The State of New Hampshire

Supreme Court

2022 Term

No. 217-2017-CV-00623; 217-2019-CV-00449

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

v.

WATERHOUSE REALTY TRUST, GARY WATERHOUSE, TRUSTEE, et al

RULE 7 APPEAL FROM DECISION OF MERRIMACK COUNTY SUPERIOR COURT

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

Brief By:/s/ Christopher J. Seufert
Christopher J. Seufert, Esquire
Seufert Law Office, PA
Bar # 2300
59 Central Street
Franklin, New Hampshire 03235
(603) 934-9837
cseufert@seufertlaw.com

Oral Argument:/s/ Christopher C. Snook
Christopher C. Snook, Esquire
Seufert Law Office, PA
Bar # 274093
59 Central Street
Franklin, New Hampshire 03235
(603) 934-9837
csnook@seufertlaw.com

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1. Appellant had filed a Motion for Final Judgment against Kevin Waterhouse for $21,500.00 plus interest, attorney's fees and costs. On 02/04/2020 the trial court issued a final default against Kevin Waterhouse approving Appellant's Motion for Final Judgment, which was later clarified to include an award of attorney's fees and costs. In its final decision on the trial court has ordered that judgment against Kevin Waterhouse is $0.00. Was it an error of law to reverse the Final Default Judgment against Kevin Waterhouse of $21,500.00 plus interest by later issuing an order that the judgment is now $0.00? (Preserved, Plaintiff's Motion to Reconsider, Appendix p. 116-19)

2. Waterhouse Realty Trust reached an agreement with Appellant to terminate Appellant's lease for $20,000.00 to be paid on 07/01/2015. The Trust dud not pay Appellant on 07/01/2015, so Appellant reoccupied the rental space. The understood purpose of this contract was to effectuate the sale of the property to Klemm's Corner, LLC, which was accomplished on 07/27/2015 despite Appellant's occupation of the rental space. The eviction of Appellant was later done by Klemm, LLC resulting in a district court trial, where an order was issued ruling that Waterhouse Realty Trust breached the contract by not paying Appellant on 07/01/2015 but that Appellant could not reoccupy the property. Was it an error of law for the trial court to find Appellant in material breach of the contract? (Preserved, Plaintiff's Motion to Reconsider, Appendix p. 116-19)

3. Using the same circumstance as in #2, was it an error of law for the trial court to not find the Trust in material breach of the contract? (Preserved, Plaintiff's Motion to Reconsider, Appendix p. 116-19)

4. The Trust asserts that it had a contract with Klemm's Corner, LLC to pay the costs of evicting Appellant, the only evidence of this contract was testimony by Gary Waterhouse and the issue was not raised at the District Court during the eviction case. In its decision on the merits, the trial court found that an indemnification clause in the contract with Appellant made it so upon judgment against Appellant, Appellant must pay the attorney's fees and costs of its own eviction.

Was it wrong as a matter of law to find that the Appellant had to pay for the costs of his own eviction? (preserved, Plaintiff's Motion to Reconsider, Appendix p. 116-19)

5. The Trust (and other Defendants) were able to sell the property to Klemm's Corner LLC., but under the trial court's decision they do not have to pay Appellant the $20,000.00 for terminating the lease, and are entitled to reimbursement for the eviction, which is set-off by the $1,500.00 security deposit owed to Appellant. Was it an error of law for the trial court to find only the Appellant liable for damages? (preserved, Plaintiff's Motion to Reconsider, Appendix p. 116-19)

New Hampshire Superior Court Civil Rule 42

(a) When a party against whom a Complaint or other pleading (see Rule 6) requiring a response has been filed fails to timely Answer or otherwise defend, the party shall be defaulted. No such default shall be stricken off, except by agreement, or by order of the court upon such terms as justice may require. The court shall strike the default only upon motion and affidavit of defense, specifically setting forth the defense and the facts on which the defense is based.

(b) Final default may be entered by the court, *sua sponte*, where appropriate, or by motion of a party, a copy of which shall be sent to all parties defaulted or otherwise.

(c) In all cases in which final default is entered, whether due to failure to file an Answer or otherwise, the case shall be marked "final default entered, continued for entry of judgment or decree upon compliance with Rule 42." A copy of the court's order and any subsequent orders shall be mailed or electronically delivered to all parties, defaulted or otherwise.

(d) The non-defaulting party may then request entry of final judgment or decree, by filing a motion, together with an affidavit of damages or, in cases where equitable relief is requested, a proposed decree. Where the default is based on a failure to file an Answer, the motion shall include a military service statement. The moving party shall certify to the court that a copy of all pleadings has been mailed to the defaulting party and shall include a notice that entry of final judgment or decree is being sought. Any party may request a hearing as to final judgment or decree. All notices under this rule shall be sufficient if mailed to the last known address of the defaulting party.

(e) A hearing as to final judgment or decree shall be scheduled upon the request of any party. Otherwise, the court may enter final judgment or decree based on the pleadings submitted or exercise its discretion to hold a hearing depending on the circumstances of the default, the sufficiency of the pleadings and the nature of the damages sought or relief requested.

(f) If the court schedules a hearing, all parties, defaulted or otherwise, shall receive notice and an opportunity to be heard.

STATEMENT OF CASE

Initial Pleadings

On 11/30/2017, Plaintiff Jerry Gaucher d/b/a JR's Steak and Seafood ("Gaucher" began the instant case by filing a Complaint against Waterhouse Realty Trust ("the Trust"), Gary E. Waterhouse as Trustee, Kevin K. Waterhouse as Trustee and Waterhouse Country Store, Inc. for breach of the lease termination agreement. (Appendix 98-100) The Trust and Waterhouse Country Store, Inc. thereafter counterclaimed against Gaucher for damages caused by Gaucher's reentering of the property 01/18/2018. (Appx. 101-04).

Later, on 07/15/2019 Gaucher filed a Motion to Amend Complaint to add Gary E. Waterhouse and Kevin K. Waterhouse as individual Defendants for violations of RSA 545-A, Uniform Fraudulent Transfer Act. (See Appx. 105-06). Defendants objected, and to preserve Gaucher's rights, a complaint naming Gary E. Waterhouse and Kevin K. Waterhouse as individual Defendants for violations of RSA 545-A, Uniform Fraudulent Transfer Act was filed as a separate action on 07/17/2019. (See Appx. 105-06)

Thereafter, the two cases were consolidated. (Appx. 105-06).

Default Against Kevin Waterhouse

Default was entered against Kevin Waterhouse on 10/03/2019 for failure to file a timely answer and appearance. (Appx. 107). Therefore, on 12/24/2019 Gaucher filed a Motion for Final Judgment against Kevin Waterhouse for $21,500.00 ($20,000.00 lease termination fee + $1,500.00 lease deposit) plus interest and fees, and attorney's fees and filing costs. (Appx. 108-12).

On 02/24/2020, Hon. McNamara issued a Final Judgment against Kevin Waterhouse granted the above motion. (Appx. 113).

Later, on 04/27/2020 Hon. McNamara clarified in his order that the default judgment against Kevin Waterhouse did not include attorney's fees because Gaucher's Motion for Final Judgment "did not refer to the request for [attorney's] fees, which was not part of the caption of the Motion." (Appx. 114-15).

Bench Trial

After a bench trial on 03/09/2021, Hon. Schulman issued a ruling against Gaucher on all his claims and for The Trust on its counterclaim, subject to a $1,500.00 set-off of Gaucher's deposit which he posted with the Trust. (Addendum 25-38).

Thereafter, Gaucher filed his Motion for Reconsideration asking the Court to reconsider reversing the previous award of damages against the Defendant Kevin Waterhouse, ruling in favor of Defendant Waterhouse Realty Trust on their counterclaim and ruling against Gaucher on his breach of contract claim. (Appx. 116-19).

After denial of the Motion for Reconsideration, the instant appeal followed.

STATEMENT OF FACTS

Background

The Trust owned property in Windham, New Hampshire and Gaucher leased space inside a building on the property to operate a restaurant named JR's Steak and Seafood. (Appx. 14-16 [Transcript of Bench Trial page 13 lines 11-15, page 14 lines 1-25, page 15 lines 1-15].

The parties had a lease agreement executed on January 24, 2014 for five (5) year tenancy which Gaucher felt would be sufficient to ensure he recouped the approximately $50,000.00 he invested into JR's Steak and Seafood. (Appx. 15, 19-20 [Tr. page 14 lines 6-25, page 18 lines 20-25, page 19 lines 1-18])

Apparently, within a month or two of the lease's execution, Defendants began looking for buyers to purchase the property. (Appx. 15 [Tr. page 14 lines 18-25]) Once a buyer was secured, the prospective new owner wanted Gaucher to move his business out of the property. (Appx. 16 [Tr. page 15 lines 1-5])

Lease Termination

Therefore, The Trust reached an agreement to terminate Gaucher's lease on 05/14/2015, where the Trust would pay $20,000.00 to Gaucher on 07/01/2015 in exchange for Gaucher vacating his space at the 18 Mammoth Rd, Windham, NH property by 06/15/2015. (Appx. 13-15, 18, 21 [Tr, page 12 lines 18-25, page 13 lines 1-25, page 14 lines 1-13, page 17 lines 8-14, page 20 lines 3-18]; Lease Termination Agreement Appx. 90).

Gaucher needed the $20,000.00 on 07/01/15 so that he could then relocate JR's Steak and Seafood to another location. (Appx. 20-21 [Tr. page 19 lines 19-25, page 20 lines 1-14]). Defendants executed the Lease Termination agreement so that the property could be sold to Klemm, LLC. (Appx. 69 [Tr. page 68 lines 4-5]).

Contract Breach

Gaucher vacated the space by 06/15/15 but The Trust did not pay the $20,000.00 by 07/01/15. (Appx. 21 [Tr. page 20 lines 3-18]). Notably, Gary Waterhouse testified that 07/01/2015 was the date Gaucher was supposed to be paid. (Appx. 51-52 [Tr. page 50, lines 24-25, page 51 lines 1-2]).

Without the tender of $20,000.00 Gaucher was unable to relocate at another location. (Id.). Unable to move to a new location and losing money, Gaucher decided to reoccupy the property and begin operating JR's Steak and Seafood again. (Appx. 24 [Tr. page 23 lines 13-23]). However,

despite knowing Gaucher had reoccupied the premises, Gary Waterhouse never asked Gaucher to leave, or cease doing business. (Appx. 44-45 [Tr. page 43 lines 7-25, page 44 lines 1-22]).

Notably, Gary Waterhouse and Kevin Waterhouse had transferred the property from the Trust to themselves personally on 06/29/2015. (Appx. 52-53 [Tr. page 51 lines 3-25, page 52 lines 1-19]; Quit Claim Deed Appx. 91-93). Despite this transfer, Gary Waterhouse insisted the Trust didn't have the money to pay Gaucher the $20,000.00 on 07/01/2015. (Appx. 82-83 [Tr. page 81, lines 18-25, page 82 lines 1-3]).

Thereafter, Gary and Kevin sold the property to Klemm's Corner LLC ("Klemm") by deed recorded on 07/27/2015, while Gaucher was still at the property. (Appx. 54-55 [Tr. page 53 lines 22-25, page 54 lines 1-23]; Warranty Deed Appx. 94-95). After the sale of the property to Klemm, the proceeds returned to Gary and Kevin Waterhouse personally, not The Trust. (Appx. 55-58 [Tr. page 54 lines 13-25, page 55 lines 1-25, page 56 lines 1-25, page 57 lines 1-19]).

Eviction

Gaucher remained at the property and Klemm, LLC proceeded to begin an eviction action which ended in a trial in Salem District Court on 12/03/2015. (Appx. 96-97).

The Hon. Robert S. Stephens, issued an order finding that the original lease between Waterhouse and Gaucher was substituted by the Lease Termination and that The Trust proceeded to breach the Lease Termination by not tendering the $20,000.00 on 07/01/15. (Id.)

No demand for rent was ever made of Gaucher after he moved back into the property. (Appx. 36 [Tr. page 35 lines 3-17]).

Gary Waterhouse personally incurred legal fees in relation to the above eviction action against Gaucher. (Appx. 73 [Tr. page 72 lines 7-11, 23-25]). These fees were Gary Waterhouse's

responsibility because of an agreement he had with Klemm in which Gary Waterhouse was personally responsible for evicting Gaucher. (Appx. 79 [Tr. page. 78 lines 11-24]).

Liability

Gary Waterhouse further testified that he and his brother Kevin Waterhouse assigned all rights, title, and interest in their lease and lease termination agreement with Gaucher, to Klemm, LLC. (Appx. 80-81 [Tr. page 79 lines 24-25, page 80 lines 1-10]).

Through counsel, Gary Waterhouse agreed to be liable to Gaucher for damages if either The Trust or Waterhouse Country Store, Inc. were found liable to Gaucher for damages. (Appx. 10 [Tr. page 9, lines 1-14]).

SUMMARY OF ARGUMENT

Hon. McNamara issued a Final Judgment against Kevin Waterhouse granting Gaucher's Motion for Final Judgment after Kevin Waterhouse had been defaulted for failure to file a timely answer and appearance. Gaucher's Motion for Final Judgment requested damages against Kevin Waterhouse and was accompanied by an Affidavit of Damages. By granting Gaucher's Motion for Final Judgment, the trial court issued a judgment on the merits of Gaucher's claims against Kevin Waterhouse and any periods for appeals on this decision have long since passed.

Gaucher and the Trust reached an agreement to terminate Gaucher's lease, within which was a clause where Gaucher agreed to indemnify the Trust for any actions, claims, costs, demands, expenses, fines, liabilities and suits. The Trust thereafter transferred ownership of the property where Gaucher was a tenant to Kevin and Gary Waterhouse, who then sold the property and assigned , all rights, title, and interest in the lease and lease termination agreement with Gaucher to Klemm. Apparently, as part of the sale Gary Waterhouse agreed to pay for Klemm's eviction of Gaucher. The counterclaim to recoup the eviction expenses was by the Trust and

Waterhouse's Country Store, both of whom assigned all their rights to the lease and lease termination agreement to Klemm and were not party to the agreement to pay for Gaucher's eviction. Therefore, the Trust and Waterhouse's Country Store have no claim for the costs of the eviction.

When the Trust transferred the property to Gary and Kevin Waterhouse, it voluntarily deprived itself of assets necessary satisfy the $20,000.00 payment to Gaucher. Further, when the date of payment came and no money was provided to Gaucher he was unable to relocate his business and therefore defeating the purpose for which Gaucher agreed to terminate his lease. The Trust agreed to terminate the lease so the property could be sold, which did occur despite Gaucher still being at the property. Therefore, the Trust is not discharged from paying Gaucher the $20,000.00.

ARGUMENT

I. DEFAULT JUDGMENT

Procedural Background

When judgment was issued in this matter the trial court stated in its 05/20/2021 Order that Gaucher is not entitled to recover against Kevin Waterhouse, despite Final Judgment against Kevin Waterhouse being entered for the $21,500.00 claimed by Gaucher. (Addendum 25-38; 02/24/2020 Order Appx. 113; see generally Appx. 107-112).

The trial court reasoned that it could issue a judgment on damages because a damages hearing was held during the bench trial on the claims against Kevin Waterhouse. (Addendum 25-38). However, damages against Kevin Waterhouse were not discussed during the hearing outside of Counsel for Gaucher pointing out that Final Judgment was made against Kevin for liquidated

damages of $20,000.00 and the security deposit of $1,500.00. (Appx. 6-7 [Tr. page 5 lines 16-25, page 6 lines 1-20]).

Thereafter, Gaucher filed his Motion for Reconsideration, and among other issues, raised that "the Court now ruling that Gaucher is not entitled to that prior judgment against Defendant Kevin Waterhouse seems in error." (Appx. 116-19). When denying the Motion for Reconsideration, the trial court stated that "Kevin Waterhouse's liability was never previously determined." (Addendum 39).

Default Judgment is Conclusive as to the Rights of the Parties

The trial court now ruling that Gaucher is not entitled to that prior judgment against Defendant Kevin Waterhouse is in error because a default judgment is an admission of all material and well-pleaded allegations of fact in Gaucher's writ. See Koch v. Randall, 136 N.H. 500, 503 (1992) ("as in the case of a default, a judgment *pro confesso* results in the admission of all material and well-pleaded allegations of fact").

In Innie v. W & R, Inc., 116 N.H. 315 (1976), the defendants defaulted on a writ of attachment to perfect a mechanics' lien, and judgment of $15,041.27 was granted for the plaintiff. Id. at 315-16. Later, the defendants sold their property to a third-party who brought an action to dissolve the attachment, which was denied by the trial court. Id. at 316. On appeal, the Court held that the new owner was precluded by *res judicata* from litigating the attachment. See Id.

In holding that res judicata applied to the new owner, the Court reasoned that "the default judgment entered against [original defendants], was **a final judgment on the merits**, conclusive as to the rights of the parties and their privies." Id. (emphasis added).

Further, even a default judgment for failure to respond to interrogatories within 10 days of a conditional default due to negligence by the defaulting party's attorney constitutes a judgment on the merits. Barton v. Barton, 125 N.H. 433, 433-35 (1984).

In the instant case, Gaucher motioned for Final Judgment Kevin Waterhouse's default, asking for judgment of $21,500.00. (Appx. 108-12). After the filing of that motion with an accompanying sworn affidavit of damages, none of the co-defendants objected or requested a hearing on those damages. (See 02/24/2020 Order, Appx. 113).

If no hearing is requested on the damages, then the trial court "may enter final judgment or decree based on the pleadings submitted." New Hampshire Superior Court Civil Rule 42(e).

By granting that motion, the trial court issued final judgment based on the pleadings submitted to that point, which asked for and specified that a judgment of $21,500.00 would satisfy Gaucher's claim. (See Appx. 108-13).

Therefore, the judgment was for $21,500.00 and all appeals periods have long since run so that judgment against co-defendant Kevin Waterhouse is final.

II. INDEMNITY OF ATTORNEY'S FEES AND COSTS FOR THE EVICTION ACTION

The indemnification language in the Lease Termination states:

> **Whereas:** In consideration for terminating the lease, indemnifying and holding harmless the Landlord from any and all actions, claims, costs, demands, expenses, fines, liabilities and suits of any nature whatsoever, removing the equipment and cleaning the space, Gary E. Waterhouse and

(Appx. 90).

Kessler v. Gleich

In Kessler v. Gleich, 161 N.H. 104 (2010), the defendant, individually and as general partner of Fire House Block Associates, L.P., appealed an order requiring him to indemnify the plaintiff, "one of several limited partners of FHBA," for the attorney's fees and costs the plaintiff

incurred in the underlying declaratory judgment action and those incurred by the New Hampshire Housing Finance Authority ("NHHFA") in a related foreclosure action. Kessler, 161 N.H. at 105.

The Kessler Court considered whether two indemnification clauses in a partnership agreement required the defendant pay the attorney's fees of the plaintiff for those incurred by the NHHFA. The indemnification clauses specifically stated that one party would pay the attorney's fees of another in several different scenarios. Id. at 107.

In relevant part, the two clauses state:

> Notwithstanding the foregoing, each General Partner shall indemnify and save harmless the Partnership, the Limited Partners and the other General Partners from and against any claim, loss, expense, liability, action or damage, including, without limitation, reasonable costs and expenses of litigation and appeal (and the reasonable fees and expenses of counsel) arising out of his fraud, bad faith, gross negligence, or his willful failure to comply with any representation, condition or other agreement herein contained…
>
> The Partnership will indemnify and hold harmless each of the General Partners and their successors and assigns from any claim, loss, expense, liability, action or damage resulting from any act or omission performed or omitted by any of them in their capacities as General Partners, including, without limitation, reasonable costs and expenses of litigation and appeal (and the reasonable costs and expenses of attorneys engaged by the General Partners in defense of such act or omission), but no General Partner shall be entitled to be indemnified or held harmless for any act or omission arising from his fraud, bad faith, gross negligence, or his willful failure to comply with any representation, condition or other agreement herein contained. Any indemnity under this Section 6.7 shall be provided out of and to the extent of Partnership assets only, and no Limited Partner shall have any personal liability on account thereof. Kessler, 161 N.H. at 107.

No Indemnity for Attorney's Fees In Successful Declaratory Judgment Action

The trial court ruled in the plaintiff's favor on the declaratory judgment action finding that the defendant willfully breached his fiduciary duty of loyalty when he violated the partnership agreement and allowed a housing development to default. Id. at 105-06.

To determine whether those clauses compelled the indemnification of attorney's fees for the underlying action, the Court compared the law of various states. Id. at 107-110. After which the Kessler Court held:

> The indemnification provision at issue does not require the defendant to indemnify the plaintiff for the attorney's fees and costs he incurred in bringing this declaratory judgment proceeding because it does not specify that such fees and costs are recoverable in an action between the parties. Id. at 111.

Specifically, the Kessler Court reasoned that to collect attorney's fees under an indemnity clause, there must be "unmistakably clear" language that attorney's fees were contemplated. Kessler, 161 N.H. at 109-11.

No Indemnity for Attorney's Fees in Foreclosure Action

Next, the Kessler Court considered whether those clauses required indemnification of NHHFA's attorney's fees in a related foreclosure action. Id. at 111-13.

The housing development was financed through the NHHFA and record showed that the development defaulted because of the defendant's non-compliance with the financing agreement. Kessler, 161 N.H. at 105-06.

Therefore, trial court ruled that the defendant was responsible to indemnify the plaintiff for the attorney's fees in the foreclosure action because there was an agreement where partnership would pay NHHFA's reasonable attorney's fees for actions related to foreclosure resulting from

default, and the above indemnity clauses obligated "the defendant to indemnify the partnership for any expenses arising out of his willful failure to abide by the agreement." Id. at 112.

Notably, the Kessler Court agreed with the analysis but vacated the award of attorney's fees because the agreement to pay NHHFA's reasonable attorney's fees did not obligate the plaintiff to pay those fees, only the partnership. Kessler, 161 N.H. at 112. The plaintiff in Kessler was not the partnership and therefore it follows that the plaintiff was not a party to the partnership's agreement with NHHFA and therefore cannot recover under it.

Kessler Applied to the Instant Case

The Lease Termination Agreement was between Gaucher and The Trust. (Appx. 90). However, the property and therefore Gaucher's tenancy was transferred to Gary Waterhouse and Kevin Waterhouse individually on 06/29/2015. (Appx. 52-53 [Tr. page 51 lines 3-25, page 52 lines 1-19]).

Gary and Kevin Waterhouse thereafter sold the property to Klemm on 07/27/2015. (Appx. 54-55 [Tr. page 53 lines 22-25, page 54 lines 1-23]). Apparently, Klemm and Gary Waterhouse had an agreement where Gary was personally responsible for evicting Gaucher. (Appx. 79 [Tr. page. 78 lines 11-24]). Which led to Gary Waterhouse personally incurring legal fees of about $6,000.00 in relation to the above eviction action against Gaucher. (Appx. 73 [Tr. page 72 lines 7-11, 23-25]).

The counterclaim for which Gaucher was found liable for attorney's fees was made by Defendants Waterhouse Realty Trust and Waterhouse's Country Store, Inc.

In his order, Hon. Schulman found that Gaucher had to indemnify the Trust for attorney's fees expended in the related eviction action. Likewise, the trial court in Kessler ordered the defendant to indemnify the plaintiff for fees accrued in a related foreclosure action.

Also, like in Kessler, Gary Waterhouse agreed to cover the costs of Klemm's eviction of Gaucher, not the Trust.

Gaucher agreed to indemnify the Trust not Gary Waterhouse. There is no privity between Gaucher and Gary Waterhouse for an agreement for indemnity. Further, all rights, title, and interest in the lease and lease termination agreement with Gaucher, was assigned to Klemm, LLC. (Appx. 80-81 [Tr. page 79 lines 24-25, page 80 lines 1-10]).

Therefore, Gaucher was in privity with Klemm, LLC regarding indemnification. Not only is Klemm, LLC not a party to this action, Gary Waterhouse was responsible for paying for the eviction, not the Trust. The Trust had no rights under the lease termination agreement following the assignment of those rights to Klemm, LLC and further, the Trust was not responsible for evicting Gaucher.

Therefore, the Trust has no claim for indemnity against Gaucher for the costs of eviction and the trial court's ruling that Gaucher must pay damages to the Trust under the counterclaim is in error.

III. BREACH OF CONTRACT

Waterhouse Realty Trust Materially Breached the Lease Termination

"Whether conduct is a material breach is a question for the trier of fact to determine from the facts and circumstances of the case." S. Willow Props., LLC v. Burlington Coat Factory of N.H., LLC, 159 N.H. 494, 503 (2009).

A material breach goes "to the root or essence of the between the parties, or… touches the fundamental purpose of the contract and defeats the object of the [contracting] parties" Seacoast Health v. Hosp. Corp. of Am., 165 N.H. 168, 181-82 (2013). Specifically, the material breach is present when:

> (1) "a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions"; (2) "the breach substantially defeats the contract's purpose"; or (3) "the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract. Id. at 182.

Further, "if one party… disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived." Roehm v. Horst, 178 U.S. 1, 8 (1900).

In LeTarte v. W. Side Dev. Group, LLC, 151 N.H. 291 (2004), the Court cited to the above quote to support the proposition that a party who voluntarily removes his power to perform, it gives rise to an immediate cause of action for breach of contract. Id. at 296.

The parties reached an agreement to terminate Gaucher's lease on 05/14/2015, where Defendant Waterhouse Realty Trust would pay $20,000.00 to Gaucher on 07/01/2015 in exchange for Gaucher vacating his space at the 18 Mammoth Rd, Windham, NH property by 06/15/2015. (Appx. 90).

The only parties to the Lease Termination Agreement were Gaucher and his landlord, the Trust. (Id.). Gaucher needed the $20,000.00 on 07/01/2015 in order to relocate JR's Steak and Seafood to another location. (Appx. 20-21 [Tr. page 19 lines 19-25, page 20 lines 1-14]).

Gaucher vacated the space by 06/15/15 but was not paid the $20,000.00 by 07/01/2015, despite Gary Waterhouse acknowledging a duty to do so. (Appx 21, 51-52 [Tr. page 20 lines 3-18, page 50, lines 24-25, page 51 lines 1-2]). Instead, Gary Waterhouse and Kevin Waterhouse had transferred the property from the Trust to themselves personally on 06/29/2015. (Appx 52-53 [Tr. page 51 lines 3-25, page 52 lines 1-19]; Quitclaim Deed Appx. 91-93).

Despite this transfer, Gary Waterhouse insisted the Trust didn't have the money to pay Gaucher the $20,000.00 on 07/01/2015. (Appx. 82 [Tr. page 81, lines 18-25, page 81 lines 1-3]). Logically, this is because the transfer from the Trust to the brothers was for less than $20,000.00, and in all likelihood was for $0.00. This meant that the Trust no longer had any assets and therefore could not pay the $20,000.00.

Further, after the sale of the property to Klemm, LLC, the proceeds returned to Gary and Kevin Waterhouse personally, not the Trust. (Appx. 55-58 [Tr. page 54 lines 13-25, page 55 lines 1-25, page 56 lines 1-25, page 57 lines 1-19]).

At no point after 06/29/2015 was the Trust capable of paying Gaucher the $20,000.00.

The Trust's decision to transfer the property to Gary and Kevin Waterhouse as individuals was a voluntary decision to make its performance under the Lease Termination impossible. Without the tender of $20,000.00 Gaucher was unable to relocate at another location, thus defeating the substantial purpose for Gaucher signing the Lease Termination.

The Trust made it impossible for Gaucher to realize the benefit he was to receive by agreeing to terminate his lease and therefore committed a material breach of the Lease Termination.

Waterhouse Realty Trust Should Not be Allowed to Shirk its Contractual Duties

Only a total breach discharges the injured party's duties under a contract. McNeal v. Lebel, 157 N.H. 458, 465 (2008) (quoting Fitz v. Coutinho, 136 N.H. 721, 725 (1993)); see also Bouffard v. State Farm Fire & Cas. Co., 162 N.H. 305, 311 (2011).

As shown above, the Trust materially breached the Lease Termination by voluntarily being incapable of tendering the $20,000.00 on 07/01/2015. (Appx. 20-21 [Tr. page 19 lines 19-25, page 20 lines 1-14]). Thereafter, Gaucher, unable to move to a new location and losing money, decided

to reoccupy the property and begin operating JR's Steak and Seafood again. (Appx. 24 [Tr. page 23 lines 13-23]).

This action is not a reason for the Trust to be absolved of owing Gaucher the $20,000.00. Despite knowing Gaucher had reoccupied the premises, Gaucher was never asked to leave or cease doing business at the property prior to the sale to Klemm, LLC. (Appx. 44-45 [Tr. page 43 lines 7-25, page 44 lines 1-22]). Further, the Trust executed the Lease Termination agreement so that the property could be sold to Klemm, LLC, and still the property was sold to Klemm by deed recorded on 07/28/2015, while Gaucher was still at the property. (Appx. 54-55, 69 [Tr. page 53 lines 22-25, page 54 lines 1-23, page 68 lines 4-5]).

To the degree that Gaucher may have breached the Lease Termination agreement by moving back in after not being paid the $20,000.00 by 07/01/2015, it was not a total breach which would discharge the duties of the Trust to tender the $20,000.00.

Since the property sold with Gaucher still occupying it, the fundamental reason for the Trust agreeing to the Lease Termination was accomplished. Therefore, the Trust's duties under the Lease Termination are not discharged by Gaucher's re-entering of the property.

It was an error of law to not find the Trust liable to Gaucher for $20,000.00.

CONCLUSION

The award of $0.00 in damages against Kevin Waterhouse after final judgment was entered for $21,500.00, was in error and $21,500.00 in damages against Kevin Waterhouse should be entered.

The award of fees expended by the Trust in the eviction of Gaucher, based on an agreement between Gaucher and the Trust for Gaucher to indemnify the Trust for such fees was in error and the award of fees should be vacated.

The ruling that Gaucher is not entitled to recover the $20,000.00 lease termination fee under his claim for breach of contract, if based on the Trust not committing a material breach was in error. If based on Gaucher's reentry into the property, was also in error and an award of $20,000.00 should be entered against the Defendants.

Request for Oral Argument

The Petitioner hereby request oral argument in this matter.

Respectfully submitted,
Gerald Gaucher d/b/a JR's Steak and Seafood
By and through counsel,

/s/ Christopher J. Seufert 01/03/2022

Christopher J. Seufert, Esquire
Seufert Law Office, PA
Bar # 2300
59 Central Street
Franklin, New Hampshire 03235
(603) 934-9837
cseufert@seufertlaw.com

Date

STATE OF NEW HAMPSHIRE

MERRIMACK, ss

I certify that on this the 4th day of January 2022 I mailed two copies of the within brief, addendum of appealed/reviewed orders and appendix to Steven G. Shadallah and Richard J. Maloney.

/s/ Christopher J. Seufert

Christopher J. Seufert, Esquire
Seufert Law Office, PA
Bar # 2300
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Franklin, New Hampshire 03235
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cseufert@seufertlaw.com

ADDENDUM

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Merrimack, ss.

JERRY GAUCHER
d/b/a JR's Steak And Seafood

v.

GARY WATERHOUSE and KEVIN WATERHOUSE
As Trustees Of The Waterhouse Realty Trust;
WATERHOUSE COUNTRY STORE, INC.;
GARY WATERHOUSE; and
KEVIN WATERHOUSE

217-2017-CV-00623

JERRY GAUCHER
d/b/a JR's Steak And Seafood

v.

GARY WATERHOUSE; and
KEVIN WATERHOUSE

217-2019-CV-00449

ORDER

On March 9, 2021 this court held a bench trial in these matters with respect to all claims by all parties, with the exception of plaintiff's claims against defendant Kevin Waterhouse in his individual capacity.

Because defendant Kevin Waterhouse defaulted, by never filing an appearance or answer, the court held a damages hearing on the plaintiff's claims against him.

The court now rules as follows:

1. Gaucher is not entitled to the $20,000 lease termination fee due to his material breach of the lease termination contract.

2. Defendant Waterhouse Realty Trust ("the Trust") is entitled to damages from Gaucher in the amount of the $6,544.54. This is the amount that the Trust paid for attorneys' fees and costs to have the plaintiff evicted from the premises.

3. Plaintiff Jerry Gaucher is entitled to a set-off of $1,500. This is the amount of the security deposit he posted with the Trust.

4. Based on Judge McNamara's prior orders, no party is entitled to any other form of incidental or consequential damages.

6. The Trust is entitled to statutory interest and recoverable costs (which are likely limited to the filing fee for the counterclaim).

7. However each side will bear its own attorney's fees in connection with the litigation of this case.

7. Accordingly:

In 2017-CV-00623, Judgment on the counterclaim is issued to the Trust in the amount of $5,544.54, plus costs and interest.

In 2017-CV-00623, Judgment on all of claims is granted to all of the defendants.

In 2019-CV-00449, Judgment on all claims is granted to both of the defendants.

FACTS

The Trust is the former own of a plot of land located at 18 Mammoth Road (State Road 111) in Windham, New Hampshire. This real estate has long been used as a gas station/convenience store. During the Trust's tenure of ownership, defendant Windham Country Store, Inc. operated the convenience store.

In January 2014, the Trust leased a section the convenience store building to Gaucher. The leased portion of the premises was not a separately secured unit, but rather a specified portion of the retail area. The lease entitled and required Gaucher to operate a steak and seafood restaurant in the demised space.

The written lease agreement is not in the record. However, the parties testified that (a) a written lease agreement did exist, (b) the written lease was for a five-year term ending in January 2019 and (c) the lease required Gaucher to pay a $1,500 security deposit which he did in fact pay. The record does not

disclose what contingencies were covered by the security deposit.

On May 14, 2015 (i.e. approximately sixteen months into the five year lease term), Gaucher and the Trust mutually agreed to terminate the lease effective June 15, 2015. There had been some tension between landlord and tenant leading up to the termination agreement. However, what truly motivated the Trust was that it found a buyer for the real estate and that buyer, Klemms Corner LLC ("Klemms"), did not want Gaucher to remain as a tenant.

Gaucher agreed to accommodate the Trust by relinquishing his rights under the lease in return for a $20,000 lease termination fee. Gaucher needed the money so that he could relocate his restaurant and resume operations quickly.

Gaucher and the Trust memorialized their agreement is a written contract signed by both parties. Plaintiff's Ex. 1. The contract provided that:

(a) Gaucher would vacate the premises by June 15, 2015;

(b) Prior to that date, Gaucher could continue to operate his restaurant for two weeks and then spend two weeks removing his equipment and cleaning;

(c) The Trust would pay Gaucher $20,000 "on July 1, 2015," i.e. two weeks after the termination of the tenancy; and

(d) Gaucher would indemnify and hold the Trust harmless from claims, costs, etc.

The parties disagree as to whether Gaucher vacated the premises by June 15, 2015 as required by the lease termination agreement. Gaucher asks the court to find that "Plaintiff vacated the space by 6/15/15[.]" Gaucher's Proposed Findings and Rulings, ¶5. The Trust asks the court to find that "Gaucher did not fully vacate the premises by June 15, 2015[.]" Trust's Proposed Findings and Rulings, ¶6.

Oddly enough, the parties have switched their positions on this issue. Paragraph 8 of the Trust's counterclaim alleges that " . . . Gaucher did vacate the property[.]" Gaucher denied this allegation in his answer to the counterclaim.

The evidence at trial proved that Gaucher did indeed leave the premises by June 15, 2015 but he left some bulky equipment behind. Although Gaucher maintains that the equipment belonged to the Trust (and, therefore, had to be left behind), and the Trust maintains that the equipment belonged to Gaucher (and, therefore, had to be removed), either way he had abandoned it. Thus, on June 15, 2015 Gaucher's tenancy was no more. It had been terminated.

Under the lease termination agreement, the Trust was supposed to pay Gaucher the $20,000 lease termination on July 1, 2015, e.g. two weeks after he vacated the premises. However,

the Trust defaulted on this obligation. Because it had not yet closed on the sale to Klemms, the Trust lacked the funds to pay Gaucher.

Gaucher viewed this as material breach. He believed the Trust's failure to pay on July 1 entitled him to unilaterally rescind the lease termination agreement by resurrecting his tenancy. In mid-July (although the precise date cannot be discerned from the record), Gaucher used self-help to move back into the premises. He brought his restaurant equipment back into the building and resumed operations. He did this unilaterally and without notice to the Trust. Gaucher then refused to leave, claiming the benefit of the original five year lease term.

Later that month, on July 27, 2015, the Trust consummated the sale of the premises to Klemms. The next day the Trust informed Gaucher that it had the $20,000 lease termination fee and would pay it to Gaucher if he left the building and abandoned any claim to lawful possession. Gaucher, however, insisted that the lease termination agreement had been rescinded (although he did not use the word "rescinded") and refused to leave.

The new owner, Klemms, was not amused. When it became clear that Gaucher would not budge absent a judicial order, Klemms filed a landlord/tenant action in Circuit Court. That

case went to trial in December, 2015. During the intervening five months Gaucher had remained in possession but did not pay rent to either Klemms or the Trust.

The Circuit Court ruled in Klemms' favor and issued a writ of possession. The Circuit Court found that Gaucher's lease terminated pursuant the lease termination agreement. The court opined that Trust's failure to pay the lease termination fee on the due date might have supported a claim for damages but did not resurrect the tenancy. Gaucher accepted the Circuit Court's judgment and finally moved out in December 2015.

The Trust was contractually responsible for the cost of maintaining the eviction action. That cost turned out to be $6,544.54.[1] As noted above, the case went to trial. Along the way counsel had to interact with the relevant witnesses, respond to Gaucher's defenses, deal with Gaucher's motion to transfer venue, and prepare a memorandum of law.

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[1]In a prior order Judge McNamara ruled that the amount of attorneys' fees would be proven as follows: The Trust's attorney would file an itemized affidavit of counsel. Gaucher would then have the opportunity to object to the affidavit or portions of the affidavit. The court would resolve any objections. Neither party objected to this arrangement. The Trust filed the required affidavit. Gaucher did not object to the affidavit or any portion of the affidavit. The court reviewed the affidavit and finds that (a) the total amount of attorneys' fees appears reasonable, (b) each individual entry appears reasonable, and (c) the Trust actually incurred the cost stated in the affidavit.

Gaucher later filed this action seeking (a) the return of his $1,500 security deposit, (b) the full amount of the $20,000 lease termination fee and (c) consequential damages.

The Trust denied liability and filed a counterclaim for (a) the expenses it incurred in connection with the landlord/tenant action and (b) consequential damages.

Both parties' claims for consequential damages were the subject of an in limine ruling by Judge NcNamara. Because Gaucher never provided concrete evidence of special damages in discovery, Judge McNamara ruled that he could not present such evidence at trial. Gaucher did not revisit the issue. He never made an offer of proof with respect to special damage or, more broadly, consequential damages. He did not ask this judge to allow him to present such evidence at trial.

Judge McNamara's ruling also narrowed the Trust's claim for consequential damages. The Trust was allowed to present evidence of the cost of the eviction action. However, because it did not disclose any other concrete evidence of special damages, the Trust was precluded from presenting such evidence at trial. The Trust accepted this ruling and never asked the court to reconsider it. Further, it is difficult for the court to conceive of any other species of consequential damages. The Trust received the full purchase price from Klemms and seemingly did not incur any other costs.

LEGAL ANALYSIS

Both parties rely solely on the common law of contracts. They both accuse the other materially breaching the lease termination agreement.

"A breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract." Audette v. Cummings, 165 N.H. 763, 767 (2013); see also, Lassonde v. Stanton, 157 N.H. 582, 588 (2008). A non-breaching party may sue the breaching party for compensatory monetary damages.

If the breach is "material," the non-breaching party may be also be excused from future performance under the contract. See, e.g. Fitz v. Coutinho, 136 N.H. 721, 724-25 (1993); McNeal v. Lebel, 157 N.H. 458, 465 (2008); Restatement (Second) of Contracts, §237 (1981).

"For a breach of contract to be material, it must go to the root or essence of the agreement between the parties, or be one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." Foundation for Seacoast Health v. Hospital Corporation of America, 165 N.H. 168, 181 (2013) (quoting Ellis v. Candia Trailers and Snow Equipment, Inc., 164 N.H. 457, 466 (2012). Thus, the New Hampshire Supreme Court has held that a breach is material if:

> (1) a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions; (2) the breach substantially defeats the contract's purpose; or (3) the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.

Foundation for Seacoast Health, 165 N.H. at 182 (internal quotation marks and citation omitted).

In this case, Gaucher maintains that the Trust's failure to pay the lease termination fee on July 1 was a material breach that allowed him to rescind the lease termination agreement and reinstate his tenancy. This position was rejected by the Circuit Court in the landlord/tenant case and, putting *res judicata* to the side, it is rejected again on the merits by this court.

Even if the Trust's delinquency in proffering payment were a material breach (and it was not, see below), Gaucher had no right to re-enter the premises and re-take possession. A material breach excuses the non-breaching party from *future* performance. It does not entitle the non-breaching party to unilaterally claw back *past* performance. For example:

-If A sells a car to B and B's check bounces, A cannot simply retitle the car back to himself. If a car seller has a security interest in the vehicle it may repossess and sell the vehicle for non-payment, but it can't just pretend the sale never happened.

-If C builds a house for D and D never pays, C cannot deconstruct the house and cart away the materials it supplied. C may have a mechanics' lien on the property but it can't unilaterally wind back the clock and restore the land to its status quo ante as a vacant lot.

-If E sells his house to F in return for a promissory note, and if F doesn't pay, E can't just move his family back into the house. The note might be secured by a mortgage which could be enforced, but E does not have some sort of super-mortgage capable of undoing the sale *nunc pro tunc*.

Furthermore, the Trust's failure to pay the lease termination fee on June 15 was not a material breach. "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 v. Coutinho, 136 N.H. at 725. In this case, the precise date of payment does not appear to be essential to the contract. To be sure, the court credits Gaucher's testimony that deal envisioned that payment would be made in a time frame sufficient to allow Gaucher to relocate his restaurant. But, the contract did not require payment coincident with termination of the lease. Indeed, the contract included a two week gap between the termination of the tenancy and payment. This gap was likely due to the Trust's need to close on the sale of property before making payment. A delay of 27 days was a breach

of the contract—and one that would support a claim for incidental and consequential damages if there were supporting evidence—but it is not material. The quid pro quo in the contract was this: Gaucher would relinquish his tenancy so that the Trust could sell the property and in return he would receive $20,000 shortly thereafter.

In contrast, Gaucher's trespassory retaking of possession, and refusal to leave, even after the $20,000 was tendered on July 27, is the very definition of a material breach. 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.

Because Gaucher materially breached the lease termination agreement, the Trust is discharged from its obligation to perform its end of the deal. Gaucher has not sought, and the facts do not provide any basis to award alternative damages under the doctrines of *quantum meruit* and unjust enrichment. Gaucher possessed the premises for approximately five months, rent free.

The Trust is entitled to recover the $6,544.54 it spend on the eviction action. The lease termination agreement required Gaucher to indemnify and hold the Trust harmless form precisely this type of expense. The expense was due solely to Gaucher's material breach of the agreement.

Gaucher is, however, entitled to a set-off for his $1,500 security deposit. The court rejects the Trust's argument that the lease termination agreement *sub silentio* extinguished Gaucher's right to the return of *his* deposit. In general, a security deposit is a sum of money that a tenant posts with its landlord as security for damage to the premises or other specified contingencies. If such a contingency comes to pass, the landlord can then claim the deposit as payment. However, until that time, the landlord is merely the custodian of the funds.

Neither party introduced the underlying lease. Therefore the court does not know the precise lease language governing the security deposit. However, the Trust does not claim that it had the right to use the security deposit to pay for any specified contingency. Instead it claims that the lease termination agreement effectively awarded the security deposit to the Trust by netting it against the lease termination fee due to Gaucher.

If the parties wanted the lease termination agreement to (a) award the security deposit the Trust, without any proof of damage to the premises, and (b) provide only $18,500 as consideration to Gaucher, the parties could have said so in the agreement. The court will not read such a peculiar result into the white spaces between the letters.

Therefore:

1. Gaucher is not entitled to the lease termination fee;

2. The Trust is entitled to recover its cost to evict Gaucher;

3. Gaucher is entitled to a set-off in the amount of the security deposit;

4. The Trust is entitled to costs and interest, but neither side is entitled to attorneys' fees.

5. Gaucher is not entitled to any payment from Gary or Kevin Waterhouse.

May 20, 2021

Andrew R. Schulman,
Presiding Justice

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
5 Court Street
Concord NH 03301

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

CHRISTOPHER J. SEUFERT, ESQ
SEUFERT LAW OFFICES PA
59 CENTRAL ST
FRANKLIN NH 03235-1423

Case Name: **Jerry Gaucher v Waterhouse Realty Trust, Gary E. Waterhouse, Trustee, et al**
Case Number: **217-2017-CV-00623** ***217-2019-CV-00449***

Please be advised that on July 06, 2021 Judge Schulman made the following order relative to:

Motion for Reconsideration

"Denied. The amount of Kevin Waterhouse's liability was never previously determined. That amount is $0.00. In all other respects the court's final order speaks for itself."

July 07, 2021

Catherine J. Ruffle
Clerk of Court

(485)

C: Steven G. Shadallah, ESQ; Kevin Waterhouse; Richard J. Maloney, ESQ