

RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001716-MR
AND
NO. 2017-CA-001804-MR

GUYS N' DOLLS, LLC

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 15-CI-01078

MARY LIPPERT

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Guys N' Dolls, LLC (GND) appeals and Mary Lippert cross-appeals from an order entered July 18, 2017, by the Campbell Circuit Court

awarding GND \$3,744 for breach of contract damages and \$3,727.50 in attorney fees.¹ Finding no error, we affirm.

In February 2013, GND, via Steve Chuke and Jack Eck (its members), rented a building in Cold Spring, Kentucky to DeVanna's, LLC, an entity which held functions such as wedding receptions. Mary Lippert, the sole member of DeVanna's, signed a guaranty of the lease. Unusually, the lease provided that the rent would be "sixty (60%) percent of [DeVanna's] 'Net Profit' received for the prior calendar month[.]" Record on appeal at 4. Net profit was defined as "all income from the operation of LESSEE's business at the Premises . . . less . . . all expenses incurred in the operation of LESSEE's business at the Premises[.]" *Id.* The lease also provided that "deposits and other advance payments for weddings, receptions, anniversaries, and all other occasions shall not be accounted for as income until the event has actually occurred[.]" *Id.*

Perhaps unsurprisingly, problems arose in determining the rent DeVanna's owed GND. GND filed two forcible detainer actions in early 2014, but each was dismissed. In June 2014, GND filed a third forcible detainer action and received a judgment in its favor in October 2014. DeVanna's vacated the property

¹ The final order awarding the damage amount and attorney's fees was entered by order on September 21, 2017. This order also denied Guys N' Dolls, LLC, (GND) motion to alter, amend, or vacate the July 18, 2017, order.

on October 31, 2014. We do not have the record from any of those actions in this appeal.

Meanwhile, DeVanna's entered into a sublease with a church in April 2013 for a period running through February 2015. Under the terms of that sublease, to which Chuke expressly consented on behalf of GND, the church's rent was \$5,850 quarterly, \$10,530 bi-annually, or \$18,720 annually. It is uncontested that the church prepaid \$18,720 rent for a year's occupancy for the period ending February 28, 2015. Thus, the church remained on the premises for about four months after DeVanna's was evicted.

In November 2015, GND brought this action against Lippert, as guarantor, raising claims for breach of contract, conversion, damage to property and fraud. The matter progressed to a May 15, 2017, bench trial at which Chuke and Lippert were the only witnesses. In July 2017, the trial court issued findings of fact and conclusions of law, finding that GND had not submitted sufficient proof on its fraud, conversion and property damage claims.

As to breach of contract, the court found GND "did not provide any evidence to the Court of what Defendant's profits were for each month, [so] the Court has no way to determine what the rent value should have been." Record on appeal at 105. The court also concluded DeVanna's breached the lease by not

providing GND with any of the prorated rent from the four months the church occupied the premises after DeVanna's exit.²

The court declined to award treble damages under the holdover provision in the lease between GND and DeVanna's because, among other things, GND had not given DeVanna's the thirty-day notice necessary to terminate the lease prior to filing the forcible detainer actions.³ Because the guaranty signed by

² \$18,720 (annual rent)/12 months per year = \$1,560 per month x 4 months (November 2014 through February 2015) = \$6,240.

³ The holdover provision is as follows:

If the LESSEE remains in possession of the Premises after the Lease has terminated, LESSOR may bring an action for possession. If the LESSEE'S holdover is willful and not in good faith the LESSOR may recover up to three months' rent or three times the LESSOR'S actual damages, whichever is greater, plus reasonable attorney's fees.

Record on appeal at 9.

Section four of the lease, which governs nonpayment of rent, provides in its entirety:

IF THE RENT OR ANY OTHER CHARGE OR COST IS UNPAID WHEN DUE AND LESSEE FAILS TO PAY ALL AMOUNTS DUE WITHIN THIRTY (30) DAYS AFTER THE SENDING OF WRITTEN NOTICE BY LESSOR OF NONPAYMENT AND OF LESSOR'S INTENTION TO TERMINATE THIS LEASE IF THE AMOUNTS ARE NOT PAID IN FULL BY THE END OF THE THIRTY (30) DAY PERIOD, LESSOR MAY TERMINATE THIS LEASE AND PURSUE EVICTION. UPON TERMINATION OF THIS LEASE BY LESSOR, LESSOR RETAINS ANY RIGHTS WHICH LESSOR HAS ACCRUED AGAINST LESSEE BEFORE THE DATE OF THE TERMINATION.

Record on appeal at 5.

Lippert stated that she would pay GND's "reasonable attorney's fees, arising out of the failure by [DeVanna's] to pay rent and other sums under the Lease[,]” the court held that GND was entitled to attorney fees in an amount to be determined after submission of proper documentation.

Lippert filed a motion to alter, amend or vacate, contending GND was not entitled to attorney fees or any rent from the church's occupancy of the premises following DeVanna's departure. Alternately, Lippert argued GND was entitled to only 60 percent of the rent at issue as that would have been her profits for the four months in question. GND did not file a response.

On September 21, 2017, the trial court issued an order which purports to deny the motion to alter, amend or vacate. However, the order functionally granted the motion in part because the court concluded GND was only entitled to 60 percent of the rent for the four months at issue. The court also awarded GND \$3,727.50 in attorney fees.

GND then filed Appeal No. 2017-CA-001716-MR, challenging three aspects of the trial court's decision: 1) the court's conclusion GND was only entitled to 60 percent of the rent for the four months the church remained on the premises after Lippert's departure, 2) the court's refusal to award treble damages under the holdover provision of the lease, and 3) the court finding in favor of Lippert on the fraud claim. Thereafter, Lippert filed Cross-Appeal 2017-CA-

001804-MR, arguing the trial court erred by awarding any of the prorated rent to GND. Lippert also argues that GND was entitled to no breach of contract damages and thus concomitantly was not entitled to attorney fees.

As noted, this case was tried by the court without a jury. Under Kentucky Rules of Civil Procedure (CR) 52.01, the circuit court is required to make findings of fact and conclusions of law. Findings of fact shall not be set aside on appeal unless clearly erroneous. CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Goshorn v. Wilson*, 372 S.W.3d 436, 439 (Ky. App. 2012). As fact-finder, the circuit court must assess the credibility of witnesses and the weight of the evidence presented. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). And, on appeal, this Court reviews questions of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

Accordingly, we begin our analysis by determining the amount, if any, of damages to which GND was entitled for DeVanna's breach of contract. That determination requires analyzing the lease, which we review under the familiar standards of contract review. *See, e.g., Stowe v. Realco Limited Liability Company*, 551 S.W.3d 462, 465-66 (Ky. App. 2018) (reviewing a lease term under general contract principles). Interpretation of a contract presents a question of law, so we review *de novo* the trial court's legal conclusions. *Hazard Coal Corp. v.*

Knight, 325 S.W.3d 290, 298 (Ky. 2010). If a contract is not ambiguous, we will strictly enforce its terms, assigning them their ordinary meaning without examining extrinsic evidence. *Id.* A contract is ambiguous if a reasonable person could conclude it is susceptible to inconsistent interpretations. *Id.*

Clearly, the rent payment from the church qualified as income under the unambiguous terms of the lease. Yet adopting Lippert's position would entitle DeVanna's to keep the entirety of that income. Indeed, Lippert's extremely terse brief cites to no clause in the lease to support her argument that DeVanna's was entitled to the entire rent payment. Instead, she argues no portion of the rent was owed to GND because "no income was received by the Appellee in those 4 months The income was received in the month it was paid and then subject to the 'net profits' provisions of Lease paragraph 3." Lippert's Brief at 6. However, section three of the lease states that "deposits and other advance payments . . . shall not be accounted for as income until the event has actually occurred[.]"⁴ Therefore, the church's prepaid rent was not income until the event occurred. In other words, rent for the four months in question did not qualify as income under the lease until those four months came to pass. Further undermining her position is the fact that Lippert cites to nothing in the record to show she *ever* remitted *any* portion of the

⁴ The lease agreement is found on pages 4-13 of the record on appeal.

church's prepaid yearly rent to GND. Indeed, throughout the bench trial the parties presented scant documentation to support their respective positions.

As the trial court noted, DeVanna's logically could not have incurred expenses from business operations on premises it no longer occupied. Therefore, the entirety of the prorated rent for those four months was net profit for DeVanna's, so the trial court properly required DeVanna's to remit 60 percent of the prorated rent received from the church to GND.

Conversely, GND cites to nothing in the lease which would entitle it to the entirety of the disputed rent. Indeed, the substantive entirety of GND's fleeting argument is that the trial court erred by only awarding it 60 percent of the rent for the four months because "this amount would not be rent because the Appellee did not occupy the premises so there was no rent, this is money that belonged to Appellant alone." GND's Brief at 4. This argument fails for the same reasons as the mirror image one raised by Lippert.

Awarding the entirety of the church's prorated rent for the four months at issue to either party would result in a windfall and violate the lease's terms regarding advance payments and the amount of rent owed by DeVanna's to GND. Consequently, we affirm the trial court's decision to award GND \$3,744 (\$6,240 prorated rent for four months x 0.60). That conclusion inevitably dooms

Lippert's wholly dependent argument that GND is entitled to no attorney fees because its breach of contract claims lacked merit.⁵

Similarly, we affirm the trial court's decision that GND is not entitled to treble damages under the lease's holdover provision. This argument is again underdeveloped, consisting only of two paragraphs with no citations to precedent or statutory authority. As we construe the argument, GND believes it is entitled to treble damages because the lease terminated once GND filed the first forcible detainer action.

The holdover provision states that “[i]f [DeVanna’s] remains in possession of the Premises after the Lease has terminated, [GND] may bring an action for possession. If [DeVanna’s] holdover is willful and not in good faith [GND] may recover up to three months’ rent or three times [GND’s] actual damages, whichever is greater, plus reasonable attorney’s fees.” Record on appeal at 9. But, as the trial court noted, GND’s argument ignores section four of the lease, which permits GND to terminate the lease for rent nonpayment if DeVanna’s failed to pay the amounts due “within thirty (30) days after the sending of written notice by [GND] of nonpayment and of [GND’s] intention to terminate this lease[.]” Record on appeal at 5 (emphasis and all caps omitted).

⁵ No party has questioned the amount of the attorney fee award.

Crucially, GND does not point to any written notice it sent to DeVanna's regarding nonpayment and an intent to terminate the lease. In addition, it is illogical to consider DeVanna's a holdover based upon the filing of the two unsuccessful forcible detainer actions. Though we do not have the record of those proceedings, it is inescapable that those proceedings were not successful and thus DeVanna's was legally permitted to remain on the premises, given the lease was not legally terminated. In any event, GND could not have satisfied the holdover provision's requirement in the unsuccessful forcible detainer actions that DeVanna's continued tenancy was "willful and not in good faith" since the court effectively permitted DeVanna's to remain on the premises. Finally, GND points to nothing specific in its terse argument to contradict the trial court's conclusion that it "failed to provide the Court with any evidence of actual damages" which occurred between the filing of the successful forcible detainer action and DeVanna's leaving the premises. July 18, 2017, Order at 13.

GND's final argument is that the trial court erred by ruling in DeVanna's favor on the fraud claim. Again, our review is hampered by the fact that GND's argument is significantly underdeveloped, consisting of only three paragraphs. The gist of GND's argument is that DeVanna's "had a consistent pattern of fraudulent activity." GND's Brief at 5. But all that GND cites to support that generic conclusion is DeVanna's alleged failure to provide sufficient

documentation of its income and expenses while it was operating at the premises and during the trial court proceedings. But GND’s argument is fatally undercut by the fact it proceeded to trial without protest when it did not have the documents it now insists it needed, nor did it file a motion to compel Lippert to provide additional documents in discovery.

It is difficult to discern with reliable accuracy what type of fraud claim(s) GND raised. Regardless, CR 9.02 requires fraud claims to be “stated with particularity.” Thus, though circumstantial evidence may support a fraud claim, “mere conjecture or speculation is insufficient” *PBI Bank, Inc. v Signature Point Condominiums LLC*, 535 S.W.3d 700, 714 (Ky. App. 2016). To support a fraudulent misrepresentation claim, which it appears GND has raised, a party must prove the following six elements by clear and convincing evidence:

- (1) that the declarant made a material representation to the plaintiff, (2) that this representation was false, (3) that the declarant knew the representation was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff.

Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544, 549 (Ky. 2009) (citation omitted).⁶

⁶ We presume GND intended to raise a fraudulent misrepresentation claim because it cites those six elements in its brief whereas a claim for fraudulent omission contains different elements. *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011). Even if, however, GND intended to raise a fraudulent omission claim, it would fail because GND has not shown what material fact(s) DeVanna’s, LLC, failed to disclose, nor how that failure caused GND to suffer actual damages. *Id.* (listing the elements for a fraudulent omission claim).

As the trial court aptly concluded, GND has not satisfied those six elements. GND has not shown what material misrepresentations DeVanna's knowingly made or how GND relied on the misrepresentation(s) to its detriment. Even now, GND only laments DeVanna's failure to provide unspecified additional documents showing its income and expenses. We agree with the trial court that GND "has not put forth any [specific] evidence that [DeVanna's] committed fraud in getting [GND] to sign the contract" July 18, 2017, Order at 10. Because GND clearly failed to satisfy the required six elements by clear and convincing evidence, we affirm on the fraud claim.

For the foregoing reasons, the orders of the Campbell Circuit Court are affirmed as to the Appeal and Cross-Appeal.

ALL CONCUR.

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