[Cite as *Katz Interests, Inc. v. Music Factory, L.L.C.*, 2012-Ohio-3919.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Katz Interests, Inc.,	:	
Plaintiff-Appellant,	:	
		No. 11AP-946
v.	:	(C.P.C. No. 03CVH-07-8468)
The Music Factory, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	
Jeffrey Graham et al.,	:	
Plaintiffs-Appellees,	:	
		No. 11AP-947
v.	:	(C.P.C. No. 03CVC-12-13782)
Kyle Katz et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(The Katz Interests, Inc.,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on August 28, 2012

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant.

Cooper & Elliott, LLC, *Charles H. Cooper, Jr.*, *Rex H. Elliott* and *Adam E. Crowell*, for appellee Michael McCuen.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, The Katz Interests, Inc. ("Katz Interests"), appeals a judgment of the Franklin County Court of Common Pleas that granted defendant-appellee, Michael McCuen, restitution. For the following reasons, we reverse that judgment.

{¶ 2} In 2002, Kyle Katz owned and operated two businesses: Katz Interests, which owned property located at 382 and 384 West Nationwide Boulevard, and Penwest Assets, Inc. ("Penwest"), which held a D-5/D-6 liquor permit. McCuen and Jeffrey Graham also owned and operated two businesses: The Music Factory, LLC ("Music Factory") and J&M Enterprises, LLC ("J&M").

{¶ 3} In the fall of 2002, Katz struck a deal with McCuen and Graham. Katz would sell McCuen and Graham Penwest's liquor permit so that they could operate a dance club. While an application to transfer the liquor permit was pending before the Division of Liquor Control, McCuen and Graham would lease 382 West Nationwide Boulevard, which was part of the permit premises, for their dance club.

{¶ 4} To consummate the deal, Katz, McCuen, and Graham executed three agreements. In the first agreement, Katz Interests leased 382 West Nationwide Boulevard to Music Factory for a term of 25 months, ending October 31, 2004. Later, the parties executed an addendum to the lease that expanded the leased premises to include 384 West Nationwide Boulevard, changed the term of the lease so that it expired October 31, 2003, and added McCuen and Graham as parties who were jointly and severally liable under the lease. In the second agreement, Penwest agreed to sell J&M its liquor permit for $35,000. This purchase agreement required J&M to immediately pay $11,000 and sign a cognovit note in the amount of $24,000, payable in monthly installments of $2,000. The cognovit note executed in conformance with the purchase agreement bound McCuen and Graham personally, as well as J&M. In the third agreement, Penwest employed J&M as manager for the dance club until the Division of Liquor Control issued a decision regarding the transfer of Penwest's liquor permit. This management agreement required J&M to collect and pay sales tax on all liquor sales.

{¶ 5} J&M filed a transfer application with the Division of Liquor Control on October 7, 2002. Penwest cancelled the transfer on June 11, 2003. At the time of the

cancellation, J&M had paid Penwest $27,000 of the $35,000 purchase price for the liquor permit. Subsequent to the cancellation, Penwest sought and received an $8,000 cognovit judgment against J&M, Graham, and McCuen. Penwest then filed a judgment lien against property that McCuen owned, and it collected $8,961.66 when McCuen sold that property.

{¶ 6} On July 1, 2003, Katz notified McCuen that he had cancelled the liquor permit's transfer and that any further use of the permit would be unlawful. Soon thereafter, Music Factory abandoned the leased premises.

{¶ 7} In October 2003, the Ohio Department of Taxation informed Penwest that the renewal of its liquor permit was in jeopardy because no sales tax had been paid for March, April, May, or June of 2003. Katz Interests paid the delinquent sales taxes on behalf of J&M.

{¶ 8} The parties sued each other in the trial court over their failed business transaction. Ultimately, the parties tried their claims before a jury. The jury returned verdicts that found: (1) in favor of Katz Interests for $21,282 on its claim against Music Factory, McCuen, and Graham for breach of the lease agreement by the failure to pay rent after July 1, 2003, (2) in favor of Penwest for $9,210.03 on its claim against Music Factory and J&M for the breach of the management agreement by the failure to pay the sales taxes, (3) in favor of Penwest on J&M's claim that Penwest breached the purchase agreement by cancelling the transfer of the liquor permit, and (4) in favor of McCuen for $19,000 on his claim against Penwest for the unjust enrichment that resulted when Katz cancelled the transfer of the liquor permit, but retained the money paid under the purchase agreement. The trial court entered judgment on these verdicts on June 8, 2005.

{¶ 9} On June 22, 2005, J&M and McCuen moved for judgment notwithstanding the verdict or, in the alternative, a new trial or additur. In the motion, J&M and McCuen pointed out that J&M's breach-of-contract claim and McCuen's unjust-enrichment claim turned on the same undisputed fact—that Penwest failed to transfer the liquor permit, but retained the money that it collected under the purchase agreement. Thus, J&M and McCuen argued that the jury erred in awarding McCuen $19,000 on his unjust enrichment claim, but rejecting J&M's claim for breach of the purchase agreement. According to J&M and McCuen, the jury should have entered judgment for J&M in the

amount of $27,000—the amount J&M had paid to Penwest for the liquor permit—on its claim for breach of contract. Additionally, the jury should have awarded to McCuen $8,961.66—the amount Penwest collected on its judgment lien—on his unjust-enrichment claim.

{¶ 10} The trial court issued a decision denying J&M and McCuen's motion, and it entered judgment on its decision on September 26, 2005. Music Factory, J&M, and McCuen appealed that judgment and the June 8, 2005 judgment. *See Katz Interests, Inc. v. Music Factory, L.L.C.*, 170 Ohio App.3d 663, 2007-Ohio-1413 (10th Dist). On appeal, appellants asserted two assignments of error relative to the trial court's ruling on the motion for judgment notwithstanding the verdict or, in the alternative, for new trial or additur. In these two assignments of error, appellants asserted:

> 1. The jury erred in awarding $19,000.00 to appellant Michael McCuen while simultaneously rejecting J&M Enterprises' breach of contract claim. The jury should have awarded $8,961.66 to McCuen and $27,000.00 to J&M Enterprises.
>
> 2. The trial court erred in denying defendants-appellants Michael McCuen and J&M Enterprises' motion for judgment notwithstanding the verdict or in the alternative for a new trial or in the alternative for additur.

Id. at 21.

{¶ 11} This court reviewed these assignments of error together. We concluded that the uncontroverted evidence established that J&M paid $27,000 and McCuen paid $8,961.66 for a liquor permit that Penwest never transferred. Therefore, we held that:

> [R]easonable minds could reach but one conclusion, that being that Penwest breached the purchase agreement when it cancelled the transfer, that Penwest was unjustly enriched through retention of the liquor license without repayment of McCuen's payment toward the purchase price, that J&M was entitled to recover the total amount it had paid on the contract at the time of the breach, $27,000, and that McCuen was entitled to recover the total amount he paid toward the purchase price, $8,961.66.

Id. at ¶ 26. We thus sustained appellants' first two assignments of error. We then reversed the June 8, 2005 and September 26, 2005 judgments, and we remanded the case

to the trial court so it could vacate the two reversed judgments and enter judgment for J&M in the amount of $27,000 and for McCuen in the amount of $8,961.66. *Id.* at ¶ 28. On April 10, 2007, the trial court entered judgment exactly as instructed.

{¶ 12} Almost four years after the April 10, 2007 judgment, McCuen filed a motion for restitution against Katz Interests. In his motion, McCuen represented that Katz Interests had collected $22,763.27 from him pursuant to the part of the June 8, 2005 judgment that awarded damages for Katz Interests' claim for breach of the lease. McCuen argued that Katz Interests owed that money back to him because this court had reversed and the trial court had vacated the June 8, 2005 judgment.

{¶ 13} On October 3, 2011, the trial court issued a judgment granting McCuen's motion. Katz Interests now appeals that judgment to this court, and it assigns the following errors:

> 1. The trial court erred by entering its October 3, 2011 Order of Restitution.
>
> 2. The trial court erred by failing to reconsider and vacate its October 3, 2011 Order of Restitution.
>
> 3. The trial court erred by failing to correct its April 10, 2007 entry to reflect that KII's judgment remained intact.

{¶ 14} By its first assignment of error, Katz Interests argues that the trial court erred in requiring it to return monetary damages that it had collected pursuant to a valid judgment. The success of this argument turns on whether the portion of the June 8, 2005 judgment that awarded Katz Interests damages on its breach-of-lease claim remains in effect. To resolve this argument, we must interpret our 2007 decision. Courts have the right to construe and clarify their own rulings. *In re Walker*, 10th Dist. No. 02AP-421, 2003-Ohio-2137, ¶ 22.

{¶ 15} The last paragraph of our 2007 decision appeared to reverse the June 8, 2005 judgment in its entirety. Likewise, our instruction for remand appeared to require the trial court to vacate the June 8, 2005 judgment in its entirety. However, a complete reading of our decision reveals that we only reversed the part of the June 8, 2005 judgment that resolved J&M's claim for breach of contract and McCuen's claim for unjust enrichment. Our instruction to vacate, therefore, only applied to the part of the June 8,

2005 judgment that rendered judgment on those two claims. Thus, the part of the June 8, 2005 judgment awarding damages on Katz Interests' claim for breach of the lease and Penwest's claim for breach of the management agreement remains effective.

{¶ 16} We so interpret our decision because nothing in the assignments of error asserted in the prior appeal challenged the judgment for Katz Interests on its breach-of-lease claim or the judgment for Penwest on its breach-of-contract claim. McCuen contends that we could have exercised our discretionary powers to pass on error not asserted and, having found error in the entire judgment, reversed the entire judgment. However, our legal analysis did not even mention the judgment for Katz Interests on its breach-of-lease claim or the judgment for Penwest on its breach-of-contract claim. We, therefore, did not even consider, much less find any error in, that part of the judgment.

{¶ 17} McCuen next argues that we necessarily reversed the judgment on Katz Interests' breach-of-lease claim when we rendered a decision against Penwest on J&M's claim for breach of the purchase agreement. McCuen contends that the lease and the purchase agreement were so intertwined that Penwest's breach of the purchase agreement excused Music Factory's breach of the lease. We would agree with McCuen if the lease included a term that conditioned Music Factory's obligation to pay rent on J&M's receipt of the liquor permit. If such a condition existed, then Penwest's breach of the purchase agreement would release Music Factory from paying rent. The lease, however, does not include any such condition. Consequently, even though McCuen only executed the lease because he wanted the liquor permit, Katz's cancellation of the liquor permit's transfer did not relieve Music Factory of its contractual obligations or negate McCuen's liability for the breach of the lease.

{¶ 18} In sum, we conclude that the June 8, 2005 judgment is a valid, effective judgment to the extent that it rendered judgment and awarded damages to Katz Interests for breach of the lease and to Penwest for breach of the management agreement. The trial court, therefore, erred in ordering Katz Interests to disgorge the monetary damages that it collected from McCuen. Accordingly, we sustain Katz Interests' first assignment of error.

{¶ 19} Our resolution of Katz Interests' first assignment of error renders the remaining assignments of error moot. Consequently, we will not address the second and third assignments of error.

{¶ 20} For the foregoing reasons, we sustain Katz Interests' first assignment of error, and we find the second and third assignments of error moot. We reverse the judgment of the Franklin County Court of Common Pleas and we remand this case to that court so that it may vacate the October 3, 2011 judgment.

Judgment reversed; cause remanded with instructions.

BRYANT and CONNOR, JJ., concur.