STATE OF MICHIGAN

COURT OF APPEALS

JERVIS LEWIS and GUSSIE LEWIS, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED July 15, 2008
v	No. 276062 Livingston Circuit Court
SARAH M. CROSS and NOUREDDINE HADJ SADOK, Defendants/Counter-Plaintiffs-Appellants.	LC No. 05-021791-CZ

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, the trial court awarded plaintiffs $107,077 on their claim for breach of a lease agreement, and found no cause of action on defendants' counterclaims for breach of contract, constructive eviction, and misrepresentation. Defendants appeal as of right. We affirm.

I. Standard of Review

The trial court's factual findings at a bench trial are reviewed for clear error. MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to observe the witnesses and judge their credibility. *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

II. Findings of Fact

Defendants first argue that the trial court clearly erred in finding that additional repairs were not necessary before the first freeze. This finding is supported by the report of plaintiffs' expert, Piet Lindhout, who opined that the water migration was caused by water backing up in the gutter and freezing due to winter conditions and that the problem should be addressed before winter. We agree that the trial court erred to the extent that it found that defendants' expert, Bruce McCullen, also indicated that repairs were not required before the first freeze. McCullen did not indicate that winter conditions were a cause of the moisture penetration or specify a timeframe for any repairs. Nonetheless, any error in this regard was harmless because McCullen

agreed with Lindhout that moisture was entering the building at the gutter, and Lindhout's report provided an explanation for this condition. *Kyser v Kasson Twp*, 278 Mich App ___; ___NW2d___ (Docket No. 272516, issued 5/6/08), slip op at 9.

Defendants also argue that the trial court clearly erred in finding that they were using over 7,000 square feet of the leased premises. The court found that "the condition of the premises did not prevent Defendants from using 7,312 square feet of retail space as a 'showroom.' " Although defendants assert that the front area that was used as a showroom was only 6,000 square feet, defendants' promotional materials listed their showroom as being 7,000 square feet, and defendant Sarah Cross sent out a promotional email stating that their business had over 7,000 square feet. In light of this evidence, the trial court's finding is not clearly erroneous.

III. Constructive Eviction

Defendants argue the trial court erred in finding no cause of action on their claim for constructive eviction. We disagree.

A constructive eviction occurs when there is a disturbance of the tenant's possession by the landlord, the premises are rendered unfit for occupancy for the purposes for which they were demised, or the landlord deprives the tenant of the beneficial use and enjoyment of the property, in whole or part. *Panagos v Fox*, 310 Mich 157; 16 NW2d 700 (1944); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474-475; 666 NW2d 271 (2003); *De Bruyn Bros Realty Co v Photo Lith Plate Service Corp*, 31 Mich App 487, 489; 188 NW2d 111 (1971).

First, contrary to what defendants argue, the record does not indicate that the trial court applied incorrect legal standards in evaluating this claim. The court recognized the applicable principles recited in *Belle Isle, supra*, and never indicated that a necessary element of such a claim is the existence of a health hazard.

Although defendants claimed that they were unable to use the rear 4,000 square feet of the leased space because of the roof problems or a health hazard from mold, the trial court viewed both photos and a video of the area. It found that one wall was wet and stained, but that defendants' claims that there was standing water on the floor and that the condition posed a health hazard were not credible. As the trial court found, plaintiffs made repairs after being notified of the roof leak, and environmental reports indicated that there was no health hazard. After considering the evidence and affording deference to the trial court's credibility determinations, we find no clear error in the trial court's finding that the condition of the premises did not amount to a constructive eviction.

Defendants also assert that their constructive eviction claim was based on other unresolved problems with the building, e.g., broken lighting, a hole in the front lawn, and broken glass. However, these problems did not render the premises unfit for occupancy for the purposes

for which they were demised or deprive defendants of the beneficial use and enjoyment of the property.

Accordingly, we affirm the trial court's verdict of no cause of action on defendants' constructive eviction claim.[1]

IV. Rent Abatement

Defendants argue that the trial court erred in determining that they were not entitled to abate rent during the period of repair or restoration. We disagree.

Section 18 of the parties' lease provides:

> Destruction of the premises. If the premises are partially damaged or destroyed through no fault of the lessee, the lessor shall, at its own expense, promptly repair and restore the premises. If the premises are totally destroyed through no fault of the lessee or if the premises cannot be repaired and restored within 120 days, either party may terminate this lease effective the date of the destruction by giving the other party written notice of termination within 10 days after the destruction. If such a notice is given within that period, this lease shall terminate and rent shall be adjusted between the parties to the date of the surrender of possession. If the notice is not given within the required period, this lease shall continue, *without abatement of rent*, and the lessor shall repair the premises. [Emphasis added.]

Initially, we disagree with defendants' argument that this provision is not applicable because the evidence showed that the damage to the building was attributable to plaintiffs' lack of maintenance. Unambiguous contractual language must be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Section 18 applies to all situations where the premises are partially damaged. There is no basis for excluding situations where damage allegedly results from inadequate maintenance by the lessor.

Under section 18, because the lease was not terminated by either party, there was to be no rent abatement while the roof repairs were being made. We disagree with defendants that plaintiffs waived section 18. Section 29 of the lease contains an anti-waiver clause that provides:

> Waiver. The failure of the lessor to enforce any condition of this lease shall not be a waiver of its right to enforce every condition of this lease. No provision of this lease shall be deemed to have been waived unless the waiver is in writing.

Defendants are correct that section 29 did not prevent the parties from mutually agreeing to waive the anti-abatement provision and modify their lease to allow for the abatement of rent.

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[1] In light of our decision, it is unnecessary to address defendants' arguments regarding damages.

To establish the waiver of a contract provision, one must show by clear and convincing evidence that the parties mutually agreed to waive both the particular contractual term and any anti-waiver clause. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). As explained in *Quality Products, supra* at 372-373:

> [I]t is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses. This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed.
>
> However, the freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement. Rather, a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract. This principle follows from the contract formation requirement that is elementary to the exercise of one's freedom to contract: mutual assent.
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> Where mutual assent does not exist, a contract does not exist. Accordingly, where there is no mutual agreement to enter into a new contract modifying a previous contract, there is no new contract and, thus, no modification. Simply put, one cannot unilaterally modify a contract because by definition, a unilateral modification lacks mutuality.

In this case, the evidence did not show that the parties mutually assented to an agreement to abate rent. The evidence showed that defendants submitted different proposals and calculations for rent abatement, but there was no evidence that plaintiffs ever assented to defendants' various proposals. Defendants contend that plaintiffs offered to abate rent by 20 percent. However, that offer was limited to a three-month period, and was conditional on plaintiffs bringing the balance of their rent payments current, which they did not do. Because the evidence failed to show that the parties mutually assented to an agreement to abate rent, the trial court properly concluded that section 18 of the lease was enforceable and did not permit any abatement of the rent.

V. Mitigation of Damages

Defendants argue that the trial court clearly erred in finding that plaintiffs made reasonable efforts to mitigate their damages. Because this issue involves the trial court's determination of damages at a bench trial, we review the issue for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

A plaintiff has a duty to mitigate damages by making efforts that are reasonable under the circumstances to minimize the economic harm caused by the wrongdoer. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994). The burden was on defendants to prove that plaintiffs failed to mitigate their damages. *Lawrence, supra* at 15.

Defendants vacated the premises in November 2005. Plaintiffs thereafter attempted to re-lease the premises and also sent out letters to other occupants of the industrial park informing

them that the building was for sale. Plaintiffs showed the building to at least four people in December 2005 and January 2006. Plaintiffs accepted a purchase offer for the property in February 2006, and closed on the sale in May 2006.

In light of the evidence of plaintiffs' quick efforts to either re-lease or sell the property, and the evidence that plaintiffs accepted a purchase offer only three months after defendants vacated the building, the trial court did not clearly err in rejecting defendants' argument that plaintiffs failed to mitigate their damages

VI. Hearsay Ruling

Lastly, we find no merit to defendants' argument that the trial court erroneously excluded testimony of Christine Cross as hearsay. Contrary to what defendants argue, the record does not indicate that the trial court excluded the testimony. Rather, Cross was able to testify about her conversation and the trial court never struck her testimony or indicated that it would be disallowed. Accordingly, we reject this claim of error.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra