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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MERONA ENTERPRISES, INC., et al., Plaintiffs and Respondents, v. ADIR RESTAURANTS CORP., et al., Defendants and Appellants.	B234489 (Los Angeles County Super. Ct. No. BC438767)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed and remanded with instructions.

Elizabeth Van Horn; K & L Gates, David P. Schack and Cyrus S. Naim for Defendants and Appellants.

Law Office of Daniel J. Bramzon, Daniel J. Bramzon and Ross T. Kutash for Plaintiffs and Respondents.

Defendants and appellants Adir Restaurants Corp. (Adir) and Sahar Azarkman (Azarkman) (collectively defendants) appeal from the judgments entered in favor of plaintiffs and respondents Merona Enterprises, Inc. (Merona) and Gage Village Commercial Development, LLC (GVCD) (collectively plaintiffs) in this action involving breach of a commercial lease. The original judgment had initially been entered in favor of GVCD's predecessor-in-interest, but the trial court corrected the judgment nunc pro tunc to substitute GVCD as the plaintiff in lieu of Merona after defendants filed their notice of appeal.[1] Defendants contend the trial court lacked jurisdiction to amend the judgment to substitute GVCD as the plaintiff. Defendants further contend the judgment must be reversed because the trial court improperly rejected their defense that plaintiffs' damages for lost rent were mitigated by a subsequent sale of the property.

The trial court did not err by concluding that defendants failed to establish their mitigation of damages defense, and the court had jurisdiction to amend the clerical error in the judgment identifying Merona as the plaintiff rather than GVCD. We therefore affirm the judgment.

BACKGROUND

Merona was the owner, until 2004, of a multi-tenant shopping center located at Gage and Compton Avenues in Los Angeles (the Property). Adir entered into a 20-year lease agreement with Merona on September 15, 2003, to operate a Pollo Campero restaurant at the property until March 2025. Azarkman guaranteed payment of Adir's rent for the first 60 months of the lease pursuant to the terms of a written guaranty. On December 10, 2004, Merona transferred the Property and all associated leases to GVCD, a single asset entity formed by Merona to hold title to the Property.

Under the terms of the lease, Adir was required to pay $11,686.50 in monthly base rent plus a proportionate share of common area maintenance costs, real property taxes,

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[1] The parties have stipulated that defendants shall be considered to have appealed from both the original judgment entered in favor of Merona and the corrected judgment in favor of GVCD.

and insurance. Adir stopped paying rent in October 2009 and abandoned the leased premises without notice that same month.

In August 2010, GVCD re-leased the premises vacated by Adir to Carl Karcher Enterprises, Inc., more commonly known as Carl's Jr., for an initial 10-year term, with options to renew for four additional five-year periods at a base rent of $8,500 per month. Under the terms of the lease, Carl's Jr. commenced paying rent in March 2011. On December 21, 2010, GVCD sold the Property to an unrelated buyer known as Gage Village LLC for a sales price of $28,950,000.

Merona filed this action on June 1, 2010, seeking damages for defendants' breach of the lease and guaranty. Shortly before the April 18, 2011 trial date, plaintiff's counsel learned that Merona had transferred the Property to GVCD and that GVCD, not Merona, was the proper plaintiff in the action. Plaintiffs' counsel brought an ex parte application seeking to amend the complaint to substitute GVCD in place of Merona. The trial court granted the ex parte application, continued the trial date to April 20, 2011, and ordered plaintiffs' counsel to prepare and file by April 22, 2011, a revised order incorporating the suggested changes to the complaint. The court further ordered that defendants' answer already on file would serve as the answer to the first amended complaint and any objections were to be filed by April 22, 2011. Plaintiffs' counsel did not file a revised order or a first amended complaint, and defendants did not file any objections.

A seven-hour bench trial on the issue of damages was held on June 20, 2011. At its conclusion, the trial court awarded Merona $845,082 plus interest against Adir and $85,288 plus interest against Azarkman.

After defendants filed their notice of appeal, plaintiffs' counsel filed a notice of motion and motion to correct the judgment for clerical error by substituting GVCD in place of Merona as the plaintiff. Defendants opposed the motion. The trial court granted the motion and ordered plaintiffs' counsel to prepare an amended judgment. The amended judgment in favor of GVCD was entered on October 31, 2011.

DISCUSSION

I. Defendants' Mitigation Defense

A. Applicable law and standard of review

Civil Code section 1951.2 specifies the damages a landlord may recover from a tenant who breaches the lease and abandons the property. In such cases, the lease terminates and the landlord may recover "(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination; (2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided; (3) . . . the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and (4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom." (Civ. Code, § 1951.2, subd. (a).)

Civil Code section 1951.2 makes clear that the tenant bears the burden of proving that the landlord's rental loss damages were or could have been avoided. (Civ. Code, § 1951.2, subds. (a)(2) & (a)(3); *Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 ["The burden of proving facts in mitigation of damages rests upon the defendant"].) The tenant's burden of proving avoidable rental loss may be satisfied by presenting evidence of "the existence of a vibrant marketplace of potential tenants willing to bid up the price on a limited supply of equivalent rental space." (*Milliken v. American Spectrum Real Estate Services Cal., Inc.* (2004) 117 Cal.App.4th 1094, 1102 (*Milliken*).) If the property is sold, the tenant may satisfy its burden by proving that the sale price mitigated the landlord's damages, including any right to future lost rents. (*Ibid.*) This is done most commonly by establishing an appropriate market capitalization rate for the property. (*Ibid.*)

An appropriate market capitalization rate may be established by reviewing sales of comparable leased premises. (*Milliken, supra*, 117 Cal.App.4th at p. 1102.) "With an assumed capitalization rate based on the sales of comparable properties, and the known sales price for the subject building, the equivalent rental stream may be determined and compared with the rental loss resulting from the tenant's abandonment. By this means, the tenant may establish whether the landlord has recovered his lost rental, in whole or in part, by a favorable sale. . . . [T]his evidence would necessarily require expert opinion testimony." (*Ibid.*)

Defendants contend they presented the requisite expert testimony regarding appropriate market capitalization rates and that their experts demonstrated that GVCD realized a higher sale price for the Property with Carl's Jr. as a tenant than it would have had Adir remained a tenant. Defendants further contend their expert testimony was uncontroverted and the trial court improperly rejected their mitigation defense because of a faulty legal analysis. They urge de novo review of the issue.

The issue presented in this appeal is the trial court's determination that defendants failed to sustain their burden of proving their mitigation defense. De novo review of that issue is not appropriate. Rather, the proper inquiry is "'whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."' [Citation.]" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466 (*Sonic*).) As we discuss, defendants' evidence does not compel a finding in their favor.

B Defendants' evidence does not compel reversal

Defendants presented an expert witness, Allen Nevin (Nevin), who calculated separate capitalization rates for Adir and for Carl's Jr., assigning a capitalization rate of eight percent to Adir and a lower five percent rate to Carl's Jr. Nevin testified that Carl's Jr. was entitled to a lower capitalization rate because it was a substantially stronger and

more desirable tenant than Adir. Nevin further testified that given the difference between the two capitalization rates, the Property was worth $181,800 more with Carl's Jr. as a tenant paying less rent for a shorter lease term that it would be had Adir continued as a tenant paying a higher rent for a longer term.

Although defendants claim that Nevin's testimony was uncontroverted, the record does not support that claim. Merona's Vice President of Real Estate Operations, Armando Delgado (Delgado), testified that he calculated a capitalization rate of 7.75 percent for the Property as a whole, based on net operating income and the actual sales price for the Property. Delgado applied the 7.75 capitalization rate to the difference in rent plaintiff was receiving from Carl's Jr. on an annualized basis and determined that the Property could have been sold for $601,000 more had Adir remained a tenant at the time of the sale.

Delgado further testified that using a single "blended" capitalization rate, rather than separate rates for each tenant, was appropriate because the Property was a multi-tenant shopping center. Delgado said using a separate capitalization rate for an individual tenant was not appropriate except in the case of a single-tenant property or a property with a large anchor tenant. He pointed out that the leased premises occupied by Adir comprised less than three percent of the Property and that he had never heard of using a separate capitalization rate for such a small retail tenant when analyzing the sale of the Property as a whole.

Delgado's testimony was bolstered by the testimony of defendants' second expert witness, Dino Savant. Savant confirmed that when selling a multi-tenant commercial center, "You don't break out cap rate by tenant. You would look at the financial strength of the overall income."

Defendants' evidence was not uncontradicted and did not compel a finding in their favor. (*Sonic, supra*, 196 Cal.App.4th at p. 466.)

C. No legal error

Nothing in the record supports defendants' claim that the trial court engaged in faulty legal analysis or that the court erred as a matter of law by rejecting their mitigation defense. The faulty analysis appears rather to have been on the part of defendants and their experts.

Guidelines for determining an appropriate market capitalization rate for the sale of an income producing property were discussed in *Milliken*. The court in *Milliken* stated that in such cases, "[t]he appropriate market capitalization rate could be established by reviewing sales of *comparable* leased premises." (*Milliken, supra*, 117 Cal.App.4th at p. 1102.) Defendants ignored these guidelines and assigned capitalization rates to Carl's Jr. and to Adir based on tenant-specific criteria rather than a review of comparable leased properties. The trial court did not err as a matter of law by rejecting defendants' mitigation defense.

II. Corrected Judgment

Defendants contend the trial court erred by amending the judgment to substitute GVCD in place of Merona as the plaintiff in this action. As discussed, the trial court had previously allowed plaintiffs' counsel to make that very substitution by granting an ex parte application to amend the complaint and by instructing counsel to file a revised order effecting the amendment. There is no evidence to support defendants claim that counsel's failure to file and serve the revised order was part of a deliberate scheme to subject defendants to multiple lawsuits.

Defendants next argue that the trial court lacked jurisdiction to amend the judgment after they filed their notice of appeal. A court retains jurisdiction to correct clerical errors in a judgment. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237.) The record here indicates the original judgment identifying Merona as the plaintiff was a clerical error. Both the parties and the trial court intended to substitute GVCD in place of Merona before the trial commenced and before judgment

was entered. The trial court did not exceed its jurisdiction by entering a corrected judgment nunc pro tunc.

III. Attorney Fees

GVCD requests an award of its attorney fees as the prevailing party in this appeal. Civil Code section 1717 authorizes such an award in a breach of contract action if the contract contains an attorney fee provision. The statute provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

The lease and guaranty entered into by defendants contain an attorney fee provision. Paragraph 24.21 of the lease agreement with Adir provides as follows:

> "**Attorney Fees.** If at any time after the date of this Lease either Landlord or Tenant institutes any action or proceeding against the other relating to the provisions of this Lease, or any default under the Lease, the party not prevailing in the action or proceeding shall reimburse the prevailing party for the reasonable expenses of attorney fees and all costs of disbursements incurred by the prevailing party, including without limitation, any fees, costs of disbursements incurred on any appeal from the action or proceeding."

The guarantee agreement between Azarkman and GVCD contains a similar provision:

> "**Attorney Fees and Court Costs.** If Landlord or Guarantor participates in an action against the other arising out of or in connection with this Guaranty, the prevailing party shall be entitled to recover from the other attorney fees, court costs, collection costs, and other costs incurred in and in preparation for the action."

Pursuant to Civil Code section 1717 and the provisions of the lease and guaranty, GVCD is entitled to its attorney fees as the prevailing party in this appeal.

DISPOSITION

The judgment is affirmed. GVCD is awarded its costs and attorney fees on appeal. The matter is remanded to the trial court to determine the amount of attorney fees to be awarded.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST