

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001227-MR

UNIVERSAL MANAGEMENT, INC.,
D/B/A HOME CLASSICS,
AND KAY BOOTH

APPELLANTS

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, SPECIAL JUDGE
CIVIL ACTION NO. 02-CI-00239

LOUISA JUNCTION, LTD.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR
JUDGE.¹

MINTON, JUDGE: Universal Management, Inc., d/b/a Home Classics,
and Kay Booth (collectively "Booth") appeal from the circuit
court's grant of summary judgment to Louisa Junction, Ltd., in a
case in which both sides claimed the other breached a lease.

Finding no error, we affirm.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of the
Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Our review of this case was hindered by the fact that Booth's brief does not contain a recitation of the factual and procedural history of the case, as is required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). Based on our review of the record, the facts pertinent to this appeal are discussed below.

Louisa Junction leased a portion of the Louisa Plaza Shopping Center in Louisa, Kentucky, to Booth for the operation of a furniture store. Kay Booth, an experienced businessperson and owner of Home Classics, gave her personal guarantee for Home Classics' obligations under the lease. According to the lease, Booth accepted the leased property "in 'as is' condition[.]" In addition, section 6.3 of the lease obligated Louisa Junction to maintain the roof and exterior walls of the leased premises in good repair; but section 6.4 of the lease required Booth to maintain the heating and air conditioning on the premises. Furthermore, section 8.1 of the lease contained an exculpatory clause, which provided that Louisa Junction was not liable for any damage to Booth's property from, among other things, a leaking roof. Finally, section 14.1 of the lease stated that any oral agreements in conflict with any of the written terms of the lease were without effect. Notwithstanding the explicit written terms of the lease, Booth claims that before she signed

the lease, a representative of Louisa Junction orally promised to repair the air conditioning units.

The leased premises had recurring roof leaks. Louisa Junction patched and eventually replaced the entire roof. The air conditioning unit also leaked throughout the first few months of Booth's tenancy. Around the first anniversary of the lease, Booth and Louisa Junction made a written amendment to the lease in which Booth agreed to pay more monthly rent in exchange for Louisa Junction's agreement to fix or replace the air conditioning unit. All the remaining lease terms were left unchanged by the amendment.

Eventually, Booth demanded that Louisa Junction pay for water damage to Booth's inventory allegedly caused by leaks from the air conditioner or from the roof. When Louisa Junction refused to allow Booth an offset against rent for the cost of the damaged inventory, Booth vacated the premises without notice and without paying the rent due.

Louisa Junction then sued Booth for unpaid rent, late fees, and attorney's fees. Booth counterclaimed, alleging, among other things, that Louisa Junction had committed the tort of intentional infliction of emotional distress and interference with Home Classics' business relationships. Following a period of discovery, the trial court granted Louisa Junction's motion for summary judgment. Later, the trial court issued a

supplemental order awarding Louisa Junction attorney's fees and costs and denying Booth's motion to alter, amend, or vacate. Booth filed this appeal.

In assessing the propriety of the trial court's grant of summary judgment to Louisa Junction, we are mindful of the fact that summary judgment was appropriate only if Louisa Junction showed that Booth "could not prevail under any circumstances."² In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-movant.³ When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact.⁴ Since factual findings are not at issue, the trial court's decision is entitled to no deference.⁵

Booth's first argument is that the trial court erred by not finding that Louisa Junction fraudulently induced her to enter into the lease. Booth's brief does not contain a statement showing how, or if, this argument was preserved for review, as is required by CR 76.12(4)(c)(v). Indeed, Booth's

² Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

³ *Id.*

⁴ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁵ *Id.*

brief does not show where any of the issues she attempts to raise were preserved for appellate review. Furthermore, despite her arguments to the contrary, we have examined Booth's sprawling counterclaim; and we have found no definitive claim that Louisa Junction committed fraud. CR 9.02 requires that all allegations of fraud must be "stated with particularity." Under our law, an allegation of fraud in a pleading must set forth the time, place, and substance of the allegedly fraudulent statements.⁶ Booth's counterclaim does not meet that requirement. Thus, Booth's fraud claims are not cognizable.

But even if we assume that Booth's fraud claim is enough for CR 9.02, it would still fail because it is unquestioned that Booth had an opportunity to read the lease and that the lease says that no oral agreements in conflict with its written terms could be valid. Such a clause fits the general rule that oral statements contradicting the written terms of a contract are unenforceable.⁷ Furthermore, the lease expressly provides that Booth was accepting the property "as is." Thus, Booth's claim that Louisa Junction fraudulently induced her to entering into the lease by orally promising to repair the air conditioning system is unavailing.

⁶ Scott v. Farmers State Bank, 410 S.W.2d 717, 722 (Ky. 1966).

⁷ See, e.g., Citizens Nat. Bank of Glasgow v. Damron, 286 Ky. 43, 149 S.W.2d 762, 765 (1941).

Booth next contends that the trial court erred by not finding that Louisa Junction breached the lease by not making the necessary repairs to the roof, which purportedly led to the destruction of some of Booth's inventory. This claim, however, must fail in light of the exculpatory clause found at section 8.1 of the lease. That section provides in relevant part that:

All personal property, fixtures, goods, wares, and merchandise in the Demised Premises shall be and remain at Tenant's [Booth's] sole risk, and Landlord [Louisa Junction] shall not be liable for any damage to, or loss of, such personal property, fixtures, goods, wares, or merchandise arising from . . . bursting, overflowing, or leaking of the roof or downspouts, or of water, sewer, or steam pipes, or from heating or plumbing fixtures, or from electric wires or fixtures, or from any other cause whatsoever

Since these terms are clear and unmistakable, we agree with the trial court's conclusion that "Section 8.1 of the contract prohibits Defendant [Booth] from recovering for damage to her inventory[.]"

Perhaps recognizing that Section 8.1 dooms her claim regarding Louisa Junction's alleged breach of the lease by failure to make necessary repairs to the roof, Booth contends that Section 8.1 violates public policy. We disagree.

Under our law, exculpatory clauses are enforceable; but they are not favored and are to be strictly construed.⁸ To be enforceable, the exculpatory clause must be written so clearly that an ordinarily prudent person would perceive the negligence for which liability will be avoided.⁹ The exculpatory clause at issue here plainly states that all personal property and goods in the leased premises are "at Tenant's sole risk" and that Louisa Junction would not be liable for damage caused by a "leaking of the roof" or "from any other cause whatsoever[.]" We find that the exculpatory clause is written in plain, unmistakable language that establishes clearly that Louisa Junction bore no liability for damage to Booth's property due to a leaking roof. Furthermore, the exculpatory clause is in accordance with one we have previously found to not violate public policy.¹⁰ So we reject Booth's argument that the exculpatory clause violates public policy. The clause is harsh; but the purpose of the law is to save parties from illegal bargains, not unwise ones.¹¹

⁸ Hargis v. Baize, 168 S.W.3d 36, 47, (Ky. 2005)

⁹ *Id.*

¹⁰ Jones v. Hanna, 814 S.W.2d 287 (Ky.App. 1991).

¹¹ *Id.* at 290.

For the foregoing reasons, the Lawrence Circuit Court's decision to grant summary judgment to Louisa Junction, Ltd. is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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