

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000120-MR

LJM CORPORATION

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 02-CI-00358

MAYSVILLE HOTEL GROUP, LLC, AND
MAYSVILLE RESTAURANT GROUP, LLC

APPELLEES

OPINION
AFFIRMING IN PART
VACATING AND REMANDING IN PART

** ** * * *

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: LJM Corporation brings this appeal from a November 20, 2003, order of the Mason Circuit Court entered after a bench trial upon a breach of contract claim regarding the operation of a restaurant at the French Quarter Inn in Maysville, Kentucky. We affirm in part, vacate and remand in part.

On June 7, 2001, appellant and appellees entered into a contract (the Operating Agreement) whereby appellant was to

operate a restaurant located in a hotel (French Quarter Inn) owned by appellees. By letter dated October 29, 2002, appellees informed appellant that "[t]he Operations Agreement under which you are operating at French Quarter Inn is terminated." Thereupon, appellant filed the instant breach of contract action against appellees in the Mason Circuit Court. Specifically, appellant claimed to be entitled to damages, per the Operating Agreement, in a sum equal to all monies paid to appellees by appellant during the calendar year proceeding the termination of the contract. Appellees filed a counterclaim, asserting the Agreement was procured by fraud and they were entitled to damages and attorney fees. The action was tried by the court without a jury on September 22, 2003. Ky. R. Civ. P. 52.01. By order entered November 20, 2003, the trial court concluded, *inter alia*, that appellant had breached an implied covenant of cleanliness and thus, was not entitled to any damages as appellees' termination of the Agreement was "for cause."¹ This appeal follows.

Our standard of review in this case is governed in part by CR 52.01. This rule provides that in actions tried upon

¹ The trial court did grant appellant a judgment for \$1,647.94 as the prorated value of a liquor license obtained by appellant that would accrue to the benefit of appellees. The judgment regarding the liquor license was not cross-appealed. The trial court also ruled against appellees on their counterclaim, which likewise was not appealed.

the facts without a jury, the trial court's findings of fact shall not be set aside unless clearly erroneous with due regard given to the trial court in judging the credibility of the witnesses. Since the trial court's findings of fact are not at issue in this appeal, this Court's review is thus limited to the trial court's interpretation of the terms of the Operating Agreement, which is a matter of law for the Court. Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893 (Ky. 1992). Accordingly, our review is de novo.

Appellant contends the trial court committed error by determining that there existed an implied covenant of cleanliness in the Operating Agreement. The Agreement is quite specific in detailing the duties and responsibilities of each party thereto. When implying the covenant of cleanliness into this Agreement, the trial court reasoned:

As sure as anything in the law can
be, a contract to operate a
restaurant, silent upon the
requirement of cleanliness, will
be deemed to contain an implied
covenant on the part of the
operator of sanitized
cleanliness

The trial court, however, failed to cite any legal authority recognizing such an implied covenant of cleanliness; in our review, we can find no jurisdiction that recognized such a covenant.

Courts must be cautious when implying contractual terms in written agreements. 17A Am. Jur. 2d Contracts § 369 (2004). Contractual terms should only be implied if they are necessarily involved in the contractual relationship and the parties have failed to include the terms through inadvertence or due to their obvious nature. Id. The contract before this Court is one to operate a restaurant. Arguably, one could assume that the parties intended the restaurant to be kept "clean." However, this is a highly subjective standard which the parties chose to ignore in the Operating Agreement.² Such an omission indicates an intention to exclude any reference to cleanliness, not to include it. Id. Upon reviewing the Operating Agreement, we cannot conclude that "cleanliness" was intended to be a material term thereof.

However, all existing laws, statutes, and ordinances that are applicable are presumed to become part of a contract at the time and place of its making. Id. at §371. The trial court noted in its findings that the Mason County Health Department had conducted an inspection of the restaurant at the request of appellees and identified several infractions of health rules. There was no finding by the trial court as to whether restaurant operations were ordered to cease for health or sanitary reasons. If the restaurant were closed for violation of applicable health

² The Operating Agreement was drafted by the appellees' attorney.

codes or statutes, precluding appellant's performance under the Operating Agreement, then a breach of the agreement could have been maintained.

Additionally, in Kentucky, every contract contains an implied covenant of good faith and fair dealing. RAM Engineering & Construction, Inc. v. University of Louisville, 127 S.W.3d 579 (Ky. 2003); KRS 355.1-203. This implied covenant has been interpreted to mean that "contracts impose on the parties thereto a duty to do everything necessary to carry them out." Id. at 585 (citations omitted). Neither the trial court's findings of fact nor conclusions of law address whether appellant's actions violated the implied covenant of good faith and fair dealing as recognized by Kentucky courts.

Considering the complete absence of legal authority supporting an implied covenant of cleanliness and the general rule prohibiting courts from rewriting contracts, we decline to recognize an implied covenant of cleanliness in the Operating Agreement. See Wilhoit v. Furnish, 295 Ky. 356, 174 S.W.2d 515 (1943). Simply stated, we are of the opinion the trial court erred by implying a covenant of cleanliness into the Operating Agreement. Therefore, we vacate the trial court's order upon this issue and remand this matter for the trial court to reconsider its decision in light of our holding.

Appellant also alleged the trial court erred by considering certain photographs of the restaurant. Appellant claims the photographs were "too remote in time to have productive value." The relevancy of evidence is within the sound discretion of the trial court, and in this instance, we see no abuse of that discretion and affirm that ruling. See Love v. Commonwealth, 55 S.W.3d 816 (Ky. 2001).

As to appellant's remaining contentions, we deem them either to be moot or to be without merit.

As noted, the trial court granted a judgment for appellant against appellees for the prorated value of the alcohol beverage licenses that had been acquired by appellant in the operation of the restaurant. Appellees did not appeal this judgment and it shall not be reconsidered by the trial court upon remand.

For the foregoing reasons, the order of the Mason Trial court is affirmed in part, vacated in part and this cause is remanded to the Mason Trial court for proceedings not inconsistent with this opinion.

SCHRODER, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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