IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 23, 2015 Session

KENNETH KUHN, et al v. PAM PANTER dba VALLEY MINI STORAGE

Appeal from the Circuit Court for Franklin County
No. 2013CV228 J. Curtis Smith, Judge

No. M2015-00260-COA-R3-CV – Filed November 25, 2015

This is negligence case. Appellees rented a storage unit from Appellant. The storage unit flooded, and the flooding destroyed Appellees' personal property. Appellees filed suit against Appellant in general sessions court, claiming negligence and gross negligence. Appellees prevailed in general sessions court, and Appellant appealed the case to the trial court. After a bench trial, the trial court found the exculpatory clause in the parties' rental agreement was void. The trial court also found that the Appellant's rental of the unit to the Appellees, despite its knowledge of the obvious condition of flooding and advertising its units as dry, constituted gross negligence. We affirm.

Tenn. R. Civ. Pro. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and BRANDON O. GIBSON, J., joined.

Norris A. Kessler, Winchester, Tennessee, for the appellant, Valley Mini Storage.

Gerald L. Ewell, Tullahoma, Tennessee, for the appellees, Kenneth Kuhn and Teresa Kuhn.

OPINION

I. Background

On January 21, 2011, Kenneth Kuhn and Valley Mini Storage ("Valley" or "Appellant") executed an agreement ("Rental Agreement") by which Valley rented a storage

unit to Mr. Kuhn and his wife (together, "Appellees"). The agreement included an exculpatory clause, which states, in relevant part:

> Tenant assumes responsibility for any loss or damage to property stored by Tenant in the premises and may or may not elect to provide insurance coverage for the same. MANAGEMENT DOES NOT MAINTAIN INSURANCE FOR THE BENEFIT OF TENANT, WHICH IN ANY WAY COVERS ANY LOSS WHATSOEVER THAT TENANT MAY HAVE OR CLAIM BY RENTING THE STORAGE SPACE OR PREMISES AND EXPRESSLY RELEASES MANAGEMENT FROM ANY LOSSES AND/OR DAMAGES TO SAID PROPERTY CAUSED BY FIRE, THEFT, WATER, RAINSTORMS, TORNADO, […] OR ANY OTHER CAUSE WHATSOEVER.

(Emphasis in original). Appellees stored personal property in the unit, including family photographs, a family Bible, clothing, and furniture. Sometime in May of 2013, the Appellees discovered that their storage unit had flooded, resulting in the destruction of their property.

On June 5, 2013, Appellees filed suit against Valley in the General Sessions Court of Franklin County.[1] On August 8, 2013, the General Sessions Court entered an order finding in favor of the Appellees and awarding them $2,000. Appellant appealed the General Sessions Court's ruling to the Circuit Court of Franklin County ("trial court"). On June 17, 2014, the trial court held a bench trial.

Mr. Pat Sanders, the current building inspector for the City of Winchester, testified that Valley's site plan for a storage building was approved by the Winchester Planning Commission sometime in 1992. Mr. Sanders further testified that Valley's original owners, a Mr. and Mrs. Burt, went before the Planning Commission to get approval for an additional building on the property in August of 1993. This additional building is the one in which the Appellees rented a storage unit. This additional building had "drainage issues" during its construction, and Tom Cohenour, the building inspector for the City of Winchester at the time, issued a "stop order" for the construction of the additional building construction until such time as the drainage problems were addressed.

Although construction on the building was ultimately completed, Mr. Sanders testified that the city inspector did not conduct a final inspection of the additional building and never

[1] From the record, the complaint was filed against Valley only. It appears that Ms. Panter was named in the case because she received the complaint on Valley's behalf.

issued a certificate of occupancy for the additional building. Mr. Sanders opined that the additional storage building violated the building code with respect to rainwater runoff; however, he also acknowledged that neither Valley, its former owners, or its current owner had received any kind of citation or warning regarding this violation.

William Sain, III testified on the Appellees' behalf.[2] Mr. Sain testified that, using digital equipment, he determined that the storage building in which the Appellees' rented a unit is eleven inches lower than the surrounding storage buildings. The record does not indicate whether Mr. Sain was qualified as an expert.

Appellees testified that they rented the storage unit from Valley because it was close to their home and because Valley advertised that its storage units were "clean and dry." According to the trial court's order, both Appellees "testified extensively concerning the items and their value," and also introduced a list of items in the storage unit as an exhibit to their testimony. Appellees also testified that Valley's "agent testified in a prior hearing that the unit rented to [the Appellees] had flooded on a prior occasion."

On September 12, 2014, the trial court entered an order finding in favor of the Appellees and awarding them $17,925.49 in damages. In its order, the trial court analyzed the exculpatory clause in the rental agreement using the factors enumerated in ***Olson v. Molzen***, 558 S.W.2d 429 (Tenn. 1977) and concluded that the clause was void as against public policy. The trial court found that the flooding of the storage building was an obvious condition of which Valley was or should have been aware. The trial court found that in "light of the fact that it was obvious to the [Appellant] that water would flow off the upper buildings into the lower buildings; that the lower buildings had flooded on a prior occasion and [Appellant] rented the building space to [Appellees] under this condition and with this knowledge while advertising their facilities as 'clean and dry;' the Court finds [Appellant] guilty of gross negligence."

II. Issues

We restate the dispositive issues as follows:

I. Whether the trial court erred when it found that the Appellants' action constituted gross negligence.

II. Whether the trial court erred when it concluded that the exculpatory clause in the Renter's Agreement did not bar the Appellees' recovery.

[2] The record does not reveal Mr. Sain's title or relation to the case.

III. Whether the trial court used the correct measure of damages.

IV. Whether the Appellant should be awarded fees and costs in defending this action, pursuant to the Renter's Agreement.

III. Standard of Review

We note at the outset that the record in this case does not contain a transcript; there is a Statement of the Evidence as allowed for by Tennessee Rule of Appellate Procedure 24(c). This case was tried without a jury. Accordingly, we review the findings of fact made by the trial court *de novo*, with a presumption of correctness unless the preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. 2008).

IV. Analysis

A. Gross Negligence

Appellant argues that the trial court erred when it concluded that its actions constituted gross negligence. Specifically, Appellant argues that there was no evidence presented at trial that its actions exhibited a conscious indifference to the consequences of the drainage issues on its property, or that its actions showed a reckless disregard for the rights of the Appellees. Appellees contend that the Appellant's knowledge of the drainage issue, its advertising of its units as "clean and dry," and its failure to notify the Appellees of the flooding all amount to gross negligence.

"Gross negligence has been defined as arising from 'a conscious neglect of duty or a callous indifference to consequences.'" ***Conroy v. City of Dickson***, 49S.W.3d 868, 871 (Tenn. Ct. App. 2001) (quoting ***Thomason v. Wayne County***, 611 S.W.2d 585, 587 (Tenn. Ct. App. 1980)). "Elsewhere, this court has said, '[g]ross negligence is not characterized by inadvertence. It is a negligent act done with utter unconcern for the safety of others, or one done with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law.'" ***Id.*** (quoting ***Odum v. Haynes***, 494 S.W.2d 795, 807 (Tenn. Ct. App. 1972)).

We first note that the evidence shows that neither Valley nor its owners ever obtained a certificate of occupancy for the building in which the Appellees rented a unit. According to the Winchester County building inspector, the building would not pass an inspection.

Furthermore, the trial court found that "the drainage issue was discussed with [Appellant's] predecessor in title." Finally, in concluding that Appellant was grossly negligent, the trial court noted that "[Appellant's] agent testified…that the unit rented to [Appellees] had flooded on a prior occasion." "Of course, the knowledge of an agent is imputed to the principal." ***Bland v. Allstate Ins. Co.***, 944 S.W.2d 372, 376 (Tenn. 1996). It does not appear that Appellant challenged this testimony, either on the basis that the witness was not its agent or the agent's lack of knowledge of the flooding. Because Valley's agent was aware of the flooding, Appellant is also charged with knowledge that the unit it rented to the Appellees had flooded previously, meaning Appellant was on notice of the flooding condition.

Taken together, this evidence illustrates a "callous indifference to consequences," which is a required criterion for a finding of gross negligence. Valley clearly was unconcerned about the consequences to its customers when it decided to rent storage units not in compliance with building codes. Although a city codes inspector issued a stop order on the building's construction, the building was completed, and it still cannot pass the required inspection. Most tellingly, however, is the fact that the trial court found that Valley was aware that the particular unit rented to the Appellees had previously flooded. This fact not only demonstrates an awareness of the flooding, but also evinces a "callous indifference to consequences." In other words, Appellant knew that the unit had experienced flooding, yet advertised its rental units as "clean and dry." Renting the unit with prior knowledge of flooding and the obvious potential for a renter's property to be damaged, rises to the level of "callous indifference" required to constitute gross negligence. Accordingly, we affirm the trial court's finding of gross negligence.

B. Exculpatory Clause

Appellant argues that the trial court erred when it concluded that the exculpatory clause of the rental contract was void as against public policy under the factors presented in ***Olson v. Molzen***, 558 S.W.2d 429, (Tenn. 1977). Appellant also argues that the trial court erred in that it "fail[ed] to acknowledge that parties may contract so as to exonerate one of them from liability or any damages resulting from the other party's negligence and that the exculpatory clause in the instant case was valid and enforceable and a complete bar to the [Appellees'] recovery." In Tennessee, "a contract against liability will not operate to protect a party who is guilty of gross negligence." ***Buckner v. Varner***, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990); ***Adams v. Roark***, 686 S.W.2d 73 (Tenn. 1985). Having affirmed the trial court's finding of gross negligence, the exculpatory clause will not operate to excuse Appellant's gross negligence.

C. Trial Court's Award

Appellant argues that the trial court's award is excessive and against the weight of the evidence. Specifically, Appellant argues that the Appellees did not prove their damages because there was no evidence introduced that established the difference in the value of the items immediately before and after the flooding. However, Appellees argue that they testified concerning the actual damages suffered, and the trial court accepted such testimony in making its award.

Appellant's argument rests on the tenuous concept that, because the Appellees only testified as to the value of the items in the storage unit, they did not prove their damages. We find this argument unpersuasive. The trial court accepted Appellees' testimony regarding the value of the property stored in the unit. The trial court specifically noted that Appellees "introduced a list of their damages as Exhibit '6' and testified extensively concerning the items and their value." Although the record is admittedly sparse, there is no indication in the record that Appellant presented any proof to contradict Appellees' testimony regarding the value of their items. In fact, the record does not reveal whether Appellant's counsel cross-examined the Appellees regarding the value of the items in the storage unit. In other words, there is no evidence contrary to the Appellees' testimony. Because Appellant has provided only a Statement of the Evidence, there is no transcript for this Court to review. Accordingly, we must take the Statement of the Evidence as true. In the absence of any evidence to contradict the Appellees' proof on damages, we affirm the trial court's award.

D. Fees

Appellant argues that it is entitled to attorney's fees and costs under the Rental Agreement. Appellant relies on the following contractual language in the Rental Agreement: "In the event [Valley] is required to obtain the services of an attorney to enforce any of the provisions in this Lease, Tenant agrees to pay in addition to the sums due hereunder, an additional amount as and for attorney's fees and cost incurred." Appellees argue that because the exculpatory clause in the contract is void under the ***Olsen*** analysis, the contract does not allow Valley to recover costs.

"In Tennessee, courts follow the American Rule, which provides that litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." ***Taylor v. Fezell***, 158 S.W.3d 352, 359 (Tenn. 2005). Appellant's claim for attorney's fees is based on a provision in a written agreement. Because the interpretation of a written agreement is a matter of law, ***Allstate Ins. Co. v. Watson***, 195 S.W.3d 609, 611 (Tenn. 2006), we undertake to interpret the language of the Rental Agreement *de novo*, in order to resolve the issue of whether Appellant is entitled to attorney's fees. "A cardinal rule

of contract interpretation is to ascertain and give effect to the intent of the parties." ***Id.*** (citing ***Christenberry v. Tipton***, 160 S.W.3d 487, 494 (Tenn. 2005)). "In interpreting contractual language, courts look to the plain meaning of the words in the documents to ascertain the parties' intent." ***Id.*** (citing ***Planters Gin Co. v. Fed. Compress & Warehouse Co.***, 78 S.W.3d 885, 889-90 (Tenn. 2002)).

Turning to the language of the attorney fee provision, it states that a renter will be liable for attorney's fees in the event that Valley obtains counsel to enforce a provision of the rental agreement. Thus, under the plain language of the fee provision, Appellant is entitled to fees in the event it attempts to enforce the Rental Agreement in court. The instant case, however, was brought by the Appellees for damages. The Appellant has not demonstrated, nor does the record show, how Valley is enforcing the Rental Agreement in this action. Thus, under the plain language of the attorney fee provision, Appellant is not entitled to attorney's fees.

V. Conclusion

For the reasons stated above, we affirm the trial court's judgment. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of this appeal are assessed to the Appellant, Valley Mini Storage and its surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE