

[Cite as *Crickets of Ohio, Inc. v. Hines Invests., LLC*, 2010-Ohio-5815.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRICKETS OF OHIO, INC.

Plaintiff-Appellee

-vs-

HINES INVESTMENTS, LLC, ET AL.

Defendants-Appellants

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09-CA-51

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of
Common Pleas, Case No's. 07-CV-924 &
09-CV-554

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 29, 2010

APPEARANCES:

For Plaintiff-Appellees

For Defendants-Appellants

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Hoffman, J.

{¶1} Defendants-appellants Hines Investments, LLC and Pam Hines, Individually, appeal the June 1, 2009 Judgment Entry of the Fairfield County Court of Common Pleas in favor of Plaintiffs-appellees Crickets of Ohio, Inc. and William Smith, Individually.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 30, 2007, Appellees Crickets of Ohio, Inc. and William Smith, Individually, (hereinafter collectively referred to as “Appellees”) initiated the within action against Appellants Hines Investments, LLC and Pam Hines, Individually, (hereinafter collectively referred to as “Appellants”) for breach of lease agreement, unreasonably withholding consent to the assignment of a lease and for intentional interference with a business relationship.

{¶3} On August 29, 1996, Appellees entered into a lease agreement with Grilli Real Estate Corporation for the purpose of operating a restaurant. The term of the lease was for five years, with the right to renew for two additional five year periods. The lease was amended on September 11, 2001.

{¶4} On November 25, 2002, Appellants purchased the real property subject to the lease, including the building used for Appellees’ restaurant. Pertinent to this matter, Appellees later notified Appellants of their intent to sell the restaurant business to the chef, Matt Brady. Appellees asserted the lease did not end on July 31, 2011, but ended on July 31, 2021. Further, during discussions, Appellees indicated it wished to build a smoking patio on the restaurant premises. Appellees then requested an assignment and extension of the lease until 2021. Appellees also then began deducting from the

rent owed to Hines the amount Appellees spent for repairs made to the premises pursuant to the terms of the lease.

{¶5} Following the initiation of the within action by Crickets, Appellants filed a counterclaim alleging Appellees converted assets and wrongfully withheld rent. Appellants then filed a forcible entry and detainer action against Appellees. The two actions were consolidated.

{¶6} Appellees filed a motion to dismiss the forcible entry and detainer action, which was granted by the trial court.

{¶7} Following jury trial, the trial court entered judgment in favor of Appellees on all its claims, and against Appellants as to its counterclaim. The June 1, 2009 Judgment Entry grants judgment against Appellants in the combined amount of \$195,750.00 for the breach of lease claims. The trial court granted William Smith judgment against Pam Hines, Individually, and against Hines, LLC. jointly and severally, in the amount of \$239,746.00 for intentional interference with a business relationship. The trial court also granted judgment in favor of William Smith for \$25,000 as punitive damages, as well as attorney fees.

{¶8} Appellants now appeals, assigning as error:

{¶9} "I. THE TRIAL COURT ERRED IN NOT DISMISSING THE DEFENDANT/APPELLANT, PAM HINES INDIVIDUALLY AS A DEFENDANT IN THIS CASE AND IN NOT PROVIDING THE JURY WITH PROPER INSTRUCTIONS IN THIS REGARD.

{¶10} "II. THE TRIAL COURT ERRED IN DISMISSING THE DEFENDANTS/APPELLANTS' FORCIBLE ENTRY AND DETAINER ACTION.

{¶11} “III. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT FOR THE DEFENDANTS AND A JUDGMENT NOTWITHSTANDING THE VERDICT ON THE CLAIMS OF THE PLAINTIFF/APPELLANT REGARDING BREACH OF CONTRACT FOR UNREASONABLY WITHHOLDING CONSENT TO ASSIGN THE LEASE AND FOR TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP.

{¶12} “IV. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT FOR THE DEFENDANTS AND A JUDGMENT NOTWITHSTANDING THE VERDICT ON THE CLAIM OF THE PLAINTIFF/APPELLANT REGARDING BREACH OF CONTRACT FOR UNREASONABLY WITHHOLDING CONSENT TO BUILD A PATIO.

{¶13} “V. THE TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT ON THE FINDING AGAINST THE DEFENDANT, HINES INVESTMENTS, LLC, AGAINST CRICKETS OF OHIO, INC. FOR CONVERSION AND FOR WITHHOLDING RENTS WITHOUT JUSTIFICATION.

{¶14} “VI. THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF ROBERT WELSHER REGARDING THE LOSS OF THE PLAINTIFF/APPELLEE FROM NOT BUILDING AN OUTDOOR PATIO.”

I.

{¶15} In the first assignment of error, Appellants assert the trial court erred in not dismissing Pam Hines, Individually, as a defendant in this matter, and in not providing the jury with a proper instruction with regard thereto. Appellant Pam Hines moved the trial court for a directed verdict in her favor dismissing the action against her individually. The trial court denied the motion.

{¶16} Civil Rule 50(A) governs motions for directed verdict, and reads, in pertinent part:

{¶17} “When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.”

{¶18} At the end of the trial, Appellant Pam Hines, individually, moved the trial court for a jury instruction concerning her personal liability. Specifically, the requested instruction indicated more than sole ownership of the corporation was needed in order for the jury to find her personally liable. The trial court did not give the instruction.

{¶19} The jury found against Pam Hines, individually, and Hines Investments, LLC on the tortious interference with a business relationship claim in the identical amounts of \$239,746. The jury also awarded punitive damages against both jointly and severally in the amount of \$25,000. The trial court questioned the jury as to whether they intended there to be two damage awards against both Hines Investments, LLC and Pam Hines, Individually. The jury foreman indicated the jury intended a total award of \$264,746.

{¶20} A trial court’s decision as to the dismissal of a party and as to instructing the jury is reviewed under an abuse of discretion standard. *State v. Wolons* (1989), 44 Ohio St.3d 64. The evidence does not demonstrate the trial court abused its discretion in instructing the jury as to her liability. The evidence presented at trial indicates Pamela

Hines acted in both her corporate capacity and individual capacity, for her own benefit, by making threats and accusations. We find reasonable minds could conclude Pam Hines acted individually to tortiously interfere with the business relations of Appellees and Matt Brady. Further, the judgment was rendered jointly and severally as to either defendant for a total award of \$264,746. Therefore, the trial court did not err in denying the request for directed verdict, or in instructing the jury as to liability.

{¶21} The first assignment of error is overruled.

II.

{¶22} In the second assignment of error, Appellants maintain the trial court erred in dismissing the forcible entry and detainer action against Appellees. Specifically, Appellants maintain Appellees deducted rent owed to Appellants.

{¶23} Appellees concede throughout the lease they deducted from rent payments the amount they paid for repairs made when Appellants either refused or simply failed to make them.

{¶24} On April 30, 2009 Appellees wrote a check to Appellants in the amount of \$4,949.15, which indicated on the memo line "May 2009 Rent." Appellants deposited the check. The trial court found Hines accepted future rent payments after serving Appellees with a notice to vacate.

{¶25} Upon review, the trial court did not err in dismissing the forcible entry and detainer action, finding Appellants accepted future rent payments after commencement of the action. The second assignment of error is overruled.

III, IV.

{¶26} The third and fourth assignments of error raise common and interrelated issues and will be discussed together.

{¶27} In the third and fourth assignments of error, Appellants argue the trial court erred in failing to direct a verdict and grant judgment notwithstanding the verdict (“JNOV”) in favor of Hines.

{¶28} Ohio Civil Rule 50 governs directed verdicts and judgments notwithstanding the verdict, and reads, in pertinent part:

{¶29} “(A) Motion for directed verdict

{¶30} “***

{¶31} “(4) *When granted on the evidence.* When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶32} “***

{¶33} “(B) Motion for judgment notwithstanding the verdict

{¶34} “Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his

motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.”

{¶35} JNOV is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the nonmoving party, reasonable minds could come to but one conclusion, that being in favor of the moving party. Civ.R. 50(B); *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St.3d 512, 769 N.E.2d 835, 2002-Ohio-2842. In ruling on a motion for judgment notwithstanding the verdict, the court does not determine factual issues, but only questions of law, even though it is necessary to review and consider the evidence in deciding the motion. *Goodyear* at paragraph 4.

{¶36} A motion for directed verdict presents a question of law, not fact, even though we review and consider the evidence. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, syllabus 3 by the court. Thus, we review a motion for directed verdict using the de novo standard of review. *Cleveland Electric Illuminating Company v. Public Utility Commission*, 76 Ohio St.3d 521 at 523, 1996-Ohio-298, 668 N.E.2d 889, citation deleted.

{¶37} Initially, Appellants argue the trial court should have directed a verdict or granted judgment notwithstanding the verdict on Appellees' claims for breach of

contract and tortious interference with a business relationship. Appellants assert the same facts were alleged to prove multiple claims included in the verdict forms; therefore, the verdicts overlap on claims. Further, Appellants assert the verdicts are against the weight of the evidence.

{¶38} Article XV, Section 15.01 of the lease reads, “Lessee shall not assign the lease nor sublet all or any portion of the lease to premises without the prior written consent of Lessor, but the Lessor shall not arbitrarily or unreasonable withhold consent.”

{¶39} Appellees maintain they requested written consent from Appellants to assign or sublet the property to Matt Brady. Appellees contend Appellants refused to give said consent, and further threatened to take retaliatory action against Appellees if Appellees sold shares of the corporation to the third party without the knowledge of Pamela Hines. Appellees further assert Hines threatened to take retaliatory action if Appellees entered into a business relationship with Matt Brady to sell the shares of the corporation or otherwise purchase an interest in the business. Ultimately, Matt Brady walked away from the proposed assignment or sub-lease.

{¶40} The trial court awarded judgment to William Smith, individually, on the tortious interference claim, in addition to Crickets of Ohio, LLC. as William Smith sustained damages when Pam Hines personally interfered with the proposed alternative stock sale to Brady by making threats. William Smith, individually, would have been the beneficiary of the stock deal, not Crickets of Ohio, LLC. Further, Appellants argue, though not separately assigned as error, the trial court erred in awarding damages for the loss of the sale, valued at approximately \$375,000, while allowing Crickets

Appellees to retain the business valued at between \$400,000 to \$500,000. The trial court instructed the jury:

{¶41} “LOST PROFITS. Lost profits are calculated by deciding what William Smith was entitled to receive had William Smith and Matt Brady entered into a business relationship. You should then add other damages, if any, suffered by William Smith as a result of Hines Investments, LLC and/or Pam Hines’ improper interference. From this sum you should subtract the amount, if any, that William Smith saved by not having to fully perform in the business relationship. You may only award damages the existence and amount of which are reasonably certain and have been proved to you by the greater weight of the evidence. You may not award damages that are remote or speculative.”

{¶42} Upon review, the jury was properly instructed as to the finding of damages, and we do not find the evidence demonstrates reasonable minds could come to but one conclusion favorable to Hines as to the issue of tortious interference. The evidence indicates Hines, LLC. and Pam Hines Individually threatened retaliation should Crickets assign the lease to Matt Brady or sell the shares of the restaurant. Further, we note, the record indicates Appellees invested over \$120,000 in the restaurant to reinvent the business after Appellants refused the assignment and interfered with the business relationship. Therefore, Appellants have failed to demonstrate how justice requires they should retain the business valued between \$400,000 to \$500,000 after having paid damages in the amount of \$359,492.00. We find, the trial court did not err in denying the motion for JNOV.

{¶43} Hines further asserts they did not unreasonably withhold consent as to the building of a patio as the evidence does not demonstrate Appellees were serious about building said patio. However, William Smith and Matt Brady testified at trial they repeatedly asked Pamela Hines for her consent to construct the patio due to Ohio's smoking ban, and she continually refused without justification. Again, the evidence does not demonstrate reasonable minds could come to but one conclusion favorable to Appellants, and the trial court did not err in so finding.

{¶44} Finally, Appellants maintain the trial court erred in not granting JNOV in its favor for conversion and withholding of rent. However, the evidence presented at trial indicates Appellees withheld rent for the recoupment of repairs they made on the lease premises. The jury determined Appellees properly withheld said rent, as the evidence demonstrates the repairs were made at Appellees' expense. Again, the evidence demonstrates JNOV would not be appropriate on the matter.

{¶45} Upon review of the evidence presented at trial, the same does not demonstrate reasonable minds could come to only one conclusion adverse to Appellees. Accordingly, the trial court did not err in denying Appellants' motion for directed verdict or motion for judgment notwithstanding the verdict. The third and fourth assignments of error are overruled.

V.

{¶46} In the fifth assignment of error, Appellants maintain the trial court erred in allowing the testimony of Robert Welcher regarding the loss to Appellees from not building the outdoor patio.

{¶47} As a general rule, the admission or exclusion of evidence is left to the sound discretion of the trial court. The trial court herein allowed Robert Welcher, the owner of Restaurant Consultants, Inc. and RCI Business Brokers to testify as an expert on the areas of restaurant consulting and brokering, and as a lay witness with regard to the issue of the outdoor patio. The trial court allowed the testimony as opinion evidence as to Welcher's opinion based on his own perceptions. The trial court properly instructed the jury as to Welcher testifying as a lay witness, and the jury was free to weigh the evidence. Accordingly, the trial court did not abuse its discretion in admitting the testimony.

{¶48} The fifth assignment of error is overruled.

{¶49} The June 1, 2009 Judgment Entry of the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman _____
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards _____
HON. JULIE A. EDWARDS

s/ John W. Wise _____
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRICKETS OF OHIO, INC.

Plaintiff-Appellee

-vs-

HINES INVESTMENTS, LLC, ET AL.

Defendants-Appellants

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JUDGMENT ENTRY

Case No. 09-CA-51

For the reasons stated in our accompanying Opinion, the June 1, 2009 Judgment Entry of the Fairfield County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE