[Cite as *Waxman Dev., L.L.C. v. Iron Cowboy Prods., L.L.C.*, 2016-Ohio-3458.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103453

WAXMAN DEVELOPMENT, L.L.C.

PLAINTIFF-APPELLEE

vs.

IRON COWBOY PRODUCTIONS, L.L.C.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829921

BEFORE: Laster Mays, J., Jones, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: June 16, 2016

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ANITA LASTER MAYS, J.:

I. Statement of the Case and Procedural Posture

{¶1} Defendant-appellant Iron Cowboy Productions, L.L.C. ("Iron Cowboy") appeals the trial court's grant of partial summary judgment and judgment in favor of plaintiff-appellee Waxman Development, L.L.C. ("Waxman"). After review of the record, we affirm.

{¶2} Waxman filed a complaint in the Bedford Municipal Court on April 4, 2014, alleging that Iron Cowboy breached the lease agreement between the two parties. Iron Cowboy answered the complaint, and filed a counterclaim against Waxman, alleging that Waxman breached the lease agreement by failing to install a handicap ramp on the leased property. In addition, Iron Cowboy demanded damages in excess of $20,000. Because Iron Cowboy's counterclaim exceeded Bedford Municipal Court's jurisdiction, the case was transferred to the Cuyahoga County Court of Common Pleas.

{¶3} Waxman filed a motion for partial summary judgment on Iron Cowboy's counterclaim. The trial court granted summary judgment dismissing Iron Cowboy's counterclaim. After which, the trial court conducted a bench trial regarding Waxman's complaints against Iron Cowboy. The trial court granted a judgment in Waxman's favor, awarding Waxman damages in the amount of $4,547.80, finance charges of $4,640,

and attorney fees of $7,700.45. Iron Cowboy filed this timely appeal and assigns four assignments of error for our review.

I. The trial court erred by granting partial summary judgment to the appellee.

II. The trial court erred, and abused its discretion, by excluding evidence concerning appellee's breach of its duty to construct a handicap access ramp.

III. The trial court erred to the prejudice of the appellant, by awarding attorneys' fees in the sum of $7,700.45 to appellee.

IV. The trial court erred, as a matter of law, by awarding the appellee damages in the sum of $4,547.80 of compensatory damages and $4,640 of finance charges due to the fact that the appellee failed to prove these amounts by preponderance of the evidence and failed to mitigate its damages.

II. Facts

{¶4} On February 14, 2011, Waxman and Iron Cowboy entered into a commercial lease agreement. Iron Cowboy was the tenant of Waxman. The original lease was subsequently amended to extend the lease term to June 30, 2013. Both parties incorporated handwritten provisions on the signature page evidenced by both parties' representatives initialing next to the provisions. In 2013, the lease term was again extended to June 30, 2014. It is this provision and extension period that is the subject of the conflict between the two parties.

{¶5} Iron Cowboy contends that this second extension of the lease agreement contains a handwritten provision wherein Waxman agreed to install a handicap ramp. Iron Cowboy submitted an affidavit of its employee, Denise Derk ("Derk") who allegedly

needed the ramp. Derk stated that when it snowed, the ramp was necessary for her to access the office. Iron Cowboy's owner, Derek Smith ("Smith") submitted an affidavit contending the ramp was needed for Derk. Iron Cowboy's copy of the lease has this handwritten provision initialed by their representative only. There are no Waxman representative initials by the provision as they had done with previous lease amendments. Waxman contends that this handwritten provision did not exist on the lease agreement that was executed between the two parties.

{¶6} Both parties agree that the amended lease agreement covers the term from July 1, 2013 to June 30, 2014 under which Iron Cowboy would pay $975 per month as its total rental and fees. The two parties also agreed that in the event that Iron Cowboy defaults under the lease agreement, Iron Cowboy would be responsible for all of Waxman's expenses incurred with respect to the default including attorney fees. The lease agreement defined default as "if the tenant fails to pay the monthly rent, any additional charges, and all fees incurred." In the event of a default, both parties agreed that Waxman had the right to terminate the lease no less than ten days after the date of the notice termination. The lease agreement also stated that if Iron Cowboy abandoned or vacated the property, Waxman could remove any property left behind, change the locks, and charge Iron Cowboy a payment fee of $50, plus $2 per day, for each day thereafter until the payment is made in full. Also, if Iron Cowboy defaulted, according to the lease, they would be responsible to Waxman for the rent of the entire lease term.

{¶7} In December 2013, Iron Cowboy purchased its own building and moved its

headquarters from Waxman's building. Iron Cowboy did not pay Waxman any rent from January 2014 to the end of the lease agreement of June 2014. Waxman sent Iron Cowboy several emails regarding failure to pay. Upon receiving no response, Waxman served Iron Cowboy a notice to vacate the premises.

{¶8} On January 27, 2014, a representative from Iron Cowboy emailed Waxman stating that when Iron Cowboy signed the second amended lease it was with the understanding that Waxman would construct a handicapped ramp at the leased building. The representative also stated that Iron Cowboy would vacate the premises if the parties could not come up with a resolution. There was no mention regarding payment of the January rent. On January 29, 2014, Waxman gave Iron Cowboy a notice to leave the premises for nonpayment of rent. When Iron Cowboy did not respond, Waxman went to the property and determined that Iron Cowboy had indeed vacated the premises. Waxman removed Iron Cowboy's remaining belongings and changed the locks.

{¶9} According to the lease agreement, if Waxman obtained possession of the property, they were required to use reasonable efforts to find a new tenant, whose rent will be applied to the previous tenant's default, any necessary repairs, and attorney fees. Any amount that is not covered by the new tenant's rent, must be paid by the previous defaulting tenant. On March 18, 2014, Waxman entered into a new lease agreement with another company to lease the space previously occupied by Iron Cowboy. In lieu of paying rent, the company agreed to perform repairs on Waxman's property to make it suitable for them to take possession by June 1, 2014.

{¶10} As a result of Iron Cowboy's default, Waxman initiated a legal action against Iron Cowboy seeking damages under the lease. In response, Iron Cowboy filed a counterclaim for breach of contract and requested damages. The court conducted a bench trial and ruled in favor of Waxman. Iron Cowboy filed this timely appeal.

III. Law and Analysis

A. Summary Judgment

{¶11} "An appellate court reviews an appeal of the granting of summary judgment under a de novo standard of review." *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶ 8 (8th Dist.). "Accordingly, it affords no deference to the trial court's decision and independently reviews the record to determine whether summary judgment is appropriate." *Id.* "Additionally, an appellate court recognizes that for purposes of deciding a motion for summary judgment, it is not the duty of the appellate court, or the trial court, to weigh the evidence or to resolve issues of credibility." *Id.*

> Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party.

Briggs v. Castle, L.L.C., 8th Dist. Cuyahoga No. 103795, 2016-Ohio-1548, ¶ 10 citing *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-957, 991 N.E.2d 232, ¶ 7.

{¶12} In their first assignment of error, Iron Cowboy argues that the court erred by granting partial summary judgment to the appellee.

A party moving for summary judgment on the ground that the nonmoving

> party cannot prove its case bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The moving party must specifically point to evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates the nonmoving party has no evidence to support its claims. Once the moving party has met its initial burden, the nonmoving party must produce competent evidence establishing the existence of a genuine issue for trial. The nonmoving party may not rest on the mere allegations of the pleading, but must set forth specific facts, by affidavit or otherwise, demonstrating that there is a genuine triable issue. When determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions.

Pappas at ¶ 36 - 37.

{¶13} Iron Cowboy and Waxman are in dispute about which contract governs their agreement. Iron Cowboy contends that Waxman agreed, as a part of their contract, to provide a handicap access ramp on the leased property. However, the contract that Iron Cowboy submitted that contained the handwritten annotation regarding said ramp was only initialed by Iron Cowboy's representative, not by Waxman's representative. In the past, when there was an amendment or annotation to Iron Cowboy and Waxman's contract, both of their representatives would initial. Waxman's copy of the contract did not contain the handwritten notation, and they argued that Iron Cowboy added this after the parties signed the contract. "A contract cannot be unilaterally modified. In order to modify a contract, the parties to that contract must mutually consent to the modification." *Willis v. Avery Label Sys.*, 8th Dist. Cuyahoga No. 68617, 1996 Ohio App. LEXIS 1057 (Mar. 21, 1996).

{¶14} In addition, the lease agreement between the two parties included this

provision, "this lease shall not be modified except in writing signed by both Landlord and Tenant." Therefore, the trial court determined that the evidence presented a sufficient disagreement between the parties' position regarding which contract governed. The trial court correctly determined that the Waxman contract governed and therefore, did not err in granting partial summary judgment to Waxman. The appellant's first assignment of error is overruled.

B. Exclusion of Evidence

{¶15} "Absent an abuse of discretion, a reviewing court may not disturb a trial court's ruling on the exclusion of evidence." *State v. Graceffo*, 8th Dist. Cuyahoga No. 55553, 1989 Ohio App. LEXIS 3008 (July 27, 1989). "The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Albert v. UPS of Am., Inc.*, 8th Dist. Cuyahoga No. 103163, 2016-Ohio-1541, ¶ 14. "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *Id*.

{¶16} In their second assignment of error, Iron Cowboy argues that the trial court abused its discretion by excluding evidence concerning appellee's breach of its duty to construct a handicap access ramp. "The admission or exclusion of evidence rests within the sound discretion of the trial court." *Caruso v. Leneghan*, 8th Dist. Cuyahoga No. 99582, 2014-Ohio-1824, ¶ 15, citing *State v. Jacks*, 63 Ohio App.3d 200, 207, 578 N.E.2d 512 (8th Dist.1989). The appellant did not show that the trial court's ruling was

unreasonable, arbitrary, or unconscionable. The court ruled on this evidence in summary judgment. Waxman's contract governed, and Iron Cowboy could not unilaterally amend the lease agreement. The evidence that Iron Cowboy submitted to the court to show that Waxman agreed to build a handicap access ramp was the lease agreement initialed only by Iron Cowboy's representatives. Iron Cowboy did not offer any additional evidence to show that Waxman agreed to build the ramp. Therefore, the court was well within its discretion to exclude this evidence. The appellant's second assignment of error is overruled.

C. Attorney Fees

{¶17} "The awarding of attorney fees is within the sound discretion of a trial court." *Albert* at ¶ 14. "Thus, an award of attorney fees will only be disturbed upon a finding of an abuse of discretion." *Id.* "The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *Id.*

{¶18} In its third assignment of error, Iron Cowboy argues that the trial court abused its discretion by awarding attorney fees to the appellee.

> Generally, in Ohio each party to a lawsuit must pay his or her own attorney fees. Exceptions to this rule allow fee-shifting and taxing attorney fees as costs (1) if there has been a finding of bad faith; (2) if a statute expressly provides that the prevailing party may recover attorney fees; or (3) if the parties' contract provides for fee-shifting. Any attorney fees award must be fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case.

Hrynik v. Nicole Brayden Real Estate, 8th Dist. Cuyahoga No. 98036, 2012-Ohio-3822, ¶ 27.

{¶19} Both parties agreed, within the lease agreement, that if Iron Cowboy defaults under the lease, Iron Cowboy would be responsible for Waxman's attorney fees. Iron Cowboy argues that the attorney fees were unreasonable and excessive because they are almost twice that of Waxman's actual damages, excluding finance charges.

> Unless the amount of attorney fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to the trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court.

Bittner v. Tri-County Toyota, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991), quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 23 Ohio App.3d 85, 91, 491 N.E.2d 345 (12th Dist.1985). The trial court held a hearing and determined that the attorney fees were proper and not excessive. The appellant has not provided any evidence or an argument to the contrary. Therefore, appellant's third assignment of error is overruled.

D. Damages

{¶20} "On a challenge to the manifest weight of the evidence in a civil case, we neither weigh the evidence nor judge the credibility of the witnesses." *Hawkins v. Green*, 8th Dist. Cuyahoga No. 96205, 2011-Ohio-5175, ¶ 9. "Our duty is to determine whether there exists competent and credible evidence in the record upon which the fact-finder could base its decision." *Id.* "Judgments supported by some competent,

credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Id.*

{¶21} "To prove a breach of contract claim a plaintiff must demonstrate by a preponderance of the evidence that: (1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendant failed to fulfill his obligations, and (4) damages resulted from this failure." *Id.* at ¶ 10. "As a general rule, the measure of damages in a contract action is the sum necessary to place the non-breaching party in as good a position as he would have been had the contract been fully performed." *Id*. "A plaintiff can only be compensated for damages for breach of contract for an amount that is established by the evidence with reasonable certainty." *Id*.

{¶22} In their fourth assignment of error, Iron Cowboy argues that the trial court erred as a matter of law by awarding Waxman damages when Waxman failed to prove the amount of damages by a preponderance of the evidence and failed to mitigate its damages.

> Where a "breaching tenant caused harm such that the lessor's profitability is affected, then that harm is compensable to the extent it is proved." Further, "the damage award should put the injured party in as good a position had the contract not been breached at the least cost to the defaulting party." "A lessor has a duty to mitigate damages caused by a lessee's breach of a commercial lease." This "duty to mitigate arises in all commercial leases of real property." A lessor's efforts to mitigate "must be reasonable, and the reasonableness should be determined by the trial court."

Telecom Acquisition Corp. I v. Lucic Ent., 8th Dist. Cuyahoga No. 102119, 2016-Ohio-1466, ¶ 68.

{¶23} The trial court awarded Waxman $4,547.80 in compensatory damages and $4,640 in finance charges. The compensatory damages include the rent not paid from January 2014 to May 2014, the fee to change the locks, air conditioner, heat check, and garbage removal. Iron Cowboy argues that Waxman did not put forth a good faith effort to mitigate its damages because they allowed a new tenant to occupy the premises in April and May of 2014 without paying rent. However, Waxman's lease agreement with the new tenant began June 2014. The new tenant was allowed access to the property to make necessary repairs. We find that the trial court did not err in determining Waxman did make a good faith effort to mitigate their damages, and that the awarding of compensatory damages, and finance charges was proper. Iron Cowboy's fourth assignment of error is overruled.

{¶24} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellant Procedure.

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ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR