

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK O'NEIL,

Plaintiff/Counterdefendant-
Appellant,

v

M. V. BAROCAS COMPANY,

Defendant/Counterplaintiff/Third-
Party Plaintiff-Appellee,

and

CAFÉ HAWAII, INC.,

Third-Party Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 243356

Wayne Circuit Court

LC No. 99-925999-NZ

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

In separate orders following a bifurcated bench trial, the trial court determined that third-party defendant Café Hawaii, Inc., breached its lease agreement with defendant, awarded possession of the leased premises to defendant, and awarded defendant damages of \$52,919.99, plus taxable costs and statutory interest. In a separate post-judgment order on summary disposition, the court determined that plaintiff Patrick O'Neil, as a guarantor of the lease between Café Hawaii and defendant, was jointly and severally liable with Café Hawaii for the damages awarded to defendant. Plaintiff and Café Hawaii now appeal as of right. We affirm in part and remand for further proceedings.

I. FACTS

In 1997, Café Hawaii leased a building from defendant in Dearborn, Michigan, in order to operate a theme restaurant. Less than two years after opening, the restaurant began to experience financial difficulties, causing it to fall behind in its obligations under the lease agreement. In February 1999, defendant sent a letter to Café Hawaii, notifying it that it was to begin making escrow payments for real estate taxes. Although the parties' lease agreement required the payment of real estate taxes into an escrow account, Café Hawaii had previously paid the taxes directly to the city.

In May 1999, defendant filed an action in district court to recover past-due rent and real estate taxes. A judgment was entered against Café Hawaii for the past-due amounts. In July 1999, defendant notified Café Hawaii that it was terminating the lease because Café Hawaii was in default.

Plaintiff, a shareholder of Café Hawaii and a guarantor under the lease agreement, sought to purchase Café Hawaii's assets and obtain an assignment of the lease from Café Hawaii. Plaintiff personally paid some of the amounts owed by Café Hawaii under the lease, including the district court judgment, and approached defendant about obtaining an assignment of the lease, which required defendant's approval. Plaintiff had plans to either operate another business in the building or sublet the building. Defendant refused to approve an assignment unless plaintiff agreed to certain terms, one of which required plaintiff to pay substantial costs to restore the building to its former condition. Plaintiff refused to pay the requested amount because he believed it was excessive. Defendant subsequently entered into a lease with a new tenant.

Plaintiff commenced this action requesting a declaratory ruling regarding the parties' obligations under the lease. Defendant filed a counterclaim against plaintiff and a third-party complaint against Café Hawaii requesting possession of the premises for breach of the lease agreement and damages.

Following a bench trial limited to the issue of liability in November and December 1999, the trial court determined that Café Hawaii had breached the lease agreement and awarded defendant immediate possession of the property. Following a later hearing to determine damages, the court awarded defendant \$52,919.99, plus taxable costs and statutory interest. Thereafter, the court determined that plaintiff, as a guarantor of the lease, was jointly and severally liable along with Café Hawaii for the damages awarded. This appeal followed.

II. ESTOPPEL & RES JUDICATA

Plaintiff argues that, at the liability phase, the trial court erroneously failed to consider (1) whether defendant was equitably estopped from terminating the lease because it knew that plaintiff was making required payments under the lease with the expectation that he would be assigned the lease, and (2) whether defendant's claims were barred by res judicata based on the earlier district court proceeding. We find no error.

A. Standard of Review

This Court generally reviews a trial court's application of equitable estoppel de novo. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998). Reversal is warranted if the trial court's findings are clearly erroneous, or we conclude that we would have reached a different result. *Id.* A trial court's ruling on res judicata is reviewed by this Court as a question of law. Questions of law are also reviewed de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

B. Analysis

Plaintiff asserts that defendant was estopped from asserting that there was a material breach of the lease by Café Hawaii because it accepted payments from him with the

understanding that it would consent to the assignment of the lease to him. Although the trial court did not squarely address this issue in its decision after the liability phase,¹ it is apparent that plaintiff cannot succeed on an equitable estoppel theory.

This Court explained the concept of equitable estoppel in *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999):

Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309-310; 583 NW2d 548 (1998). Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Id.*, 310.

In this case, while plaintiff was hopeful of obtaining defendant's approval of the lease assignment, there was no evidence that defendant ever assured plaintiff that it would consent to the assignment of the lease. Plaintiff admitted that Joseph Barocas only told him that he would contact his attorney about the issue. There was no evidence that Barocas assured plaintiff that plaintiff would receive Barocas' consent to the assignment if plaintiff paid the past-due taxes and rent.

In the absence of justifiable reliance, a party cannot establish equitable estoppel. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 219-220; 561 NW2d 854 (1997). Because the evidence failed to show that plaintiff justifiably relied on any assurances made by Barocas, plaintiff's equitable estoppel theory must be rejected.

Moreover, plaintiff cannot properly claim that he was induced to pay Café Hawaii's debts based solely on an expectation that he would receive Barocas' consent to the lease assignment because plaintiff was individually liable for the debts under the terms of the guaranty. See *Green v Millman Bros, Inc*, 7 Mich App 450, 458; 151 NW2d 860 (1967) ("A further limitation on the doctrine of estoppel is that the acceptance of a benefit under a contract to which the party is entitled in any event does not bring about the operation of estoppel.")

Plaintiff also argues that, in light of the earlier district court proceeding, defendant's claims were barred by res judicata. We disagree.

¹ The record suggests that plaintiff raised this issue in his motion for reconsideration after the liability phase. Although a hearing was held on this motion, plaintiff has not provided a transcript of that hearing. Generally, where a party fails to present a transcript relevant to an issue on appeal, the issue is not preserved because there is no record for this Court to review. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000). In this case, however, we shall consider the merits of plaintiff's argument because the parties stipulated that the appeal could be decided on less than the full transcript.

The trial court held that res judicata did not apply because the district court action was one for past-due rent and real estate taxes owed under a current lease, whereas the present action was one for possession and other damages arising from Café Hawaii's refusal to vacate the premises after the lease was terminated by defendant.

Shortly before the trial court decided this matter, our Supreme Court in *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 168-170; 600 NW2d 617 (1999), held that summary proceedings in the district court, to regain possession of real property, did not bar a subsequent action in the circuit court involving the same lease. The Court held that MCL 600.5750 specifically provides that the remedy available in summary proceedings is in addition to, and not exclusive of, other remedies. Because that statute creates an exception for applying res judicata in summary proceedings, the Court held that the plaintiff's claims were not barred by res judicata. "[I]n light of the first sentence of MCL 600.5750 . . . clarifying that the remedy is not exclusive, it is evident that judgment in these summary proceedings, no matter who prevails, does not bar other claims for relief." *JAM Corp, supra* at 170.

In *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575-577; 621 NW2d 222 (2001), the Court distinguished *JAM Corp, supra*. In *Sewell*, the defendant obtained a district court order to evict the plaintiff from the leased premises. The plaintiff returned to the premises to remove items after the eviction. The plaintiff was injured while at the premises that she formerly leased from the defendant and sued the defendant for negligently maintaining the premises. She also alleged that she had been unlawfully evicted. *Id.* at 571-572. The trial court found that the defendant unlawfully evicted the plaintiff and this Court affirmed, relying on *JAM Corp, supra*. *Sewell, supra* at 572-573.

The Supreme Court reversed this Court's decision because nothing in *JAM Corp* or MCL 600.5750 provides that issues actually litigated in the district court can be relitigated de novo in a subsequent suit. *Sewell, supra* at 575-576.

We believe this case falls within the rule of *JAM Corp*, and is distinguishable from *Sewell*. In the district court action, defendant sued for both past-due rent and taxes and to regain possession. However, plaintiff paid the past-due rent and taxes in order to retain possession of the premises. There is no indication in the record that the district court addressed whether the lease should be terminated on the grounds urged in the present case. Therefore, under *JAM Corp* and MCL 600.5750, defendant was not barred from filing a claim in this action for breach of the lease and to regain possession. This case is distinguishable from *Sewell* because there is no indication that the issues decided in this case were actually litigated in the district court. Accordingly, the trial court did not err in ruling that defendant's counterclaim was not barred by res judicata.

III. LEASE ASSIGNMENT

Plaintiff argues that the trial court erroneously failed to determine if the conditions defendant imposed on plaintiff for an assignment of the lease were unreasonable. We disagree. Because the trial court found that defendant had the right to terminate its lease with Café Hawaii, it appears that the court rejected any argument that the lease should have been assigned to plaintiff.

A. Standard of Review

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C)." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

B. Analysis

The parties' lease agreement contains the following limitations on assignment:

ASSIGNMENT: LESSEE covenants not to assign or transfer this Lease . . . or sublet said premises or any part thereof without the written consent of the LESSOR. An assignment, . . . , subletting without said written consent shall give the LESSOR the right to terminate this Lease and to reenter and repossess the Leased premises. LESSOR agrees not to unreasonably withhold consent, reserving however, the right to determine the conditions that shall be imposed with respect to same.

Plaintiff argues that the undisputed evidence showed that the conditions imposed by defendant for assignment were unreasonable. However, the lease does not provide that any such conditions must be reasonable. Instead, the lease provides that defendant reserved the right to solely determine the conditions that shall be imposed on any assignment, without restriction. There was no requirement that the conditions be reasonable.

Furthermore, while defendant could not unreasonably withhold its consent to an assignment, the facts here showed that defendant reasonably had concerns about consenting to an assignment to plaintiff. Plaintiff was a shareholder of Café Hawaii and was heavily involved in its operation, which proved to be unsuccessful. Defendant had reason to be concerned about allowing plaintiff to open another business when the first venture was unsuccessful. In addition, Neil Shuell, Café Hawaii's president, notified defendant that the corporate resolution that gave plaintiff the right to acquire Café Hawaii's assets was of questionable validity and advised defendant not to assign the lease to plaintiff. Under the circumstances, defendant did not unreasonably withhold its consent to an assignment.

IV. FINDINGS OF FACT

Plaintiff and Café Hawaii also challenge specific findings adopted by the trial court. We find no error.

A. Standard of Review

We review the trial court's findings of fact for clear error. *Alan Custom Homes, Inc, supra.*

B. Analysis

Plaintiff and Café Hawaii first challenge the court's finding that the lease was the only agreement between defendant and Café Hawaii. They argue that the parties had changed the terms of the lease by agreeing that Café Hawaii could pay property taxes directly to the city, not into an escrow account. The evidence established that this procedure for paying taxes evolved as a practice by Café Hawaii, but it was never a modified term of the parties' lease agreement. Moreover, the evidence failed to show that the parties modified the terms of the lease with respect to when payments were to commence. Plaintiff was the only witness to testify to this proposed change, but his testimony was based upon hearsay from another shareholder. For these reasons, the trial court did not clearly err in finding that the parties' lease incorporated all terms of the parties' agreement.

Plaintiff and Café Hawaii also challenge the trial court's finding that the payment of rent commenced on August 1, 1997, and increased annually on that date, in accordance with the terms of the lease agreement. The only evidence offered to vary the date the rent commenced was hearsay testimony from plaintiff. The trial court properly rejected that evidence and found that the terms of the written lease were not modified.

Plaintiff and Café Hawaii also challenge the trial court's finding that Café Hawaii's past-due account for water was transferred to the real estate tax rolls. It does not appear that there was evidence offered to support this finding, although there was no dispute that Café Hawaii had also fallen behind in paying the water bill. To the extent this finding is clearly erroneous, it does not affect the result in this case.

Plaintiff and Café Hawaii also argue that the trial court erred in finding that plaintiff did not make the rent payment for August 1999. We find no error. Plaintiff admitted that he failed to pay the correct amount due that month. Moreover, the trial court did not err in finding that Café Hawaii failed to pay the monthly real estate taxes into an escrow account. Although some taxes were paid directly to the city, Café Hawaii was required to pay a monthly amount for taxes into an escrow account under the terms of the lease.

V. DAMAGES

Plaintiff and Café Hawaii next challenge the trial court's findings regarding damages. We remand this issue for clarification.

A. Standard of Review

A trial court's findings on damages in a bench trial are also reviewed for clear error. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995).

B. Analysis

After reviewing the record and the trial court's findings on damages, we conclude that remand is necessary to clarify the trial court's determination of damages of \$12,753.50 for outstanding real estate taxes. That figure was based on what Café Hawaii should have paid into an escrow account for real estate taxes from March 1999 to December 1999. However, there was testimony at trial that either Café Hawaii or plaintiff paid taxes directly to the city. Clearly, defendant was not damaged to the extent that some of the taxes were paid directly to the city.

Plaintiff, the only witness who testified regarding the amount of real estate taxes actually owed, testified that approximately \$1,600 in taxes was owed at the time of the liability phase of the trial. Furthermore, plaintiff testified that he made real estate tax payments in August 1999. At the hearing on damages, defendant failed to present evidence of the outstanding balance owed to the city for property taxes after April 1999, but instead argued that plaintiff owed \$1,275.35 for each month the escrow payment was not made. The trial court did not clearly resolve the conflicting testimony regarding this issue in its decision. Accordingly, we remand for further proceedings regarding an appropriate award of damages for unpaid real estate taxes. On remand, the trial court shall determine the amount of real estate taxes Café Hawaii owed to defendant for the period March 1999 to December 1999, and whether plaintiff and Café Hawaii are entitled to any credit for taxes actually paid on defendant's behalf to the city.

We find no clear error in the trial court's remaining damage awards.

The trial court's awards for rent and water were generally supported by the evidence introduced at trial. In addition, Café Hawaii has failed to show that the court clearly erred in awarding defendant \$20,000 for cleanup costs. The parties' lease included a provision allowing for cleanup costs. The testimony at trial showed that defendant incurred excessive expenses to restore the building to the condition it was in when Café Hawaii originally assumed possession and that the building could not be leased until it was restored to its former condition.

We reject plaintiff and Café Hawaii's claim that the trial court's calculation of damages is contrary to this Court's decision in *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App 131, 134; 255 NW2d 794 (1977). That case is distinguishable because it involved a breach by a prospective lessee, whereas this case involves breach of a lease agreement by an existing lessee. There is more than one method for calculating damages. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 299; 616 NW2d 175 (2000). We believe that the method used in this case served the fundamental purpose of compensating defendant consistent with the parties' agreement. *Id.*

As for Café Hawaii's request for a setoff, the trial court did not err in refusing to award it damages for items left in the building. The evidence showed that Café Hawaii was afforded sufficient time to vacate the premises and had several opportunities to remove any items of value left in the building.

VI. PLAINTIFF'S PERSONAL LIABILITY AND SUMMARY DISPOSITION

Plaintiff next argues that the trial court erred in deciding, on cross-motions for summary disposition, that plaintiff was personally liable for any judgment entered against Café Hawaii. We disagree.

A. Standard of Review

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The trial court considered the cross-motions for summary disposition under MCR 2.116(C)(9) and (10).

When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). . . . Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers. *Id.* at 565; MCR 2.110(A). Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine Environmental Production, Inc.*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). [*Slater v Ann Arbor Public Schools Bd of Education*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

B. Analysis

After both the liability and damage phases were concluded, the parties could not agree on a final judgment because they disagreed whether plaintiff was jointly and severally liable with Café Hawaii for the damages awarded. The trial court ordered the parties to submit cross-motions for summary disposition to resolve the question of plaintiff's liability.

Plaintiff first argues that defendant waived this issue by failing to raise it earlier. We disagree. Plaintiff's liability as a guarantor did not become an issue until after the other issues in the case were resolved. Moreover, the trial court could not enter a final judgment until all claims, including this one, were resolved. MCR 2.602(A)(3) and MCR 2.604(A). Therefore, we reject plaintiff's claim that this issue was waived.

Next, plaintiff challenges the trial court's decision granting defendant summary disposition on this issue.

Plaintiff argues that summary disposition was inappropriate because there were genuine issues of material fact regarding his liability as a guarantor and whether defendant was equitably estopped from pursuing damages against him. Plaintiff argues that because he previously paid many of Café Hawaii's debts in anticipation that defendant would consent to the assignment of the lease to him, defendant is estopped from pursuing damages against him for Café Hawaii's remaining debts. As previously discussed, the evidence failed to disclose that defendant made assurances to justifiably cause plaintiff to believe that it would consent to an assignment of the lease. Moreover, the trial court properly held that plaintiff could not rely on equitable estoppel on these facts where he was independently liable for Café Hawaii's lease obligations under the terms of a guaranty in the lease. See *Green, supra*.

Plaintiff also argues that the guaranty was no longer operative because it expired by its terms in August 1999. We disagree. The guaranty provided, in pertinent part:

If after 24 months of rent payments and tenant is not in default of any clause in the lease, this guarantee shall be voided and replaced by Hawaii Café, Inc.

Because Café Hawaii was in default of the lease before July 1999, the above provision was not applicable. Therefore, plaintiff was still liable under the plain terms of the guaranty. Accordingly, the trial court did not err in granting defendant's motion for summary disposition on this issue.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper