

# 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**

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**RULE 7 APPEAL FROM DECISION OF  
MERRIMACK COUNTY SUPERIOR COURT**

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

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## QUESTIONS PRESENTED

1. Appellant had filed a Motion for Final Judgment against Kevin Waterhouse for \$21,500.00 plus interest, attorney's fees. 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 not include an award of attorney's fees. In its final decision, the trial court 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. 117-20)

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 did 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. 116-20; Plaintiff's Request for Findings of Facts and Rulings of Law 121-29)

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. 116-20; Plaintiff's Request for Findings of Facts and Rulings of Law 121-29)

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. 116-20; Plaintiff's Request for Findings of Facts and Rulings of Law 121-29)

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. 116-20; Plaintiff's Request for Findings of Facts and Rulings of Law 121-29)

## **STATEMENT OF FACTS**

### **Background**

Waterhouse Realty Trust owned property in Windham, New Hampshire and Plaintiff Jerry Gaucher d/b/a JR's Steak and Seafood ("Gaucher") leased space inside a building on the property to operate a restaurant named JR's Steak and Seafood. (Appx. 15-17, [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. 16, 20-21 [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. 16 [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. 17 [Tr. page 15 lines 1-5])

### **Lease Termination**

Therefore, the Waterhouse Realty 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. 14-16, 19, 22 [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. 91).

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. 21-22 [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. 70 [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. 22 [Tr. page 20 lines 3-18]). Notably, Gary Waterhouse testified that 07/01/2015 was the date Gaucher was supposed to be paid. (Appx. 52-53 [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. 25 [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. 45-46 [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. 53-54 [Tr. page 51 lines 3-25, page 52 lines 1-19]; Quit Claim Deed Appx. 92-94). 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. 83-84 [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. 55-56 [Tr. page 53 lines 22-25, page 54 lines 1-23]; Warranty Deed Appx. 95-96). After the sale of the property to Klemm, the proceeds returned to Gary and Kevin Waterhouse personally, not Waterhouse Realty Trust. (Appx. 56-59 [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. 97-98).

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 Waterhouse Realty 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. 37 [Tr. page 35 lines 3-17]).

Gary Waterhouse personally incurred legal fees in relation to the above eviction action against Gaucher. (Appx. 74 [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. 80 [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. 81-82 [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 Waterhouse Realty Trust or Waterhouse Country Store, Inc. were found liable to Gaucher for damages. (Appx. 11 [Tr. page 9, lines 1-14]).

## **ARGUMENT**

### **I. INDEMNIFICATION ISSUE PRESERVED FOR APPEAL**

In their memorandum of law, Defendants Waterhouse Realty Trust and Waterhouse Country Store, Inc. (“Waterhouse”) assert that Gaucher did not preserve his argument against indemnifying Gary Waterhouse (“Gary”) for Gaucher’s eviction. (Def.’s Memo of Law pages 3, 8). This is incorrect, despite Gaucher alluding to the injustice of paying for his own eviction in his Motion for Reconsideration, Gaucher also raised the indemnification issue in his Request for Findings of Fact and Rulings of Law. (Appx. 126-27).

### **II. NON-PAYMENT ON 07/01/2015 ISSUE PRESERVED FOR APPEAL**

Waterhouse also asserts that Gaucher raises a new “claim” on appeal regarding the transfer of the property from Waterhouse Realty Trust to the

Waterhouse brothers. (Def.'s Memo of Law page 7). This new “claim” is merely a restatement of fact and a reasonable inference drawn therefrom:

- Waterhouse Realty Trust transferred the property by deed to Kevin and Gary Waterhouse as individuals. (Appx 53-54 [Tr. page 51 lines 3-25, page 52 lines 1-19]; Quitclaim Deed Appx. 92-94).
- Waterhouse Realty Trust did not have the funds to pay \$20,000.00 to Gaucher on 07/01/2015. (Court's 05/20/2021 Order, Addendum to Gaucher's Brief pages 29-30).
- Therefore, the transfer of the property to Kevin and Gary Waterhouse **must** have been for less than \$20,000.00 and was most likely for \$0.00.

Instead, Waterhouse is likely arguing that prior to appeal, Gaucher never raised the issue of whether being incapable of paying \$20,000.00 on 07/01/2015 is a breach of contract. This too would be incorrect as Gaucher argued and specifically raised the issue of “Payment Being Impossible on 7/1/15 Supports Defendants’ Liability as to Plaintiff” in his Request for Findings of Fact and Rulings of Law. (Appx. 123-24). Further, the Trial Court specifically addressed the delay of payment as being itself, a breach of contract. (Court's 05/20/2021 Order, Addendum to Gaucher's Brief pages 35-36-30).

### **III. MATERIAL BREACH ARGUMENT IS NOT A *DE NOVO* REVIEW**

Waterhouse also argues that Gaucher’s arguments on appeal regarding material breach is an attempt to turn his appeal into a *de novo*

review. (Def.'s Memo of Law pages 2, 5). Supporting this argument, Waterhouse cites to Foundation for Seacoast Health v. Hospital Corporation of America, 165 N.H. 168 (2013) for the proposition that ruling on who committed material breach is within the Trial Court's discretion and therefore is an issue properly settled by the Trial Court. (Def.'s Memo of Law page 2).

As true as it is, that material breach is a question of fact, the Trial Court's ruling is reviewable on appeal if it lacks evidentiary support and/or is a clear error of law. Foundation for Seacoast Health, 168 N.H at 181. Gaucher's argument is that it is a clear error of law for Trial Court to find only Gaucher in material breach of contract. To the contrary, when applying the applicable law, the evidence is insufficient to support the Trial Court's finding.

#### **IV. DAMAGES ARE NOT NECESSARY TO PROVE MATERIAL BREACH**

Waterhouse again cites Foundation for Seacoast Health, this time to incorrectly assert that "damages are required to be proven in connection with a material breach." (Def.'s Memo of Law page 3). Apparently, Waterhouse was citing to parentheticals within the Foundation for Seacoast Health Court's own citations, as the proper statement of law by the Court is "the absence of proof of damages is not dispositive of whether a breach is material." Foundation for Seacoast Health, 168 N.H at 182 (citing Ellis v. Candia Trailers & Snow Equipment, Inc., 164 N.H. 457, 467 (2012)). In fact, the Ellis Court specifically rejected the proposition that evidence of

damages is necessary to prove whether a breach was material. Ellis, 164 N.H. at 467.

As Gaucher has argued in his appeal, Waterhouse Realty Trust materially breached the contract because failure to tender \$20,000.00 on 07/01/2015 defeated the essential purpose of the contract. See Ellis, 164 N.H. at 467 (citing 23 Williston on Contracts § 63:3, at 438-39 (4th ed.)).

#### **V. DEFAULT JUDGEMENT IS FINAL**

Waterhouse's sole response to whether the Final Default Judgment against Kevin Waterhouse should be upheld is a general cite to Collins v. Walker, 55 N.H. 437 (1875) for the proposition that the Trial Court had authority to revise the judgment to correct judicial error and prevent injustice. (Def.'s Memo of Law page 2). Collins v. Walker is a case where entry of judgment was made without any assessment by a jury or Court, and therefore was vacated and remanded. Collins, 55 N.H. 439-40 (1875).

In this case however, an assessment of damages of \$21,500.00 was made by the Trial Court on Gaucher's sworn affidavit of damages. (See Appx. 109-14). This assessment was on a Motion for Final Default Judgment (Appx. 114) and the trial court only has the power to reconsider an issue until final judgment is entered. Radziewicz v. Town of Hudson, 159 N.H. 313, 315 (2009) (citation omitted). Therefore, judgment against Kevin Waterhouse for \$21,500.00 was final and it was an error of law for the Trial Court to revisit and reconsider the issue later.

## **CONCLUSION**

The issue of indemnification was properly raised before appeal and therefore 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 issue of the \$20,000.00 being impossible to pay on 07/01/2015 was properly raised before appeal and therefore 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.

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.

## **REQUEST FOR ORAL ARGUMENT**

The Appellant, Plaintiff Gerald Gaucher d/b/a JR's Steak and Seafood, hereby request oral argument in this matter. Oral argument on behalf of Plaintiff will be by Christopher C. Snook, Esquire (Bar # 274093; Seufert Law Office, PA, 59 Central Street, Franklin, New Hampshire 03235; (603) 934-9837; [csnook@seufertlaw.com](mailto:csnook@seufertlaw.com)).

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

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### **CERTIFICATION OF SERVICE**

I, Christopher J. Seufert, Esquire, certify that on this the 18<sup>th</sup> day of February 2022 two copies of the within filing were sent to Kevin Waterhouse by First Class US Mail, and service through the efile system was made on Steven G. Shadallah, Esquire and Richard J. Maloney, Esquire.

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**RULE 26(7) STATEMENT OF COMPLIANCE**

This filing has been properly served on all parties, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading, and the within Reply Brief is in compliance with the Rule 16(11) 3,000 word limit for reply briefs.

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**CERTIFICATION OF WORD COUNT**

I certify that the within Reply Brief contains 2766 words.

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