STATE OF MICHIGAN

COURT OF APPEALS

HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA,

Plaintiff/Counter-Defendant/Appellant,

v

HEATHER HILLS LIMITED PARTNERSHIP,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
July 11, 1997

No. 152603
Kent Circuit Court
LC No. 89-063241-CK

Before: Sawyer, P.J., and Neff and A. L. Garbrecht*, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of the circuit court in favor of defendant. We affirm.

This dispute arises out of a lease agreement between plaintiff as lessee of Sherbrooke Nursing Home and defendant, the lessor. Specifically at issue was whether Sherbrooke's laundry related services were to be provided at defendant's expense. Defendant paid laundry expenses for the first four years of the lease, until April 1989, and thereafter refused to pay those expenses. Plaintiff filed this action, seeking a declaration that defendant was in breach of the lease and damages for the laundry expenses defendant refused to pay. Defendant counterclaimed, seeking reimbursement for approximately $170,000 in laundry expenses that it claims it mistakenly paid. Following a three-day bench trial, the trial court ruled in favor of defendant.

We will first collectively consider plaintiff's first two issues on appeal, namely whether the trial court erred in finding that defendant's payment of laundry expenses for the first four years constituted a mistake of fact recoverable in equity. Plaintiff argues that defendant made the payments with full knowledge of the facts and, therefore, any mistake is a mistake of law regarding the interpretation of the contract and is not recoverable. We disagree.

In equity cases, we review the record de novo, giving due deference to the findings of the trial court. *Kern v City of Flint*, 125 Mich App 24, 27; 335 NW2d 708 (1983). Furthermore, a payment made by mistake of material fact is regarded as involuntary and can be recovered under some

circumstances. *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951). We are satisfied that the facts support the trial court's conclusion.

It is not disputed that defendant paid the laundry expenses for four years. Rather, defendant claims that the payments were made by mistake of fact regarding the requirements of the lease. The uncontroverted testimony of the lease negotiators is that the laundry expenses were not intended to be included in the lease provision that provides that defendant would pay for housekeeping, maid service and outdoor maintenance at Sherbrooke. However, defendant argues, none of the on-site employees were aware that defendant was not obligated to pay for the laundry expenses and, therefore, the payments were made by mutual mistake of fact.[1]

The trial court is in a superior position than us to consider the evidence and gauge the credibility of the witnesses. The trial court did so and issued an extensive written opinion detailing its conclusions. While the trial court may not have been compelled to reach the conclusion it did, the evidence certainly justified its conclusion. More to the point, the evidence does not persuade us to disagree with the trial court and reach a different conclusion. Accordingly, we agree with the trial court's conclusion that this represents a mutual mistake of fact and defendant is entitled to recover the amounts mistakenly paid.

Plaintiff also argues that, even if the payment was made by mistake and would otherwise be recoverable, recovery is not appropriate here because plaintiff detrimentally relied on the payments. We disagree. There is an exception to the rule that payments made by mistake are recoverable, namely where the payee has detrimentally relied on the payment and it would be inequitable to permit recovery. *Kern*, *supra* at 28. The trial court rejected plaintiff's arguments, noting that plaintiff had not presented any evidence that it had relied on the payments to the extent that fundamental fairness precluded reimbursement and that plaintiff was also responsible for the mistake because it had erroneously invoiced defendant for the laundry expenses.

After careful consideration of the evidence, we are not persuaded that the trial court erred in finding that plaintiff had not detrimentally relied on the payments. Accordingly, recovery of the payments is not barred.

Plaintiff next argues that the trial court incorrectly concluded that the anti-waiver provision of the lease was ambiguous and, therefore, incorrectly admitted parol evidence regarding the interpretation of that provision. The lease contains a clause which provides that the failure to insist upon strict performance of any term in the lease does not constitute a waiver for the future enforcement of that term. We need not decide if the trial court erred in finding the provision to be ambiguous and considering parol evidence because we do not believe the provision can be read to support plaintiff's position. That is, even if unambiguous, the provision does not stand for the proposition that defendant is barred from recovery of past payment because the provision limits defendant to only insisting upon strict performance in the future. The clause contains no such limitation.

Next, plaintiff argues that the trial court erred in its declaration that plaintiff is only entitled to future payments for reimbursements totaling $61,115.76 per year. Plaintiff argues that the

reimbursements should be $75,000 annually. We disagree. The lease provides that the expense reimbursements for the sixth through tenth years of the lease would not exceed the amount expended during the fifth year of the lease.

Plaintiff presents two arguments on this issue. First, plaintiff argues that defendant artificially lowered the expenses paid during the fifth year. The trial court rejected this argument for lack of evidentiary support, as do we. Second, plaintiff argues that the intent of the parties was that defendant would incur expenses at Sherbrooke starting at $75,000 and increasing to $100,000 over the life of the lease. The trial court rejected this argument because it would require the court to rewrite the lease. The trial court acknowledged that it was envisioned that the expenses paid by defendant would reach at least $75,000, which was required in order for defendant to reap the desired tax advantage. However, the trial court concluded, the parties understood that the payment could fall below the desired $75,000 threshold. The trial court held that there was no justification for a construction of the contract which departs from the express terms of the contract. We agree.

Finally, plaintiff argues that the trial court applied the incorrect post-judgment interest rate. Plaintiff, however, has not properly presented this issue for appellate review. First, the argument presented on appeal is not the same argument that was presented in the trial court. Plaintiff argued in the trial court that the lease was not an "instrument" within the meaning of the statute and, therefore, the post-judgment interest rate applicable to a judgment on a written instrument does not apply. Rather, plaintiff argued, the rate applicable to civil actions applies. However, on appeal, plaintiff makes a different argument: that the rate applicable to written instruments does not apply in this case because this is an equitable action. We will not consider an argument raised for the first time on appeal. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). Furthermore, plaintiff has also abandoned this issue by failing to present any authority in support of its argument. *Terzano v Wayne Co*, 216 Mich App 522, 533; 549 NW2d 606 (1996).

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Allen L. Garbrecht

[1] While it may have been known at the corporate headquarters that the lease did not require payment for laundry expenses, payments made by mistake are still recoverable even if the mistake is due to lack of investigation. *Kern*, *supra* at 28.