

RENDERED: MAY 18, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000953-MR
AND
NO. 2016-CA-000978-MR

WILDCAT PROPERTY
MANAGEMENT, LLC

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CI-05238

STEPHANIE REUSS, TOM REUSS,
LINDSAY FRANZEN,
CARL T. FRANZEN
AND MARY M MCGEEHAN

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** * ** * ** *

BEFORE: ACREE, JOHNSON, AND TAYLOR, JUDGES.

JOHNSON, JUDGE: This appeal and cross-appeal are from the June 20, 2016

Findings of Fact, Conclusions of Law and Final Judgment of the Fayette Circuit

Court on a landlord/tenant dispute. On remand from this Court, the sole issue before the trial court was a determination of the amount of damages due Wildcat Property Management, LLC. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM IN PART AND REVERSE IN PART.

BACKGROUND

This matter began its journey through the legal system in 2005. On April 18, 2005, four college students and their fathers, who agreed to be guarantors of the lease, (“tenants”) signed a lease with Wildcat Properties (“Wildcat”) to lease property from August 15, 2005 to August 15, 2006. The terms of the lease provided for monthly rent of one thousand four hundred fifty dollars (\$1,450.00), tenants paying the monthly utilities, and a seven hundred dollar (\$700.00) performance fee. On August 15, 2005, when the tenants took possession of the property, Wildcat was still in the process of remodeling the property and agreed to several changes to the property, including installing a hot tub.

The tenants and Wildcat almost immediately began disputing what promises were made and whether Wildcat had performed the changes as requested by tenants. Tenants withheld rent and made written demands of Wildcat on August 21, 2005 and September 26, 2005. The tenants tendered one payment of rent in the amount of two thousand one hundred fifty-nine dollars (\$2,159.00) in

early October 2005, which Wildcat rejected stating that the amount due at that time was five thousand seventy-five dollars (\$5,075.00) in rent, plus the performance fee, penalties for late payment of rent, and interest. When the tenants continued to withhold their rent payments, Wildcat filed both a forcible detainer action and a lawsuit for unpaid rent and damages. In December 2005, the tenants were evicted.

In the civil suit, which is the basis of this appeal, Wildcat sought damages for rental payments through February 2006; deficiency rent for March and April alleging it had to rent the property for less than the amount of tenants' rent; electric and water bills for September 2005, and January 2006 through May 2006; late fees; interest at 18%; and attorneys' fees, currently determined by Wildcat to be approximately one hundred twenty thousand dollars (\$120,000.00). For a period of two years the lawsuit languished in the court system with no action taken. On January 25, 2008, the court gave notice to Wildcat to show cause why the action should not be dismissed in that no steps had been taken in the two previous years. On April 24, 2008, Wildcat filed a motion for extension of time, which was granted. On October 24, 2008, tenants filed a motion to dismiss due to lack of prosecution. Wildcat filed a response and on November 13, 2008, the court dismissed the action. Wildcat appealed and in 2009, we reversed the court's dismissal for lack of prosecution pursuant to Kentucky Ruled of Civil Procedure

(CR) 72.02(2), sending the matter back to the circuit court for findings in support of its dismissal.

In 2015, the court ruled that the lease was void and unenforceable, based upon a finding by the court that the property was uninhabitable. Wildcat again appealed and in March 2016, we reversed that ruling upon a determination that there is no implied warranty of habitability under Kentucky law, that the lease was not void, and that the Uniform Residential Landlord and Tenant Act (“URLTA”) in conjunction with the lease terms governed the rights and remedies of both parties. We remanded the matter to the court for a determination of Wildcat’s damages.

On June 2, 2016, the court held a hearing on Wildcat’s Motion for Summary Judgment. At the conclusion of the hearing, the court orally issued its ruling and the basis for its decisions, which were later set out in a Findings of Fact, Conclusions of Law and Final Judgment dated June 20, 2016. It is from the June 20, 2016 order that Wildcat now files its third appeal. Tenants filed their cross-appeal on July 8, 2016.¹

¹ One of the original tenants, Jenna Stevens, and her father, Doug Graff, have settled with Wildcat property and have been dismissed from the case. Mary Martha McGeehan appears *pro se*.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v B & R Corp.* 56 S.W.3d 432, 436 (Ky. App. 2001).

ANALYSIS

Because this is the third appeal, we will apply the law-of-the-case doctrine which states that an appellate court, on a subsequent appeal, is bound by a prior decision in a former appeal in the same court. As law-of-the-case is most commonly used, “it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case.” *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). “[A]ppellate courts hold fast to the law-of-the-

case doctrine in the interest of maintaining the integrity of prior appellate rulings.”
Ragland v. DiGiuro, 352 S.W.3d 908, 915 (Ky. App. 2010).

On remand after the second appeal, we determined that the lease agreement between the parties was valid under the URLTA, and as such remanded the matter to the court only on the issue of determining the amount of damages due Wildcat as permitted under the terms of the lease and URLTA. Wildcat is requesting total damages of approximately one hundred twenty-one thousand dollars (\$121,000.00). In its June 20, 2016 ruling, the court made the following findings: Wildcat was awarded judgment jointly and severally against the tenants in the amount of six thousand seven hundred eighty-one dollars and ninety-six Cents. (\$6,781.96). The court’s ruling was based upon its award of two thousand nine hundred sixty-two dollars and fifty cents (\$2,962.50) in rent, three hundred nineteen dollars forty-six Cents (\$319.46) in prejudgment interest, and a total three thousand five hundred dollars (\$3,500.00) in attorneys’ fees for both this case and the forcible detainer action.

The amount of rent due Wildcat was reduced at the hearing upon the stipulation of Wildcat having previously settled with one of the four tenants² and by two thousand six hundred twenty-five dollars (\$2,625.00) previously deposited

² Both parties agreed to reduce the judgment by one-fourth based upon the settlement of one of the four original parties resulting in a stipulated reduced principal award of five thousand five hundred eighty-seven dollars and fifty cents (\$5,587.50).

with the court by the two guarantors. The court further determined that tenants were evicted by Forcible Detainer and Judgment in December 2005, and denied Wildcat any rent or utilities after December 31, 2005. Wildcat was awarded pre-judgment interest of 12% per annum from the date of the Court of Appeals opinion, July 10, 2015. The personal guarantees were found valid and enforceable to the maximum amount of four thousand two hundred dollars (\$4,200.00) from each of the guarantors. Wildcat was denied any costs associated with the forcible detainer, but was awarded one thousand dollars (\$1,000.00) in attorneys' fees. The court found the breach of the agreement by tenants was not willful, but awarded Wildcat an additional attorneys' fees of two thousand five hundred dollars (\$2,500.00) for the present action in which it sought to collect on the unpaid rents. Finally, the court awarded Wildcat post-judgment interest at the statutory rate of 12% per annum until paid.³

Wildcat, in this third appeal, appeals the court's denial of the unpaid rent and utility bills from January to April 2006, late fees it claims due under the terms of the lease, the court set rate of 12% pre and post-judgment interest, the date when pre-judgment interest should begin to run, and the denial of their requested attorneys' fees.

³ KRS 360.040 was amended in 2017, as to both post-judgment and pre-judgment interest at the rate of 6% unless the judgment is for unpaid child support or if the interest rate was agreed upon by the parties to the action.

The facts of this case are not in dispute. At the June 2, 2016 hearing, the court found that during January and February, Wildcat was remodeling and making repairs to re-let the property, most of which were changes that they had promised tenants would be made. Wildcat urges us to find that even though it chose to take the property off the market for two months while it made changes to the property, tenants should bear the financial burden of its decision. The court found that if Wildcat felt the property was proper to rent to tenants in August 2005, there should have been no reason for Wildcat to not rent it in the same condition for January or February. We agree. The fact that Wildcat chose not to re-let the property, but instead chose to continue with their remodeling, should not be a reason to hold tenants responsible.

The court also granted Wildcat the performance fee of seven hundred dollars (\$700.00), which was to be paid at the time tenants took possession of the property per the lease. The court determined that under the terms of the lease, tenants should have paid the seven hundred dollars (\$700.00) prior to taking up residence, and we find that the court's granting of the performance fee is in accordance with Kentucky law and affirm.

The court found that tenants were forcibly and legally evicted as of December 2005, thus they were not liable to Wildcat for any additional rent. We do not agree with the holding of the court concerning the liability of tenants after

eviction. We find no case law that supports such a position and in fact have found one unpublished opinion in Kentucky law which found that a lessor may seek to recover any future rent obligation as it accrued under the terms of the lease, even after eviction. *Nohr v. Hall's Rentals, LLC.*, 2013 WL 462004 (Ky. App. 2013)(2011-CA-000646-MR).

However, we agree with the court's finding that Wildcat is not entitled to rent for January and February, since it chose to take the property off the market and finish remodeling. As to the difference in rent for the months of March and April, we concur with the trial court that Wildcat, because of their decision to not rent the property for the preceding two months, put themselves in the position of not getting the full rental amount they had charged the tenants, and are not entitled to the difference in the amounts. As the court explained, since the property is advertised to college students, the optimum times to rent it would be at the beginning of a semester. Wildcat chose not to rent the property in January and February, thus putting themselves in a position of not being able to get the maximum rents.

As to its claim that tenants should pay utility bills for January through April 2006, Wildcat attempts to find relief under Kentucky Revised Statutes ("KRS") 383.685, which allows a landlord to bring a claim for actual damages.

If the rental agreement is terminated, the landlord may have a claim for possession and for rent and a separate claim for actual damages for breach of the rental agreement and reasonable attorney's fees as provided in KRS 383.660(3).

The court found that tenants had paid all bills prior to being evicted, that Wildcat legally terminated the lease through the forcible detainer action, and thus tenants were not responsible for any utility bills after they vacated the property. Again, we point out that Kentucky law does not support the court's reasoning as a basis of denying the utility bills as a legitimate claim for "actual damages for breach of the rental agreement." However, relying on our reasoning above, we concur with the court's denial of utility bills for January through April. The total amount awarded by the court for rent, late fees and the performance fee was seven thousand four hundred fifty dollars (\$7,450.00).⁴ On each of these issues we agree with the court's final decision and affirm.

The next issue raised by Wildcat is their claim for late fees. Under the terms of the lease at Paragraph 15, the tenants were to pay a late fee of fifty dollars (\$50.00) for each month in which they did not pay rent on the first day of the month. The court granted those late fees, which amount is two hundred twenty-five dollars (\$225.00).⁵ What Wildcat appeals is that the court did not

⁴ This amount was reduced by the aforementioned off-sets.

⁵ That figure was obtained by granting the late fee of fifty dollars (\$50.00) per month for September through December and twenty-five dollars (\$25.00) for the half month of August.

grant it the additional ten dollars (\$10.00) per day as set forth in Paragraph 15 of the lease agreement. The court found that the additional two hundred fifty dollars (\$250.00) combined with the other late fee of fifty dollars (\$50.00) each month would equal an additional 20% over and above the agreed upon rent. The court found this additional fee to be unconscionable based upon KRS 383.555 which states:

If the court, as a matter of law, finds:

(a) A rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

KRS 383.555(1)(a).

“Unconscionable” means an act or conduct which is willful and is so harsh and unjust as would be condemned or considered to be wrongful and would be shocking to the conscience of honest and fair-minded persons.

KRS 383.545(16).

The court found that the enforcement of the ten dollars (\$10.00) per day late fees as provided in the lease agreement was harsh and unjust. The court found that the fifty dollars (\$50.00) per month late fee was appropriate, but found that Wildcat’s demand for an additional ten dollars (\$10.00) per day, over and above that late fee, was unconscionable. The court based its finding upon the fact that the additional penalty combined with the late fee amounted to three hundred

dollars (\$300.00) per month or an additional 20% penalty over and above the required rent.

The doctrine of unconscionability has developed as a narrow exception to basic contract law, which states that “[a]bsent fraud in the inducement a written agreement ... will be enforced according to its terms.” *Schnuerie v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 575 (Ky. 2012). In this case, the Kentucky legislature has determined that as applied to a rental agreement, a court may find as a matter of law, that a provision of a rental agreement is unconscionable if the court finds that the provision is so harsh and unjust that it would be wrong to enforce it. In this case we are dealing with a “[c]ontract of adhesion[, which] is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Schnuerie* at 576. As part of its decision the court noted the fact that the parties to this dispute were Wildcat and the tenants, four college students. Wildcat, using a standardized form that included late fees, was clearly in a superior position to the tenants. While we do not find that late fees per se are illegal, we will not substitute our judgment for that of the court. *Castle v. Castle*, 266 S.W.3d 245, 247 (Ky. App. 2008). Therefore, we find no error in the court’s determination that an additional late fee of 20% is unjust and harsh, and as such, is unconscionable under the statute.

Wildcat next appeals the court's ruling concerning the rate of interest to be applied and the date from which interest accrues. The court found that prior to the date of remand from this court on Wildcat's second appeal, July 2014, the amount of damages was disputed, still questionable, and unliquidated, and awarded pre-judgment interest after the remand date. We agree with the court's reasoning on this issue.

The court then found that once the issue was remanded, since it was no longer a factual issue, that it was possible to determine damages, and the court applied prejudgment interest at the rate of 12%. The court in doing so, rejected Wildcat's demand for the 18% interest called for in the lease agreement. The court based its ruling on KRS 383.555 finding that it was unjust to award interest at a rate more than the legal rate of 12%⁶ and determined the interest clause was unconscionable as a matter of law. While we acknowledge that the court granted 12% for both pre and post-judgment interest, in this case the contract signed by the parties allows for an eighteen percent (18%) per annum interest rate on the unpaid balance due Wildcat. While the court found that it would be unjust to award interest greater than the legal rate prescribed by statute, the provision of eighteen percent (18%) per annum is a standard amount found in most lease and rental agreements. Further, the eighteen percent (18%) does not exceed the

⁶ At the time this case was decided, the legal rate of pre-judgment interest was 8%.

amount permitted by statute. KRS 360.010 provides for interest rates up to nineteen percent (19%) where both parties have agreed. Therefore, as to the award of pre-judgment interest from the date of remand on the second appeal and the post-judgment interest, we affirm the court. As to the correct percentage of interest to be applied, we find that the court erred as a matter of law. We find that the lease agreement sets forth the correct percentage to be applied at eighteen percent (18%) per annum for both the pre and post-judgment interest due Wildcat.

The final issue raised by Wildcat is the court's denial of their requested attorneys' fees incurred in this litigation asking for forty-nine thousand two hundred eighteen dollars (\$49,218.00) in attorneys' fees. The court expressed outrage that this matter has languished in the legal system for the past twelve years, in part due to Wildcat's lack of diligence in pursuing its initial claim, and the three appeals which have been filed, all over an original claim of four months back rent. Conversely, in support of its claim, Wildcat cites KRS 383.660(3) which states:

Except as provided in KRS 383.505 to 383.715, the landlord may recover damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or KRS 383.605 or KRS 383.610. If the tenant's noncompliance is **willful** the landlord may recover actual damages and reasonable attorney's fees. (emphasis added).

The court, after considering Wildcat's request for the forty-nine thousand two hundred eighteen dollars (\$49,218.00) in legal fees, denied them the

amount requested based on its finding that tenants did not “willfully” break the lease as required under KRS 383.660(3). The court found that the tenants had tried to pay rent which Wildcat rejected, noted the letters back and forth between the parties indicating a dispute, and pointed out that Wildcat had obligations to make certain changes to the property but had not done so.

While attorneys’ fees may be awarded, the amount is largely within the discretion of the court and they are dependent upon the facts and circumstances of each particular case. *Flag Drilling Co., Inc v Erco, Inc.* 156 S.W.3d 762, (Ky. App. 2005). In its order, the court found that Wildcat is entitled to reasonable attorneys’ fees, and denied the full amount of Wildcat’s request, but granted it two thousand five hundred dollars (\$2,500.00) in legal fees for this action and one thousand dollars (\$1,000.00) in legal fees for the forcible detainer action.

As to this issue, the court was faced with a dilemma of the law. On the one hand, the court could have found appellees’ noncompliance was willful and awarded all the fees appellant’s counsel requested. That would have been a legal but seemingly inequitable result for appellees. On the other hand, having found appellees’ noncompliance was not willful, the court could have followed the American rule and awarded appellant nothing for attorneys’ fees which would have been a legal but seemingly inequitable legal result for the appellant. The

court refused to have either hand shackled by this Hobson's choice and turned to equity.

We have previously ruled that "attorney's fees are not allowable as costs in absence of statute or contract" does not "abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case." *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998). While there is no statute in the URLTA that prohibits an award of attorneys' fees, KRS 383.510 does say that "the principles of law and equity . . . supplement its provisions." Therefore, since the court found that the breach was not willful, we find that the court decision, based upon principles of equity, awarding Three Thousand Five Hundred Dollars, (\$3,500.00) in attorneys' fees to the appellant was not error.

Next, we address the cross-appeal of tenants. Specifically, tenants appeal the award of attorneys' fees, prejudgment interest, and the court's granting of the performance fee. Since we have previously dealt with the issues of the attorneys' fees and prejudgment interest, we shall only address the court's granting of the performance fee.

The court granted Wildcat the performance fee finding that the tenants should have paid the fee prior to taking up residence of the property per the terms of the lease. Even though Wildcat did not insist upon payment before

tenants took up residence, the court found that Wildcat was due the performance fee. We find no error in the court's ruling and thus affirm that part of the trial court's order.

CONCLUSION

Based upon the foregoing, we AFFIRM IN PART and REVERSE IN PART the June 20, 2016 order of the Fayette Circuit Court.

ACREE AND TAYLOR, JUDGES, CONCUR IN RESULT ONLY.

BRIEF FOR
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ORAL ARGUMENT FOR
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BRIEF FOR APPELLEES/
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J. Ross Stinetorf
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ORAL ARGUMENT FOR
APPELLEES/CROSS-APPELLANTS

Carroll M. Redford
Lexington, Kentucky