Court of Appeals, State of Michigan

ORDER

55 28th Street LLC v Hector Lopez-Huerta

Docket No. 314950

LC No. 12-003780-CK

William B. Murphy, C.J.
Presiding Judge

Peter D. O'Connell

Kirsten Frank Kelly
Judges

On the Court's own motion, the damage award is VACATED, and the case is REMANDED to the trial court for an evidentiary hearing and decision on the sole issue of the amount of damages that should be awarded to plaintiff-appellee, MCR 2.603(B)(3)(b)(ii), without prejudice as to the issues raised by the dissent.

The trial court shall hear and decide the matter within 35 days after the Clerk's certification of this order. The trial court shall make findings of fact and a determination on the record and submit them to the Clerk of this Court no later than 14 days from the date of the evidentiary hearing.

This Court retains jurisdiction.

Murphy, C.J., dissenting. I respectfully dissent with respect to the majority's order vacating the award of damages and remanding the case to the trial court for an evidentiary hearing on damages. Defendant appeals as of right a default judgment entered by the trial court in favor of plaintiff in the amount of $131,126. Defendant, as tenant, entered into a three-year commercial lease with plaintiff, as landlord, with respect to space located in a retail center that defendant used to operate a restaurant. Defendant vacated the premises after only eight months of the lease period had elapsed, owing some rent for the final month of occupancy and, for the most part, never paying any rent for the period following abandonment of the premises. The lease agreement contained an acceleration clause pursuant to which all rent owed for the entire lease period immediately becomes due and payable upon a default of the lease and plaintiff's termination of the lease due to the default. Plaintiff filed suit for breach of contract, and a default was later entered by the court clerk when defendant failed to timely answer the complaint. The trial court denied defendant's motion to set aside the default. Subsequently, the trial court entered the default judgment, denying defendant's request for an evidentiary hearing on damages and, more particularly, on the question of mitigation of damages. On appeal, defendant does not challenge the trial court's rejection of the motion to set aside the default; rather, he argues that the trial court erred in refusing to conduct an evidentiary hearing on damages. The thrust of defendant's appeal concerns the issue of mitigation of damages. Defendant argues that the trial court abused its discretion in denying his

request for an evidentiary hearing on the issue of damages, effectively sanctioning recovery of over two years of damages absent any determination of whether plaintiff took reasonable steps to mitigate its damages. Defendant maintains that a proper award of damages for purposes of plaintiff's breach of contract action must necessarily take into consideration the question whether plaintiff took reasonable steps to mitigate its damages. Defendant further contends that the acceleration clause was unenforceable, given that it was contrary to public policy, constituted an invalid liquidated damages provision, and considering that enforcement of the clause would be inequitable under Michigan law concerning acceleration clauses generally.[1]

I would reject defendant's mitigation argument in light of the procedural posture of this case and a preservation failure. MCR 2.111(F)(2) provides that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules *is waived*, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted." (Emphasis added.) With respect to affirmative defenses, and in order to avoid waiver of such defenses, they "must be raised in a party's first responsive pleading or by motion filed not later than this responsive pleading[,]" and "affirmative defenses are to be listed under a separate heading and must include the facts constituting such a defense." *Attorney Gen ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664-665; 741 NW2d 857 (2007), citing MCR 2.111(F)(2) and (3). "The burden is on the tenant to establish that the landlord failed to act reasonably to mitigate damages." *Jefferson Dev Co v Heritage Cleaners*, 109 Mich App 606, 611; 311 NW2d 426 (1981); see also *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994) ("[W]hile a plaintiff has a duty to mitigate his loss, it is the defendant who bears the burden of proving a failure to mitigate[]."). In *Rasheed v Chrysler Corp*, 445 Mich 109, 124; 517 NW2d 19 (1994), our Supreme Court, in the context of an employment action, stated that "the failure . . . to mitigate damages . . . is an affirmative defense to be established by the [defendant.]" The *Lawrence* Court noted that "the defendants did not plead mitigation[.]" *Lawrence*, 445 Mich at 15. Here, defendant's answer, affirmative defenses, which included the failure to mitigate damages, and counterclaim were not timely filed, resulting in the default, which default is not challenged on appeal. Accordingly, affirmative defenses were never effectively filed or pled. Therefore, any argument that plaintiff failed to mitigate its damages was waived. No exception is carved out in MCR 2.111(F) for a defense to damages in the context of a damages hearing under MCR 2.603(B)(3)(b) following default. A hearing on damages is not "necessary and proper," MCR 2.603(B)(3)(b), when a request for the hearing is made in order to assert a defense or affirmative defense that was never successfully pled or raised, as required by the court rules, in light of the default. To rule otherwise would place a defaulted defendant in a better position relative to damages than a defendant who was not defaulted but failed to plead the defense of failure to mitigate damages; such a proposition is entirely illogical and circumvents MCR 2.111(F).

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[1] The acceleration clause contained in the parties' lease agreement provided as follows:

> If Landlord terminates this Lease or terminates Tenant's right to possess the Premises because of a default, Landlord may hold Tenant liable for Base [$2,700] and Additional [$800] Rent under the Lease accrued to the date the Lease terminates, *and Landlord may also accelerate the Base Rent (and a reasonable estimate of the Additional Rent) that would have been payable over the remainder of the Term.* The present value of this accelerated rent (calculated by using a four percent (4%) discount rate per annum) *shall be immediately due and payable*. [Emphasis added.]

Moreover, defendant never challenged the validity or enforceability of the acceleration clause in the trial court. We need not review issues raised for the first time on appeal, *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Defendant did not assert below that the acceleration clause violated public policy, that it was an invalid liquidated damages provision, or that equity did not allow for the enforcement of the clause under Michigan law governing acceleration clauses generally. While the acceleration clause here did not expressly state that mitigation efforts were not required upon a default or breach by defendant, the operation of the clause necessarily precluded a duty to mitigate. Given that plaintiff was not required to mitigate its damages under the acceleration clause, and considering that defendant failed to preserve any argument challenging the validity or enforceability of the clause itself, there was no duty to mitigate on plaintiff's part under the circumstances.

Defendant presents a separate argument regarding the acceleration clause in connection with the language calling for acceleration of the "reasonable estimate of the Additional Rent," which was $800 per month, covering defendant's share of common-area maintenance fees and the property taxes; the judgment awarded plaintiff the full $800 a month for the balance of the lease period. Defendant maintains that plaintiff should have been required to prove in a damages hearing whether the full $800 each month until expiration of the lease was reasonable for purposes of acceleration, considering that defendant's abandonment may have reduced maintenance costs. This argument, however, was never posed to the trial court as a basis to conduct a damages hearing; therefore, it should not be addressed given the preservation failure. To the extent that defendant is making an argument that a damages hearing is necessary to contemplate any possible offset due to the premises being leased to a new tenant after judgment, the trial court ruled that it would amend the judgment on defendant's request if it subsequently developed that a new tenant leased the premises prior to expiration of the three-year lease period.

The majority's decision to vacate the damage award and remand the case for an evidentiary hearing on damages fails to appreciate the nature of plaintiff's action, the lease and its acceleration clause, and the particular arguments made by defendant below in favor of a damages hearing. I would agree that, on the basis of it being necessary and proper, a court should generally exercise its discretion and order a plaintiff to establish his or her damages in the context of a default, with the defendant having the right to fully participate in a damages hearing. MCR 2.603(B)(3)(b)(ii); *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554-555; 620 NW2d 646 (2001); *Wood v DAIIE*, 413 Mich 573, 583-585; 321 NW2d 653 (1982); *Marshall Lasser, PC v George*, 252 Mich App 104, 106; 651 NW2d 158 (2002); *Mink v Masters*, 204 Mich App 242, 246; 514 NW2d 235 (1994); *Mich Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 649; 419 Mich App 439 (1988); *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743; 432 NW2d 423 (1988); *Meyer v Walker Land Reclamation, Inc*, 103 Mich App 526, 540-541; 302 NW2d 906 (1981). Here, the damages were based on the unpaid rent, accrued during occupancy and post abandonment, pursuant to the acceleration clause, which essentially operated as a liquidated damages provision. As noted above, in the trial court, defendant did not dispute the validity of the acceleration clause, nor did he dispute the dollar amount as to rent that was never paid under the lease agreement, which lease was part of the record. Thus, there effectively was a general agreement on damages and the basis for those damages, with defendant simply arguing that perhaps the total amount might need to be reduced if plaintiff failed to make a reasonable effort to mitigate its damages through attempts at re-renting the premises. Accordingly, below, the dispute concerned the mitigation of damages, and there was no dispute regarding the amount of plaintiff's damages aside from the mitigation question. Therefore, beyond the lease agreement itself, this was not a case that needed proofs

on the amount of unpaid rent damages. Mitigation being the only argument, it failed for the reasons noted above.

Finally, the majority's order provides no direction on remand in regard to the question, addressed extensively in defendant's appellate brief, whether there even is a duty to mitigate damages when a tenant has abandoned or vacated leased premises prior to the expiration of a *commercial* lease when an acceleration clause had been executed by the landlord and tenant. Indeed, our Supreme Court has at times appeared hesitant to formally recognize that a duty to mitigate exists in such a situation even absent an acceleration clause. See *Fox v Roethlisberger*, 350 Mich 1, 2-3; 85 NW2d 73 (1957). While an acceleration clause contained in a residential lease is only enforceable if it also demands mitigation efforts by the landlord, MCL 554.633(1)(i) and 554.632(a), there is no Michigan law on the subject with respect to commercial leases. The issue is one of first impression in Michigan. In retaining jurisdiction, the majority evidently plans to address the issue following the evidentiary hearing. For the reasons stated earlier, I find no basis to remand for an evidentiary hearing, nor a need to address the issue of first impression. Therefore, I would affirm the trial court's ruling.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 15 2014
Date

Chief Clerk