IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 6, 2008 Session

WS INVESTMENT HOLDINGS, LP ET AL. v. DAVID E. DANNER, P.C.

Appeal from the Circuit Court for Davidson County
No. 06C1962 J.S. Daniel, Judge

No. M2007-00847-COA-R3-CV - Filed September 10, 2008

Tenant appeals the judgment of the Circuit Court for Davidson County in an unlawful detainer action on appeal from General Sessions Court awarding Landlord back rent, possession of the premises, and attorney's fees. Tenant challenges the denial of its motion to amend the pleadings and subsequent motion for new trial, the finding that the lease agreement was unambiguous, and the denial of its motion to strike allegedly defamatory parts of the record. Finding the lease unambiguous and no abuse of discretion by the trial court in denying Tenant's motions, we affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

David E. Danner, Antioch, Tennessee, Pro Se.

Claire Marie Goodman and Robert A. Guy, Jr., Nashville, Tennessee, for the appellee, WS Investments.

OPINION

David E. Danner is a licensed attorney in Tennessee. On January 5, 2004, David E. Danner, P.C. ("Danner, P.C." or "Tenant") entered into a lease agreement with WS Investment Holdings, L.P. and Square Investment Holdings, L.P. (collectively "WS Investments" or "Landlord") to lease commercial office space in Nashville. The space was defined in the lease as "approximately 1,300 rentable square feet designated as Suite 416 (the 'Leased Premises') in the building known as Washington Square located at 222 Second Avenue North, Nashville, Tennessee." The initial lease was for a 12-month term and provided a monthly base rent calculated at $15.96 per rentable square foot. On December 31, 2004, the parties agreed to extend the lease an additional twenty-four months at an increased rate of $16.00 per rentable square foot. In addition to the base rent, the lease required Tenant to pay its pro rata share of operating expenses, which included costs for building and land maintenance, HVAC, janitorial services, and management fees, among other expenses.

Danner, P.C. defaulted on the rental payments. During the first year of the lease, Tenant was late paying rent for four months; thereafter, Tenant made inconsistent payments, missing months at a time, and stopped paying rent altogether in April 2006. After giving notice of default and opportunities to cure, WS Investments filed a complaint for unlawful detainer against Mr. Danner on February 3, 2006, in general sessions court. The complaint was later amended to add Danner, P.C. as a defendant. Trial was held on July 14, 2006, and the court entered judgment against Danner, P.C. awarding Landlord possession of the premises and damages in the amount of $15,676.88. The claims against Mr. Danner individually were dismissed because the court found Mr. Danner was not a party to the lease. Tenant appealed the judgment to the Circuit Court for Davidson County pursuant to Tenn. Code Ann. § 29-18-128 and a trial was held de novo on February 28, 2007.[1]

On the morning of trial in circuit court, there was a change in the courtroom assignments. As a result, Mr. Danner appeared in court just after the circuit judge[2] called the case. Counsel of record for Danner, P.C. then moved to withdraw from the case having been terminated on February 12, 2006. Mr. Danner proceeded to represent Danner, P.C. and moved to file an amended answer and counter-complaint.[3] The motion was denied. During the trial, Tenant admitted its default and breach of the lease agreement. The only issue remaining concerned damages as Tenant disputed the size of the space and the manner in which rent was calculated under the lease. Tenant argued the contract was vague and ambiguous because the term "rentable" was not defined in the lease and objected to the admission of expert testimony as to its meaning. The court found in favor of WS Investments and entered judgment against Danner, P.C. in the amount of $24,368.05 for past due rent and attorney's fees.[4]

Tenant filed a motion for new trial based on the court's denial of its motion to amend the answer and counter-complaint at trial. Tenant also filed an objection to Landlord's proposed order drafted at the request of the trial court. Landlord filed a response opposing Tenant's motion for new trial on March 9, 2007, and a reply supporting its proposed order of judgment. On March 19, 2007, Mr. Danner filed a motion to strike from the record particular written statements in WS Investments'

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[1]The notice of appeal to circuit court was signed by "David E. Danner." WS Investments argued that Mr. Danner was not the proper party to appeal since he was dismissed from the action in general sessions court. After arguments from counsel, the circuit court found Danner, P.C. was the intended party to the appeal and proceeded to trial against Danner, P.C. WS Investments' argument that this court now lacks jurisdiction is without merit. We find no error in the circuit court's finding that Mr. Danner was signing for Danner, P.C., the only remaining defendant.

[2]Senior Judge J.S. Daniel was assigned to the case by order of the Supreme Court of Tennessee on November 30, 2006, after Judge Walter C. Kurtz recused himself September 21, 2006.

[3]The proposed counter-complaint alleged violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Tennessee Consumer Protection Act (TCPA) and fraud, in addition to the counterclaims of breach of contract and covenant of good faith, abuse of process, negligent misrepresentation, unjust enrichment, promissory estoppel, reliance alleged in the general sessions court. The proposed amendment also restated the affirmative defenses of fraud/illegality, estoppel, payment, and release/waiver asserted in general sessions court.

[4]Danner, P.C. relinquished possession of the premises in August 2006.

filed responses. A hearing was held on April 10, 2007, to address all pending post-trial motions. The trial court denied Tenant's motions and this appeal followed.

CONTRACT CONSTRUCTION

We first address Tenant's challenge to the court's finding that the lease agreement was unambiguous on its face. Our review is de novo upon the record with a presumption of correctness as to the trial court's factual findings unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). However, the trial court's conclusions of law are accorded no such presumption. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). A written lease agreement must be interpreted according to customary rules of contract construction. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006). The construction of a contract is a matter of law and, therefore, is afforded no presumption of correctness on appeal. *Id.*; *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006). If a contract is found to be unambiguous, then it is the court's duty to determine the intention of the parties as expressed in the body of the contract, regardless of their unexpressed intentions. *Planters Gin Co. v. Fed. Compress Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002); *Nat'l Garage Co. v. George H. McFadden & Bro., Inc.*, 542 S.W.2d 371, 373 (Tenn. Ct. App. 1975). If the language of the agreement is clear and unambiguous, its literal meaning will control. *Planters Gin Co.*, 78 S.W.3d at 890.

The proof showed that "rentable square feet" is different from what Mr. Danner calls "usable square feet" and is calculated by apportioning a share of the common areas to a tenant based on the tenant's pro rata share of rented space in the building. Cindy Sorci, a licensed design professional in the State of Tennessee and expert witness, explained the industry calculation methods and her measurement results for the space leased to Danner, P.C. To determine the rentable square feet, the usable square feet of the commercial office space is multiplied by a market load factor, in this case 1.13 or 13 percent. Ms. Sorci testified that the national standard for measuring floor area in office buildings is the Building Ownership and Management Association (BOMA) standard. Using the BOMA standard, Ms. Sorci determined that the usable square feet of the space at issue was 1,153 and the rentable square feet was 1,303.[5]

Mr. Danner argues that the contract should be construed as vague because the terms "rentable" and "load factor" are not defined in the lease and the BOMA standard is not referenced in the lease. The lease agreement clearly and unambiguously states that "Tenant hereby leases from Landlord approximately 1,300 rentable square feet[.]" Danner, P.C. paid approximately $1,730 rent per month and $32.50 in operating expenses per month in the first year. As previously noted, the lease required Tenant to pay for operating expenses which were defined in detail. As defined, the operating expenses are clearly separate and apart from the base rent charge and cannot be construed

[5] In its brief, Danner, P.C. asserts that the trial court erroneously "permitted the [Landlord's] expert testimony to provide the court's ruling and reasoning that 'rentable' was not a vague term because such construction is a matter of law for the court." Danner, P.C. made no objection to Ms. Sorci's qualification as an expert witness at trial. Her testimony, opinion or otherwise, was evidence properly before the court for its consideration. *See* Tenn. R. Evid. 103(1) and 702.

as anything other than a charge for Tenant's pro rata share of expenses. Tenant made no objection to the way rent was calculated or the amount owed until the litigation of this matter. In fact, Danner, P.C. renewed its lease agreement after the first year for an additional two years at an increased rate per rentable square foot. While Tenant may not be familiar with industry standards and terminology used in commercial real estate or how "rentable square feet" is calculated, it expressly agreed to lease "approximately 1,300 rentable square feet" and received "approximately 1,300 rentable square feet." Mr. Danner's subjective intent, that he never intended "to agree to pay for square footage that [he] did not actually have as usable square footage," cannot be considered since it is not expressed in the terms of the lease agreement. *See Planters Gin Co.*, 78 S.W.3d at 890; *McFadden*, 542 S.W.2d at 373 . We find no ambiguity in the lease and, therefore, affirm the judgment of the trial court.

MOTION FOR NEW TRIAL AND MOTION TO AMEND

Mr. Danner's motion for new trial was primarily based on the denial of his oral motion to amend the pleadings the day of trial. Mr. Danner sought to amend his answer and counter-complaint asserting new claims against WS Investments, including RICO and TCPA violations. The Tennessee Rules of Civil Procedure provide:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within fifteen (15) days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires.

Tenn. R. Civ. P. 15.01 (2007). The Tennessee Rules of Civil Procedure "'put forth a liberal policy of permitting amendments in order to ensure determination of claims on their merits. . . .'" *Hawkins v. Hart*, 86 S.W.3d 522, 532 (Tenn. Ct. App. 2001) (quoting *Henderson v. Bush Bros. & Co.*, 868 S.W.2d 236, 237 (Tenn. 1993)). The denial of a motion to amend the pleadings at or during trial is within the sound discretion of the trial court and will not be disturbed on appeal absent showing an abuse of discretion. *Id.* Likewise, whether to grant or deny a motion for new trial is within the court's discretion and is accorded great deference on appeal. *Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004); *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

In ruling on a motion to amend a complaint, a trial court should consider several factors including: "1) undue delay in filing, 2) lack of notice to the opposing party, 3) bad faith by the moving party, 4) repeated failure to cure deficiencies by previous amendments, 5) undue prejudice to the opposing party, and 6) futility of amendment." *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 42 (Tenn. Ct. App. 2006) (citing *Hall v. Shelby County Ret. Bd.*, 922 S.W.2d 543, 546 (Tenn. Ct. App. 1995)).

The following exchange occurred after Mr. Danner assumed representation and before the proof was presented at trial:

MR. DANNER: I am prepared to move forward today if I have an opportunity to file an answer and a counterclaim.

THE COURT: It's too late for that.

MR. DANNER: Well, your Honor, when prior counsel was on the case, I couldn't have filed this for the record. Therefore, I'm asking your Honor for a leave to file an answer and a counterclaim based on the complaint that was recently filed. There was a complaint that was filed by WS Investment Holdings, LLP and Square Investment Holdings, LP this month. And [former counsel] was still on the case. Therefore –

THE COURT: This month?

MR. DANNER: This month. Therefore, I'm asking that the Court review what's present here.

. . . .

MR. DANNER: Tennessee law requires [Landlord] to file a new complaint as far as the General Sessions complaint is being appealed. Therefore, that complaint was filed this month. And in addition to the fact that [Landlord] is raising an issue of individual liability, and my answer and countercomplaint addresses those issues. I would like to have an opportunity to file the answer and the countercomplaint, and just the prior statement I made about my counsel or the corporate counsel just being released in the case.

THE COURT: I overrule your request. It's untimely.

. . . .

MR. DANNER: Okay. If your Honor please, under our Tennessee Rules of Civil Procedure 6.02, your Honor has the authority to extend the time.

THE COURT: I do, but I'm not exercising that authority. I've overruled your request.

As Mr. Danner referenced, WS Investments filed an amended complaint in circuit court three weeks before trial. The complaint raised Landlord's jurisdictional challenge regarding the proper party to the appeal and noted that the damage limitations of the general sessions court no longer applied. No new claims or facts were alleged; the amended complaint functioned solely as notice. Mr. Danner's amendment, on the other hand, sought to add a new civil RICO claim, a new claim under the TCPA, and a new claim of fraud. The basis for each of these claims was Landlord's alleged unfair practice of overcharging tenants by calculating rent based on rentable square feet instead of actual square feet. Because we have determined the lease unambiguously charged for "rentable square feet" and that Tenant received the benefit of his bargain, the amendment(s) sought would be futile. Furthermore, the case had been in litigation more than a year at the time Danner moved to amend, and WS Investments had no prior notice of Mr. Danner's proposed amendment

or the additional claims asserted against it. The liberality of Rule 15.01 must be balanced with any undue prejudice, surprise, or delay such amendment would cause the other party. To permit the amendment would have required a continuance to allow Landlord a fair opportunity to prepare its defense.

Danner, P.C. contends Tenn. Code Ann. § 16-15-729 mandates that the trial court permit its amendment:

> No civil case, originating in a general sessions court and carried to a higher court, shall be dismissed by such court for any informality whatever, but shall be tried on its merits; and the court shall allow all amendments in the form of action, the parties thereto, or the statement of the cause of action, necessary to reach the merits, upon such terms as may be deemed just and proper. The trial shall be de novo, including damages.

Danner, P.C.'s reliance on Tenn. Code Ann. § 16-15-729 is misplaced. The statute makes provisions for the de novo trial of cases appealed from general sessions court. In such circumstances, the Rules of Civil Procedure apply, but it is well-settled that parties are not required to file new pleadings, issue new process, or retake any other steps which have been completed prior to the appeal to circuit court. *Ware v. Meharry Med. Coll.*, 898 S.W.2d 181, 185 (Tenn. 1995); *Vinson v. Mills*, 530 S.W.2d 761, 765 (Tenn. 1975). The statute instructs that "the court shall allow all amendments . . . *necessary to reach the merits*, upon such terms as may be *deemed just and proper*." Tenn. Code Ann. § 16-15-729 (emphasis added). Pursuant to the statute, the circuit court is still vested with the discretion either to grant or deny the request to amend as it finds necessary, just, and proper.

Danner, P.C. relies on *Henderson v. Bush Bros. & Co.,* 868 S.W.2d 236, 237 (Tenn. 1993), to support its claim that the circuit court offended the policy behind Rule 15.01 and abused its discretion by denying its motion to amend. In *Henderson*, the trial court granted summary judgment without first considering the plaintiff's motion to amend, which was filed before the motion for summary judgment. *Henderson*, 868 S.W.2d at 237. In reversing summary judgment, the Special Workers' Compensation Appeals Panel of the Supreme Court of Tennessee noted that the trial judge's statement that "the motion to amend comes too late" was not a reasoned explanation for the ruling or proof that the motion was fully considered. *Id*. at 238. If, however, justifiable reasons for dismissing a motion to amend are readily apparent, then the action is not an abuse of discretion and will be sustained. *Id.*; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

Henderson may be distinguished from the instant action because, in *Henderson*, the motion to amend was pending before the defendant moved for summary judgment, and the court failed to consider the motion to amend at all. Here, the amendment was offered just as the trial was beginning. Tenant made its argument in support of allowing the amendment, and the court denied the request. Following the trial, the court heard further arguments on the motion to amend on April 10, 2007. The transcript from this hearing contains over 20 pages of argument from the parties on the amendment issue. Judge Daniel then gave the following explanation of his ruling:

> In my opinion, the Rules of Civil Procedure, Rule 15, give the trial judge discretion on allowing amendments. . . .With the procedural history, it is obvious that for a long period of time, all parties were knowledgeable of the respective claims. And to assert an amended complaint or counter-complaint on the day of trial, as I said, came too late as it gave rise to the other party not being prepared to address new issues. Now, I may not have said all that language on the day, but that's what I meant by "the claims came too late."

Although both courts used the same language in describing the motion as "too late," it is clear from the trial transcript and the transcript of the April hearing that the trial court in this case fully considered the request to amend and determined it would cause undue delay. The liberal amendment policy behind Rule 15.01 was not offended in this instance. Based on the foregoing, we conclude that the court was well within its discretion to deny the motion. The judgment of the trial court denying Tenant's motion to amend is affirmed and, therefore, we affirm the denial of Tenant's motion for new trial.

MOTION TO STRIKE

Lastly, Danner, P.C. appeals the denial of its motion to strike a number of sentences appearing in two of WS Investments' responsive filings pursuant to Tennessee Rule of Civil Procedure 12.06 which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Tenn. R. Civ. P. 12.06 (2007). As with motions for new trial or motions to amend, the decision to grant or deny a motion to strike is within the trial court's discretion. *Conley v. Life Care Ctrs. of America, Inc.*, 236 S.W.3d 713, 731 (Tenn. Ct. App. 2007). Such discretionary decisions will not be overturned on appeal absent a showing by the party challenging the decision that the trial court abused its discretion. *Id.; Hawkins*, 86 S.W.3d at 532.

The following allegedly defamatory statements appear in WS Investments' response in opposition to Tenant's motion for new trial and response in support of its proposed judgment:

> 1. "On the day of the appeal in Circuit Court, Tenant showed up late to court. . . ."
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> 2. "Tenant also dragged out proceedings regarding the withdrawal of its counsel."
>
> 3. "Tenant waited until a few weeks before trial to formalize its request that counsel withdraw and to get notice of withdrawal filed, and then waited until the day of trial

to have counsel submit an order allowing withdrawal. These were just further attempts at delay."

4. "Tenant's proposed alternative order is inappropriate for numerous reasons. Among other things, Tenant has omitted language that "execution shall issue," for obvious purposes – Tenant hopes the order will be defective and delay execution, which would require Landlord to file a Rule 59 or 60 motion to correct the order, taking additional time."

Tenant contends the statements are defamatory attacks on Mr. Danner's character and cannot be supported by the record. Landlord submits the statements are simply part of the argument advocating the Landlord's position against Tenant's motions and explaining the circumstances of the case. The trial court found that the statements were arguments reasonably construed from and supported by the record. We agree.

There is proof in the record that Mr. Danner appeared in court after the case was called, that there was a planned change of counsel weeks before the formal request was made, and that Mr. Danner's proposed order did not include the words "execution shall issue." While the record suggests various circumstances could have contributed to the delays, we cannot conclude the above arguments were made in bad faith or for an improper purpose as there is support in the record upon which Landlord's advocates could reasonably base the arguments. In reaching the same conclusion, the trial court did not abuse its discretion in denying Tenant's motion to strike.[6]

ATTORNEY'S FEES AND DAMAGES FOR FRIVOLOUS APPEAL

Lastly, WS Investments requests attorney's fees and expenses incurred on appeal and in defense of the lease. Paragraphs 25(B)(4)-(5) and 25(C) of the lease agreement provide Landlord the remedy of attorney's fees and costs incurred as a result of Tenant's default and termination of the lease. According to the express provisions of the agreement, we find WS Investments entitled to attorney's fees and costs.

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[6] We take seriously Mr. Danner's contention that there is "actual institutional bias" against him in the courts of our State. In *Hunt v. Claybrooks*, Mr. Danner represented the plaintiff and accused opposing counsel of "fraud, misrepresentation, or other misconduct" in a written motion to set aside an order of dismissal. *Hunt v. Claybrooks*, No.M1999-01582-COA-R3-CV, 2000 WL 1586459, *1 (Tenn. Ct. App. Oct. 25, 2000). The *Hunt* court found there was nothing in the record to substantiate such serious charges, ordered the words be stricken from the record, and imposed Rule 11 sanctions against Mr. Danner. *Id.* at *2. As this court stated, "Rule 11.03(1)(b) gives the Court wide latitude and discretion to sanction specific conduct on 'its own initiative' when it appears that the conduct violates Rule 11.02. Appellate courts review the imposition of Rule 11 sanctions under the 'deferential abuse of discretion standard.'" *Id.* at *3. Trial courts are given sole discretion to impose sanctions as the circumstances and conduct in each case require, unless injustice or injury has occurred. *Id.* In our opinion, the accusations in *Hunt* differ greatly in severity from the arguments made by opposing counsel in this case and, therefore, justify a different disposition, best left to the sound discretion of the trial court.

WS Investments also seeks damages for frivolous appeal. "When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may. . . award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal." Tenn. Code Ann. § 27-1-122. An appeal is considered frivolous when it has no reasonable chance of success and is so devoid of merit that imposing a penalty is justified. *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006). Mr. Danner did not present a very strong case on appeal, but we are not willing to label his appeal as frivolous.

CONCLUSION

Finding that the relevant provisions of the lease agreement are unambiguous and that the trial court properly exercised its discretion to deny Tenant's motion to amend, motion to strike, and motion for new trial, we affirm the judgment of the trial court in all respects. The case is remanded to the trial court for determination of attorney's fees and costs as directed above. We find the other arguments not specifically addressed in the foregoing analysis to be without merit. Costs of appeal are assessed against Appellant David E. Danner, P.C., for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE