

IN THE SUPREME COURT OF OHIO

COCCA DEVELOPMENT, Ltd.)	Case No. 2013-1714
)	
Appellant)	
-v-)	
)	
MAHONING COUNTY)	
BOARD OF COMMISSIONERS)	
)	
Appellee)	
)	

**APPELLEE MAHONING COUNTY'S OPPOSITION
TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**STATEMENT OF APPELLEE'S POSITION AS TO WHY
THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

While this matter may be of great personal interest to Appellants, this appeal does not present any question of public or great general interest. Indeed, there is very little discussion of this issue in Appellants' Memorandum, and nothing in that Memorandum distinguishes the instant matter from any other matter lost by a plaintiff on summary judgment.

Appellants contend that the instant matter presents a question of public and great general interest because “. . . [t]he Court of Appeals for the Seventh District misapplied contract law in determining that, under the facts of this case, rents paid under a July 13, 2007 lease mitigated part of a landlord's damages for breach of a February 15, 2001 lease.” An examination of this Court's decisions regarding what constitutes, and what does not constitute, a question of “public or great general interest” clearly shows that the instant matter does not constitute such a question. Cases where this Court found a question of public or great general interest involved questions that affected, or potentially affected, far more people than the questions in the instant matter. For example, in *State v. Bolan* (1971), 27 Ohio St. 2d 15, this Court exercised jurisdiction because the question whether *Miranda* rights extend to questioning or interrogation by a private citizen constituted a question of public or great general interest. Obviously, that question potentially affected every person under police investigation in the state. Similarly, in *In Re Suspension of Huffer From Circleville High School* (1989), 47 Ohio St. 3d 12, this Court found that a question regarding the authority of a local school board to make rules and regulations providing for discipline of students who attend school functions while intoxicated, was of great general interest. Again, the impact of that case could be potentially felt by thousands of people (in that case students) across Ohio.

See also, *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St. 3d 28 (question

whether zoning scheme creating environmental quality districts constituted proper exercise of city's zoning authority was one of great public interest); *Atkins v. McFaul* (1996), 76 Ohio St. 3d 350 (question whether inmates serving county jail sentences are entitled to "good time" credit as are inmates in state correctional institutions was one of public interest); *Danis Clarkco Landfill Co. v. Clark County* (1995), 73 Ohio St. 3d 590 (question regarding the proper procedures for a municipality to follow in selecting solid waste disposal service providers); and *State ex rel Rudes v. Rofkar* (1984), 15 Ohio St. 3d 69, 472 N.E. 2d 354 (overruled on grounds unrelated to appellate jurisdiction) (question regarding appropriations for courts of common pleas).

In the case at bar, the issues presented have no comparable potential impact. In its decision, the Court of Appeals determined that Appellant properly mitigated its damages when it relocated a tenant from one space to another within the same building. The Court reached this decision by recognizing that the purpose of the 2007 lease was identical to that of the 2001 lease, i.e. for the general office purposes of the Mahoning County Educational Service Center and for no other purpose. Because this purpose was contained within both the 2007 and 2001 leases, the Court opined that ". . . it would not be reasonable for Appellant to expect to have the same occupant in two separate spaces, with both continuing to general rent." *Cocca Development Ltd. V. Mahoning Cty. Bd. of Commrs.* (2013), 2013-Ohio-4133 (7 App. Dist.).

There is no dispute regarding a court's authority to determine whether a landlord mitigated its damages in a breach of lease case. Instead, Appellants raise the issue whether or not the Court, in this case, properly applied this legal doctrine. This type of legal argument demonstrates that the outcome of this case will affect the Appellants, and no other members of the public. Accordingly, while this matter may be of great interest to the Appellants, it is not a matter of public or great general interest. For these reasons, this Court should refuse to exercise

jurisdiction over this matter, because it does not present a question of public and great general interest.

PROPOSITION OF LAW NO. 1

In an action for breach of a lease in a multi-tenant building, must judgment for landlord be reduced by the amount of rent paid under a subsequent lease did not depend on their being a default in the first lease?

PROPOSITION OF LAW NO. 2

In an action for breach of a lease in a multi-tenant building, if judgment would not otherwise be reduced by the amount of rent paid under a subsequent lease which did not depend on their (sic) being a default of the first lease, must judgment for landlord be reduced by the amount paid under circumstances that (a) the first lease is to provide office space for a third-party; (b) neither the tenant nor the third party occupant are bound to the other to provide or occupy the office space; and (c) the subsequent lease is made between the landlord and the third-party occupant for the purpose of relocating the third-party occupant's offices?

Because both propositions of law are interrelated, as acknowledged by Appellant, Appellee will address both simultaneously. See Appellant's Memorandum at p. 9.

The facts and circumstances surrounding this matter are quite simple. Appellee signed a Lease Agreement with the Landlord in 2001 ("2001 Lease"). According to the terms of the 2001 Lease, the leased premises was to be used ". . .for the general office space of the Mahoning County Educational Service Center and for no other purpose." Because of a change in the law, in December, 2006, Mahoning County requested that the Mahoning County Educational Service Center ("MCESC") assume the rental obligations on the property at issue. In July, 2007, the MCESC informed Appellee that it secured new office space and would vacate the premises by

August 31, 2007. It is undisputed that neither the MCECSC nor Appellant informed Appellee that the MCECSC would be relocating to another space within the same building.

In its Memorandum, Appellant argues that the Court erred when it reduced its judgment for unpaid rent by the amount of rent paid by the MCECSC. Appellant's rationale for this claim is that the space occupied by the MCECSC in its 2007 Lease is different than the space covered by the 2001 Lease Agreement. But the one critical element that Appellant continues to ignore when asserting this proposition of law is that while the physical space may have been different, the *occupant* and the *purpose* of the same was not.

To support its position, Appellant maintains that mitigation principles only apply in breach of contract cases if the "new lease is of the same premises." Appellant tries to use the concept of "lost volume" to further demonstrate that the mitigation should not have occurred in the case at bar. In general, the lost volume doctrine provides that if an injured party could have and would have entered into the subsequent contract, even if the first contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the first. Restatement of Contracts 2d, §347, Comment f. See Appellant's Memorandum, p. 7. In a breach of lease case occurring in a multi-tenant development, Appellant claims that an offset would not apply if other spaces within the same building were vacant at the time the successor lease is executed. This is so because, theoretically, the Landlord could have leased both spaces, regardless of the breach.

In asserting the "lost volume" argument, however, Appellant fails to acknowledge how its argument would be affected if a successor lease is executed with the same tenant for the same purpose as the earlier lease. In the case at bar, it is undisputed that in the 2001 Lease, Appellee

was only permitted to use the subject premises for “. . . the general office purposes of the **Mahoning County Educational Service Center and for no other purpose.**”(Emphasis added.) Despite the clear prohibitions contained within the permitted use section of Appellee’s 2001 Lease Agreement, Appellant met with the MCECSC and secured a new and separate Lease Agreement with them in 2007. Incidentally, the 2007 MCECSC Lease was also to be used for general office purposes of the MCECSC and for no other use. Thus, it is untenable for Appellant to now argue that the Court of Appeals erred by giving Appellee a mitigation offset. The simple fact remains that the permitted use of Appellee’s 2001 Lease and the 2007 MCECSC Lease were **both** for general office purposes of the MCECSC and that any other use was strictly prohibited in both leases. The Court of Appeals correctly noted this connection in its Opinion when it stated:

The Court simply examines whether reasonable efforts were, in fact, made to mitigate damages. There is no indication that the 2007 contract was unreasonable. Since Appellant did not rent out the identical space described in the 2001 lease, the court was left to use reasonable means to calculate mitigation of damages using the facts of the case. It was apparent that the purpose of the 2007 lease was identical to that of the 2001 lease, so it was reasonable for the trial court to take those facts into consideration when it calculated the mitigation of damages. This is particularly true since the occupant in the 2001 lease was the MCECSC, and the relevant occupant for purposes of mitigation was also MCECSC.

See *Cocca Development Ltd. V. Mahoning Cty. Bd. of Commrs.*, 2013-Ohio-4133 (7 App. Dist.).

Because the 2001 and 2007 Leases were for the same purpose and involved the same occupant, it was proper for the Court to apply mitigation principles as set forth in the Court’s opinion. Therefore, for the above stated reasons, Appellee Board of Mahoning County Commissioners submits that Appellant’s First and Second Propositions of Law do not warrant acceptance of jurisdiction in this case.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest. Therefore, Appellee Board of Mahoning County Commissioners respectfully requests that this Court deny jurisdiction and dismiss the instant appeal.

Respectfully submitted,



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CERTIFICATE OF SERICE

This shall certify that a true and accurate copy of Mahoning County's Brief in Opposition of Jurisdiction was sent this 27th day of November, 2013 via U.S. regular mail to William A. Myers, 100 DeBartolo Place, Suite 400, Boardman, OH 44512, Attorney for Cocca Development.



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