

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 1, 2024

CRAIG CHARLES ET AL. v RAYMOND KEITH MCCRARY ET AL.

**Appeal from the Circuit Court for Washington County
No. 37417 James E. Lauderback, Judge**

No. E2023-00608-COA-R3-CV

Defendant appeals a jury verdict finding him liable for breach of contract and fraudulent inducement. We affirm the jury verdict, but reverse, in part, the trial court's denial of attorney's fees to the plaintiffs under the parties' contract. We also award the plaintiffs their attorney's fees incurred on appeal under Tennessee Code section 27-1-122.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part; and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and JEFFREY USMAN, JJ., joined.

Russell L. Egli, Knoxville, Tennessee, for the appellant, Collin McCrary, as Administrator of the Estate of Raymond Keith McCrary.

Alexis I. Tahinci, Kingsport, Tennessee, for the appellees, Craig Charles, and Kennedy Pascal, d/b/a Crown Cutz Academy LLC.

MEMORANDUM OPINION¹

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about January 26, 2015, Plaintiff/Appellee Craig Charles (“Mr. Charles” or “Tenant”) and Defendant/Appellant Raymond Keith McCrary (“Defendant” or “Landlord”)² executed a commercial lease agreement (“Lease Agreement”) in which Mr. Charles and his business partner Kennedy Pascal (together, “Plaintiffs”) would lease premises from Defendant in order to operate a barber academy, Crown Cutz Academy. The Lease Agreement contained the following provision:

6. Repairs and Maintenance. Tenant acknowledges that Tenant has inspected the Premises and that it is fit for its stated use as described herein. Tenant agrees that no representation regarding the Premises or the condition thereof, and no promises to alter, decorate, improve, or repair have been made by Landlord

A. Duties of Landlord. Landlord shall keep the Common Areas and all Major Systems serving the Premises and/or the Common Areas in good working order and repair, normal wear and tear excepted. Upon written notice from Tenant, Landlord shall, within a reasonable time period thereafter, repair all defects in the Common Areas and those Major Systems that are the responsibility of Landlord to maintain in good working order and repair. . . . Landlord shall not be liable to Tenant for any damage caused by any of the Major Systems referenced herein or by water coming through or around the roof or any door, flashing, skylight, vent, window, or the like in or about the Premises, except if such damages is due to the gross negligence or willful misconduct of Landlord. Major Systems include:

 X HVAC/Mechanical X Plumbing X Electrical X Sidewalls/Structure X Roof

The Lease Agreement further provided that “[w]hensoever any sums due hereunder are collected by law, or by attorney at law to prosecute such an action, then both parties agree that the prevailing party will be entitled to reasonable attorney’s fees, plus all costs of collection.”

Following the execution of the Lease Agreement, Plaintiffs hired contractors to begin renovations on the property. Soon, however, a dispute arose when Plaintiffs alleged that Defendant failed to bring the property up to compliance with building codes. In

² During the pendency of this appeal, Defendant passed away. This matter was therefore stayed to allow substitution of the proper party. By order of June 18, 2024, Collin McCrary, as Administrator of the Estate of Raymond Keith McCrary, was substituted as a party pursuant to Tennessee Rule of Appellate Procedure 19, and this matter was permitted to proceed. We refer to the appellant in this case as simply Defendant for ease of reading.

particular, Plaintiffs alleged that the property was not structurally sound and had no functioning plumbing, heating, or cooling; that the property's roof leaked; and that the property had electrical issues.

Ultimately, Plaintiffs filed a complaint against Defendant d/b/a MCM Properties on January 30, 2018, in the Washington County Circuit Court ("the trial court") alleging breach of contract and fraudulent inducement. Therein, Plaintiffs asserted that they incurred damages as a result of Defendant's breach of the Lease Agreement and that Defendant knew at the time of the execution of the Lease Agreement that he could not fulfill his obligations thereunder. Plaintiffs asked that the matter be heard by a jury and that they be awarded \$200,000.00 in compensatory damages, along with punitive damages and attorney's fees.

No answer was filed by Defendant. As such, on April 10, 2018, Plaintiffs filed a motion for default judgment. The trial court granted default judgment to Plaintiffs by order of October 29, 2018, and awarded Plaintiffs a judgment of \$300,000.00, plus attorney's fees. Plaintiffs then moved to sell the property at issue to satisfy their judgment.

Finally, on April 13, 2021, Defendant responded in opposition to the motion to sell the real property. On the same day, Defendant moved to set aside the default judgment under Rule 60.02 of the Tennessee Rules of Civil Procedure. Specifically, Defendant asserted that he was not properly served with the original complaint. On June 18, 2021, Defendant filed a detailed memorandum of law in support of his Rule 60.02 motion. On the same day, Plaintiffs filed a response in opposition to the Rule 60.02 motion, arguing that Defendant was properly served.

On August 20, 2021, the trial court entered an order granting Defendant's Rule 60.02 motion and setting aside the default judgment.³ The trial court further ruled that Plaintiffs would be permitted to file an amended complaint, which they did on the same date. The amended complaint again raised claims for breach of contract and fraudulent inducement and requested the same damages. Later, Plaintiffs were permitted to amend their ad damnum clause to request \$500,000.00 in both compensatory damages and punitive damages.

Defendant filed an answer and countercomplaint on September 9, 2021. Therein, Defendant denied that he had breached the Lease Agreement. Defendant further asserted that Plaintiffs' claims were barred by various affirmative defenses. Moreover, Defendant alleged that Plaintiffs breached the Lease Agreement when they relocated their business to another location and failed thereafter to pay rent due under the Lease Agreement. As a result, Defendant alleged that he was forced to sell the property at a discount. So Defendant

³ Plaintiffs do not raise the trial court's ruling on the motion to set aside the default judgment as an issue on appeal.

asked that he be awarded \$66,300.00 in unpaid rent, \$130,000.00 for “the loss of the leased premises,” and attorney’s fees. Plaintiffs answered the countercomplaint on October 11, 2021, denying that they breached the Lease Agreement.

On October 21, 2021, the trial court entered an order resolving the parties’ dispute over the proper interpretation of paragraph 6.A of the Lease Agreement. After considering the language of the Lease Agreement, the trial court ruled that this provision required that the major systems “are, or should have been, in place and working at the time the Lease Agreement was executed.” In other words, the trial court ruled that “it is and was the duty of the Landlord to have the ‘Major Systems’, identified in the Lease [Agreement], in good working order on the date the lease was entered into by the parties.”

A jury trial was eventually held over three days in November 2022. Plaintiffs presented testimony and other evidence that the building did not have working electrical, plumbing, heating, or cooling at the start of the project, and that these issues were never remedied by Defendant, ultimately causing Plaintiffs to abandon the building for a new location. Moreover, Plaintiffs presented proof that the roof of the building was leaking water, causing serious deterioration of the building and significant delays on their renovations of the building. Delays and increased costs were also attributed to the need for building permits, after Defendant had promised Plaintiffs that the building did not need permits due to being “grandfathered in.” Moreover, Plaintiffs presented proof that Defendant knew about the issues with the water damage and the non-compliant electrical system well in advance of the execution of the lease, but never informed Plaintiffs of these issues.

In contrast, Defendant presented proof that he undertook major repairs of the building pursuant to his duties under the Lease Agreement, including repairing the roof, and that he could not complete all further installation to Major Systems until Plaintiffs had finished their renovations and properly cooperated with permitting. Defendant also presented proof that problems with the project were caused by Plaintiffs’ decision to hire unlicensed contractors and that the alleged water damage to the building was not caused by a leaking roof.

Defendant did not move for a directed verdict at the conclusion of Plaintiffs’ proof or at the conclusion of all the proof.⁴ Ultimately, the jury returned a verdict of \$25,000.00 for the breach of contract claim, \$63,000.00 for fraudulent inducement, and \$10,000.00 in punitive damages. Defendant filed no post-trial motions. The trial court eventually struck the punitive damages award,⁵ and denied Plaintiffs’ request for attorney’s fees, ruling that Plaintiffs were not entitled to attorney’s fees under the language of the Lease Agreement. Although Plaintiffs filed a timely motion to alter or amend the trial court’s judgment, the

⁴ Defendant’s appellate counsel did not represent him at trial.

⁵ Plaintiffs do not raise this ruling as an issue on appeal.

motion was eventually withdrawn on April 20, 2023. Defendant thereafter filed a notice of appeal to this Court on April 26, 2023.

II. ISSUES PRESENTED

Defendant presents two issues for review, which are taken from his appellate brief:

1. Whether the jury verdict was in error as the evidence presented at trial was not sufficient to establish either a claim for breach of contract or fraudulent inducement to contract.
2. Whether the trial court judge's charge and use of parol evidence was in error given the fact that the commercial lease agreement contained merger and liability clauses.

In the posture of appellee, Plaintiffs assert that Defendant's arguments are waived and that they are entitled to attorney's fees incurred in the trial court and on appeal.

III. STANDARD OF REVIEW

This appeal follows a jury verdict in favor of Plaintiffs. “[W]hen a trial court approves a jury verdict, appellate courts may only review the record to determine whether it contains material evidence to support the jury’s verdict.”⁶ *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 718 (Tenn. Ct. App. 1999) (citing Tenn. R. App. P. 13(d); *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994); *Whitaker v. Harmon*, 879 S.W.2d 865, 867 (Tenn. Ct. App. 1994)). “Appellate courts do not reweigh the evidence and consider where the preponderance lies. Instead, they determine whether there is any material evidence to support the verdict, and, if there is, they must affirm the judgment.” *Id.* (citing *Reynolds*, 887 S.W.2d at 823; *Pullen v. Textron, Inc.*, 845 S.W.2d 777, 780 (Tenn. Ct. App. 1992)). As the Tennessee Supreme Court has explained:

[I]n determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to the contrary.

Crabtree Masonry Co. v. C & R Const., Inc., 575 S.W.2d 4, 5 (Tenn. 1978).

IV. ANALYSIS

⁶ As discussed in detail, *infra*, the trial court was not called upon to approve the jury’s compensatory damages verdict because Defendant filed no motion for directed verdict or post-trial motion of any kind. Defendant, however, characterizes our review as applying the material evidence standard. Because Defendant’s issues are waived, we need not tax the length of this Opinion with consideration of this issue.

A.

We begin with Plaintiffs' assertion that all of Defendant's arguments are waived. We agree. Here, Defendant's issues go to both the evidence presented and the alleged legal errors committed by the trial court. He first argues that the jury's verdicts as to Plaintiffs' breach of contract or fraudulent inducement are not supported by the evidence—an argument contesting the factual basis for the jury's verdict. He next argues that the trial court made errors in how it instructed the jury and in what evidence was presented to the jury given various provisions of the Lease Agreement—an argument directed to the trial court's alleged errors.

In jury cases, separate post-trial motions are directed towards these two types of arguments. “The question of whether evidence is sufficient to support a jury verdict is tested by a motion for a directed verdict[.]” *Steele v. Columbia/HCA Health Care Corp.*, No. W2001-01692-COA-R3-CV, 2002 WL 1000181, at *3 (Tenn. Ct. App. May 13, 2002). “In contrast, a motion for a new trial is utilized to correct alleged errors the court made during trial.” *Id.* Each type of motion, however, is necessary to preserve issues for appeal.

When a party fails to make a motion for directed verdict at the conclusion of the proof and renew the motion post-trial, the party cannot complain about the sufficiency of the evidence on appeal. See *McLemore ex rel. McLemore v. Elizabethton Med. Invs., Ltd. P'ship*, 389 S.W.3d 764, 778 (Tenn. Ct. App. 2012) (“For this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict.” (citing *Steele*, 2002 WL 1000181, at *3)); see also *Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 894 (Tenn. Ct. App. 1996) (“The motion [for directed verdict] must be made at the conclusion of all the proof in order for it to be considered by the trial court on a post-trial motion and by this court on appeal.” (quoting *Potter v. Tucker*, 688 S.W.2d 833, 835 (Tenn. App. 1985))).

Additionally, Rule 3(e) of the Tennessee Rules of Appellate Procedure provides, in relevant part, as follows:

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the *admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.*

Tenn. R. App. P. 3(e) (emphasis added). Thus, the failure to file a motion for new trial results in waiver of arguments concerning “those issues which may result in the granting

of a new trial.” *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989).

Here, Defendant’s alleged errors concern both the sufficiency of the evidence and the trial court’s decisions regarding jury instructions and admitted evidence. In order to challenge the sufficiency of the evidence in support of the jury’s verdict, Defendant was required to file a motion for directed verdict in the trial court. He did not. As such, he is not permitted to challenge the sufficiency of the evidence in support of the jury’s verdict on appeal. *McLemore*, 389 S.W.3d at 778. In order to challenge the trial court’s jury instructions or evidentiary rulings, Defendant was required to file a motion for new trial. Again, he did not. As such, he is likewise not permitted to challenge these rulings on appeal. *Dodson*, 780 S.W.2d at 780. Therefore, all of Defendant’s arguments are waived. The jury’s verdict in Plaintiffs’ favor as to their breach of contract and fraudulent inducement claims, as well as rejecting Defendant’s counterclaims, must be affirmed.⁷

B.

We therefore turn to Plaintiffs’ argument concerning attorney’s fees. Here, Plaintiffs assert two bases for an award of attorney’s fees: Tennessee Code Annotated section 27-1-122 for the attorney’s fees incurred on appeal, and the Lease Agreement for the attorney’s fees incurred at trial. We begin with section 27-1-122, which provides as follows:

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, either upon motion of a party or of its own motion, 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.

“A frivolous appeal is one that is ‘devoid of merit,’ or one in which there is little prospect that it can ever succeed.” *Indus. Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995).

In this case, all of Defendant’s arguments are waived due to his failure to file appropriate motions in the trial court. As such, we agree that this appeal had no prospect of success. So we exercise our discretion to grant Plaintiffs’ request for attorney’s fees incurred on appeal, the amount of which the trial court shall determine upon remand.

Plaintiffs also assert that the trial court erred in denying their request for attorney’s fees incurred in the trial court under the Lease Agreement. As previously discussed, the Lease Agreement provides that: “Whenever any sums due hereunder are collected by law,

⁷ To the extent that Defendant asserts in his brief that he is also entitled to attorney’s fees upon reversal of the jury’s verdict, he is not entitled to attorney’s fees under the Lease Agreement because he has not prevailed in this appeal.

or by attorney at law to prosecute such an action, then both parties agree that the prevailing party will be entitled to reasonable attorney's fees, plus all costs of collection." The trial court interpreted the Lease Agreement as permitting an award of attorney's fees only "when litigation is required to collect 'any sums due hereunder.'" But the trial court concluded that

[t]he damages sought by plaintiffs and awarded by the jury were not "sums due" under the lease. They were damages for breach of the Lease Agreement and for fraudulent inducement in entering into the Lease Agreement. From the Court's review, such damages are never mentioned or contemplated in the Lease Agreement.

On appeal, Plaintiffs assert that the trial court erred in interpreting the Lease Agreement so narrowly, as neither party to the contract interpreted the above language to disallow fees to Plaintiffs as the prevailing party in this litigation.⁸ But Plaintiffs cite no law that holds that the trial court was bound by the parties' understanding of the contract. Indeed, Tennessee law provides that "the interpretation given by the parties to the contract should receive great weight, if not controlling, by the courts when called upon to construe any provision of the contract under which the parties are acting, or had acted." *Nashville Terminal Co. v. Tennessee Cent. Ry. Co.*, 2 Tenn. App. 646, 657 (Tenn. Ct. App. 1926). However, the only question is how the attorney's fees provision should be interpreted—a provision that no party had "acted" under at the time of the trial court's ruling.⁹ Instead, the proper interpretation of an unambiguous contract remains an issue of law for the court to decide. *Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 252 (Tenn. 2017) (citing *BSG v. Check Velocity, Inc.*, 395 S.W.3d 90, 92 (Tenn. 2012)). And while the court's role in interpreting a contract is "to ascertain the intention of the parties[.]" it must do so "based upon the usual, natural, and ordinary meaning of the language used." *Adkins v. Bluegrass Ests., Inc.*, 360 S.W.3d 404, 411 (Tenn. Ct. App. 2011). So we conclude that the trial court did not err in construing the language of the Lease Agreement as written prior to the award of fees in this case.

Here, the award of attorney's fees is clearly conditioned upon the collection of, or prosecution of any action for "sums due" under the Lease Agreement. As such, we agree with the trial court that Plaintiffs' action to recover damages incurred due to Defendant's nonperformance on the Lease Agreement and fraudulent inducement were not encompassed by the language of the Lease Agreement.

⁸ Defendant did not lodge any opposition to Plaintiffs' request for attorney's fees.

⁹ This principle is typically applied to determine whether the parties' actions evidence that a contract was formed. *See, e.g., St. Paul Cmty. Ltd. P'ship v. St. Paul Cmty. Church*, No. M2017-01245-COA-R3-CV, 2018 WL 5733288, at *4 (Tenn. Ct. App. Oct. 31, 2018); *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 345 (Tenn. Ct. App. 1994); *Bailey v. Brister*, 49 Tenn. App. 191, 203, 353 S.W.2d 564, 568 (Tenn. Ct. App. 1961).

We note, however, that Defendant did file a counterclaim seeking payment of rent due under the Lease Agreement. Clearly, this action was prosecuted to recover “sums due” under the Lease Agreement. Although we agree that the attorney’s fees provision in the Lease Agreement is not a model of clarity, considering the provision as a whole, we conclude that it unambiguously provides that the prevailing party in an action to recover “sums due” will be entitled to attorney’s fees. Plaintiffs plainly prevailed against Defendant’s counterclaim. So we conclude that the Lease Agreement entitles them to an award of those attorney’s fees that are attributable to their defense of Defendants’ counterclaim. The trial court’s decision to deny Plaintiffs’ any recovery for attorney’s fees under the Lease Agreement is therefore reversed. The trial court shall determine the amount of reasonable attorney’s fees incurred in defending against Defendant’s counterclaim on remand.

V. CONCLUSION

The judgment of the Washington County Circuit Court is affirmed in part and reversed in part, and this matter is remanded to the trial court for the calculation of Plaintiffs’ reasonable attorney’s fees as provided herein. Costs of this appeal are taxed to Appellant Collin McCrary, as Administrator of the Estate of Raymond Keith McCrary, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE