable from Walker’s breach of contract claim against Market; indeed, the opposing claims are mutually exclusive. Moreover, any subsequent appeal of Walker’s breach of contract claim would necessarily involve the same issues presented here, not the least of which being the issue of “who breached first.” Accordingly, the circuit court abused its discretion in certifying Market’s breach of

⁶ In *Curtiss-Wright*, this statement was an interpretation of Federal Rule of Civil Procedure (FRCP) 54(b), the federal corollary to CR 54.02. However, as our own Supreme Court has stated, “CR 54.02 is substantively equivalent to Federal Rules of Civil Procedure (FRCP) 54(b). Federal case law is instructive on the purpose of the rule.” *Watson*, 245 S.W.3d at 725.

contract and IICR claims as final and appealable, and to that extent Market's appeal is DISMISSED.

It is also unclear whether the circuit court's ultimate resolution of Walker's breach of contract claim against Market could influence its resolution of the parties' declaration of rights action. Until the circuit court resolves that remaining claim, we decline out of an abundance of caution to review that matter. *See* Kentucky Revised Statute (KRS) 418.065.

ALL CONCUR.

ENTERED: February 22, 2019

/s/ Joy A. Kramer
JUDGE, COURT OF APPEALS

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