[Cite as *Feller, L.L.C. v. Wagner*, 2012-Ohio-5972.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Feller, LLC,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-759 (C.P.C. No. 10CVH-03-3708)
Sandra K. Wagner,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Love Fitness, LLC dba Curves et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 18, 2012

Harris, McClellan, Binau & Cox, P.L.L., Dan J. Binau, Emily J. Jackson, and *Mark S. Coco,* for appellee Feller, LLC.

Michael T. Gunner, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Sandra K. Wagner, from a judgment of the Franklin County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Feller, LLC.

{¶ 2} Appellee is the owner of commercial property located at 1246 W. Fifth Avenue, Columbus. On July 26, 2003, Love Fitness, LLC dba Curves ("Love Fitness") entered into a commercial lease agreement (hereafter "the 2003 lease agreement") with

appellee's predecessor-in-interest, NCB Northwest and Fifth Plaza, Inc. ("NCB"), whereby Love Fitness took possession of the premises as tenant for a term of five years, with an option for a renewal term of five years. Also on that date, appellant, as well as two other individuals, Ami J. Love and Kyle S. Love, signed a "Guaranty of Lease." On October 31, 2008, Love Fitness and appellee entered into a "Lease Modification Agreement No. 1" (hereafter "2008 lease modification agreement"), thereby extending the lease for an additional five-year period.

{¶ 3} On March 9, 2010, appellee filed a complaint in forcible entry and detainer, naming as defendants Love Fitness, Ami Love, Kyle Love, and appellant. The complaint included claims for unpaid rent, damages, breach of lease, breach of guaranty, and for an action on an account. On March 23, 2010, defendants Ami Love and Kyle Love filed a Chapter 7 bankruptcy petition in federal court.

{¶ 4} On March 31, 2010, appellee filed an amended complaint, naming as defendants Love Fitness and appellant. On April 13, 2010, a magistrate of the trial court filed a decision and entry as to appellee's first cause of action only, finding that Love Fitness was in default of the lease agreement for failure to pay rent, and that appellee was entitled to the right of immediate and present possession of the premises.

{¶ 5} On December 14, 2010, appellee filed a motion for summary judgment against appellant, asserting that appellant, as guarantor, was liable for rent and damages owed to appellee. Attached to the motion was the affidavit of Debra A. Zink. Also on that date, appellee filed a motion for default judgment against Love Fitness. By judgment entry filed on December 27, 2010, the trial court granted appellee's motion for default judgment against Love Fitness. On January 3, 2011, appellant filed a response to appellee's motion for summary judgment. Attached to the response was the affidavit of Kyle Love. On February 14, 2011, appellee filed a reply, attaching the affidavit of Kevin Clay, the managing member of appellee. On July 15, 2011, the trial court filed a decision granting summary judgment in favor of appellee and against appellant. The decision of the trial court was journalized by entry filed on August 5, 2011.

{¶ 6} On appeal, appellant sets forth the following two assignments of error for this court's review:

> [I.] WHERE A LEASE PROVIDES THAT A GUARANTY IS DISCHARGED IN THE EVENT THAT TENANT SELLS ITS BUSINESS AND LANDLORD AGREES TO ACCEPT BUYER AS THE TENANT, THE TRIAL COURT ERRED BY REFUSING TO CONSIDER EVIDENCE THAT THE EVENTS DESCRIBED DID OCCUR AND THE GUARANTY LIABILITY WAS DISCHARGED UNDER THE LEASE.
>
> [II.] THE TRIAL COURT WRONGLY GRANTED SUMMARY JUDGMENT TO THE LANDLORD ON THE ISSUE OF DAMAGES WHERE DAMAGES WERE BASED ON UNPAID FUTURE RENT AND THERE WAS NO EVIDENCE OF EFFORTS MADE TO RE-LEASE THE PREMISES.

{¶ 7} Under these assignments of error, appellant challenges the trial court's grant of summary judgment in favor of appellee with respect to the issue of appellant's liability under a guaranty provision, and as to the issue of damages. Pursuant to Civ.R. 56(C), summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In reviewing a trial court's grant of summary judgment, an appellate court "stands in the shoes of the trial court and reviews all questions of law de novo." *Lynch v. Lilak*, 6th Dist. No. E-08-024, 2008-Ohio-5808, ¶ 9, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 8} Under the first assignment of error, appellant argues that paragraph 10 of the 2008 lease modification agreement provided for a discharge of guaranty if certain events occurred. Appellant contends that she submitted evidence indicating that events such as those described in paragraph 10 occurred by the time appellee moved for summary judgment, thereby discharging her from liability under the guaranty.

{¶ 9} Paragraph 10 of the 2008 lease modification agreement states:

> In the event that Tenant wishes to sell Tenant's business at the Premises to another owner/operator, then as long as said prospective owner/operator has financial holdings and credit rating acceptable to Landlord, Landlord agrees to either: 1) allow the Lease to be assigned with no obligation of further guaranty by Tenant, or 2) allow the Lease to be terminated, as long as a new lease has previously been executed by said new owner/operator and Landlord (at terms and conditions

> acceptable to Landlord), with said new owner/operator being the sole guarantor of the new lease.

{¶ 10} Appellant argues that the affidavit of Kyle Love offered the following evidence in opposition to appellee's motion for summary judgment: (1) the tenant's fitness business was sold to a buyer, Sidley Helphrey, in July of 2009; (2) in October of 2009, Kevin Clay, a representative of the landlord, told Kyle Love that the landlord had been negotiating with Helphrey, and that an agreement had been reached with the buyer on a lease; (3) Clay also told Kyle Love that the buyer (Helphrey) could begin paying the landlord directly for the rent and other lease charges; (4) the landlord's records show that for November and December of 2009, and January of 2010, the landlord accepted payment strictly from the buyer; and (5) the landlord sent Kyle Love a draft agreement reflecting an assignment of the lease to the buyer (although the draft agreement wrongfully reflected that the guaranty obligations would continue).

{¶ 11} Appellant maintains that such evidence proves the tenant sold its business, and that the landlord either allowed the lease to be assigned to the buyer as tenant, or that the landlord entered into a new lease with the buyer. Under either scenario, appellant argues, the guaranty obligations were discharged under paragraph 10 of the 2008 lease modification agreement.

{¶ 12} In response, appellee contends that, while appellant argued before the trial court that her guaranty was discharged by virtue of an assignment, appellant did not, in opposing the motion for summary judgment, claim that the lease had been terminated or that appellee had entered into a new lease with a third-party. Appellee argues that the only evidence before the trial court was that there was never written consent to an assignment given by appellee as required under the terms of the lease, and that there was no evidence presented by appellant of either a termination of the lease or a new lease for the premises.

{¶ 13} A review of the record indicates that appellant, in response to appellee's motion for summary judgment, argued she was a guarantor only as to the original lease, and that she was released by a lease assignment when appellee accepted new tenancy (i.e., from Helphrey and her company, Byntec Health & Fitness, LLC). Appellant argued before the trial court, as she does on appeal, that the affidavit of Kyle Love, as well as a document

identified as "Exhibit 1," established that she was released from any further obligation. As part of her response to the summary judgment motion, appellant submitted two unsigned documents ("Exhibit 1" and "Exhibit 2"), both titled "Assignment, Assumption and Modification of Lease Agreement." Both documents contained signature lines listing Love Fitness as "assignor," Byntec Health & Fitness, LLC, as "assignee," appellee as "landlord" and Kyle Love, Ami Love, and appellant as "original guarantor."

{¶ 14} The documents generally contain identical or similar provisions, with the exception of language in the respective documents addressing the original guarantor's obligations. Specifically, paragraph 13 of Exhibit 1 provides: "Original Guarantor and Landlord acknowledges this Agreement as being a part of the Lease and further acknowledges and reaffirms Original Guarantor's release of continued obligations under the Original Guaranty." By contrast, paragraph 13 of Exhibit 2 states: "Original Guarantor acknowledges this Agreement as being a part of the Lease for the purpose of the Original Guaranty and further acknowledges and reaffirms Original Guarantor's continued obligations under the Original Guaranty."

{¶ 15} The trial court addressed the conflicting language found in paragraphs 13 of the respective documents, holding in part:

> Defendant Wagner offers the Affidavit of Kyle Love and a document (marked as "Exhibit 1") she describes as "the proposed Assignment, Assumption and Modification of Lease Agreement" which includes a paragraph purporting to release the "Original Guarantors," including Defendant Wagner, from any further obligation under the lease. Defendant Wagner asserts that a release of the original guarantors was what had been discussed and agreed to by the parties in connection with negotiations for the assignment of the Lease, notwithstanding the apparent concession that the document attached to her Memorandum Contra marked as "Exhibit 2" contains no such release, and that in any event Defendant Wagner cannot provide a signed document of either version.

{¶ 16} The trial court found persuasive appellee's argument that, pursuant to the terms of the lease itself, no modification of the lease could be made unless in writing, signed by both parties, and duly delivered between them. As reflected above, the court cited the absence of any signed document evincing a modification such that an assignment of the lease provided for the release of appellant's guaranty.

{¶ 17} In addressing issues of contract interpretation, the role of a court is to "give effect to the intent of the parties." *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, ¶ 37. We therefore "examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract." *Id*. A court "will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id*.

{¶ 18} As set forth under the facts, appellant, along with Ami Love and Kyle Love, signed a guaranty of lease on July 26, 2003. That guaranty states in part as follows:

> In consideration of and as a material inducement to NCB NORTHWEST AND FIFTH PLAZA, INC. ("Landlord") executing and delivering simultaneously herewith, in reliance upon this Guaranty that certain Lease (the "Lease") * * * between Landlord and LOVE FITNESS LLC ("Tenant"), the undersigned (hereinafter called "Guarantor") hereby unconditionally and absolutely guarantees unto Landlord, it[s] successors and assigns, the full, prompt and complete payment by Tenant of any Minimum Rent, Additional Rent and any additional payments, as these terms may be provided for and used in the Lease and the prompt, faithful and complete performance and observance by Tenant of all of the terms, covenants and conditions of the Lease on Tenant's part to be performed or observed.
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> * * *
>
> It is understood that the liability hereunder of Guarantor shall continue for and during the entire term of the Lease and any renewals or extensions thereof, notwithstanding any assignment of the Lease or subletting of all or any portion of the premises demised under the Lease. This Guaranty shall not be limited to any amount or time and shall at all times include the full indebtedness and all other liability and obligation of Tenant, or any assignee or subtenant of Tenant, to Landlord under the Lease.

{¶ 19} Page 4 of the 2008 lease modification agreement, which contains appellant's signature, is titled "Consent and Acknowledgement of Guarantor," and states as follows:

> The undersigned acknowledge this Lease Modification Agreement No. 1 as being a part of the Lease for the purpose of that certain Guaranty of Lease, dated July 26, 2003 (the "Guaranty"), and further acknowledge and reaffirm his/her/its/their continued obligations under the Guaranty, to guaranty the full performance of all of Tenant's obligations under the Lease and any amendments, modifications or alterations thereto, including the payment of all amounts that may become due and payable by Tenant to or for the benefit of Landlord.

(Emphasis sic.)

{¶ 20} Section 24.05 of the 2003 lease agreement provides in part: "This Lease may not be modified by oral agreement, usage, course of conduct, estoppel, partial performance, performance based on a writing not signed by both parties, nor in any other manner, other than in a writing which has been signed by both parties and has been duly delivered between them."

{¶ 21} Section 13.01 of the 2003 lease agreement addresses assignment and subletting, and states in relevant part:

> Tenant shall not sell, assign, mortgage, license or transfer this Lease, in whole or in part, or sublet the Premises or any part thereof without in each case the written consent of the Landlord. * * * Any transfer by operation of law of Tenant's interest in the Premises shall be regarded as an assignment or sublease requiring Landlord's prior consent in the manner provided above. Each assignee or transferee shall assume and be deemed to have assumed this Lease and shall be and remain liable jointly and severally with Tenant for the payment of the Minimum Rent, Additional Rent and adjustments of rent, and for the performance of all the terms, covenants, conditions and agreements herein contained on Tenant's part to be paid or performed.

{¶ 22} In general, "[a] guaranty of payment of an obligation, as distinguished from a guaranty of collection, is considered to be an absolute or unconditional guaranty." *Buckeye Fed. S. & L. Assn. v. Olentangy Motel*, 10th Dist. No. 90AP-1409 (Aug. 22, 1991). Under Ohio law, " '[a]n absolute guaranty of the prompt payment of rent by the lessee of real property creates an unconditional undertaking by the guarantor that it will perform

the obligation upon lessee's default.' " *Id*., quoting *Eden Realty Co. v. Weather-Seal, Inc*., 102 Ohio App. 291 (9th Dist.1957), paragraph one of the syllabus.

{¶ 23} Under the terms of the guaranty in the instant case, appellant unconditionally guaranteed rent payments to the landlord and its assigns. As cited above, the language of the guaranty provides that "the liability hereunder of Guarantor shall continue for and during the entire term of the Lease * * * notwithstanding any assignment of the Lease or subletting of all or any portion of the premises." According to the affidavit of appellee's managing member, Kevin Clay, appellee "never consented to any assignment or modification of the Lease * * * whereby Defendant * * * Wagner would be released from her Guaranty or relieved from liability." (Clay Affidavit at ¶ 3.) Clay further averred in his previously filed affidavit that "[t]he Assignment, Assumption And Modification of Lease Agreement, attached to the affidavit of Kyle Love as Exhibit '1' was never approved by Plaintiff and was never executed on behalf of Plaintiff." (Clay Affidavit at ¶ 5.)

{¶ 24} In the affidavit of Kyle Love, filed in support of appellant's response to appellee's motion for summary judgment, Kyle Love averred that Clay "sent over an assignment which showed rent concessions made to the Helpheys [sic] but included a paragraph 13 which would still hold the original personal guarantors liable." (Kyle Love Affidavit at ¶ 15.) Kyle Love stated that a "redraft" of the consent to assignment was prepared that "contained the correct provisions releasing the personal guaranty." (Kyle Love Affidavit at ¶ 16.) Kyle Love acknowledged, however, that "[w]e never received any signed copies back from Mr. Clay" of the redraft. (Kyle Love Affidavit at ¶ 20.)

{¶ 25} Standing alone, Kyle Love's affidavit statement indicating he submitted a document (Exhibit 1) to appellee with language proposing to release the guarantor of continued obligations under a lease assignment does not create a genuine issue of material fact as to whether appellee agreed to such terms. As noted by the trial court, pursuant to Section 24.05 of the 2003 lease agreement, any modification of the lease was required to be in writing, "signed by both parties," and "duly delivered between them." Further, pursuant to Section 13.01, no assignment or sublease of the premises by the tenant was permissible without the landlord's written consent.

{¶ 26} The record on summary judgment supports the trial court finding that appellant offered no signed documents in support of her position that appellee approved

the release of appellant's guaranty. In the absence of a signed document between the parties with respect to an assignment of the lease agreement and/or an agreement to modify the lease so as to release the original guarantor of continued obligations, we agree with the trial court's determination that appellant "continues to be personally liable pursuant to the terms of the lease."

{¶ 27} Further, even accepting appellant's contention that the language of paragraph 10 of the 2008 lease modification agreement somehow obviated the need for an assignment in writing and signed by the parties, we agree with appellee that there was no evidence presented that the prospective owner/operator had financial holdings and credit rating acceptable to the landlord as required by paragraph 10 of the 2008 lease modification agreement. Rather, the only evidence presented on this issue was in the form of Clay's affidavit, in which he averred that "[f]or purposes of any purported potential assignment of the Lease, the financial holdings and credit ratings of prospective tenant and/or guarantor offered [i.e., Helphrey and Byntec Health & Fitness, LLC] were never acceptable to [appellee]." (Clay Affidavit at ¶ 4.)

{¶ 28} Appellant also argues that the lease was terminated based upon a ledger attached to appellee's motion for summary judgment. Appellant did not make this argument before the trial court in response to appellee's motion for summary judgment. Rather, appellant raised this issue for the first time in her "motion for new trial" (subsequently re-styled as a motion for reconsideration), filed after the trial court granted summary judgment in favor of appellee. Specifically, appellant argued that the ledger reflected rent payments of $1,500 per month for the months of November and December of 2009, and January and February of 2010, which appellant described as the period of occupancy for "Helphrey and/or her company Byntec Health and Fitness, LLC."

{¶ 29} We note that the ledger itself does not indicate the source of the payments for the months at issue. However, Section 13.01 of the 2003 lease agreement provides in part:

> Acceptance by Landlord of rent or other monies from a purported sublessee or assignee as to whom Landlord's written consent has not been obtained shall not be deemed to imply Landlord's acceptance of or consent to such assignment or subletting (regardless of the number of occasions on which such monies are so accepted), and any monies so paid shall be

> deemed to have been paid on behalf of or by Tenant for Tenant's account.

{¶ 30} Here, evidence that the landlord may have accepted rent checks from a third-party does not, in light of the express language of the agreement, create a genuine issue of material fact as to whether appellee waived the right to require written consent to an assignment of the lease, nor does it create a triable issue as to whether the lease was terminated. *See, e.g., Sokol v. Burroughs,* 10th Dist. No. 08AP-45, 2008-Ohio-4597, ¶ 10 (where lease provided that any provision may be modified, waived or discharged only by signed written instrument, and landlord did not sign writing changing lease obligations, trial court erred in finding landlord waived right to receive payments for utilities). As noted by appellee, under the lease terms, any concessions are expressly deemed to have been paid on behalf of the tenant or for the tenant's account. Again, the ledgers do not indicate the source of the payments; however, according to the affidavit testimony of Clay, any rent concessions "given under the Lease * * * were given to Love Fitness, LLC, the tenant under the Lease." (Clay affidavit at ¶ 9.) Finally, in addition to a lack of evidence of a signed lease agreement between appellee and a buyer, we have previously noted the absence of any evidence contradicting Clay's affidavit statement that the financial holdings and credit ratings of the prospective tenant "were never acceptable" to the landlord.

{¶ 31} Having reviewed de novo the record in this case, we conclude that the trial court did not err in granting summary judgment in favor of appellee as to the issue of appellant's liability under the guaranty. Based upon the foregoing, appellant's first assignment of error is without merit and is overruled.

{¶ 32} Under the second assignment of error, appellant argues that the trial court erred in prematurely granting summary judgment on the issue of damages. Appellant maintains that, where a landlord seeks to recover for rent owed for the remaining term of the lease, the landlord has a duty to make reasonable efforts to mitigate damages by re-renting the premises. Appellant argues that, while some Ohio courts have placed the burden of proving lack of mitigation on the tenant, a number of courts have found it appropriate to place the burden of showing reasonable mitigation on the landlord. According to appellant, the trial court had no evidence regarding the landlord's mitigation

efforts, nor did the court have evidence whether the property had been re-rented. Appellant argues that, by awarding the full amount of rent due as damages, the trial court assumed that the landlord's mitigation efforts were reasonable, and that the property had not been (and would not be) re-rented.

{¶ 33} In response, appellee contends that the issue of mitigation is being raised by appellant for the first time on appeal. Specifically, appellee argues that appellant failed to raise the issue of mitigation of damages as an affirmative defense in her answer to appellee's amended complaint, or at anytime thereafter, and therefore waived the defense. Appellee contends it provided evidence supporting its claim for damages in its motion for summary judgment in affidavit form, and that appellant did not challenge or otherwise oppose or object to appellee's right to future rent, or the dollar amount asserted by appellee.

{¶ 34} Under Ohio law, "when a landlord issues a notice to vacate because of a lease violation or pursues eviction, the tenant who violated the terms of the lease is liable for the unpaid rents until either the expiration of the lease, or until the premises are re-rented." *Pinnacle Mgt. v. Bell*, 12th Dist. No. CA2011-08-145, 2012-Ohio-1595, ¶ 8, citing *Dennis v. Morgan*, 89 Ohio St.3d 417, 418 (2000). A majority of Ohio courts hold the view that "a landlord in a commercial lease has a duty to mitigate damages once the tenant has abandoned the premises." *New Towne L.P. v. Pier 1 Imports (U.S.), Inc.*, 113 Ohio App.3d 104, 107 (6th Dist.1996). However, "[t]he failure to mitigate damages is an affirmative defense," and "the tenant has the burden to prove that the landlord failed to mitigate damages." *Hines v. Riley*, 129 Ohio App.3d 379, 383 (4th Dist.1998). *See also Manor Park Apts., LLC v. Delfosse*, 11th Dist. No. 2006-L-036, 2006-Ohio-6867, ¶ 17 ("A tenant, as the defendant asserting an affirmative defense, does have the burden of proving the landlord failed to mitigate damages."). In *Gupta v. Edgecombe*, 10th Dist. No. 05AP-34, 2005-Ohio-6890, ¶ 12, this court held that "[m]itigation of damages is an affirmative defense under Civ.R. 8(C)," and that "[a]n affirmative defense, not listed in Civ.R. 12(B), is waived unless it is raised affirmatively in a responsive pleading under Civ.R. 8(C), or by amendment under Civ.R. 15."

{¶ 35} Upon review, we agree with appellee that appellant failed to raise the issue of mitigation of damages in her answer (or by responsive pleading or amendment under

Civ.R. 15), nor did appellant otherwise raise or present any evidence to support mitigation as an affirmative defense. While appellant's answer set forth several affirmative defenses, mitigation of damages was not raised in the answer, and appellant did not raise the issue of mitigation in response to appellee's motion for summary judgment. Rather, appellant argued in her response that "[t]he amount of rent and other damages allegedly owing to Plaintiff, for purposes of this motion only is not disputed because it is irrelevant if there has been a release of liability of the guarantors by Plaintiff."

{¶ 36} We note that the only evidence in the record on summary judgment with respect to mitigation was provided by appellee in its motion for summary judgment. In support of the motion, appellee submitted the affidavit of Deborah A. Zink, the vice-president of Casto Management Services, Inc., the managing agent for appellee. In her affidavit, Zink averred that appellee "has been unable to procure a new tenant for the Premises prior to the expiration of the Lease Term." (Zink Affidavit at ¶ 9.) Appellee also submitted account statements as part of its exhibits, and Zink averred in her affidavit as to the amounts due for unpaid rent and accelerated rent.

{¶ 37} Here, because appellant failed to raise mitigation as an affirmative defense, and did not set forth any evidence before the trial court regarding the issue of mitigation of damages, the mitigation issue cannot be raised for the first time on appeal, and we agree with appellee that the issue has been waived. *See Kanistros v. Holeman,* 2d Dist. No. 20528, 2005-Ohio-660, ¶ 37 (defendant's attempt to raise mitigation of damages issue for first time on appeal constitutes waiver); *Gray-Jones v. Jones*, 137 Ohio App.3d 93, 103 (10th Dist.2000) (issue of failure to mitigate damages not raised before trial court and therefore waived on appeal). Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 38} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.

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