IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

November 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

DAIRY GOLD, INC.,	)	
	)	03A01-9901-CH-00019
Plaintiff/Appellee	)	
	)	Appeal As Of Right From The
vs.	)	HAMILTON CO. CHANCERY COURT
	)	
MICHAEL THOMAS,	)	HON. W. FRANK BROWN, III
	)	CHANCELLOR
Defendant/Appellant.	)	

For the Appellant:
Lawrence A. Ault
Knoxville, TN 37902

For the Appellee:
James T. Williams
MILLER & MARTIN LLP
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AFFIRMED

Swiney, J.

O P I N I O N

This is an appeal by Michael Thomas ("Lessee") of the Trial Court's award to Dairy Gold, Inc. ("Lessor") of rent, real estate taxes, late fees and attorney fees under the terms of a lease, offset by Lessee's security deposit and expenses incurred for demolition of a building on the leased premises. On appeal, Lessee insists that the Trial Court erred in (1) failing to find the property "

untenantable" under the express terms of the lease and allowing parol evidence to alter the lease's express terms, (2) failing to construe lease ambiguities against the drafter, (3) failing to take judicial notice of Tenn. Code Ann. § 68-215-101 *et seq.*, the Tennessee Petroleum Underground Storage Tank Act, (4) finding that there was a meeting of the minds sufficient to form a contract, and (5) denying rescission of the lease. Lessor appeals the Trial Court's refusal to award pre-judgment interest. We affirm the judgment of the Trial Court.

BACKGROUND

Lessor has owned the property at 3911 Brainerd Road in Chattanooga since 1951 and used it or leased it as a car wash from 1955 until 1989, although the property sat empty for eighteen months immediately before the transaction at issue here. On August 2, 1990, Lessor leased the premises to Lessee for a period of ten years, commencing on October 1, 1990, with an option to buy, under the terms of a Commercial Lease agreement. Before the parties entered into the lease, they met on the property and discussed the building and the agreement. The Commercial Lease they then entered into provides that Lessee will use the premises as a car wash and for no other purpose without prior written consent of the Lessor. By the terms of the lease, Lessee acknowledged that the premises were in good order and repair, "unless otherwise indicated herein," and Lessee agreed to, "at its own expense, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installation . . . ." Lessee agreed to be responsible for all repairs required with the exception of a repair specifically set out in the lease, to be paid for by Lessor, i.e., the "removal of 35 feet of curbing nearest Brainerd Road . . . ." Other pertinent terms of the lease require Lessee to pay a security deposit, to make monthly lease payments which increase in years four, six and nine, to pay all city, county or state real estate taxes, and to pay reasonable attorneys' fees if legal proceedings between the parties become necessary and Lessor prevails. Specific paragraphs of the Commercial Lease which are at issue in this case include:

> **17. Destruction of Premises:** If at any time the Premises become totally untenantable by reason of damage or loss by fire or other casualty and such fire or other casualty shall not have been caused by the

> negligence or wrongful act or omission of the Lessee, Lessee's servants, agents, licensees or invitees, the rent shall abate until the Premises have been restored to tenantable condition, but nothing herein is to be construed as requiring Lessor to restore or rebuild the Premises . . . .
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> **19. Remedies of Lessor on Default:** (b) Notwithstanding anything herein to the contrary, any installment of rent or other sum due hereunder not paid within (5) days from the due date shall bear a late charge of 5% of the amount due, which shall be payable with the next installment of the rental due hereunder.
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> **31. Entire Agreement:** The foregoing constitutes the entire agreement between the parties and may be modified only in writing signed by the parties hereto or their successors in interest.

Lessee, who owns a number of Calibur Car Wash operations, took possession of the premises on October 1, 1990, but never occupied the building. In the spring of 1991, Lessee learned through a feasibility study that the traffic pattern was not going to work to enhance the location, the lot was not long enough to add a longer conveyor to push the cars due to the turning radius, and "basically the building was just not remodelable with those roof conditions and the electrical services." By letter of November 22, 1991, Lessor's representative (a realtor) advised Lessee, apparently in response to ongoing negotiations, that Lessor "would not be willing to enter a second mortgage on the property . . . [but] . . . would be willing to consider building a new building for you at this location with a long-term lease."

On April 2, 1992, the City of Chattanooga Better Housing Commission sent Lessor and Lessee a Municipal Inspection Report and Formal Warning about the leased premises which required litter, debris and overgrowth to be removed and damaged exterior walls, doors and windows to be repaired. By letter of April 20, 1992, Lessor notified Lessee that "Section 7 of your lease holds [you] responsible for maintenance, repairs, and alterations. In addition, you have not paid your taxes for 1991 which are now incurring penalty charges."

On April 22, 1992, Lessor gave Lessee permission to demolish the existing building and requested a letter from Lessee indicating the date of demolition to take to the City of Chattanooga, to

obtain an extension of the City's order to clean up and repair the building. Lessee replied that he planned to begin demolishing the building by June 1, 1992, but in July the parties discussed the problem again. Lessee threatened to stop making lease payments and complained that a billboard on the premises, which would have been no problem in renovation of the existing building, now prevented him from building a new car wash because it would stand in the doorway. On March 3, 1993, Lessor's attorney wrote to Lessee proposing a settlement in which Lessee would pay Lessor $4,132.03 for two years' back taxes, attorney's fees, and shortfall on rent due, less one-half of the billboard rental collected from October 1, 1990 through March 31, 1993. Lessee would also be entitled to negotiate the new billboard rental on a month-to-month basis and receive all the sign rental accruing on or after April 1, 1993, so long as Lessee was not in default under the premises lease. This letter also proposed that Lessee do soil borings at its expense, estimated at $1,800, around the underground gasoline storage tanks, and in the event that the soil is contaminated "we then will discuss responsibilities for that." Lessee paid the $4,132.03 on March 8, 1993, but declined to perform soil boring.

On May 3, 1994, Lessor received a Citation from the City of Chattanooga notifying it that the leased premises were unfit or dangerous in violation of Chattanooga City Code Sec. 21-14 and 21-35 and summoning it to City Court. The Better Housing Commission ruled that the premises must be brought up to code or demolished within 45 days. With Lessor's permission, Lessee demolished the building in June 1994.

In March, April and May of 1995, the parties attempted to reach an agreement to develop the leased premises along with adjoining properties, but they could not agree on price. Lessor's realtor, apparently encouraging negotiation, advised Lessor by letter that the property could not be sold unless the problem with the existence of underground storage tanks could be resolved.

Lessee apparently became convinced that the premises could not be used for the intended purpose and, through former counsel, notified Lessor by letter of June 14, 1995, that the costs of demolishing the building must be reimbursed by Lessor, that the premises had not been restored to tenantable conditions with respect to the use stated in the lease, i.e., a car wash, and therefore under

paragraph 17 of the lease, the rent would be withheld until the premises had been restored to tenantable conditions. Lessee also took the position in this letter that "the premises were never tenantable and usable as a car wash. Accordingly, the rent should have abated immediately . . . ." Lessee refused to make further rent payments and demanded return of all rents paid from the inception of the lease as well as taxes and demolition costs paid by Lessee.

Lessor then provided Lessee with "Formal Notice of Default" by letter of September 20, 1995, and on September 29, 1995, sent Lessee a letter of "Termination of the Right to Possession." On December 16, 1995, Lessor notified Lessee that efforts to mitigate by leasing to another party were ongoing but unsuccessful. Lessor then filed this suit to recover back rent, unpaid property taxes, late fees and attorney fees, under the terms of the lease, on February 21, 1996.

DISCUSSION

The Trial Court held that the Lessee had simply made a bad business deal, and that he had failed to prove grounds for rescission or to promptly seek judicial rescission. The Trial Court awarded damages to Lessor including delinquent rent and taxes, late charges and attorney fees, and declined to award prejudgment interest because of its award of the five percent late charge. The Trial Court also allowed the lessee an off-set for his security deposit and fees incurred for demolition of the building.

Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the Trial Court, unless the preponderance of the evidence is otherwise. Rule 13(d), T R A P.; *Lindsey v. Lindsey,* 976 S.W.2d 175, 178 (Tenn. Ct. App. 1997). The interpretation of a written agreement is a matter of law and not of fact. Therefore, our scope of review is de novo on the record with no presumption of correctness of the Trial Court's conclusions of law. *Park Place Ctr. v. Park Place Mall*, 836 S.W. 2d 113, 116 (Tenn. Ct. App. 1992).

Lessee raises the issue that the Trial Court erred in interpreting the terms of the lease by failing to find the property "untenantable" under paragraph 17 and by allowing parol evidence to alter the express terms of the contract. The Trial Court held that Lessee could not escape the Commercial Lease

by the application of paragraph 17 of the contract because that paragraph was inapplicable to the facts of this dispute. The Trial Court opined that the that paragraph refers to relief available to Lessee upon damage or loss "by fire or other casualty," and that no loss by fire or other casualty occurred in this case.

In interpreting contracts, where the provisions of a contract are "clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense." *Ballard v. North American Life & Cas. Co.,* 667 S.W.2d 79, 82 (Tenn. Ct. App. 1983). We agree with the Trial Court and find the plain language of paragraph 17 provides for relief only upon loss by fire or other casualty. The Trial Court found there was no loss caused by fire or casualty. The evidence in the record before us does not preponderate against this finding of the Trial Court.

Lessee contends the Trial Court improperly permitted parol evidence to alter the express terms of the contract. The Trial Court commented from the bench as follows:

> Lawyers like to talk about written documents and in this one it's fairly obvious to the Court that there were some discussions by the parties that took place prior to the negotiating of this lease agreement.

Lessee says the Trial Court considered parol evidence about Lessee's alleged plan to demolish the building and, relying on that evidence, the Trial Court disregarded Lessor's breach of the lease term which required Lessor to provide quiet enjoyment. Lessee argues that Lessor was in default *as of the date the lease was signed*, due to "the condition of the building, the placement of the billboard, but most importantly the presence of the underground storage tanks [which] effectively denied [Lessee] 'full, quiet and peaceful possession' of the property."

Although the record indicates that parol evidence of prior discussions was presented to the Trial Court by both sides, our reading of the whole record, including the Trial Court's Memorandum Opinion, indicates the primary basis of the Court's upholding of the Commercial Lease on this issue was that "[t]here were certain problems with the building that were obvious to the naked eye," which the Lessee nevertheless accepted by signing the Commercial Lease.

Lessee testified that the building was available for his inspection and that he visited it several times before signing the Commercial Lease Agreement. He testified:

> It was run down and basically the overhead doors for the car wash system were rusted practically down . . . the canopy in the back was falling down . . . Jim Whitaker and I looked thoroughly at the structural parts of the building. The roof, the concrete block walls, the electrical service, that's the primary things, the plumbing, that we were trying to make a point to inspect. And if it was in good shape.

We agree with the Trial Court that the condition of the building, the presence of the "76 " billboard, and the existence of underground storage tanks, as depicted in a photograph at trial, were obvious to the naked eye at the time the lease was signed. Further, Lessee admitted when deposed that "we had some discussions of the gas tanks, of whose responsibility the tanks would be." The Trial Court found that Lessee saw these obvious defects yet signed the Commercial Lease, and therefore upheld the lease in accordance with the provisions of the lease.

We find that parol evidence about the parties' intentions before they signed the lease was not used by the Trial Court to alter or amend the terms of the lease. Certainly upon considering the whole record, we cannot say that the Trial Court's admission of parol evidence, even if in error, more probably than not affected the judgment, and for this reason we decline to set aside the Trial Court's judgment on that basis. Rule 36(b), T.R.A.P.

Lessee also argues that the Trial Court erred in failing to construe lease ambiguities against Lessor as drafter. We first note the inconsistency of Lessee objecting to the Trial Court's admission of parol evidence, but then arguing that the lease terms were ambiguous. The ambiguities claimed are (a) the condition of the building, (b) Lessee's intentions towards the building, and (c) Lessee' s awareness of any underground storage tanks. Items (b) and (c) are not mentioned in the lease. There are no ambiguous lease terms on these two items to construe. We therefore consider only item (a).

As Lessee states, "[i]t has long been established that contracts are to be construed against the drafter when there is some question about the proper construction." *Tate v. Trialco Scrap, Inc.*, 745 F.Supp. 458, 467 (M.D. Tenn. 1989).

The Commercial Lease Agreement provides, as pertinent to condition of the building:

> **7. Maintenance, Repairs, and Alterations:** (a) Lessee acknowledges that the Premises are in good order and repair, unless otherwise indicated herein. Lessee shall at all its own expense and at all

> times maintain the Premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the Premises, and shall surrender the same at the termination or expiration hereof, in as good a condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs required, excepting the following:___ Lessor, at his expense, shall remove 35 feet of curbing nearest Brainerd Road between the premises and the adjacent Belvoir Plaza to improve ingress and egress to both facilities____which shall be maintained by Lessor. Lessee shall also maintain in good condition portions adjacent to the Premises such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor. [*Emphasis added*].

The fact the parties' disagree over the interpretation of a particular contract provision does not create an ambiguity. *Kensinger v. Kensinger "Conlee"*, No. 02A01-9811-CV-00322 (Tenn. Ct. App., filed July 30, 1999) *no appl. perm app.; Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994). A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one. *Id. at 462*. In this case, Paragraph 7 of the Commercial Lease unambiguously required Lessee, and only the Lessee, to acknowledge that the premises were in good order and repair. It is clear that Lessee read and accepted the condition of the building, as indicated by the fact that one repair (removal of a curb) was added to the paragraph. Moreover, we observe that Lessee has stated elsewhere in its argument (brief at page 14), "[t]herefore, as there was no ambiguity as to the language of Paragraph 7(a) nor any question . . . ."

Lessee argues that the Trial Court erred in "finding that there was a meeting of the minds sufficient to form a contract." To prove this issue, Lessee, in its brief, recites testimony of the parties about their intentions when the Commercial Lease was signed:

> Plaintiff and Plaintiff's agent testified that Defendant intended to demolish the old building and construct a new car wash . . . Defendant testified that he intended to remodel the existing building . . . Defendant testified he did not know there were USTs on the property and would not have signed the Lease if he had known . . . Defendant and Plaintiff all testified that, at the time the Lease was signed, they believed the building was basically sound.

However, Lessee also argues elsewhere (brief page 12), "[i]t is an established rule that

the courts can only construe a lease as written and cannot make a new contract for the parties. *Stone v. Martin,* 185 Tenn. 369, 374, 206 S.W.2d 388 (1947)." Lessee then cites Tenn. Code Ann. § 47-50-112(a), which provides in part:

> All contracts . . . in writing and signed by the party to be bound . . . shall be prima facie evidence that the contract *contains the true intention of the parties*, and shall be enforced as written . . .

The lease in question is clear and unambiguous. Therefore, applying the case law cited above and Tenn. Code Ann. § 47-15-112, we decline to consider pre-contractual parol evidence as to the parties' intentions to disprove the plain terms of the written lease or to create an ambiguity that doesn't exist in the written lease.

Next, Lessee raises the issue of whether the Trial Court erred in denying him rescission of the lease based on Lessee's "lack of promptitude." Lessee's lack of promptness was an issue in denying rescission, as indicated by the Trial Court's remarks from the bench:

> One of the things that is important to me is that notwithstanding the prior letter in which the defendant said he was willing to cease making payments is that he continued to make payments. And I think it's important to note that the defendant never filed a complaint for rescission. Indeed, the only lawsuit by the defendant in terms of a counterclaim came in response to the plaintiff's rental action. And in all candor, Mr. Ault has expanded that lawsuit today by his testimony in terms of his witnesses presented in his arguments.
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> * * *
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> One of the things that's in the law is that a person who finds out that the lease agreement or contract is not what he or she thought it was, is a requirement to act promptly and consistently in seeking relief. Section 12 of Tennessee Jurisprudence on Recission, Cancellation and Reformation talks about general rules. The first noted of which is, a rescission must be applied for as soon as the party ascertains that it is needed for the effectuation of justice to himself. I did not see any promptitude here in the defendant applying for recission.

However, the Trial Court also denied rescission because Lessee had failed to prove grounds for rescission. The Court opined:

> Had there been a failure to obtain a building permit due to the underground storage tanks the Court may look at this case a little differently than I have heretofore. I just don't see that as a basis for rescission.

"The equitable remedy of rescision is not enforceable as a matter of right but is a matter resting in the sound discretion of the Trial Court and the Court should exercise the discretion sparingly." *Vakil v. Idnani*, 748 S.W.2d 196, 199 (Tenn. Ct. App. 1987); *James Cable Partners v. Jamestown*, 818 S.W.2d 338, 343 (Tenn. Ct. App. 1991); *Early v. Street*, 241 S.W.2d 531, 536 (Tenn. 1951). Based upon our review of the whole record, including but not limited to the several year delay by Lessee before filing his counterclaim asking for rescission, we find that the Trial Court did not abuse its discretion in denying rescission of this Commercial Lease.

Finally, Lessee raises the issue of whether the Trial Court erred in failing to take judicial notice of the Tennessee Petroleum Underground Storage Tank Act. Tenn. Code Ann. § 68-215-106 requires, among other things, owners of underground gasoline storage tanks in use on July 1, 1988, or taken out of operation after January 1, 1974, to notify the commissioner of environment and conservation within one year of the enactment of the statute of the existence of such tank, specifying the age, size, type, location and uses of such tank. If the tank was taken out of operation after January 1, 1974, the owner is required to notify the commissioner of the date it was taken out of operation, the age of the tank on that date, the size, type and location of the tank, and the type and quantity of petroleum substances left stored in such tank on the date taken out of operation. Thereafter, any change in status of the tanks must be reported to the commissioner within 30 days of such change. The commissioner issues certificates to the owners/operators of such tanks, and the certificates must be conspicuously posted. No petroleum may be placed in an underground storage tank without a certificate. The commissioner exercises general supervision over such tanks and may revoke and remove the certificates for violations of any provisions of the Act. Tenn. Code Ann. § 68-215-109 provides that owners of such tanks must pay an annual fee, which is then deposited into the petroleum underground storage tank fund. Tenn. Code Ann. § 68-215-114(a) provides that, upon the commissioner's investigation and finding that the provisions of the statute are not being complied with, the commissioner may issue an order for correction. Section (b) provides that responsible parties ("owners and/or operators") shall be liable to the state for

costs of investigation, identification, containment and cleanup, including monitoring and maintenance. Owners/operators who have paid the required fees are liable for all costs up to entry level into the fund, and owners who have not paid the fee are liable for all costs. The owner of property which has 1 - 10 underground tanks must pay all costs up to 10% of the total cost of correction, but not to exceed $10,000.

In this case, the Trial Court stated:

> To me, I'm impressed by the fact that there was not any documentation or testimony from any regulatory official with the E.P.A. saying that the plaintiff's [sic-Lessee's] intended use of the property could not be carried out because of the underground storage tanks.
>
> * * *
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> But Rule 8.05 does talk about the necessity of pleading statutes with particularity. And I tried Saturday to read through those underground storage tanks [statutes], and in my scanning of those statutes, I didn't see anything that changed my opinion on the ultimate outcome of this case.

The Trial Court did take judicial notice of Tenn. Code Ann. § 68-215-101 *et seq.*, but found that statute not to be determinative in this lease case. We agree.

Lessor appeals the Trial Court's refusal to award prejudgment interest on the balance of unpaid rent. The Trial Court held:

> I am denying prejudgment interest for several reasons; one, that it is a matter of discretion with the court; second, I believe in effect you're getting pre-judgment interest when you get the five percent (5%) [late charge]. And the court may think that's doubling up.

Lessor argues that it is entitled to pre-judgment interest as a matter of right under Tenn. Code Ann. § 47-14-109, which provides:

> **47-14-109. Accrual; Liquidated and Settled Accounts.**
>
> (a) Interest on negotiable and non-negotiable instruments shall accrue according to the terms of the instrument; otherwise, interest on the instrument shall accrue as provided in § § 47-3-118(d) and 47-3-122(4).
>
> (b) Liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned.

> (c) In all other cases, the time from which interest is to be computed shall be the day when the debt is payable, unless another day be fixed in the contract itself.

This Court has held that a fixed obligation to pay installments of rent pursuant to a lease agreement comes within the import of this section, and entitled the plaintiff to receive prejudgment interest as a matter of right. *Jaffee v. Bolton,* 817 S.W.2d 19, 28 (Tenn. Ct. App. 1991). The basis for the Court's holding in *Jaffee* was that the claim there was liquidated. *Jaffee* at 28. In this case, the damages sought, even though they included rent, were not liquidated. The Trial Court diminished the recovery by allowing the Lessee an offset for his security deposit and for costs he incurred for the demolition of the building. The Trial Court also cut the award of attorney fees from one-third of the recovery to $15,000. This amount could not have been determined by a mere computation at the commencement of the action. We have held that when, as here, the amount cannot be determined by mere computation at commencement of the action, T.C.A. § 47-14-109 does not apply and prejudgment interest is not mandated. *Peninsular Life Ins. Co. v. Chism,* No. 02A01-9205-CV-00140 (Tenn. Ct. App., filed Sept. 8, 1993) *no appl. perm. app*.

We find Tenn. Code Ann. § 47-14-123 applicable in this case:

> **47-14-123. Prejudgment interest. -** Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum; provided that, with respect to contracts subject to § 47-14-103, the maximum effective rates of prejudgment interest so awarded shall be the same as set by that section for the particular category of transaction involved. In addition, contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default within the limits set by § 47-14-103.

Our Supreme Court has held that prejudgment interest under this statute is not allowed as a matter of right in Tennessee, but instead is discretionary with the court. *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 943 (Tenn. 1994). The award of prejudgment interest on this unliquidated claim was within the sound discretion of the Trial Court and the decision will not be disturbed upon appellate

review unless the record reveals a manifest and palpable abuse of discretion. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992). We find no abuse of discretion in the Trial Court's well-reasoned determination to deny prejudgment interest, which is affirmed.

CONCLUSION

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings, if any, as may be required, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant.

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D. MICHAEL SWINEY, J.

CONCUR:

_____

HOUSTON M. GODDARD, P.J.

_____

HERSCHEL P. FRANKS, J.