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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001814-MR

JAMES D. CROSS; ROBERTA J. CROSS, HIS WIFE; GAIL W. THOMPSON, EXECUTRIX OF THE WILL OF FRANCIS ALLAN THOMPSON; AND GAIL W. THOMPSON, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 10-CI-00581

B.J. MANAGEMENT, INC.; JERRY BRADY; AND GAYLE BRADY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: In this appeal, the appellant landlords (hereinafter, "Cross") challenge the amount of damages owed to them under a commercial lease

agreement. The Nelson Circuit Court calculated the damages, and after finding ample evidence in the record to support the trial court's decision, we affirm.

I. BACKGROUND

In 1989, Cross acquired the property at 1008 Commerce Drive in Bardstown, Kentucky, subject to a lease agreement between the previous landowner and Harry Samuels (hereinafter, "Samuels"). Samuels operated a restaurant on the premises through B.J. Management, Inc. (hereinafter, "B.J. Management"). In 1991, Cross and B.J. Management entered into a replacement lease agreement. Nearly a decade later, Samuels sold B.J. Management to appellee Brady. As a result, Brady acquired both the rights and liabilities of B.J. Management under the 1991 replacement lease.

On November 14, 2008, Cross mailed a letter to Brady outlining a number of maintenance issues with the restaurant building. Specifically, Cross informed Brady that it was necessary to replace the interior carpet and repair the foyer, front door, and gutters. Cross also noted that grease from the kitchen had to be cleaned.

On April 22, 2009, Brady mailed a certified letter to Cross stating that Brady and B.J. Management would not be renewing their upcoming lease option. The lease then terminated on July 31, 2009, and Brady relocated B.J. Management to another location in Bardstown.

On February 9, 2010, Cross entered an agreement with Edward Gene Hatfield and Joshua Hatfield, of The Palms Sports Bar & Grill, LLC (hereinafter,

"The Palms"), to sell the subject property located at 1008 Commerce Boulevard for $215,000.00. The owners, including Cross, were to provide financing, and The Palms would be responsible for paying $1,540.33 per month for one hundred and nineteen (119) consecutive months with a final balloon payment of $140,282.35 due on February 10, 2020. Additionally, The Palms agreed to assume a $150,000.00 mortgage on the property from Town & Country Bank.[1]

On June 28, 2010, Cross filed this action, asserting that Brady and B.J. Management breached their lease agreement. The Nelson Circuit Court held a bench trial on July 30, 2013. After testimony from nine witnesses and the entry of 106 exhibits into evidence, the trial court determined that Brady and B.J. Management committed breach by failing to maintain both the interior and exterior of the building. The trial court further listed 21 separate maintenance issues Cross failed to address, including damage to the ceiling, carpet, restrooms, wiring, plumbing and both the interior and exterior walls. The trial court ultimately awarded Cross $16,160.47 in damages and an additional $5,386.82 for reasonable attorney's fees.

As to the $16,160.47 damages amount, the trial court apportioned $10,535.47 for costs Cross incurred to rehabilitate the building and another $5,625.00 to replace certain kitchen equipment removed by Brady: a hood system and various sinks. Cross disagreed with the amount of the trial court's award and claimed that the correct measure of damages was the difference in fair market

[1] This loan was executed on February 23, 2010, for $165,000.00.

values of the property with and without a properly maintained building at the time of the lease termination. According to Cross, the fair market value of the property, had it been maintained as required under the lease, would have been between $340,000.00 and $380,000.00. Cross further claimed that Brady removed several additional fixtures and that the trial court incorrectly excluded their replacement costs from the total award.

Pursuant to section F of the local rules for the 10th Judicial Circuit of Kentucky, the trial court struck down Cross's diminution-of-value method for calculating the damages because he did not "itemize [his] claimed damages," and did not "specify those damages which can be calculated from objective data." The trial court also did not find Cross's appraisal of his own property persuasive; instead, the trial court chose to rely on the testimony of David B. Herring, a General Certified Real Property Appraiser, who determined that the property, as of December 15, 2009, had a fair market value of $205,000.00.[2]

Regarding Cross's claim that values for additional fixtures should have been included in the damages award, including the replacement values for a walk-in freezer box and compressors, a condensing unit for the walk-in cooler, refrigeration units, a grill, deep fryers, an oven, an ice machine, a table with heat lamps, and the bar, the trial court found that these were removable under the lease as trade fixtures.

[2] This appraisal was done after the majority of the repairs were completed.

On August 12, 2013, Cross filed a motion to alter, amend or vacate the trial court's findings and legal conclusions. The trial court denied that motion on September 23, 2013. This appeal follows.[3]

II. STANDARD OF REVIEW

In an action tried upon the facts without a jury, the trial court must make findings of fact, and those findings will not be disturbed by an appellate court unless clearly erroneous. CR 52.01. An appellate court must also give due regard "to the opportunity of the trial court to judge the credibility of the witnesses." *Id*. As for the trial court's legal conclusions, these do not receive the same level of deference; rather, an appellate court reviews them *de novo*. *Clark v. Bd. of Regents of Western Kentucky University*, 311 S.W.3d 726, 729 (Ky. App. 2010) (citing *God's Ctr. Found. Inc. v. Lexington–Fayette Urban County Gov't,* 125 S.W.3d 295, 300 (Ky. App. 2002)). Finally, the proper standard of review for a trial court's evidentiary ruling is whether a trial court abused its discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

III. DISCUSSION

On appeal, Cross first argues that the trial court erred by excluding Cross's evidence regarding the diminution of his property value. Cross also argues that the trial court erred by not allowing him to testify as to the market value of his property. In support of his arguments, Cross references several instances in his pleadings and in his pre-trial statement where he notified Brady and B.J.

[3] The order did not overrule the parties' motion in its entirety, as it amended the judgment to include Gayle Brady as a defendant. That issue is of no consequence to this appeal.

Management that he was seeking $122,000.00 for diminution of value plus another $11,000.00 to repave the restaurant's parking lot. Cross also maintains that he was entitled to testify as to the value of his property under *Summe v. Gronotte*, 357 S.W.3d 211 (Ky. App. 2011).[4] For the following reasons, the trial court did not err.

Here, even though the trial court cited a local rule as the basis for excluding Cross's diminution-of-value evidence, the trial court nonetheless permitted Cross to testify by avowal as to the value of his property. Cross stated that the property would have been worth between $340,000.00 and $380,000.00 had the building been properly maintained. The trial court further considered Cross's argument and addressed his avowal testimony and found that through normal wear and tear over twenty-five years, the property would not have been worth more than the amount provided by Mr. Herring, an expert appraiser, who determined that the property was worth $205,000.00. Thus, the trial court found against Cross based on substantial evidence. We will not disturb that finding.

For his final argument on appeal, Cross asserts that the trial court incorrectly classified the additional removed kitchen equipment as trade fixtures. Cross instead argues that removed items were merely fixtures. After reviewing the applicable Kentucky law, we agree with the trial court's classification.

[4] The *Summe* decision relates to the qualifications of a lay witness and holds that a property owner may testify as to the value of his property provided he also meets the requirements of a lay witness. *See Summe*, 357 S.W.3d at 213. In other words, Cross's status as a landowner does not confer an automatic right to testify.

Historically, items that become permanently affixed to real property are "fixtures" under Kentucky law. *Pennington v. Black*, 88 S.W.2d 969 (Ky. 1935). However, certain "property which a tenant has placed on rented real estate to advance the business for which it is leased" is more precisely a trade fixture and "may, as against the lessor, be removed at the end of the tenant's term." *Bank of Shelbyville v. Hartford*, 268 Ky. 135, 104 S.W.2d 217, 218-19 (1937).

After reviewing the items Brady removed, we cannot find that the trial court improperly classified them as trade fixtures. The items are consistent with the operation of carrying on business as a restaurant.[5] Therefore, Brady could remove the items, even if they had become affixed to the real estate. Accordingly, the Nelson County Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Douglas Hubbard
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Michael E. Coen
Bardstown, Kentucky

[5] Cross does not establish, nor does he provide any proof of these items being in the building prior to the lease agreement with Samuels. There is no mention of any prior existing restaurant equipment or supplies in the replacement lease between Cross and Samuels.