

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001336-MR

JOEL GOODIN D/B/A
GOODINS MARKET AND DELI

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 00-CI-00367

TBF FINANCIAL, LLC,
ASSIGNEE OF NORWEST FINANCIAL
LEASING, INC.; and
JAMES R. ODELL

APPELLEES

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: This is an appeal from a summary judgment of the Bell Circuit Court granted in favor of the creditor in a collection case. We conclude that the acceleration clause in the lease agreement between the parties controls as to the calculation of damages in the event of an undisputed breach by the debtor. We further conclude that a genuine issue of

material fact exists as to the total payments made by the debtor in satisfaction of his obligation under the lease agreement. Accordingly, we affirm in part and vacate and remand in part for reasons set forth in further detail in this opinion.

On August 16, 2000, the appellee and creditor in this action, TBF Financial, LLC., as assignee of Norwest Financial Leasing, Inc. (TBF Financial), filed a complaint in the Bell Circuit Court to collect on a debt in the amount of \$13,236.47, that was allegedly owed by appellant and debtor, Joel Goodin d/b/a Goodins Market & Deli (Goodin) after Goodin defaulted on a lease of a flavored iced drink machine. On April 17, 1998, Goodin financed the lease of the machine through Specialty Equipment Leasing Services, a Division of Norwest Financial Leasing, Inc. Eventually, Norwest assigned to TBF Financial all of its right, title and interest in the lease.

Under the terms of the lease, beginning in May of 1998, Goodin agreed to pay a monthly payment of \$192.53 for 60 months. Moreover, the lease had the following default provision:

Default: If you [Lessee] do not pay rent when due or if you break any of your promises to this Lease, you will be in default. If you default, we can require that you pay the remaining balance of this Lease and return the equipment to us. We can also use any of the remedies available to us under the Uniform Commercial Code or any other law. If we refer this Lease to an

attorney for collection, you agree to pay our reasonable attorney's fees and actual costs, including our travel costs to any deposition or court proceeding. If we have to take possession of the equipment, you agree to pay the cost of repossession. You agree that we will not be responsible to pay you any consequential or incidental damages for any default by us under this Lease.

In other words, this is an acceleration clause requiring the lessee, at the lessor's option, to pay all of the balance due if the lessee is in default. See Carter v. Jim Walter Homes, Inc., Ky. App., 731 S.W.2d 12, 13 (1987) (operation of acceleration clause in mortgage).

After seven months, Goodin stopped making his monthly payments under the lease because the machine was inoperable. Further, Goodin was under the impression the machine he agreed to lease would be brand-new, however, the machine he received from the supplier was a reconditioned machine. Ultimately, in late 1999, after Goodin informed the supplier that he no longer wanted the machine, the supplier came to pick it up from Goodin's market and deli. Thereafter, the supplier sold the machine for \$1,200.00.

Goodin filed an Answer and Counterclaim alleging that the machine was defective and did not conform to the contract or the representations of the seller. Moreover, Goodin alleged that TBF Financial and the supplier fraudulently represented

that the machine he was leasing would be brand-new, not reconditioned. Discovery ensued.

In January of 2002, TBF Financial made a motion for summary judgment. In support, TBF Financial asserted that there was no genuine issue as to any material fact. TBF Financial contended that Goodin did not dispute that he breached the contract. On the issue of damages, TBF Financial argued that the parties had agreed to the proper measure of damages in the default provision of the lease, and Goodin did not dispute the accuracy of the accounting entered by TBF Financial in support of its claim for relief. The accounting may be summarized as follows:

Total payments	
due (60@ \$192.53)	\$11,551.80
Payments made	(1,607.76)
Late charges	789.25
Credit for sale of	
equipment	<u>(1,200.00)</u>
Total due	\$ 9,533.29

In response to TBF Financial's motion for summary judgment, Goodin argued that the measure of damages was provided in Kentucky Revised Statutes (KRS) 355.2A-528, the statutory provision in Kentucky's Uniform Commercial Code for calculating the lessor's damages in the event of default by the lessee.

Ultimately, on May 20, 2002, the trial court granted TBF Financial's motion for summary judgment. The trial court ordered Goodin to pay the sum of \$9,533.29, together with

interest thereon at the rate of 8 percent per annum from September 28, 2001, until the date of this judgment and at the rate of 12 percent per annum from May 20, 2002, until paid; for an attorney's fee in the amount of \$3,001.50 as provided in the lease agreement; and for all costs expended by TBF Financial. The trial court further dismissed Goodin's counterclaim with prejudice.

In this appeal, Goodin argues that the trial court erred by granting summary judgment. Goodin contends that the formula used by the trial court in calculating damages was unfair. Further, the parties to the lease did not agree to this measure of damages. Specifically, Goodin asserts that the lease provision addressing default speaks in terms of remedies, not calculation of damages. Because the lease is silent as to how "remaining balance" of the lease should be calculated, the trial court should have deferred to KRS 355.2A-528. Goodin does not appeal the trial court's dismissal of his counterclaim.

The standard of review on appeal of a summary judgment under Kentucky law is well-settled. Specifically, the standard 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, Ky. App., 916 S.W.2d 779, 781 (1996); Rules of Civil Procedure (CR) 56.03. Moreover, "[t]he record must be viewed in a light

most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”

Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Further, where the relevant facts are undisputed and the dispositive issue becomes the legal effect of those facts, our review is *de novo*. See Western Ky. Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, Ky. App., 80 S.W.3d 787, 790 (2001).

Turning to the facts of this case, there is no question that Goodin defaulted under the lease in failing to make his monthly payments. The issue concerns the amount of damages to which TBF Financial is entitled due to Goodin’s breach. Goodin argues that KRS 355.2A-528 is applicable in this case. KRS 355.2A-528 is as follows:

- (1) Except as otherwise provided with respect to damages liquidated in the lease agreement (KRS 355.2A-504) or otherwise determined pursuant to agreement of the parties (KRS 355.1-102(3) and 355.2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under KRS 355.2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in KRS 355.2A-523(1) or 355.2A-523(3)(a), or, if agreed, for other default by the lessee:
 - (a) Accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as

of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor;

(b) The present value as of the date determined under clause (a) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term; and

(c) Any incidental damages allowed under KRS 355.2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under KRS 355.2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

In response to Goodin's assertions, TBF Financial argues that the parties agreed on the method of calculating damages in the event of the lessee's breach, therefore, KRS 355.2A-528 is inapplicable. We agree. KRS 355.2A-528 expressly provides that the parties are free to make such an agreement. We further agree with TBF Financial that Goodin's argument that the parties had an agreement as to the remedy, but no agreement as to damages is a distinction without a difference because the recovery of damages is the remedy under the circumstances of this case.

Here, TBF Financial and Goodin contracted for the financing of Goodin's lease of a machine used in his business. The parties contemplated damages in the event of Goodin's default in advance and inserted such a provision in the contract. Specifically, the damages equal the performance promised by Goodin less the performance delivered. In addition, Goodin agreed to pay TBF Financial's attorney's fees if the matter was referred to an attorney for collection. In short, TBF Financial did not seek any damages over and above what was set out in the default provision of the lease agreement. Because the parties had an agreement as to damages for the lessee's default, KRS 355.2A-528 is inapplicable. Accordingly, we affirm the trial court's judgment insofar as it defers to the method of calculating damages set out in the lease agreement.

After reviewing the record, however, we noticed several discrepancies in the total amount of payments made by Goodin before he returned the machine. First, TBF Financial stated that Goodin had paid a total of \$1,524.17 in monthly payments. Then, it stated that Goodin had paid a total of \$1,607.76. Throughout discovery and in this appeal, Goodin maintains that he paid a total of \$2,013.76, and the record further indicates in Joel Goodin's deposition that he produced cancelled checks to substantiate that amount. Because we believe a genuine issue of material fact remains as to the total

amount paid by Goodin in satisfaction of the lease agreement, we vacate the judgment and remand this case for the sole purpose of determining that amount.

For the foregoing reasons, the trial court's judgment is affirmed in part and vacated and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Nagle
Denham, Golden and Nagle
Middlesboro, Kentucky

BRIEF FOR APPELLEE:

James R. Odell
Lexington, Kentucky