

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

NO. 2021-0338

JERRY GAUCHER, d/b/a JR'S STEAK AND SEAFOOD

v.

WATERHOUSE REALTY TRUST, GARY WATERHOUSE, TRUSTEE, et al

DEFENDANT'S MEMORANDUM OF LAW PURSUANT TO RULE 16 (4)(b)

NOW COMES Waterhouse Realty Trust and Waterhouse Country Stores, Inc. (hereinafter Waterhouse) by and through their attorney, Steven G. Shadallah, Esquire and respectfully submits this Memorandum of Law pursuant to Rule 16 (4)(b) of the Supreme Court Rules.

I. ESSENTIAL FACTS AS FOUND BY THE TRIAL COURT

The trial court's May 2021 Final Order (FO) made the following essential findings relevant to this appeal. The court found the motivation for the Lease Termination Agreement (LTA) was that Waterhouse's buyer, the Klemms, did not want the Plaintiff, Gaucher, to remain as a tenant (FO p 4). Gaucher was not paid timely for the payment due him under the LTA because the closing with the Klemms was delayed so Waterhouse lacked the funds to pay Gaucher the \$20,000.00 on July 1, 2015 (FO p 6). Gaucher then unilaterally reentered the property and refused to leave (FO p 6). On July 28, 2015, the day after the sale to the Klemms was complete, Waterhouse offered to pay Gaucher the \$20,000.00 if he vacated but he refused (FO p 6). Gaucher paid no rent for 5 months until he was evicted (FO p 7). Gaucher was not

allowed to present evidence of consequential damages due to not providing evidence in discovery and he made no offer of proof (FO p 8). The court further found that the date of payment was not essential to the contract as the contract did not specify that time was of the essence to payment (FO p 11). The court further found that Gaucher's reentry was a material breach of the parties' Agreement (FO p 12). The court ruled that Waterhouse should be indemnified for its eviction costs pursuant to the parties' LTA. (FO p 12). The court also ruled that Gaucher was entitled to a set off relative to the return of Gaucher's security deposit (FO p 13). The crux of the court's decision was that "the Lease Termination Fee was intended to buy only one thing, i.e. the permanent separation of Gaucher from the premises prior to the sale of the premises to Klemms" (FO p 12).

Though Gaucher may contest the court's rulings and findings, those rulings and findings were within the discretion of the trial court to make. Gaucher's appeal fails to recognize that the trial court has the discretion to decide conflicts in evidence, determine credibility and it can even reject uncontroverted evidence. See Loon Valley Homeowner's Ass'n v Pollock, 171 N.H. 75, 78 (2018); Foundation for Seacoast Health v Hospital Corporation of America, 165 N.H. 169, 175 (2013). The lower court's finding that Gaucher materially breached the contract is a discretionary ruling that is within the province of the trial court to make and is not subject to de novo review. See Foundation for Seacoast Health at 181.

The trial court's July 7, 2021 post decision order revised the default judgment order against Kevin Waterhouse to find zero damages. Although Waterhouse is not subject to that order, the trial court had the authority to revise its' default damages to correct judicial error to prevent injustice. See Collins v Walker, 55 N.H. 437 (1875)

II. PROCEDURAL IRREGULARITIES IN GAUCHER'S APPEAL

Gaucher has raised a new argument for the first time on appeal. Gaucher's Brief makes an argument against indemnification of eviction costs at pages 14-18 of his Brief. However, he never presented this issue to the trial court. New Hampshire Supreme Court Rule 16(3)(b) required Gaucher to identify where the issue was raised. Gaucher's Brief cited pages 116-119 of the Appendix. Gaucher Brief at p 5. However, that is a reference to Gaucher's Motion for Reconsideration which interestingly does not mention indemnification within the Motion. Therefore, Gaucher's argument against indemnification for eviction costs has not been preserved in his appeal and should not be considered by this court. Bean v. Red Oak Property Mgt Inc., 151 N.H. 248 (2004)

Gaucher has also omitted a material court order in its Appendix. A central part of Gaucher's Complaint was that he suffered consequential damages by not being paid timely. Damages are required to be proven in connection with a material breach. See Foundation for Seacoast Health, supra at 182. On March 19, 2019, the trial court barred Gaucher from offering evidence at trial on this issue due to a failure to respond to discovery requests. Pursuant to New Hampshire Supreme Court Rule 17, Waterhouse attaches a copy of this Order as an Addendum.

Gaucher has asserted several alleged facts that the trial court did not adopt. First, the Brief asserts Gaucher invested \$50,000.00 into the property. Gaucher Brief at 8. This was based on Gaucher's testimony which was uncorroborated by any documents and conflicted with the testimony of Gary Waterhouse. The trial court refused to make such a finding. Second, the Brief asserts one or two months after the Lease was executed, Waterhouse was looking for a buyer. Gaucher Brief at 9. Once again, the evidence was conflicting and the court made no such finding. Third, the Brief states after reentry, Waterhouse never asked Gaucher to leave or pay

rent. Gaucher Brief at 10. The trial court, however, found otherwise. Specifically, the court held “Gaucher refused to leave” and “Gaucher possessed the premises for approximately five months, rent free.” (FO p 6 and 12)

III. ARGUMENT

In the eviction action brought in the 10th Circuit – District Division – Salem, that court ruled that the LTA “was a new substituted agreement under New Hampshire law” and that Waterhouse’s late payment “did not give the defendant, Mr. Gaucher, the right to move back into the property. Rather, his right was to pursue his legal remedies for damages in an appropriate court of law.” (Gaucher Appendix at p 96)

The trial court in this case made note of that ruling (FO p 7) and also noted that Gaucher was making the same argument in this case that the judge in the eviction case had denied, to wit, that the late payment resurrected his tenancy. (FO p 6) Gaucher never explained why Waterhouse’s late payment allowed him to unilaterally squat without offering to pay rent for five months.

In any event, it is noteworthy that this underlying ruling – that the LTA was a new substituted agreement – was correct. See National American Corp v Federal Republic of Nigeria, 448 F. Supp 622, 643 (S.D.N.Y) aff’d 597 F.2d 314 (2nd Cir 1978). In that case, the court explained a substituted contract is different than an executory accord since there is “an immediate discharge and satisfaction of existing claims in return for the new contract”. That court looked to the contract terms to make that finding. Similarly, in the within case, the LTA repeatedly says it “terminates the lease” and provides terms of a new agreement. A Massachusetts case finding a substituted contract is Haskell v Versyss Liquidating Trust, 815 N.E., 2d 225 (Mass App 2004). A New Hampshire case not using this terminology but

recognizing the concept is Phelan v Adam, 79 N.H. 348 (1920). There is no law cited by Gaucher that he had the legal right to reenter the premises because of Waterhouse's failure to make payment. The law in fact is opposite that his remedy was to sue for damages, not to reenter.

Furthermore, this appeal does not allow Gaucher to have de novo review in this court. The determination of whether a breach is material is a discretionary ruling. In Foundation for Seacoast Health, supra at 181, this court explained "Whether a breach of contract is material is a question of fact, and we will uphold the trial court's findings of fact and rulings of law unless they lack evidentiary support or constitute a clear error of law". See also Fitz v Coutinho, 136 N.H. 721, 725 (1993) ("Whether a delay in payments is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case.") As this court has stated, when reviewing discretionary rulings, "we do not decide if we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence." Loon Vally, supra

A. The Trial Court Properly Found Gaucher Materially Breached The Lease Termination Agreement

The trial court found the purpose of the LTA was to remove Gaucher from the premises. (FO p 4, 12) Gaucher asserts that the purpose was to effectuate the sale which occurred so there is no material breach. (FO p 21) Although that may have been Gaucher's view of the Agreement, it was not the trial court's view nor the trial court's finding. Additionally, the Agreement does not state that. A review of the Agreement shows that the purpose was to extinguish the lease thereby removing Gaucher from occupancy. Gaucher did not provide at trial any evidence that would lead a reasonable person to conclude that the trial judge erred.

Foundation for Seacoast Health, supra at 182, indicated that one of the criteria for deeming a breach as material is if “the breach substantially defeats the contract’s purpose”. The closing in this case occurred on July 27, 2015 but Waterhouse’s buyer, the Klemms, could not occupy Gaucher’s space until December 2015 after the eviction action was brought. Waterhouse, therefore, could not give its buyer occupancy of Gaucher’s space since Gaucher continued to occupy it which thwarted the very purpose for which the LTA was entered into. Gary Waterhouse’s testimony supported the trial court’s finding that the purpose of the Agreement was to remove Gaucher since Waterhouse’s buyer wanted Gaucher out. (TR 47, 67-8)

Moreover, Gaucher’s argument in his Brief – that the purpose of the LTA was to effectuate the sale – is contrary to his own testimony. At trial, he testified that “they approached me because the new owners didn’t want a food vendor there, they wanted to do the food themselves. So...they negotiated a buyout so that I would leave”. (Tr p 15) Gaucher’s own testimony supports the testimony of Gary Waterhouse and the court’s finding that the purpose of the LTA was to extinguish the lease and remove Gaucher from occupancy so the new buyer could occupy the same space.

B. Waterhouse Did Not Materially Breach the Agreement

The trial testimony demonstrated that Gaucher was offered to be paid the \$20,000.00 due him immediately after the sale on July 28, 2015 (FO p 6). Gaucher, however, refused to accept payment.

The trial court looked to the Agreement to find that timing was not essential to the Agreement. The court noted payment was not coincident with termination of the lease since there was a gap of one week. (FO p 11) The court quoted Fitz, supra for the proposition that

“Time is generally not of the essence in a contract, unless the contract specifically so states, even if a particular time schedule is specified.” Fitz was a late payment case that did not find a material breach.

Fitz is not the only case to find late payment was not a material breach. See Sawin v. Carr, 114 N.H., 462, 466 (1974) where this court stated that “there was substantial evidence to support the master’s finding that time was not of the essence and that the late payments were not a material breach of the agreement.” See also Guy v Hanley, 111 N.H. 73, 76 (1971) where this court approved the master’s ruling that time was not of the essence to a contract. Finally, see also George v Al Hoyt & Sons Inc., 162 N.H. 123, 135 (2011) where this court stated “Neither contract specified that time was of the essence with respect to time for performance.” Similarly, in this case, the LTA did not state that time was of the essence with respect to the time of payment.

Curiously, Gaucher cites the anticipatory breach case of LeTarte v West Side Development Group LLC, 151 N.H. 291 (2004). That case involved a sale where the seller sold the property to a third person making the contracted sale impossible. That is not what occurred in this case. Here, the sale by Waterhouse was only slightly delayed and the money was forthcoming immediately after the sale but payment was rejected by Gaucher.

It should also be noted that Gaucher raises a new claim for the first time on appeal that Waterhouse was unable to make the payment due to a transfer of title to the Waterhouse brothers. (Brief at 19-20) This court should not entertain this claim even if it was meritorious which it is not, since it was not raised in the trial court. Bean, supra. Gaucher’s Motion for Reconsideration did not make this assertion either. (Gaucher Appendix 116-119). It is also contradicted the trial court’s finding that Gaucher was offered \$20,000.00 on July 28, 2015 and

he refused payment. The trial court stated “the Trust informed Gaucher that it had the \$20,000.00 lease termination fee and would pay it to Gaucher if he left the building.” (FO p 6) In so ruling, the court likely relied on a letter from Waterhouse’s counsel to Gaucher’s counsel offering the payment, the contents of such letter Gaucher acknowledged at trial. (Tr 30)

Finally, Gaucher does not make any attempt to show that the trial court did not have sufficient evidence to make its findings and decision. Rather, Gaucher merely repeats his prior positions and makes new unfounded arguments in an attempt to convert this appeal into a de novo review which is not the standard before this court.

C. Indemnification Was Warranted

The trial court found that the indemnity provision of the LTA encompassed eviction costs. The trial court stated “The lease termination agreement required Gaucher to indemnify and hold the Trust harmless (from) precisely this type of expense. The expense was due solely to Gaucher’s material breach of the agreement.” (FO p 12)

Gaucher’s Motion for Reconsideration did not attempt to rebut this ruling. (Gaucher Appendix p 116-119). Nevertheless, Gaucher cites his Motion for Reconsideration in an attempt to show that he raised the issue below. (Gaucher Brief p 5) Since Gaucher’s challenge to the indemnification ruling is being made for the first time on appeal, it should not be considered by this court. Bean, supra

The Lease Termination Agreement’s purpose was to extinguish the lease and remove Gaucher from the property as the trial court so found. (FO p 4 and 12) The eviction proceeding against Gaucher was necessitated by Gaucher’s refusal to leave. The indemnification provision is broad. It indemnified Waterhouse from “any and all actions, claims, costs, demands, expenses, fines, liabilities and suits of any nature whatsoever”. (Gaucher Appendix p 90) It

cannot be seriously disputed that the indemnification provision would capture the costs Waterhouse incurred in seeking to evict Gaucher for his failure to abide by the provisions of the LTA which required he vacate.

Town of Nottingham v Newman, 147 N.H. 131 (2001) involved an agreement to pay costs and legal fees if a party did not remove two mobile homes as promised in an agreement. In that case, this court looked to the intent of the agreement and the parties it was intended to affect. Similarly, here, Gaucher promised to vacate but then reentered as a squatter and refused to leave. As a result, Waterhouse incurred costs in seeking his eviction to obtain his compliance with the Lease Termination Agreement.

Gaucher's argument in his Brief is based on his incorrect interpretation and analysis of Kessler v Gleich, 161 N.H. 104 (2010). The Kessler court held that a limited partner was not clearly entitled to be indemnified for attorney's fees for a suit against a general partner because the contract was designed for third party claims not intra-partnership claims. Gaucher acknowledges the testimony and documentary evidence shows that Waterhouse assigned its rights in the LTA to Klemms (Gaucher Brief at 18, Tr 79-80) and that Waterhouse's buyers, the Klemms, had an agreement with Waterhouse that Waterhouse would pay the eviction costs. Nevertheless, Gaucher argues unconvincingly that he should not be required to indemnify Waterhouse. Kessler provides little support for Gaucher's claim. Kessler did not involve a plaintiff who held an assignment. Gaucher provides no case law that would invalidate an indemnity assignment and Waterhouse is not aware of any.

IV. CONCLUSION

The decision of the trial court should be summarily affirmed in all respects and this appeal dismissed.

Respectfully submitted,

Waterhouse Realty Trust
Gary Waterhouse, Trustee



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CERTIFICATE OF SERVICE

I, Steven G. Shadallah, Esquire do hereby certify that I have made due service of a conformed copy of the foregoing Defendant's Memorandum of Law Pursuant to Rule 16 (4)(b) upon Christopher J. Seufert, Esquire, through the efile system on this 31st day of January, 2022.



Attorney for Defendants

I, Steven G. Shadallah, Esquire do hereby certify that this Defendant's Memorandum of Law Pursuant to Rule 16 (4)(b) contains 2884 words.



Steven G. Shadallah, Esquire

ADDENDUM

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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5 Court Street/PO Box 2880
Concord NH 03302-2880

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NOTICE OF DECISION

File Copy

Case Name: **Jerry Gaucher v Waterhouse Realty Trust, Gary E. Waterhouse, Trustee, et al**
Case Number: **217-2017-CV-00623**

Enclosed please find a copy of the court's order of March 19, 2019 relative to:

ORDER

March 19, 2019

Catherine J. Ruffle
Clerk of Court

(485)

C: Christopher J. Seufert, ESQ; Steven G. Shadallah, ESQ

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Jerry Gaucher d/b/a JR's Steak & Seafood

v.

Waterhouse Realty Trust, et al

No. 2017-CV-00623

ORDER

This case arises out of a lease entered into by the Plaintiff, Jerry Gaucher, d/b/a JR's Steak & Seafood ("Gaucher") and Waterhouse Realty Trust and its predecessors in interest ("Waterhouse"). Most of the facts are not in dispute, because of prior litigation between the parties. Gaucher and Waterhouse entered into a five-year lease on January 29, 2014 for commercial space in Windham, New Hampshire. Waterhouse wanted to sell the property, and entered into an agreement with Gaucher whereby Waterhouse bought out Gaucher's lease and agreed to pay Gaucher \$20,000 by July 1, 2015. Waterhouse never made the payment, and after moving out, Gaucher moved back into the premises. Eventually, Waterhouse's successor Klemm's Corner, LLC, brought an eviction action against Gaucher and succeeded in that action in the 10th Circuit Court on December 3, 2015.

Gaucher has now brought a breach of contract action to recover the \$20,000 which was never paid. In addition to the \$20,000 which is a liquidated sum based upon the contract between the parties, Gaucher seeks consequential damages. Complaint, ¶ 13.

Defendant Waterhouse has brought a Counterclaim alleging that it suffered damages because Gaucher vacated the property, but then reentered it, forcing Waterhouse's successor, to bring an eviction action.

Both parties seek to exclude evidence based upon the failure of the other party to properly complete discovery. For the reasons stated in this Order, Waterhouse's Motion is GRANTED IN PART; Gaucher may not introduce evidence relating 1) to his claim that because of the breach of contract he did not have the funds to pay off the balance remaining on his equipment lease, he paid extra interest on the loan and 2) his claim for lost income for the summer of 2015. Gaucher's Motion is GRANTED in part. Waterhouse may not introduce evidence of consequential damages caused by Gaucher's conduct, but may proceed on its claim for attorney's fees.

I

Waterhouse has filed a Motion in Limine to exclude evidence of consequential damages for failure to provide discovery. Waterhouse sent an Interrogatory, Interrogatory 6, which requested that Gaucher "itemize in full and complete detail, omitting nothing, all damages Plaintiff claims to have suffered as a result of the Plaintiff's claim that the Defendants failed to comply with the Agreement to provide all documents in support of this answer."

Gaucher responded to Interrogatory 6 by stating:

- A. I did not have the funds to pay off the balance remaining on my equipment lease, so I paid extra interest on this loan through its three-year term (see enclosure 1)
- B. Lost income for the summer of 2015 (based on 2014 in Windham). I will get CPA to get a report.
- C. Return of \$1500 security deposit.

Waterhouse also requested information about the operation of JR Steak & Seafood in 2014 by Interrogatory 12, requiring the Defendant to produce all profit and loss statements, copies of leases or rental agreements entered into by the Plaintiff for any location for the operation business from January 1, 2014.” Interrogatory 12. Gaucher provided a lease from Somersworth, N.H. but provided no information about profits or loss. Gaucher produced a ledger showing payment of interest but, according the Waterhouse’s Motion, failed to produce the actual loan documents. Although Waterhouse sent an Interrogatory seeking information about an possible expert witness, Gaucher never provided an answer to the Interrogatory:

Waterhouse seeks exclusion of any evidence regarding the following:

- A. Any claim for damages referred to in response to interrogatory number 6 given that the interrogatory was not fully and properly complied with
- B. Any evidence concerning Gaucher’s claim that he failed the did not receive the return of the security deposit specifically directed and interrogatory number 8
- C. Any report of the CPA or other rather referenced in response to Interrogatory 12 (b) or the so-called Somersworth lease.

Gaucher objects, and basically asserts that the information that he produced was sufficient. Objection in Part to Defendant’s First Motion in Limine, p. 1.

II

New Hampshire favors liberal discovery. Kamesh v. Muntrie, 168 N.H. 76, 80-81 (2015). New Hampshire courts have traditionally taken the view that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information. Laramie v. Stone, 160 N.H. 419, 425 (2010). The Superior Court Rules reflect

this principle, and require automatic disclosure of any documents and things that are disclosing party has in his or her possession which he or she may use to support his or her claims or defenses. Superior Court Rule 22 (a).

Where a party fails to produce information and discovery, but that party is allowed to present the evidence at trial, that non-producing party obtains an unfair advantage. Moreover, the failure to produce discovery in a timely fashion may result in cases being tried which would otherwise be settled, thus resulting in greater expense to the parties and congestion of the courts. For this reason, a trial court has broad control over discovery and may prevent a party from relying on evidence which it did not produce in discovery. Superior Court Rule 21 (d (2) (C); see also Burse v. Burse, 145 N.H. 283, 286 (2000). When these principles are applied to facts of the instant case, it is apparent that the failure to produce by both sides was improper.

A. Waterhouse's Motion in Limine

Gaucher cannot rely on the testimony of a CPA to establish lost income for the summer of 2014 because he never produced any report from the CPA or even identified the CPA. Obviously, a CPA would be an expert witness and Gaucher not only failed to disclose the expert's opinion and the facts underlying the opinion, he has not even attempted to show good cause for failure to produce an expert disclosure.

Similarly, Gaucher's claim that he did not have funds to pay off the balance remaining in the equipment lease, so that he paid extra interest does not appear to be quantified.¹ According to Waterhouse, Gaucher produced a ledger showing interest payments, but no copy of the loan documents themselves. No explanation for the failure to

¹ The Court assumes without deciding that such damages would be recoverable. Emery v. Caledonia Sand &

answer the interrogatory fully is provided.

However, Plaintiff's interrogatory answer regarding the \$1500 security deposit is adequate, and Gaucher may introduce evidence on that point. Therefore, Waterhouse's Motion in Limine is GRANTED in part.

B. Gaucher's Motion in Limine/to Dismiss Waterhouse's Counterclaim

Gaucher seeks to prevent Waterhouse from producing evidence of the consequential damages asserted in its Counterclaim, including attorney's fees on two grounds. First, Gaucher alleges that Waterhouse did not produce any itemization regarding its claim for damages. Second, Gaucher claims that Waterhouse's claim is barred by the doctrine of res judicata. However, at oral argument Gaucher conceded that it had not raised res judicata as an affirmative defense and is therefore barred from asserting it. Maroon v. Deutsche Bank National Trust Company, 167 N.H. 220, 230 (2014). It therefore appears that Gaucher's claim is identical to that made by Waterhouse; it claims Gaucher should be precluded from producing evidence of consequential damages because it has failed to comply with discovery rules.

Gaucher sent an interrogatory to Waterhouse which stated in substance that Waterhouse was to "describe in detail the legal and factual basis for all/any such claims." Please include any documentation you have its supporting your claim." Waterhouse answered:

Yes the Plaintiff is responsible for the damages, losses and attorney's fees were incurred as a result of its failure to terminate and vacate the premises as and when required by the agreement to terminate lease, a copy of which has been provided herewith. (Sic)

However, no quantification of the claim is provided.

Gravel, 117 N.H. 441, 446 (1977).

The decision on Waterhouse's motion informs the Court's decision on Gaucher's Motion. Waterhouse provided essentially no specific information with respect to Gaucher's Interrogatory seeking information about its consequential damages. In fact, it is arguable that any such information should have been produced as part of Waterhouse's obligations under the automatic disclosure rule, Superior Court Rule 22(a). Gaucher's Motion to exclude consequential damages must be GRANTED. However, Waterhouse will be entitled to assert a claim for attorney's fees. Attorney's fees can only be awarded if they are reasonable and it is the practice in New Hampshire to submit proposed fees to the trial court and allow the opposing party to object. Although the Court makes no determination as to whether or not, in the circumstances of this case, Waterhouse is entitled to fees, it is entitled to assert a claim for them. If attorney's fees are awarded, Gaucher will have an adequate opportunity to review the proposed fee award.

SO ORDERED

3/19/19
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/