STATE OF MICHIGAN

COURT OF APPEALS

LPR ASSOCIATES,

Plaintiff/Counter-Defendant/Appellee,

v

HALAH ABDELNOUR, NABEEH M. BESHARA, HILDA N. BESHARA, and ATRIUM CAFE AND SUNDRIES,

Defendants/Counter–Plaintiffs/Appellants.

UNPUBLISHED
June 7, 1996

No. 176899
LC No. 92-225707 CK

LPR ASSOCIATES,

Plaintiff/Counter-Defendant/Appellant,

v

HALAH ABDELNOUR, NABEEH M. BESHARA, HILDA N. BESHARA, d/b/a ATRIUM CAFE AND SUNDRIES,

Defendants/Counter–Plaintiffs/Appellees.

No. 178684
LC No. 92-225707 CK

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

PER CURIAM.

In Docket No. 176899, defendants appeal as of right the trial court's June 17, 1994, order granting summary disposition to plaintiff in this landlord/tenant dispute. In Docket No. 178684, plaintiff appeals the court's grant of attorney fees to plaintiff, claiming that the amount awarded by the court was not high enough. We affirm in part and reverse in part.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants' first argues that plaintiff's refusal to allow subletting of the premises was unreasonable and therefore a breach of contract. We disagree. While the contract clearly states that plaintiff would not unreasonably withhold consent to sublet, defendants were in material breach of the lease for failure to pay rent and leasehold improvements at the time the request for sublease was made in July, 1991. Although the judgment of eviction establishing the breach was not entered until March of 1992, evidence clearly indicates that defendants breached the lease in December 1990. One who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). This rule refers to the first breach as the point after which a party cannot expect performance from the non-breaching party - not the adjudication which conclusively determines whether the other party is entitled to damages or other relief for the breach. Therefore, there was no jury question regarding the reasonableness of plaintiff's refusal to consent to the sublease.

We also reject defendants' argument that plaintiff was required to consent to the sublet in order to mitigate damages. While a plaintiff must generally make an effort to minimize damages, *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990), it is only required that reasonable measures be taken. *Clapham v Yanga*, 102 Mich App 47, 59; 300 NW2d 727 (1980). No evidence was presented that agreeing to the sublease would be a viable alternative to plaintiff's using the eviction action as incentive for defendants to pay the defaulted amount. Accordingly, we find that plaintiff was under no duty to consent to the sublet and defendant failed to present any evidence on mitigating damages. Accordingly, summary disposition was appropriate.

Similarly, we find that plaintiff had no duty to enforce the exclusivity clause for vending machines throughout the office building following defendants' breach. While the contract clearly prohibited the sale of food, gifts and sundries in vending machines by tenants other than defendants, no evidence was presented to indicate that any breach of this clause occurred before July of 1991, when defendants were already in material breach of the lease.

Next, defendants argue that there was a genuine issue of material fact regarding the actual occupancy levels of the office building on January 1, 1991 and July 1, 1991, dates on which plaintiff claimed occupancy had reached 66% and 80% respectively, thus triggering rent increases to defendants. However, while defendants' evidence suggested discrepancies in the actual occupancy level on certain dates, no evidence was presented to rebut plaintiff's proof that occupancy of the building had surpassed 66% on January 1, 1991, and 80% on July 1, 1991. Defendants' argument that a genuine issue of material fact existed because certain tenants vacated the premises in early 1992, and dropped occupancy below 80%, is without merit. Nothing in the lease suggests that rent would be based on actual occupancy of the building. The lease only defined the circumstances under which defendants would become responsible for increasing proportions of the base rental amount. Thus, we find that while there may have been a fact issue regarding the exact occupancy level, there was no genuine issue of material fact regarding whether the levels had reached 66% on January 1, 1991, and 80% on July 1, 1991, and summary disposition pursuant to MCR 2.116(C)(10) was proper.

In its cross appeal, plaintiff argues it is entitled to appellate attorney fees based on a provision of the lease. We agree. A contractual provision for reasonable attorney fees in enforcing provisions of a contract may validly include allowance for services rendered upon appeal. *Central Transport Inc v Fruehauf Corp*, 139 Mich App 536, 549; 362 NW2d 823 (1984). Thus, the lower court's refusal to award appellate attorney fees was error. However, plaintiff is not entitled, based on this contractual provision, to an order entitling it to future attorney fees and costs associated with collection of judgment amounts if defendants fail to pay in a timely manner. First, it is unknown whether or not defendants will be untimely in paying on the judgment, and an order entitling plaintiff to costs and fees would be premature. Second, plaintiff's rights to remedies against the defendants with respect to any part of the transaction are merged into the valid final judgment. 1 Restatement of Judgments 2d, § 24(1), 196. Thus, once a judgment is entered on the claim, the contractual provision is not in effect. The proper relief for plaintiff in collecting a judgment from defendants, if necessary, is to institute a new action.

Affirmed in part and reversed in part. Remanded for a determination of the reasonable amount of attorney fees due plaintiff. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant