

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 18, 2023 Session

FILED
07/27/2023
Clerk of the
Appellate Courts

FELICIA WILLETT ET AL. v. OLYMBEC USA, LLC

Appeal from the Chancery Court for Shelby County
No. CH-19-1153 JoeDae L. Jenkins, Chancellor

No. W2022-00028-COA-R3-CV

Tenant appeals the trial court’s decision to grant landlord a judgment under a holdover provision in a commercial lease. Because we conclude that landlord voluntarily relinquished its claim under the holdover provision, we reverse the trial court’s judgment of damages, late fees, and attorney’s fees, but affirm the trial court’s decision to deny tenant’s motion to amend her complaint. We remand this case for the determination of the sole issue agreed to be heard by the parties.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

Patrick G. Walker, Memphis, Tennessee, for the appellants, Felicia Willett, and F.S.W., LLC.

S. Joshua Kahane and Aubrey B. Greer, Memphis, Tennessee, for the appellee, Olymbec USA, LLC.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a commercial lease (“the Lease” or “the Standard Lease”) dispute between Plaintiffs/Appellants Felicia Willett and F.S.W., LLC,¹ and Defendant/Appellant

¹ F.S.W., LLC is an entity wholly owned by Ms. Willett that was later made the party-in-interest to the contract at issue in this case. For ease of reference and to conform to how the parties were treated in the trial court, we refer to both Ms. Willett individually and the entity as “Willett.”

Olymbec USA, LLC (“Olymbec”), the successor-in-interest to the original lessor. The Lease was originally entered into in 2001; the Lease contained three five-year options to renew so long as written notice was given 120 days prior to the expiration of the current term. The Lease also contained the following provision:

2.07 Holding Over. In the event that Lessee does not vacate the leased premises upon the expiration or termination of this Lease, Lessee shall be a Lessee at will for the holdover period and all of the terms and provisions of this Lease shall be applicable during that period, except that Lessee shall pay Lessor as base rental for the period of such holdover an amount equal to two times the base rent which would have been payable by Lessee had the holdover period been a part of the original term of this Lease. . . .

Following a second amendment, the Lease was set to terminate on March 31, 2012.

Willett signed another amendment to the Lease in March 2012, exercising the first five-year renewal and providing a lease term from April 2012 to March 2017 (“the Third Amendment to Standard Retail Lease” or “the Third Amendment”). The Third Amendment contained the following language in section 2: “[p]rovided Lessee is not in default and upon 120 days prior written notice, Lessee shall have two (2) successive five (5) year options to renew the Lease at the then market rate for comparable restaurant retail space in comparable buildings in downtown Memphis, TN.” The base rate of rent was also modified.

On October 31, 2016 (151 days before the expiration of the first five-year renewal), Willett sent Olymbec an email stating that she would like to exercise the second five-year renewal option on the Lease. Olymbec responded that Willett needed to send a more formal letter. Willett sent the letter the next day. Olymbec later confirmed that the letter was what they wanted. The parties then began negotiations for the base rental rate.

Eventually, in February 2017, Olymbec sent Willett a Fourth Amendment to Standard Retail Lease (“the Fourth Amendment”). Negotiations continued without an executed renewal, as the parties could not agree on the base rent. According to Willett, however, she was eventually ready to sign the Fourth Amendment, but was told by Olymbec’s representative not to sign because Olymbec wanted to make changes. But Olymbec never sent a modified version of the Fourth Amendment, despite what Willett claimed were multiple inquiries. So no written contract reflecting a second renewal was ever executed by the parties. But Willett continued to operate her business in the property past the March 31, 2017 expiration of the first renewal period and continued to pay the base rent required by the prior agreement.

In July 2019, Olymbec sent Willett a letter stating that (1) the term of the Standard Lease had expired; (2) she was occupying the premises as a month-to-month tenancy; and

(3) she was to vacate the premises within thirty (30) days. According to Willett, this is the first notice she had that Olymbec was claiming that she failed to renew the Lease. On August 13, 2019, Olymbec filed a Forcible Entry and Detainer (“FED”) Warrant against Willett in the Shelby County General Sessions Court (“the general sessions court”), seeking possession of the subject property.

In response, on August 19, 2019, Willett filed a complaint for damages against Olymbec in the Shelby County Chancery Court (“the trial court”) seeking the following: (1) a declaratory judgment that she properly renewed the second five-year option; (2) a restraining order against eviction by the general sessions court; (3) that Olymbec be equitably estopped from denying the renewal; and (4) a finding that Olymbec was in breach of the duty of good faith and fair dealing and other provisions of the contract. Willett attached to her complaint the various agreements and exhibits that she asserted made up the parties’ contract.

On August 19, 2019, the trial court issued a fiat granting Willett a temporary injunction against Olymbec from pursuing its FED action until a hearing could be held on September 4, 2019. The fiat further provided that Willett would pay a bond of \$15,000.00 up front and then \$5,040.00 per month. The hearing was thereafter continued by agreement.

After Willett moved for a default judgment, on November 12, 2019, Olymbec answered the complaint and filed a counterclaim asserting that Willett breached the Lease by not executing a lease renewal, resulting in the triggering of the holdover provision.² Olymbec sought immediate possession, damages, and attorney’s fees. Willett later answered the countercomplaint denying that the holdover provision was applicable or that Olymbec was entitled to possession of the property.

On January 16, 2020, Olymbec filed a motion captioned “Motion for an Order Directing the Chancery Court Clerk to Disburse Funds Previously Paid into the Court.” Therein, Olymbec requested that the trial court issue an order taking the following actions:

(1) directing the clerk of the Shelby County Chancery Court to immediately release to Olymbec all sums representing [Willett’s] monthly rental obligation due to Olymbec which has been paid into the Court by Willett since September 3, 2019, (2) commanding Willett to pay the undisputed deficiency amount of \$4,810.45, which represents the difference between Willett’s actual monthly rent of \$6,796.09 Willett agreed to pay and the amount of base rent and additional payments she has paid into the Court

² The countercomplaint specifically set forth two separate claims: “Breach of Lease Agreement – No Executed Renewal and No Renewal by Operation of Law” and, alternatively, “Breach of Lease Agreement – No Executed Renewal But Renewal by Operation of Law[.]”

and/or to Olymbec each month through January 2020,^[3] and (3) directing Willett to pay the future monthly rent which Willett agreed to pay of \$6,796.09 directly to Olymbec until a ruling or other agreement has been made as to the causes of action involved in this litigation or her tenancy ceases.

Willett filed a response in opposition on January 23, 2020. Therein, Willett asserted that Olymbec was actually seeking to amend the fiat issued by the Court in which the parties had agreed that Willett would only pay the base rent amount of \$5,040. Willett also disagreed that \$6,796.09 was an accurate figure for her rent because she was no longer using all of the parking spaces included in that figure.

On January 31, 2020, the trial court granted Olymbec's motion and directed the clerk to immediately disburse a portion of the held funds to Olymbec. The trial court further ruled that Willett was to make other payments to cover deficiencies "consented to by Willett." The Court reserved ruling on other issues.

On February 26, 2020, the trial court issued an order following a status conference resolving certain pending issues, including disbursements of funds held by the clerk ("Order Following Status Conference"). The trial court also ruled that Willett would now pay rent of \$5,951.09 per month directly to Olymbec. Further, Olymbec would dismiss its FED action without prejudice and, so long as Willett paid the rent as ordered, would "forebear from taking any action" to evict Willett. The trial court therefore terminated the fiat. Finally, the trial court stated as follows:

7. While contesting that Willett effectively exercised her second five-year option to renew the Standard Retail Lease pursuant to Section 2 of the Third Amendment to Standard Retail Lease dated March 30, 2012, Olymbec consents to allowing Willett to maintain her tenancy in the Premises conditioned on her strict compliance with the terms of the Lease Agreement, Amendments, and Orders of this Honorable Court.

8. By agreement of the Parties, the only issue remaining in this litigation relates to a determination of the amount of "*the then market rent*" due under Section 2 of the Third Amendment to Standard Retail Lease dated March 30, 2012, which Willett was to pay beginning April 1, 2017 and continue through March 31, 2022 and whether Willett owes Olymbec any additional rent over and above the ongoing total consented to rental payments being made by Willett to Olymbec from April 1, 2017 until the date of any determination made by this Honorable Court.

9. Willett has advised this Court that she is considering an additional cause of action for breach of contract, and the Parties agree that cause of action is

³ The additional amounts were for parking, storage space, and "Provision for Opex[.]"

not alleged in the original Complaint. The Parties agree that the original Complaint must be amended before this Court may hear or consider any cause of action other than the determination of the amount of “*the then market rent*” due under Section 2 of the Third Amendment to Standard Retail Lease dated March 30, 2012 or the causes of action for non-payment brought by Olymbec in its Verified Counter-Complaint.

This order was approved by counsel for both parties.

Nothing occurred in the case for several months. On July 13, 2020, Willett filed a motion for leave to amend her complaint to add an additional breach of contract claim. She attached the amended complaint to her motion, which alleged for the first time that Olymbec breached the Lease when it closed the building lobby beginning in April 2016.⁴ According to Willett, she has had fewer customers since the closure and therefore suffered economic damages as a result of the breach.

Olymbec filed a response in opposition to the motion to amend on August 19, 2020. As grounds for denying the motion, Olymbec cited the narrowing of issues that the parties had agreed to as part of the February 2020 status conference. Specifically, Olymbec argued as follows:

This Court held a Status Conference on February 11, 2020. In that Status Conference, counsel for the respective parties agreed:

1. Willett would timely make [] the undisputed (lower) rental payments directly to Olymbec as required under the Lease.
2. Olymbec would dismiss its pending General Sessions Forcible Entry and Detainer Action.
3. Olymbec would forbear against taking any action to remove Willett from the premises and instead allow her to maintain her tenancy despite the breach.
4. Olymbec would allow Willett to continue to maintain her tenancy in the premises for the duration of the alleged lease amendment term of several years as long as she complied with the Lease.

And most critically for purposes of the instant Motion:

By agreement of the Parties, the only issue remaining in this litigation relates to a determination of the amount of “*the then market rent*” due under Section 2 of the Third Amendment to

⁴ The parties lease provided that “[t]he building lobby shall be kept open during Restaurant Operating Hours.”

Standard Retail Lease dated March 30, 2012, which Willett was to pay beginning April 1, 2017 and continue through March 31, 2022 and whether Willett owes Olymbec any additional rent over and above the ongoing total consented to rental payments being made by Willett to Olymbec from April 1, 2017 until the date of any determination made by this Honorable Court.

The Court intentionally narrowed the scope of the litigation in order to bring closure to the dispute. The Order provided that any “**additional**” causes of action that the Parties discovered and felt were relevant to the dispute could only be considered if this Court granted a Motion for Leave to amend.

A hearing was eventually held on October 2, 2020 regarding Willett’s motion to amend. Therein, Olymbec once again relied on the fact that it had agreed to waive certain of its claims in order to narrow the issues. In particular, counsel for Olymbec made the following argument:

[W]e had thought we had narrowed the scope of this conversation to whether or not Ms. Willett’s rent is the correct rent under the [L]ease and whether or not she owes any additional money beginning at the time of her renewal in April of 2019⁵ or whether she is paying the correct rent.

All the other claims we had against her for the right to dispossess her from the property, the right to seek additional damages, the right to attorney fee, everything else, we put to the side. . . . We agreed to allow Ms. Willett to remain in the property paying what is a deficient and delinquent rent during this entire period of time, with no late fees and with no additional penalties, all because we thought we had narrowed the issue down to this singular issue, which is we’re going to let you stay despite the fact that you’re in default. We’re just going to agree on how much rent you have to pay. And if Judge Jenkins -- Chancellor Jenkins determines that the rent you’re paying is the correct rent, we’re going to live by Chancellor Jenkins and we’re not going to ask you for more rent during this period, even though we believe you’re not paying the right amount of rent.

. . . .

We believe that Ms. Willett’s exercise of her renewal in 2019 in and of itself is a legal waiver and estoppel of any claims she may have had to breach of lease from 2016 when she renewed the [L]ease and said, I’m going

⁵ It appears that this may be a misstatement as to the date that renewal was required to have occurred. As evidenced by the Order Following Status Conference, the Lease would have been renewed in April 2017.

to continue on. She accepted the premises in that capacity.

There are all kinds of factual disputes, but to now put us in a position where we have now waived every claim we have against Ms. Willett in an effort to resolve this case, only to allow them to bring up a five-year-old claim for hundreds of thousands of dollars is disequitable. And we would like then to proceed with our eviction claim. We would like to be able to proceed with all of our damage claims. We would like to proceed with our attorney fees claims. And essentially, we're going to start this whole case over again, if that's what we're going to do.

The trial court then orally denied Willett's motion to amend, stating as follows:

Okay. I've heard enough. Lawyers, what the Court is going to do, it's going to deny the motion on the basis that, at this point, it's undue delay. It's prejudicial to Olymbec, at this point. The claim itself is not one wherein after the Court looks at it is going to be one that's easily proved, might be, if at all. The prejudice to Olymbec appears to arise out of what may be a change in the positions of the parties when they struck this agreed order. It's inconsistent with what has been done and I believe that it's unfair to the process. It starts this case over, if I were to grant the motion. The Court is not willing to do that and would like for this matter to proceed to a conclusion. That would be the order of the Court.

The trial court entered a written order denying the motion and incorporating its oral ruling on November 3, 2020.

On March 1, 2021, Willett filed her trial brief. Therein, Willett stated that pursuant to the Order Following Status Conference, the sole issue before the court was for the trial court "to construe the term 'the then market rate for comparable restaurant retail space in comparable buildings in downtown Memphis, TN.'" Willett thereafter focused on what she asserted the proof would show as to this question.

Olymbec filed its trial brief. For the first time since the Order Following Status Conference, Olymbec raised its claim that Willett should be considered as a holdover "lessee-at-will" tenant, entitling Olymbec to two times the base rent payment. In addition, Olymbec asked for "late fees, interest, attorney's fees incurred[,] and expenses."

Trial occurred on April 7, 2021. At its start, Willett objected to the question of a holdover tenancy that was raised in Olymbec's trial brief. Specifically, Willett's counsel stated that it was his understanding that this issue was "set to the side and that we were only considering the reasonable rental rate today." In support, Willett's counsel cited the Order Following Status Conference and Olymbec's response to Willett's motion to amend.

The parties then engaged in a lengthy colloquy on this issue, with Olymbec's counsel asserting that it had never waived those claims. The trial court then appeared to side with Olymbec that "the Court should look at both of them," i.e., both whether a renewal occurred such that the holdover provision was triggered, and if not, what the then market rate was for the renewal period. The Court made it clear that it would not "take us long to go down both of those." Counsel for Olymbec then presented proof and argument as to both the question of whether a renewal actually occurred and if so, what the then market rate of rent should be. Olymbec took the position that because no written agreement as to renewal was ever signed, a renewal was not accomplished and the holdover provision was triggered. At the conclusion of trial, the trial court asked the parties for proposed findings of fact and conclusions of law.

The trial court entered its order dismissing Willett's action and granting a judgment in favor of Olymbec on May 27, 2021. Therein, the trial court ruled that because no written renewal was ever executed between the parties, Willett did not accomplish renewal of the Lease pursuant to the option. As such, she was properly considered a holdover tenant and Olymbec was entitled to double the base rent. Taking into accounts the payments that Willett had made, the trial court determined that Olymbec was entitled to a judgment in the amount of \$373,828.47 in rent, a late charge of 5%, and reasonable attorney's fees. The rent and late fees amounted to \$392,519.89. After a later order set Olymbec's attorney's fees, Olymbec was awarded an additional \$46,951.77 in attorney's fees and expenses.

Willett then filed a timely motion to alter or amend, in part objecting to the trial court's decision to address holdover rent, attorney's fees, and late fees based on what Willett argued was Olymbec's waiver of those claims. Willett also filed a supplement to her motion to alter or amend raising new facts about how Olymbec demanded double rent from her to avoid eviction, which Willett asserted she was paying. Willett further alleged that despite payment of double rent, Olymbec sent Willett a notice of eviction in November 2021. The trial court thereafter denied Willett's motion to alter or amend with little explanation. Willett appealed to this Court.

II. ISSUES PRESENTED

On appeal, Willett raises the following issues, which are taken from her brief:

1. Whether the trial court erred in finding that [Willet] failed to exercise the renewal option pursuant to the lease agreement and find that [Willett's] occupancy was governed by the holdover provision of the lease agreement.
2. Whether the trial court erred in finding that [Willett was a] holdover tenant beginning at the end of the first five-year renewal period and awarding [Olymbec] \$373,828.47 in unpaid rent and awarding [Olymbec] \$18,691.42 in late fees.

3. Whether [Willett was] entitled to continue paying the rental rate of \$5,014.15 after March 31, 2017, because this was the rental rate from the prior renewal period and [Olymbec] withdrew its proposal recalculating the rental rate for the second five-year renewal period.
4. If [Willet] owed [Olymbec] a recalculated rental rate during the second five-year renewal period, whether the market rent should be the rates proposed by [Olymbec] in 2016 and 2017.
5. Whether the trial court erred by finding that [Olymbec] did not waive its claims for breach of the lease agreement for [Willett's] failure to exercise the renewal option, its claims for corresponding damages under the holdover provision, and its claims for attorneys' fees despite [Olymbec's] statements on the record waiving such claims and the trial court's order limiting the issue at trial to a determination of market rent.
6. Whether the trial court erred by denying [Willett's] motion to amend the complaint to assert an action against [Olymbec] for breach of the lease agreement.
7. Whether [Willett is] entitled to receive a reimbursement from [Olymbec] in the amount of \$35,281.05 if this Court holds that [Willet] exercised [her] renewal option and that [Olymbec] was not entitled to receive double rent following the trial court's order.
8. Whether [Willett is] entitled to compensation for being evicted three months before the end of the second five-year renewal period if this Court holds that [Willet] exercised her renewal option and that [Olymbec] was not entitled to rely on the holdover provision to evict [Willett] following the trial court's order.

III. STANDARD OF REVIEW

In an appeal from a bench trial, we review the trial court's factual findings de novo, with a presumption of correctness unless the evidence preponderates otherwise. *Law v. Law*, No. E2021-00206-COA-R3-CV, 2022 WL 1221084 (Tenn. Ct. App. Apr. 26, 2022) (citing *Boote v. Shivers*, 198 S.W.3d 732, 740 (Tenn. Ct. App. 2005); Tenn. R. App. P. 13(d)). The presumption of correctness does not apply to the trial court's legal conclusions, which are reviewed de novo. *Boote*, 198 S.W.3d at 741.

IV. ANALYSIS

A.

The central dispute in this appeal is Olymbec's entitlement to double rental payments from Willett under the holdover provision of the parties' lease. Not only does Willett assert that neither the facts nor law support the triggering of the holdover provision,

she asserts that Olymbec voluntarily waived this claim, along with any claim for late fees or attorney's fees, in the course of the trial proceedings. For its part, Olymbec argues that it did not waive this claim and that the facts and law support the trial court's finding that Willett was a holdover under the Lease. Olymbec therefore asserts that the trial court correctly awarded it double rent, late fees, and attorney's fees.

Because it is dispositive of this majority of the issues in this case, we begin with the question of whether Olymbec voluntarily waived its claim under the holdover provision of the Lease. The party asserting waiver has the burden of proof. *Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009). “[A] waiver, as generally understood, is a voluntary and intentional relinquishment of a known right, claim[,] or privilege.” *Spencer v. Spencer*, No. CA 03A01-9502-CH-00054, 1995 WL 422653, at *7 (Tenn. Ct. App. July 19, 1995), *as modified on reh’g* (Aug. 30, 1995) (citing 28 Am. Jur. 2d, *Estoppel and Waiver*, § 154, p. 836); *see also Cody v. McClain*, No. C/A 40, 1986 WL 8823, at *1 (Tenn. Ct. App. Aug. 14, 1986) (“A waiver is the voluntary relinquishment of a known right and is established by express declarations or acts manifesting an intent not to claim the right.” (quoting *W.F. Holt Co. v. A & E Elec. Co.*, 665 S.W.2d 722, 733 (Tenn. Ct. App. 1983))). As we have previously explained:

Waiver occurs where a party “by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was [the party’s] intention and purpose to waive.” *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby Cnty. Airport*, 169 S.W.3d 627, 636 (Tenn. Ct. App. 2004) (internal quotation marks omitted) (alteration in original) (quoting *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 722 (Tenn. Ct. App. 1998)). “[W]aiver is proven by a clear, unequivocal and decisive act of the party, showing a purpose to forgo the right or benefit which is waived.” *GuestHouse Intern., LLC v. Shoney’s N. Am. Corp.*, 330 S.W.3d 166, 202 (Tenn. Ct. App. 2010) (internal quotation marks omitted) (quoting *E & A Ne. Ltd. P’ship v. Music City Record Distribs., Inc.*, No. M2005-01207-COA-R3-CV, 2007 WL 858779, at *7 (Tenn. Ct. App. Mar. 21, 2007)).

Crye-Leike, Inc. v. Carver, 415 S.W.3d 808, 821 (Tenn. Ct. App. 2011) (alterations in original). When the facts are not in dispute, whether a waiver occurred is an issue of law that “we review de novo, with no presumption of correctness or deference to the decisions of the lower courts.” *Jackson v. Burrell*, 602 S.W.3d 340, 344 (Tenn. 2020) (citing *Bryant v. Bryant*, 522 S.W.3d 392, 399 (Tenn. 2017)).

Here, the facts are not in dispute, only the conclusions to be drawn from those facts. First, the parties do not dispute that the Order Following Status Conference was the result

of an agreement between the parties.⁶ Willett argues that paragraph eight of the Order Following Status Conference evidences the parties' agreement that the "only" issue remaining was "the then market rent" due under "Section 2 of the Third Amendment to Standard Retail Lease" following renewal of the Lease in April 2017. Willett points out that nothing in this paragraph indicates that Olymbec was retaining its claim to pursue double rent under the holdover provision of the original lease.

Olymbec raises several arguments against waiver. First, Olymbec argues that Willett in fact waived her objection to this claim being tried because she did not lodge a "formal objection" to it. Olymbec further argues that Willett waived the objection because following the trial court's less-than-definitive ruling, she chose to present evidence on the question of whether a renewal had in fact occurred. Olymbec also raises a rather hyperbolic argument that to find a waiver under these circumstances would be to award judgment in favor of Willett "with any due process at all."

To the extent that Olymbec is arguing that Willett waived her objection to the trial court's consideration of this claim, Olymbec bears the burden of proof. *Fayne*, 301 S.W.3d at 171. It does not meet this burden. For one, this portion of Olymbec's brief cites no authority of any kind for its arguments that Willett failed somehow to properly object to the consideration of this claim, that by presenting evidence on the issue of the renewal after the trial court ruled that it would consider "both" issues was a waiver, or that it would somehow be deprived of due process if waiver is found. *See Sneed v. Bd. of Pro. Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

Moreover, we simply cannot conclude that Willett waived this argument. Here, Olymbec's trial brief raised the issue of the holdover penalty for the first time since the Order Following Status Conference. Willett promptly objected to the claim under the holdover provision at the beginning of trial, before any evidence was presented. Although the trial court's oral ruling was not a model of clarity, it is clear that the trial court ruled that it would consider "both" the issue of the then market rent due and whether the holdover provision should be applicable.

In the absence of any legal authority otherwise, we further hold that Willett's actions in thereafter presenting evidence on the issue that the trial court ruled it would consider was not a waiver of her right to contest that ruling in this appeal. Instead, the trial court's ruling is akin to the denial of a motion to dismiss a claim on procedural grounds. The

⁶ In addition to being approved for entry by both parties, Olymbec's later response in opposition to Willett's motion to amend her complaint described the order as setting forth terms to which "counsel for the respective parties agreed[.]"

movant does not waive its procedural argument by participating in a later trial on the merits. See *Precision Castings of Tennessee, Inc. v. H & H Mfg. Co.*, No. M2012-00334-COA-R3-CV, 2012 WL 3608668, at *3 (Tenn. Ct. App. Aug. 22, 2012) (considering the trial court’s decision to deny the defendant’s motion to dismiss on procedural grounds in an appeal following a final judgment).

Olymbec next argues that its actions in the trial court should not be interpreted as a waiver, concession, or stipulation. While this argument is far less anemic than its waiver argument, we are not persuaded. As an initial matter, we note that while parties may not stipulate or concede to questions of law, they are permitted to do so as to their own legal strategies. See *Overstreet v. Shoney’s Inc.*, 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999). Indeed, that it exactly what Olymbec did in this case.

We turn first to the language of the Order Following Status Conference. Paragraph eight expressly describes the “only” issue that the parties agreed remained in the case:

a determination of the amount of “*the then market rent*” due under Section 2 of the Third Amendment to Standard Retail Lease dated March 30, 2012, which Willett was to pay beginning April 1, 2017 and continue through March 31, 2022 and whether Willett owes Olymbec any additional rent over and above the ongoing total consented to rental payments being made by Willett to Olymbec from April 1, 2017 until the date of any determination made by this Honorable Court.

According to Willett, this paragraph evinces a clear intent by the parties to narrow the multitude of issues in the case to only a single issue involving how much rent was due following the second renewal of the Lease. By agreeing to this issue, Willett contends that Olymbec necessarily waived its claims that no proper renewal occurred and that it was entitled to the holdover penalty applicable in the event that there was no renewal.

Olymbec argues, however, that paragraph eight must be read in light of the entirety of the Order Following Status Conference. In particular, Olymbec points to paragraph seven, which states that Olymbec was “contesting that Willett effectively exercised her second five-year option to renew the Standard Retail Lease pursuant to Section 2 of the Third Amendment to Standard Retail Lease[.]” In light of paragraph seven, Olymbec argues that paragraph eight must be read as an agreement to narrow the issues to the proper amount of Willett’s rent, an issue that necessarily includes a determination of whether a proper renewal took place such that Willett’s rent would be calculated via the “two times” base rent calculation, rather than the then market rent calculation.

In *Morgan Keegan & Company v. Smythe*, the Tennessee Supreme Court set forth the proper method for interpreting a court order:

Trial courts, as a general matter, speak through their orders and judgments. Like other written instruments, orders and judgments should be interpreted and enforced according to their plain meaning. When an order or judgment permits more than one interpretation, it should be construed with reference to the issues it was meant to decide, and should be interpreted in light of the context in which it was entered, as well as the other parts of the record, including the pleadings, motions, issues before the court, and arguments of counsel.

Court orders and judgments, like other documents, often speak as clearly through implication as they do through express statements. Accordingly, when construing orders and judgments, effect must be given to that which is clearly implied, as well as to that which is expressly stated.

401 S.W.3d 595, 608 (Tenn. 2013) (internal citations omitted).

Applying these principles, we must agree with Willett that the parties agreed to narrow the issues only to the question of the then market rent, eliminating the question of the holdover provision from the remaining claims in dispute. First, we note that while the question of the then market rent is expressly included in the Order Following Status Conference as the “only” issue still in dispute, the order goes further to state that the remaining issue of rent will be determined under the Third Amendment. The Third Amendment mentions only the then market rate of rent following a renewal pursuant to the option. The holdover provision, however, is not mentioned at all in the Third Amendment; rather it is included in the original lease’s provisions. But the calculation of rent under the original lease is neither expressly stated as an issue in paragraph eight, nor even alluded to.

Olymbec suggests, however, that it is unreasonable to suggest that it agreed to a narrowing of the issues in that it would give up a considerable arrow in its quiver against Willett. But it must be remembered that this order was entered following an agreed amendment to the fiat requiring Willett to pay more rent than originally ordered by the trial court while the case was pending. And even Olymbec characterized the Order Following Status Conference as an effort by the trial court and the parties to “intentionally narrow[] the scope of litigation in order to bring closure to the dispute.” If the Order Following Status Conference is interpreted in the manner suggested by Olymbec, it is difficult to discern how the issues of the case would have in any way been narrowed. Moreover, the Order Following Status Conference clearly states that there is only a single issue remaining. In Olymbec’s brief, however, it characterizes the question of whether a renewal occurred as a separate issue from the then market rate of rent. Specifically, Olymbec asserts that by the time of trial, there were “two fundamental issues: (1) whether [Willett] properly perfected and affected their second Renewal; and (2) the amount of rent [Willett] owed [Olymbec], whether as holdover tenants, or pursuant to the renewal terms of the Lease.”

Thus, Olymbec's own characterization of the renewal question as a separate issue undercuts its argument that the "only" issue mentioned in the Order Following Status Conference necessarily included the question of whether a renewal occurred. Instead, considering the parties' admitted purpose to narrow the issues of the case, only Willett's interpretation of paragraph eight is reasonable.

Even to the extent that the Order Following Status Conference is arguably ambiguous, however, Olymbec's statements in open court clarify its intent to waive these claims. *Smythe*, 401 S.W.3d at 608 (allowing the court to consider other parts of the record in interpreting orders). Indeed, statements in open court may serve as an independent basis for holding that a claim has been conceded:

We have recognized a number of times the validity of an oral stipulation made during the course of a trial. Further, an open court concession by the attorneys in the case constitutes a binding stipulation in this State.

When a party makes a concession or adopts a theory by stipulation and his cause of action is determined on this concession or theory, then that party must abide by his decision even on appeal by certiorari.

These stipulations will be rigidly enforced by the courts of this State.

Bearman v. Camatsos, 215 Tenn. 231, 235–36, 385 S.W.2d 91, 93 (1964) (citations omitted).

The statements by Olymbec's counsel in opposition to Willett's motion to amend clearly evince its voluntary relinquishment of its claims not only under the holdover provision, but also for late fees and attorney's fees. Specifically, Olymbec argued that Willett should not be able to raise new claims because, in an effort to "narrow[] the scope" of the case, Olymbec had voluntarily abandoned its claims regarding "additional damages, [] attorney fee, [and] everything else." Counsel later stated this waiver meant that Olymbec was seeking "no late fees and [] no additional penalties[.]" The clear import of counsel's statement was that "everything" other than the claim for then market rent was set aside; "everything" must include the claim that no renewal occurred triggering the payment of double rent under the holdover provision. Indeed, counsel clearly indicates on more than one occasion that despite Olymbec's position that no renewal had actually been accomplished, Olymbec was setting that claim aside and operating as if Willett had properly exercised her renewal option.⁷ Moreover, Olymbec's counsel clearly states it chose to "waive[] every claim we have against Ms. Willett." Obviously, the claim for double rent under the holdover provision falls under this broad umbrella. In fact, because the only two claims raised in Olymbec's countercomplaint relate to the renewal and

⁷ Specifically, Olymbec's counsel stated that the sole issue was whether Willett was paying the correct amount of rent "beginning at the time of her renewal" and argued that Willett's renewal of the Lease estopped her from making claims about the closure of the building lobby.

holdover provision, there is no other claim to which counsel could have been referring when he made this statement. And of course, there can be no dispute that Olymbec’s waiver clearly and unequivocally applied to both late fees and attorney’s fees.⁸

Here, Olymbec used the Order Following Status Conference as a shield against Willett’s efforts to amend her complaint to add new claims that would have contradicted the parties’ intent to narrow the issues. The trial court credited that argument and denied Willett’s motion to amend, even though it was somewhat anticipated.⁹ But when Willett likewise used the Order Following Status Conference as a shield against Olymbec’s claim under the holdover provision, Olymbec appeared to change its position as to what claims it had in fact set aside. Rather than the “everything” that Olymbec previously claimed had been waived, it now essentially asserted that nothing had been waived other than its right to prosecute the FED action in general sessions court.¹⁰ But because Olymbec voluntarily chose to limit the issues and waive “every claim [it] ha[d] against [] Willett” except the determination of rent under the Third Amendment, Willett was not given proper notice that those claims were at issue. *See generally State v. Bristol*, 654 S.W.3d 917, 925 (Tenn. 2022) (citing *State v. Minor*, 546 S.W.3d 59, 65 (Tenn. 2018) (holding that courts must “ensure that the [parties] are afforded an opportunity to develop fully their opposing positions on an issue”)).

As such, the trial court’s order granting Olymbec a judgment of \$373,828.47 in rent, \$18,691.42 in late fees, and \$46,951.77 in attorney’s fees and expenses is reversed. Rather, this matter is remanded to the trial court for the resolution of the sole issue that the parties agreed was in dispute, but that the trial court did not definitively answer:¹¹ “a determination of the amount of ‘the then market rent’ due under Section 2 of the Third Amendment to Standard Retail Lease” and the calculation of how much additional rent Willett owes Olymbec based on the rental rate set by the trial court under Section 2 of the Third Amendment.¹² *See Mid-S. Maint. Inc. v. Paychex Inc.*, No. W2014-02329-COA-R3-CV, 2015 WL 4880855, at *14 (Tenn. Ct. App. Aug. 14, 2015) (“Generally, when the trial court fails to address an issue in the first instance, this Court will not consider the issue, but will

⁸ The trial court’s decision to award these fees in light of Olymbec’s specific disclaimer of these claims is therefore particularly egregious.

⁹ The issue of the motion to amend the complaint is discussed, *infra*.

¹⁰ As a reminder, Willett claimed that Olymbec did send her notice of eviction after the trial court’s judgment. Olymbec does not appear to dispute that it moved to evict Willett following the trial court’s ruling. So apparently it was only the previously filed FED action in particular, rather than eviction in general, that it believed it had waived.

¹¹ The trial court’s only finding as this issue was that the rent would have ranged from \$5,929.58 per month to \$6,241.67 per month, depending on the figure used for the price per square foot. The trial court also found that the rent would “escalat[e] at a rate of *at least* 2%, per year, year over year, through March 2022.” (Emphasis added). These ranges do not constitute definite findings that may be enforced as an alternative finding of the trial court.

¹² To the extent that Willett has paid additional amounts beyond what is required following this calculation, she will be entitled to a credit or reimbursement, if applicable, on any amounts previously paid.

instead remand for the trial court to make a determination in the first instance.”).

B.

Willett next argues that the trial court erred in denying her motion to amend her complaint to add a claim regarding lost revenue related to the closure of the building lobby by Olymbec. As this Court has explained:

Generally, a party may amend its complaint with leave of the court, and such leave is to be freely given. *See* Tenn. R. Civ. P. 15.01. In determining whether to grant a motion to amend, courts are to consider the following factors: “undue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.” *Welch v. Thuan*, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994). The question of whether to grant a motion to amend “is within the sound discretion of the trial court, and will not be reversed unless abuse of discretion has been shown.” *Id.*

Messer Griesheim Indus. v. Cryotech of Kingsport, Inc., 45 S.W.3d 588, 610 (Tenn. Ct. App. 2001).

Here, the trial court denied Willett’s motion on the basis of two of the above elements: undue delay and that the amendment would be prejudicial to Olymbec.¹³ The trial court also suggested that there might be some futility, as Willett’s claim would not be “easily proved.” It appears to be in dispute that Willett acted in good faith or that there were deficiencies Willett was seeking to cure in this amendment.

In our view, the trial court did not abuse its discretion in focusing on both the undue delay of the amendment and the prejudice to Olymbec. Here, the basis of Willett’s claim regarding the closure of the lobby was known to Willett when the lobby was closed in 2016. Willett did not seek to raise this claim, however, until July 2020—approximately four years after the claim arose, nearly a year after the complaint was filed, and approximately five months after the trial court directed Willett to move to amend her complaint.¹⁴ Under these circumstances, we cannot conclude that the trial court abused its discretion in finding something of an undue delay. *See March v. Levine*, 115 S.W.3d 892, 909 (Tenn. Ct. App. 2003) (stating that when addressing undue delay, one factor considered “is where the party seeking to amend has known all of the facts underlying the amendment since the beginning of the litigation”).

¹³ On appeal, Olymbec once again argues that Willett waived this argument by failing to seek a continuance, an amendment of the order, or an interlocutory appeal. Again, however, Olymbec cites no law suggesting that any of these actions were required to preserve this issue on appeal.

¹⁴ The COVID-19 Pandemic was ongoing during the period between the Order Following Status Conference and the filing of the motion to amend.

The trial court likewise was within its discretion in finding prejudice to Olymbec and in giving this element particular weight. *See Hardcastle v. Harris*, 170 S.W.3d 67, 81 (Tenn. Ct. App. 2004) (noting that of the factors considered in deciding a motion to amend, “the most important is the proposed amendment’s potential prejudicial effect on the opposing party” (citing 6 Charles A. Wright et al., *Federal Practice and Procedure* § 1487, at 613 (2d ed. 1990))). As discussed *supra*, in order to narrow the issues, Olymbec waived many of its claims against Willett. As the trial court’s order following trial shows, these claims were worth significant value to Olymbec.¹⁵ But allowing Willett to raise a new claim for damages would significantly change the landscape of the case that had previously been narrowed by agreement of the parties. So the trial court did not abuse its discretion in denying the amendment on this basis. *See Hardcastle*, 170 S.W.3d at 81 (“Late amendments fundamentally changing the theory of a case are generally not viewed favorably when the facts and theory have been known to the party seeking the amendment since the beginning of the litigation.” (citation omitted)).

C.

Willett raises an additional issue in her brief that she is entitled to “compensation for being evicted three months before the end of the second five-year renewal period[.]” This issue, however, was not addressed in the argument section of Willett’s appellate brief. As such, Willett has presented no argument, supported by relevant authority or otherwise, on this issue. It is therefore waived. *See Childress v. Union Realty Co.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) (“[W]hen a party raises an issue in its brief, but fails to address it in the argument section of the brief, we consider the issue to be waived.”).

V. CONCLUSION

The judgment of the Shelby County Chancery Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellee, Olymbec, USA, LLC, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE

¹⁵ Of course, Willett argues that Olymbec should not have prevailed on its claim even if it had not waived those claims. We do not reach that issue, as it is pretermitted by our ruling regarding Olymbec’s voluntary relinquishment of the claim under the holdover provision.