# STATE OF MICHIGAN

# COURT OF APPEALS

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ON WHEELS, INC.,

Plaintiff-Appellee,

v

ALVIN L. KEEL and DELPHIA J. BURTON,

Defendants-Appellants,

and

CURTIS R. WILLIAMS,

Defendant,

and

ROBERT P. AULSTON and MARCIE A. WADE,

Defendants-Appellees.

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UNPUBLISHED
August 2, 2011

No. 295915
Wayne Circuit Court
LC No. 2004-410534 CK

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Defendants, Alvin Keel and Delphia Burton, appeal as of right the trial court's denial of their motion for relief from judgment and their motion for judgment notwithstanding the verdict or in the alternative, remittitur or new trial. We affirm but remand to the trial court for a determination of whether the $5,000.00 security deposit provided for in the parties' lease was or should be taken into account in the judgment.

On or about March 27, 2002, defendants, five individuals with individual law practices, entered into a three-year lease agreement with plaintiff to occupy office space in a building plaintiff owned. While each defendant signed the lease and was apparently responsible for 1/5 of the applicable payment amount, the defendants were collectively referred to as "tenant." Relevant to the instant matter, the lease contained a termination clause allowing either the tenant or the landlord to terminate the lease at any time, with 180 days advance notice. Two of the five defendants vacated the premises in December 2003, and the remaining three defendants vacated the premises by April, 2004. Plaintiff initiated the instant lawsuit in April 2004, asserting that

defendants breached the parties' lease agreement and expressed an intent to continue to default on the lease. Plaintiff sought to recover the 15 months' rent remaining due on the lease.

The matter proceeded to jury trial, at the conclusion of which the jury found the defendants jointly and severally liable to plaintiff in the amount of $83,059.26. Defendant Keel thereafter moved for judgment notwithstanding the verdict, remittitur, or a new trial and defendant Burton joined in his motion. According to Keel and Burton (hereafter "defendants"), the jury awarded plaintiff in excess of what would have been due on the remaining term of the lease, and the award should have also been reduced to account for the fact that after defendants breached the lease, plaintiff sold the building in which the office space was located for a profit, thereby benefitting from their breach. Defendants also filed a separate motion for relief from judgment, asserting that fraudulent conduct on the part of their co-defendants, Marcie Wade and Robert Aulston, misled them and prevented them from insulating themselves from a jury verdict against them. The trial court denied both motions.

On appeal, defendants first assert that the trial court erred in denying their motion for relief from judgment. Defendants contend that Wade and Aulston advised them that on July 23, 2003, they received notices from Carlos Brown, plaintiff's agent, terminating their tenancy. Pursuant to the provision in the parties' lease providing for termination of the lease by either party on 180 days' notice, defendants contend that they reasonably expected that they would have to move from the premises by January 23, 2004 and the lease would be terminated as of that date (the contract would otherwise have expired, by its terms, on March 27, 2005). Defendants claim that based upon their relationship with Wade and Aulston, as well as their knowledge that plaintiff had recently had a judgment entered against it while being represented by Wade and Aulston and was unhappy with their representation, they had no reason to doubt Wade and Aulston's statement about the termination.

Shortly before trial, the authenticity of the termination letters was questioned by plaintiff, but there was ultimately no professional conclusion that they were forgeries. The primary issue at trial was whether plaintiff terminated defendants' tenancy, thereby waiving any remaining lease payments. Defendants' primary defense, then, was that plaintiff did, in fact, terminate their tenancy and they thus did not breach the parties' lease agreement. According to defendants, during trial, plaintiff flatly denied terminating the defendants' tenancy and it became more apparent that the documents may have been forged. Defendants assert that after trial concluded they became more seriously concerned that Wade and Aulston may have forged the termination letters. Defendants assert that had they known that the termination letters were likely forged by Wade and Aulston, they could have filed a cross-complaint against them or otherwise protected themselves against a jury verdict finding that they had breached the lease agreement with plaintiffs. Defendants thus conclude that the fraud perpetrated upon them by their co-defendants justifies relief from judgment. We disagree.

We review a trial court's decision whether to grant a motion for relief from judgment for an abuse of discretion. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). MCR 2.612(C)(1) provides:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> ***
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> ***
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> (f) Any other reason justifying relief from the operation of the judgment.

For relief to be granted under MCR 2.612(C)(1)(f), three requirements must be met: "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. *Heugel v Heugel*, 237 Mich App 471, 478–479; 603 NW2d 121 (1999).

We agree that the first element above has been established. Defendant Burton briefly touches upon an argument that plaintiff may have perpetrated a fraud upon the court by denying that its agent, Carlos Brown, delivered the termination letters to Wade and Aulston, thereby suggesting a potential basis for relief from judgment under MCR 2.612 (C)(1)(c). However, this argument was not raised in the lower court and thus not preserved for appeal. And, even if we were to consider the argument, Brown provided an affidavit denying that he prepared or delivered such letters. Plaintiff's owner also testified at trial that he did not terminate defendants' tenancy. While Wade testified in direct contrast, that Brown handed her the termination letter, this matter presented an issue of credibility that the jury obviously resolved in plaintiff's favor. It is the province of the jury to assess witness credibility and we will not interfere with the same. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). And, relief is generally granted under subsection (f) only where the judgment was obtained by improper conduct of the party in whose favor it was rendered. *Id.* at 479. The primary argument raised by defendants is that their co-defendants-not plaintiff-engaged in improper conduct. Engaging in a (C)(1)(f) analysis in any event, because the reason for setting aside the judgment does not fall under subsections a through e, the first element for application of MCR 2.612(C)(1)(f) has been met. We cannot, however, say the same for the remaining two elements.

The second element requires that the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside. *Heugel*, 237 Mich App at 478–479. On this element, defendants simply make a blanket statement that plaintiff's substantial rights would not be affected because the judgment would still stand as to the remaining three defendants. As pointed out by the trial court, however, there is no indication or evidence that the three remaining defendants are or would be able to satisfy the judgment. We cannot conclude, then, and defendants have not adequately argued, that plaintiff would not be detrimentally affected if defendants were granted relief from judgment.

We find that the third and final element, that extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice, is also lacking. The authenticity of the termination letters was first made an issue long before trial. In its August 2006 motion for partial summary disposition, Keel referenced the fact that plaintiff had contested whether the signature contained on the termination notices was that of Carlos Brown. The motion also referenced the fact that Keel had hired a handwriting expert to examine and compare the signature found on a copy of the letter sent to Wade to Brown's known signatures. The expert's report, attached as an exhibit to the motion, concluded that in her qualified opinion, with a high degree of probability, the questioned signature was that of Carlos Brown. Defendants now assert that it was only when they received the original letters sent to Wade and Aulston, on the eve of the 2008 trial, that they had serious doubts as to the authenticity of the signatures. Nevertheless, rather than provide the original letters to their expert for analysis or employ some other measure of authentication, they elected to proceed to trial maintaining termination of the tenancy as their defense. Given the facts they were presented with both prior to and during trial, defendants were on notice that the termination letters could have been forgeries, and they were not precluded from presenting evidence attempting to establish the same or establishing their lack of knowledge that the letters could have been forgeries at trial.

Moreover, defendants vacated the premises in April 2004 and plaintiff initiated the instant action against them for breach of the parties lease in the same month. Had defendants reasonably believed that plaintiff had terminated their tenancy, they were certainly placed on notice by the filing of the lawsuit and plaintiff's seeking damages against them for the payments remaining on the lease that plaintiff did not believe the tenancy had been terminated. And, had they desired to at least limit their exposure to liability they could have provided plaintiff with a 180 notice of termination on their behalf when the lawsuit was filed. They did not. In short, we find no extraordinary circumstances warranting relief from judgment.[1] The trial court therefore did not abuse its discretion in denying defendants' motion for relief from judgment.

Defendants next contend that the trial court committed reversible error in denying their motion for judgment notwithstanding the verdict (jnov), remittitur or a new trial where plaintiff did not attempt to mitigate its damages and, in fact, suffered no damage as a result of alleged breach. Again, the jury found that defendants' breached the parties' lease (i.e., that plaintiff did not terminate their tenancy). Defendants do not, on appeal, dispute that this was an unreasonable conclusion based upon the evidence before it. They argue simply that they were the victims of fraud by certain of their co-defendants and unfairly and unwittingly roped into an unsuccessful defense and the resulting judgment. Defendants thus turn their arguments to the amount of the judgment itself.

We review de novo a trial court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review a trial

[1] We note that Wade and Aulston maintain that they did not commit fraud upon their co-defendants or the trial court, and it has not been proven that the letters were either forged or bore the authentic signature of Carlos Brown.

court's denial of a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A trial court's decision regarding remittitur is also reviewed for an abuse of discretion. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). "In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence . . . If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed." *Id.*

Concerning defendants' contention that plaintiff failed to mitigate its damages, it has long been recognized that the law should encourage a potential plaintiff to take reasonable actions to minimize the extent of damages arising from the wrongful breach of a contract. *M & V Barocas v THC, Inc*, 216 Mich App 447, 449; 549 NW2d 86 (1996). The defendant sued for breach of contract, however, bears the burden of proving the plaintiff failed to take reasonable steps in mitigation of his damages. *Id.* at 449-450. Here, Randy Payton, plaintiff's CEO, testified that after defendants left the premises, plaintiff sought to re-lease the premises:

> Q: Did you attempt to re-lease the space at 585?
>
> A: Yes, we did.
>
> Q: And what did you do, what steps did you do to try to re-lease the space?
>
> A: Well, talked to several brokerage companies who—to—we never really entered into any major contract. As you know, we were very busy and not really focused on trying to find new tenants, but we did talk to several brokers who at the time the rental market was really tight in Detroit so we were not successful in re-leasing the space.
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> ***
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> Q: You considered renting space out, but you never made any attempt to rent the space out, is that correct?
>
> A: No, that's not correct.
>
> Q: You said you talked with some real estate agents about renting the property out, is that right?
>
> A: Yes.
>
> ***
>
> Q: The question is, did anybody on your behalf try to find some new tenants?
>
> A: Yes,

Q: Did you enter into an agreement with them to do so?

A: Yes.

Q: You signed contracts with them to help you find new tenants [with] more than one broker?

A: I didn't sign contracts, no.

Q: You paid them?

A: No, they don't get paid unless they find tenants.

Q: They did go out and try to find some tenants?

A: Yes.

Q: And they found none?

A: Yes.

Q: Is that right?

A: Correct.

Q: And you made those efforts after your tenants moved out?

A: Correct.

There was testimony, then, that plaintiff made efforts to find tenants to lease the space vacated by defendants. If defendants believed these efforts to be insufficient, it was incumbent upon them to prove that the steps taken by plaintiff were not reasonable efforts at mitigation. *M & V Barocas*, 216 Mich App at 449-450. Defendant provided no evidence or testimony suggesting that other efforts should have been taken or otherwise refuting plaintiff's evidence that it reasonably attempted to mitigate its damages. The trial court thus did not abuse its discretion in denying defendants' motion for a new trial or for remittitur, nor did it err in denying defendants' motion for jnov on this issue.

Defendants' assertion that plaintiff suffered no damages whatsoever is premised upon the fact that plaintiff purchased the building in which the leased space was located in 2001 for approximately $850,000.000 and sold it in 2006 for approximately $1.1 million dollars—a profit of $250,000.00. According to defendants, plaintiff sold the building because defendants breached the parties' contract and thus, as a result of the breach plaintiff realized a benefit. Defendants thus assert that any jury award that plaintiff received from the defendants' breach of contract should be offset by the sales profit it received as a direct result of the defendants' breach. We disagree.

The remedy for a breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed. *Corl v Huron Castings, Inc*, 450 Mich 620,

625; 544 NW2d 278 (1996). Thus, a party damaged by another party's breach of contract may recover those damages that are the direct, natural, and proximate result of the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Defendants' argument on this issue is without merit. Plaintiff sold the building in 2006—a year after the lease between the parties had expired. Plaintiff, then, could easily have realized both the lease payments from defendants until the lease expired in 2005 *and* the profits from the sale of the building in 2006. And, there is no indication that plaintiff could or would not have sold the building *but for* defendants' breach. Defendants have not presented any evidence that plaintiff's sale profit is a direct, natural and proximate result of defendants' breach rather than, say, the timing of the real estate market or other factors far outside defendants' control. Moreover, to suggest that defendants' breach of the lease directly resulted in the sale of plaintiff's building at a profit or conferred a benefit upon plaintiff is extraordinarily tenuous. Purchase price minus sales price does not necessarily equal a profit; there is no suggestion as to the amount of money that plaintiff invested in the building, for example. And, having paying tenants in a building when it is placed on the market for sale may have resulted in a higher sales price. Keeping the property and leasing it for a longer period of time to other tenants at perhaps a higher price may have increased plaintiff's profits; the real estate market may have risen several years down the road resulting in an even higher profit to plaintiff, etc. There are simply too many unknown factors involved to conclude that just because the sales price was higher than the purchase price, there was a benefit to plaintiff directly attributable to defendants' breach of the lease. The trial court did not abuse its discretion in denying defendants' motion for a new trial or for remittitur, nor did it err in denying defendants' motion for jnov on this issue.

The final issue raised by defendants with respect to damages is that they were not credited for the $5,000.00 security deposit provided for in the lease. This Court is unable to determine from the record whether the deposit was applied toward past rent owed or was otherwise taken into account in the judgment. We thus remand to the trial court for a determination of whether the deposit was or should be taken into account in the judgment.

Affirmed, but remanded to the trial court for a determination of whether the $5,000.00 security deposit provided for in the lease was or should be taken into account in the judgment. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto