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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0045-MR

AUDREY LYNN ARCELLI AND MS. AUDREY'S CRAFTING EMPORIUM, LLC — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TRACY E. DAVIS, JUDGE
ACTION NO. 24-CI-002450

GHASEM PROPERTIES, INC. — APPELLEE

OPINION AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, L. JONES, AND TAYLOR, JUDGES.

JONES, L., JUDGE: Audrey Lynn Arcelli and Ms. Audrey's Crafting Emporium, LLC (collectively Appellants) appeal the September 30, 2024 order of the Jefferson Circuit Court granting summary judgment in favor of Ghasem Properties, Inc. (GPI).[1] We affirm the circuit court's grant of summary judgment except as to

[1] Appellants' notice of appeal states that they are appealing from:

> the Summary Judgment entered by [the circuit court] September 30, 2024[,] and from the [circuit court's] Order entered []

its award of 8% prejudgment interest and future rents for damages accruing after entry of the judgment on September 30, 2024.

I. BACKGROUND

On February 8, 2023, Ms. Audrey's Crafting Emporium, LLC entered into a commercial lease with GPI to rent certain retail space for sixty-two months. On that same date, Audrey Arcelli (Arcelli) executed a guaranty agreement, wherein Arcelli would be guarantor for the lease up to the amount of $155,124.60. Under the lease, Appellants were to pay $2,585.41 monthly for rent and community area maintenance beginning the third month of the lease term.

On April 8, 2024, GPI filed suit in Jefferson Circuit Court, alleging Appellants defaulted under the lease by failing to pay the January 2024 rental obligation or any rental payments going forward. GPI alleged it provided notice by mail on January 6, 2024, that Appellants had not paid their January 2024 rent obligation, and that the lease would be terminated in seven days if rent and late

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> December 11, 2024[,] denying [Appellants'] motion to alter, amend or vacate the aforementioned Summary Judgment under provisions of CR (Kentucky Rules of Civil Procedure) 59, and granting [GPI's] motion for a Supplemental Judgment for attorney's fees and costs.

Trial Record (TR) at 264. However, it is well settled that a party may not appeal denial of a motion under Kentucky Rules of Civil Procedure (CR) 59.05, as the appeal is from the underlying judgment rather than the CR 59.05 motion itself. *Ford v. Ford*, 578 S.W.3d 356, 366 (Ky. App. 2019). We note that the circuit court denied Appellants' CR 59.05 motion and granted supplemental judgment to GPI in the same order; however, Appellants make no arguments in this appeal about the merits of supplemental judgment.

fees were not paid. GPI alleged that, due to default, it was entitled to lost lease payments, advertising costs, and accruing late fees. GPI also claimed it was entitled to statutory prejudgment interest from January 1, 2024, to the date of judgment; post judgment interest; attorney fees; and court costs.[2] Attached to GPI's complaint was a copy of the lease agreement, the guaranty agreement executed by Arcelli, and the January 6, 2024 notice.

On April 19, 2024, Appellants filed an answer. In that answer, Appellants admitted to signing the lease, defaulting under the lease, and not paying rents under the lease for January 2024 and forward. As to the other documents attached to the complaint, Appellants responded those exhibits "speak for [themselves]."[3] Additionally, Appellants denied responsibility for damages.

On August 31, 2024, GPI filed a motion for summary judgment, asserting there were no genuine issues of material fact and it was entitled to judgment as a matter of law. Attached to that motion was an affidavit executed by Reza Ghasem (Ghasem), president of GPI. In that affidavit, Ghasem averred: (1) Ms. Audrey's Crafting Emporium entered into a lease agreement with GPI on

[2] GPI alleged in its complaint that it initiated a forcible detainer action against Appellants in Jefferson District Court, though that action was dismissed in April 2024 after Appellants vacated the property. TR at 4. While Appellants asserted in their Answer that "the record in the [] Forcible Detainer action speaks for itself[,]" there appears to be no dispute that Appellants vacated the property prior to GPI's Complaint being filed in Jefferson Circuit Court.

[3] *See* TR at 48-50.

February 8, 2023, for sixty-two months with Arcelli as guarantor for the lease; (2) Rental payments were to begin on the third month of the lease in the amount of $2,089.58 and "additional monthly common area maintenance . . . payments of $495.83 for a combined monthly total of $2,585.41 plus monthly trash payments, and such other expenses as more fully set forth therein [the lease agreement]";[4] (3) Appellants defaulted on the lease by failing to pay rent for January 2024; (4) GPI gave notice of failure to pay the rent for January 2024, demanded payment of rent and late fees, and provided notice that failure to pay would result in termination of the lease and legal recourse; (5) Following the notice, Appellants never remitted payment; (6) GPI sought a forcible detainer, but Appellants vacated the property; (7) Appellants refused any further demands for additional payment under the lease; (8) GPI entered into a commercial listing contract to locate a new tenant to mitigate damages with no success; (9) Between January 2024 and April 2028,[5] Appellants "would have paid a principal total of $131,855.91";[6] and (10) Appellants owe GPI that principal amount, "statutory prejudgment interest" from the date of default to judgment, post judgment interest "at the statutory rate,"

[4] TR at 74.

[5] The remaining lease term.

[6] TR at 77.

accrued interest, late fees, attorney fees, court costs, and expenses.[7] Attached to Ghasem's affidavit was a copy of the lease agreement, a copy of the guaranty agreement, a copy of the January 6, 2024 notice, and a copy of a commercial listing contract for the leased property.

Appellants never responded to GPI's motion for summary judgment. There was no hearing on the summary judgment motion; instead, on September 26, 2024, GPI filed an AOC[8] 280 Form Notice of Submission of Civil Matter for Final Adjudication, noting the summary judgment motion was ripe for adjudication. On September 30, 2024, the circuit court granted GPI's motion for summary judgment utilizing an order tendered by GPI. Under that judgment, GPI was awarded "$131,855.91, with prejudgment interest at the rate of 8% per annum from January 1, 2024[,] until the date of this judgment, thence post judgment interest at the rate of 6% per annum until paid in full, plus reasonable attorney fees, court costs and expenses."[9]

On October 10, 2024, Appellants filed a motion to vacate the circuit court's judgment pursuant to CR 59.05 (59.05 Motion). In their 59.05 Motion, Appellants made two arguments: (1) GPI failed to surmount its "initial burden" to

[7] TR at 77.

[8] Administrative Office of the Courts.

[9] TR at 130-31.

establish there were no genuine issues of material fact, and, thus, the summary judgment motion should have been denied without requiring Appellants to offer any supporting evidence; and (2) the circuit court might have erred by granting summary judgment based on unsworn statements by GPI's counsel.[10]

In response, GPI stated: (1) All claims in its motion for summary judgment were supported by Ghasem's affidavit; (2) Appellants' argument that the circuit court based its ruling on unsworn statements of counsel was vague and speculative; and (3) Even if the circuit court erred, Appellants have failed to show the error was manifest under CR 59.05.[11]

Appellants filed a reply, further asserting that Ghasem's affidavit was flawed as Ghasem claimed his knowledge was drawn from "certain business records" without specifically stating the records attached to his affidavit were the *only* business records to which his affidavit referred.[12] Furthermore, Appellants claimed Ghasem's affidavit did not clearly set out the basis for the $131,855.91 claimed as damages. For the first time, Appellants also argued that nothing in the

[10] TR at 137-40.

[11] TR at 141-46.

[12] TR at 247.

lease agreement entitled GPI to future rental payments for the life of the lease as liquidated damages, or 8% prejudgment interest.[13]

On December 11, 2024, the circuit court entered an order denying Appellants CR 59.05 Motion.[14] In that order, the trial court noted Appellants never responded to the summary judgment motion and their arguments "could and should have been made prior to the entry of the judgment."[15]

On appeal, Appellants continue to argue that Ghasem's affidavit failed to show there was no genuine issue of material fact. In particular, Appellants assert Ghasem's affidavit does not state that his personal knowledge and the attached exhibits are the sole foundation from which he claims damages of $131,855.91. Appellants further argue the lease agreement does not contain a liquidated damages clause or other provision which would entitle GPI to lost rental payments for the remainder of the lease period. Finally, Appellants assert that nowhere in Ghasem's affidavit or lease agreement was there a claim for 8% prejudgment interest.

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[13] TR at 251-52.

[14] In that same order, the circuit court entered a supplemental judgment, awarding GPI $8,299.30 in attorney fees and court costs. On October 31, 2024, GPI had filed a motion requesting attorney fees and costs. Appellants filed no objection to GPI's requests for attorney fees and costs, nor did Appellants appear at the hearing on that motion.

[15] TR at 258.

In response, GPI again reiterates that Appellants failed to respond to the summary judgment motion and made their objections through a motion under CR 59.05 only after judgment was entered. GPI asserts it was inappropriate for Appellants to raise objections to summary judgment by a post judgment motion when the objections should have been raised prior to entry of the judgment.

II. STANDARD OF REVIEW

A court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. In making that determination, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstance[]." *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

"The initial burden is on the proponent of the motion for summary judgment to convince the trial court of the nonexistence of an issue of material fact. Once that burden has been met, the burden shifts to the party opposing summary judgment to present affirmative evidence showing a material issue

exists." *Smothers v. Baptist Hosp. East*, 468 S.W.3d 878, 885 (Ky. App. 2015). A "properly supported summary judgment motion" cannot be defeated unless the opponent presents "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482.

Because "[a] motion for summary judgment presents only questions of law and a determination of whether a disputed material issue of fact exists," the review is de novo. *Patton v. Bickford*, 529 S.W.3d 717, 723 (Ky. 2016) (internal quotation marks and citations omitted).

We review a circuit court's ruling on a motion to alter, amend, or vacate under CR 59.05 for abuse of discretion. *Rumpel v. Rumpel*, 438 S.W.3d 354, 365 (Ky. 2014). "The test for abuse of discretion is whether the [circuit court] judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. ANALYSIS

Though a party fails to respond to a motion for summary judgment, the circuit court may not grant summary judgment by default. While the parties do not cite any Kentucky case law to this point and our own research shows nothing stating so explicitly, we find persuasive the United States Court of Appeals for the Sixth Circuit's conclusion that "a [trial court] cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The court

is required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden." *Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991).

A. Whether a Genuine Question of Material Facts Existed

Appellants contend they were not required to oppose entry of summary judgment because GPI did not satisfy its burden under the summary judgment standard. *See* Appellants' Reply Brief at 1.[16] ("In the instant case, [Appellants] [were] **not** required to have asserted any arguments before judgment, since the Circuit Court should have DENIED the motion, for [GPI's] failure to meet its initial *prima facie* burden."). Appellants are incorrect. While it is responsibility of the circuit court to make sure the proponent of a summary judgment motion meets its burden, we do not conclude the opposing party may sit idly by, do nothing, and wait for the circuit court's ruling before crying foul and requesting relief under CR 59.05. "[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly," and "[a] party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005) (internal quotation marks and citations

[16] Appellants' Reply Brief is not paginated, thus we refer to the first page of Appellants' argument. Furthermore, Appellants' Reply Brief does not conform with Kentucky Rules of Appellate Procedure (RAP) 32(C)(1) requiring a reply brief to contain a statement of authorities.

omitted). To the extent Appellants wish to challenge the evidence supporting GPI's motion for summary judgment, the time to do so was *prior* to entry of the judgment. Any evidence of facts that *could* have been presented or challenged in opposition of summary judgment were beyond the trial court's review post judgment and, therefore, are beyond our review.

Because the summary judgment motion here was supported by an affidavit and exhibits, we will examine the face of those documents to determine whether the circuit court correctly determined there were no genuine issues of material fact. Appellants' answer to GPI's complaint conceded: (1) the existence of the lease agreement; (2) Arcelli's guaranty of rental payments;[17] (3) Appellants' default on the lease; and (4) Appellants' failure to make rental payments for January 2024 or later. Therefore, Appellants conceded liability under the rental agreement, leaving only the issue of damages.

As to damages, Ghasem's affidavit made clear that GPI attempted to mitigate its damages, and was unable to relet the property. Appellants question the calculation of damages based on what they believe is a lack of specificity in

[17] In Paragraphs 13 and 14 of the complaint, GPI asserted Arcelli executed the guaranty where she would accept responsibility for all rents under the lease up to $155,124.60. TR at 3. In their answer, Appellants did not deny the existence of those documents, only stating that "the referenced document speaks for itself." TR at 48-49.

Ghasem's affidavit. Regarding the sufficiency of an affidavit, CR 56.05 provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Ghasem's affidavit calculated lost rents and common area fees at a rate of $2,585.41 per month. Ghasem's affidavit set forth the attempt of mitigation, namely entering into a commercial listing contract to locate a new tenant. Ghasem's affidavit also stated such efforts were unsuccessful in finding a new tenant. We conclude these averments were sufficient to satisfy GPI's burden under summary judgment to shift the burden to Appellants.

When a party submits an affidavit to support a motion for summary judgment that sets forth a sum for damages, the opposing party must counter with their own calculation prior to entry of summary judgment if they disagree. *See Buridi v. Leasing Group Pool II, LLC*, 447 S.W.3d 157, 177 (Ky. App. 2014). Furthermore, while "[a] party claiming damages for breach of contract is obligated to use reasonable efforts to mitigate his damages[,] . . . [t]he party committing the breach bears the burden of proving that the plaintiff failed to mitigate his

damages." *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. App. 2014) (citations omitted).

Ghasem's affidavit satisfied GPI's burden under the summary judgment standard. The burden then shifted to Appellants to offer some affirmative evidence countering Ghasem's calculation and showing GPI failed to mitigate its damages. Appellants offered nothing. Again, Appellants waited until *after* summary judgment was entered to argue Ghasem's affidavit did not comport with CR 56.05. Such argument could, and should, have been raised *prior* to entry of summary judgment.[18]

B. Whether GPI was Entitled to Judgment as a Matter of Law

While liability was clearly established under the facts and the law before the trial court, the issue of damages is more complicated.

1. 8% Prejudgment Interest

We note in review that the lease agreement does not set forth a specific rate of prejudgment interest in the event of default under the lease.[19]

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[18] We find persuasive federal case law that concludes a party cannot wait until after summary judgment is entered to object to an affidavit. *See, e.g.*, *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994) (holding that failure to object to affidavits or attachments constitutes a waiver of any objection and is reviewable on appeal "only to avoid a gross miscarriage of justice."). Here, Appellants have failed to request palpable error review.

[19] In addition to lost rental payments, the lease agreement provided that Appellants agreed they would be responsible for "all court costs, reasonable attorney fees, cost of reletting space, and any other expenses which may be reasonably incurred by the Landlord, in any court proceeding[.]" TR at 25.

Likewise, the complaint merely asked for "accruing statutory prejudgment interest from January 1, 2024[,] to date of judgment[.]"[20] Ghasem's affidavit also made the same request for "statutory prejudgment interest at the statutory rate from January 1, 2024, to the date of judgment." Nor did GPI's motion for summary judgment argue for a specific amount of prejudgment interest. The first mention of prejudgment interest at a rate of 8% appeared in GPI's tendered order granting summary judgment, submitted along with its motion. The circuit court signed the tendered judgment, and it was entered without any change.

Even though the tendered judgment contained an 8% prejudgment interest rate, we conclude that because the exact rate of prejudgment interest was not raised in any pleadings, motions, or affidavits, it was appropriate for Appellants to seek CR 59.05 relief as to the prejudgment interest rate. Thus, we review this issue on its merits.[21]

Appellants' claim KRS[22] 360.040(1) sets the statutory rate for prejudgment interest at 6%. GPI claims Appellant's argument "is a misinterpretation of and is directly contrary to language of KRS 360.040, as such

[20] TR at 6.

[21] GPI claims the issue of prejudgment interest "was not raised to the circuit court at any point and is thus waived." Appellee's Brief at 10. This is incorrect; Appellants raised the issue in their reply to GPI's response to the CR 59.05 motion. The circuit court also addressed the issue of prejudgment interest in its December 11, 2024 order and supplemental judgment.

[22] Kentucky Revised Statutes.

statute deals with post judgment, rather than prejudgment interest." Appellee's Brief at 10. Instead, GPI claims KRS 360.010 is the correct statute that addresses prejudgment interest, and, in any event, KRS 360.040 contains exceptions for judgments regarding contracts, in which the prejudgment interest rate is established by the contract.

KRS 360.010 is the statute that sets the legal interest rate in Kentucky. KRS 360.010(1) states in pertinent part: "[e]xcept as provided in KRS 360.040, the legal rate of interest is eight percent (8%) per annum[.]" KRS 360.040 concerns interests on judgments. KRS 360.040 states: "[e]xcept as provided in subsections (2), (3), and (4) of this section, a judgment, *including a judgment for prejudgment interest*, shall bear six percent (6%) interest compounded annually from the date the judgment is entered." (Emphasis added.)

In *Reliable Mechanical Inc. v. Naylor Industrial Services, Inc.*, 125 S.W.3d 856, 857 (Ky. App. 2003), this Court stated "[a]bsent a contractually agreed upon rate, the appropriate rate of interest is governed by statute."[23] KRS 360.040(3) provides "[a] judgment rendered on a contract, promissory note, or

[23] We recognize that in *Reliable Mechanical Inc.*, the issue was whether prejudgment interest should be compounded annually and that at the time, KRS 360.040 referred to only post judgment interest matters while KRS 360.010 referred to the legal interest rate in general. 125 S.W.3d at 857. The version of KRS 360.040 in effect at the time of *Reliable Mechanical Inc.* provided that judgment would bear 12% interest and was silent as to prejudgment interest. In 2017, KRS 360.040 was amended, providing, *inter alia*, that a judgment now bore a 6% interest rate (barring enumerated exceptions) and included judgments for prejudgment interest. *See* 2017 Ky. Acts Ch. 17 §1 (eff. Jun. 29, 2017).

other written obligation shall bear interest at the interest rate established in that contract, promissory note, or other written obligation." Thus, by default, the statutory prejudgment interest rate in this case would be 6%, subject to any different rate provided by the lease agreement. Appellee points us to nothing in the lease agreement that provides a specific prejudgment interest rate, nor do we find any such provision in the lease agreement on our review.

Because the judgment should have borne the statutory prejudgment interest rate of 6% provided in KRS 360.040(1), the circuit court abused its discretion by overruling Appellants' CR 59.05 Motion as to prejudgment interest. Upon remand, the circuit court shall enter a new judgment, awarding GPI prejudgment interest of 6% from January 1, 2024, to the date of judgment.

2. Future Rents Accruing After Judgment

Appellants' argument on appeal regarding liquidated damages is misplaced. In Kentucky, it has been a long-standing rule regarding a default in a lease or rental agreement by a tenant, where the due dates for the monthly rent are fixed by the underlying agreement or contract, that an award of damages for future rents that have not accrued is not allowed. *Jordon v. Nickell*, 253 S.W.2d 237, 239 (Ky. 1952). Therein, the Court, holding that due dates for future rents could not be accelerated, stated the following:

> Although not recognized in all jurisdictions, the doctrine of anticipatory breach is recognized in Kentucky. . . .

> However, we do not regard the rule as justifying the acceleration of payments under a contract where the due dates of such payments are definitely fixed by the contract. . . .
>
> . . . .
>
> Rather, the action is essentially one to recover rentals under the lease, and notwithstanding appellant's abandonment of the leased premises, the due dates of the rental payments under the lease were not precipitated. Appellee is entitled to recover rental payments only as they become due, and the lower court erred in awarding judgment for future rentals in advance of the due date thereof.

Id. at 239.

In this case, the term of the lease was for 62 months, commencing on February 1, 2023, with monthly base rent and common area maintenance fees payable on the first day of each month beginning April 1, 2023. Appellants complied through December 2023 and did not default until January 2024. When the circuit court entered judgment on September 30, 2024, Appellants only owed nine months of accrued rents. Therefore, the circuit court's judgment which included rents for the remaining 42 months in the term of the lease was a clear error of law. It is equally clear that Appellants never raised this argument to the circuit court or in their briefs.

When faced with such a situation, significant tension arises between two schools of thought at the appellate level:

> One view is that when a party fails to argue a theory on which he is entitled to win he should simpl[y] lose, the courts having enough to do without practicing lawyers' cases. On the other hand, much bad law will go into the books (more, that is, than is there already) if courts confine their analyses of cases to the theories presented in the briefs.

First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co., 517 S.W.2d 226, 229 (Ky. 1974). There is ample precedent to support both positions.

For example, in *Regional Jail Authority v. Tackett*, 770 S.W.2d 225 (Ky. 1989), our Supreme Court passed down the frequently cited rule declaring that the Court of Appeals lacks the authority to review issues not presented to or decided by the trial court. Or, as stated by the Supreme Court in *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016): "The proper role for an appellate court is to review for error – and there can be no error when the issue has not been presented to the trial court for decision."

However, in *Priestly v. Priestly*, 949 S.W.2d 594, 596 (Ky. 1997), the Supreme Court held:

> So long as an appellate court confines itself to the record (*Montgomery v. Koch*, Ky., 251 S.W.2d 235 (1952)), no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties (*Mitchell v. Hadl*, Ky., 816 S.W.2d 183 (1991)). While it is widely recognized that appellate courts should be reluctant to engage in such a practice, their discretion is broad enough to prevent a conclusion that it has been abused. *Young v. J.B. Hunt Transportation, Inc*., Ky., 781 S.W.2d 503 (1989).

And, in *Burton v. Foster Wheeler Corp*., 72 S.W.3d 925, 930 (Ky. 2002), the Supreme Court found an "[a]ppellant's failure to provide the correct legal citation to support his claim, where accurate research reveals the existence of such legal support, [did] not mean that his claim must fail, for ALJ's, workers' compensation board members, judges and justices are presumed to know the law and are charged with its proper application." Elaborating further, the *Burton* Court instructed:

> In other words, applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Nor is legal research a matter of judicial notice, for the issue is one of law, not evidence.

Id. (citations omitted). And, notably, in *Marrs v. Kelly*, 95 S.W.3d 856, 859 (Ky. 2003), the Supreme Court again debated the issue:

> We are loathe to order parties to trial based upon a concession that requires a misapplication of the law. In *Collins v. Hudson* we encountered a circumstance where the parties and the courts below had overlooked a controlling provision of the statute. If the entire statute had been applied, dismissal would have resulted, but without the statute, retrial was to be necessary. This Court was required to decide whether failure of preservation compelled the trial court to proceed without the controlling provision of the statute. In response, we said
>
> > In good conscience, we cannot, in the name of failure of preservation, particularly when the nature of the error was so elusive to both counsel and the courts below, return this case to a trial court, effectively directing it

> to apply the wrong law, thereby imposing liability that would not exist. . . .

Id. (citation and footnote omitted).

While in no way excusing Appellants' failure to respond to GPI's motion for summary judgment, we are mindful of "the litigants, who have some right, it seems to us, to expect the courts to assume a full share of responsibility for seeing that the controversy is correctly determined[.]" *First Nat'l Bank of Louisville*, 517 S.W.2d at 230. Therefore, we find the current situation merits the exercise of our discretion to prevent the incorrect application of law. *See Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991) ("When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law.").

An appeal of a summary judgment necessitates our de novo review of the entire record below. *Blackstone Mining Co. v. Travelers Ins. Co*., 351 S.W.3d 193. 198 (Ky. 2010), *as modified on denial of reh'g* (Nov. 23, 2011). And the circuit court is also duty-bound to review the lease in question and apply the applicable law as concerns any claim for damages thereunder. In this regard, whether the circuit court applied the applicable law correctly, including interpretation of that law, is also subject to our de novo review. *Ballard v. 1400 Willow Council of Co-Owners, Inc*., 430 S.W.3d 229, 234 (Ky. 2013).

In this case, the circuit court clearly applied incorrect law in ascertaining the amount of damages for Appellants' breach of the lease. The lease contained no acceleration clause or other legal basis to assess damages for future rent and maintenance payments, and the term of the lease did not expire until March of 2028. Had the lease term been expired when summary judgment was entered, then the result would be different. *See AnyConnect US, LLC v. Williamsburg Place, LLC*, 636 S.W.3d 556, 563-64 (Ky. App. 2021). Here, however, misapplication of the law allowed GPI a windfall.

On remand, nothing precludes GPI from seeking a supplemental judgment for additional rents owed as they become due, presuming GPI remains unable to relet the premises before March 2028. This also ensures GPI continues to attempt to mitigate its damages during the remaining term of the lease.

IV. CONCLUSION

In conclusion, while an opponent's failure to respond to a motion for summary judgment does not grant automatic victory for the movant, the opponent's failure to respond severely limits possible arguments that summary judgment was in error. The time to make arguments and present evidence in opposition to summary judgment is before judgment is entered. A party may not sit idly by and subsequently swoop in to utilize CR 59.05 to do what should have been done prior to entry of judgment. However, the trial court, when faced with an

unopposed motion for summary judgment, is still obligated to review the record to determine whether summary judgment is appropriate.

For the foregoing reasons, we AFFIRM the September 30, 2024 judgment of the Jefferson Circuit Court in so far as judgment was granted in favor of GPI. We also AFFIRM that post judgment interest shall accrue at a rate of 6%. We REVERSE as to the award to GPI of prejudgment interest at a rate of 8% from January 1, 2024, to the date of judgment. We also REVERSE the award of future rents and maintenance fees. We REMAND and direct the Jefferson Circuit Court to enter a new judgment for actual rents and maintenance fees accrued at the time judgment was entered, and for prejudgment interest at a rate of 6%.

We view any remaining contentions of error as moot, unpersuasive, unpreserved, or without merit.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
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