STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

FRENCHTOWN SQUARE PARTNERSHIP, PLAINTIFF-APPELLEE, VS. LEMSTONE, INC. D.B.A. LEMSTONE BOOKS, DEFENDANT-APPELLANT.	)	CASE NO. 99 C.A. 300 O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 98cv2158

JUDGMENT: Affirmed in part, reversed in part and remanded

APPEARANCES:

For Plaintiff-Appellee:
Atty. David A. Fantauzzi
2445 Belmont Avenue
P.O. Box 2186
Youngstown, Ohio 44504-0186

For Defendant-Appellant:
Atty. Donn D. Rosenblum
Atty. Peter B. Grinstein
20 Federal Plaza West
Suite 600
Youngstown, Ohio 44503

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: May 10, 2001

DONOFRIO, J.

Defendant-appellant, Lemstone Inc. (Lemstone), appeals a decision rendered by the Mahoning County Court of Common Pleas whereby the trial court overruled Lemstone's motion for summary judgment and granted plaintiff-appellee's, Frenchtown Square Partnership (Frenchtown Square), motion for summary judgment.

On June 3, 1989, Frenchtown Square entered into a lease agreement with Lemstone for store space in the Frenchtown Square Mall located in Monroe, Michigan. The lease was for a ten-year period, which commenced on September 1, 1989. Lemstone was restricted by the terms of the lease to the sale of religious gifts and items. The lease required Lemstone to pay a minimum per-month rent as well as various other fees to Frenchtown Square throughout the entire term of the lease, which expired August 31, 1999.

On or about March 1, 1998, Frenchtown Square permitted an entity known as Alpha Gifts (Alpha) to open a second store in the mall. Although Alpha operated a religious oriented kiosk prior to this time, that location did not sell the same items as Lemstone. Alpha's second store was located in a "high traffic area" as compared to Lemstone's location, which was in what Lemstone described as a "low traffic area." Together the two Alpha locations sold merchandise, some of which was identical to

the merchandise sold in Lemstone's store. Due to financial difficulties and competition from Alpha, Lemstone closed its doors and vacated the leased premises on or about February 1, 1999, approximately six months before the expiration of its lease.

On September 18, 1998, Frenchtown Square filed a complaint against Lemstone seeking attorneys fees and damages for breach of contract. Lemstone filed an answer to Frenchtown Square's complaint, and also filed multiple counterclaims against Frenchtown Square seeking compensatory and punitive damages. Frenchtown Square denied the allegations set forth in Lemstone's counterclaims.

On June 18, 1999, Frenchtown Square moved for summary judgment on its breach of contract claim and Lemstone's counterclaims. Lemstone filed a brief in opposition to summary judgment on August 16, 1999, and also moved for summary judgment on its counterclaims against Frenchtown Square. Frenchtown Square filed a brief in opposition to Lemstone's motion for summary judgment.

In a judgment entry filed October 27, 1999, the trial court sustained Frenchtown Square's motion for summary judgment and overruled Lemstone's motion for summary judgment. The sole language in the trial court's judgment entry read: "Plaintiff's

Motion for Summary Judgment is sustained. Defendant's Motion for Summary Judgment is overruled."

Lemstone filed a timely notice of appeal on November 22, 1999.

Lemstone's first assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFF/APPELLEE BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT BASED UPON THE AFFIDAVITS SUBMITTED IN SUPPORT OF AND IN OPPOSITION TO THE MOTION; AND THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING SUMMARY JUDGMENT PURSUANT TO DEFENDANT/APPELLANT'S MOTION BECAUSE THE AFFIDAVITS ESTABLISHED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND THAT THE DEFENDANT/APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. [PROPOSITION OF LAW NOS. 1, 2, AND 3)"

Lemstone's third assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF/APPELLANT [*sic*] WHERE THE EVIDENCE BEFORE THE COURT SHOWED THAT THE PLAINTIFF/APPELLEE PREVENTED THE DEFENDANT/APPELLANT FROM PERFORMING THE CONTRACT. [PROPOSITION OF LAW NO. 1]"

Lemstone's fourth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE WRONG STANDARD TO THE MOTION FOR SUMMARY JUDGMENT; THE BURDEN UPON THE NON-MOVING PARTY IS TO ESTABLISH THAT THERE IS AN ISSUE OF FACT TO BE DECIDED, NOT THAT THE NON-MOVING PARTY WILL PREVAIL ON SUCH ISSUE AT TRIAL. [PROPOSITION OF LAW NO. 1]"

Lemsone's fifth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO FIND, BASED UPON THE EVIDENCE SUBMITTED, THAT THE PLAINTIFF/APPELLEE CONSTRUCTIVELY EVICTED DEFENDANT/APPELLANT. [PROPOSITION OF LAW NO. 1]"

Lemstone's sixth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE MOVING PARTY RATHER THAN THE NON-MOVING PARTY WHEN IT MISAPPLIED ARTICLES 6 AND 50 OF THE LEASE THAT FORMED THE BASIS OF THE ACTION. [PROPOSITION OF LAW NO. 1]"[1]

Lemstone's eighth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THERE TO BE NO AMBIGUITY IN SECTION 6 OF THE LEASE THAT FORMED THE BASIS OF THE ACTION WHERE, ON ITS FACE, THE SECTION IS AMBIGUOUS, THEREBY PRECLUDING SUMMARY JUDGMENT. [PROPOSITION OF LAW NO.1]"

Lemstone's ninth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY (IMPLICITLY) ASSESSING CREDIBILITY, WEIGHING THE EVIDENCE[,] AND DRAWING INFERENCES IN REACHING ITS DECISION; A TRIAL COURT MUST TAKE ALL PERMISSIBLE INFERENCES AND RESOLVE QUESTIONS OF CREDIBILITY IN FAVOR OF THE NONMOVING PARTY. [PROPOSITION OF LAW NO. 1]"

Because Lemstone's first, third, fourth, fifth, sixth, eighth, and ninth assignments of error involve common issues of factual and legal analysis, they shall be addressed together.

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[1] Lemstone withdrew its seventh assignment of error January 31,

In Lemstone's first series of arguments, Lemstone essentially argues that the trial court erred by granting summary judgment against it as to Frenchtown Square's claim for breach of contract. Lemstone argues that when the evidence is viewed in a light most favorable to it, there is a genuine issue of material fact as to whether or not it was liable to Frenchtown Square for breach of contract.

Lemstone argues that the trial court erred by finding that the language of the contract was unambiguous. Lemstone argues that the "appropriate tenant mix" language contained in Section 6 of the lease created an ambiguity, as the parties disagree as to its meaning. Lemstone argues that this language operated as a restriction upon Frenchtown Square's discretion as to the type of businesses to which it could lease its vacant store space. Lemstone notes that Frenchtown Square opposes such an interpretation of this language and therefore argues that the parties' conflicting interpretations of the language contained in Section 6 and Section 50 create a genuine issue of material fact as to the meaning of the language used in the lease and whether or not Lemstone was in breach of contract with Frenchtown Square.

2001, at oral arguments.

The Ohio Supreme Court set out the standard for considering motions for summary judgment in *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The court stated:

> "We hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." (Emphasis *sic.*) *Id.* at 293.

Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State*

ex rel. Parsons v. Flemming (1994), 68 Ohio St.3d 509, 511. When reviewing a summary judgment case, appellate courts are to apply a *de novo* standard of review. *Cole v. American Indus. and Resources Corp.* (1998), 128 Ohio App.3d 546, 552.

Summary judgment is appropriate when there is no genuine issue as to any material fact. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603. Frenchtown Square's claim against Lemstone arises in breach of contract. In examining whether a party is entitled to summary judgment as a matter of law as to a breach of contract claim, the Ohio Supreme Court has noted:

> "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. However, if a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term." (Citations omitted.) *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66.

Thus, when contract terms are ambiguous and one interpretation supports some recovery for the defendant, the trial court may not enter summary judgment in favor of the plaintiff. *Cincinnati Ins. Co. v. Industrial Restoration, Inc.* (May 17, 1996), Lucas App. 95-352, unreported, 1996 WL 256604; *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241,

246. Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading the *entire contract or* if the terms are *reasonably susceptible* to more than one interpretation. (Emphasis added.) *Money Station, Inc. v. Electronic Payment Serv., Inc.* (1999), 136 Ohio App.3d 65, 71.

A thorough examination of the lease in its entirety shows that the trial court did not err in concluding that the lease was unambiguous in its language, and therefore, the evidence as submitted showed that Lemstone breached its contract with Frenchtown Square. Section 6 of the parties' June 3, 1989, lease listed the terms and conditions by which Frenchtown Square would permit Lemstone to operate its store in Frenchtown Square's facility and provided in pertinent part:

> "Tenant agrees that the Demised Premises shall be occupied by no other person * * * and shall be used for the sole purpose of the operation of a religious or inspirational bookstore * * *. *Tenant recognizes that the specific limited use prescribed herein is a material consideration to Landlord* in order that the Shopping Center will maintain an appropriate tenant mix.
>
> "* * *
>
> "So long as this Lease remains in effect, Tenant * * * will not, either within the Shopping Center * * * or within five (5) miles of the Shopping Center * * * directly or indirectly own * * * a business like or similar to the business authorized to be

> conducted under the terms of this Lease." June 3, 1989 Lease at 7-8.

An examination of the language in the foregoing clause shows that this language restricted Lemstone's ability to operate its business in a manner other than that specifically agreed upon in the lease. The language operated as a restriction on Lemstone, not Frenchtown Square. This language did not state that Lemstone would be the only dealer of religious items throughout the shopping center, nor did it restrict Frenchtown Square's ability to lease its property and develop and maintain what it considered to be the "appropriate tenant mix."

Section 50 of the lease further supports this reading of the contractual language used in Section 6 and provides in pertinent part:

> "Tenant does not rely on, and Landlord does not make, any representation or promise that any specific tenant or business shall occupy any space in, at or near the Shopping Center during all or any part of the term of the lease * * *." *Id.* at 44.

Clearly, the foregoing language shows that Frenchtown Square retained the discretion of choosing and maintaining what it considered to be an appropriate tenant mix. The language set forth in Sections 6 and 50 is not reasonably susceptible to more than one interpretation. If Lemstone had wished to restrict

Frenchtown Square's ability or discretion to lease its space to other shops selling similar goods as Lemstone, it should have negotiated such a restriction with Frenchtown Square.

Lemstone essentially argues that due to unforeseen market forces and increased competition, it stands to lose significant amounts of money in the absence of judicial intervention. However, as noted by the Ohio Supreme Court in *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, it is not the responsibility or function of this Court to rewrite the parties' contract to provide for such circumstances. *Id.* at 54-55. The language of the lease shows that the parties were familiar with the use of restrictive covenants. Absent any express restrictive covenant, we will not imply one as a matter of law. Therefore, Frenchtown Square was free to lease and restrict its other clients as it saw fit, such as leasing Alpha a second sales space.

Having determined that the Frenchtown Square was free to change or maintain its tenant mix as it best saw fit, it is also clear that Lemstone breached its lease with Frenchtown Square. By Lemstone's own admissions, it failed to pay Frenchtown Square all of the rent due under the lease and ceased operating its business approximately six months before the expiration of its lease.

After viewing the evidence in a light most favorable to Lemstone, reasonable minds could only conclude that Lemstone failed to present sufficient evidence to establish a genuine issue of material fact as to Frenchtown Square's claim for breach of contract. As such, the trial court did not err in granting Frenchtown Square summary judgment as to its claim for breach of contract.

Lemstone's first, third, fourth, fifth, sixth, eighth, and ninth assignments of error are without merit.

Lemstone's second assignment of error states:

> "(A) THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF/APPELLEE DESPITE THE UNCONTROVERTED EVIDENCE THAT ESTABLISHED THAT THE PLAINTIFF/APPELLEE FAILED, AND IN FACT REFUSED TO MITIGATE ITS DAMAGES. [PROPOSITION OF LAW NO. 2]"
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> "(B) THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING AS A MATTER OF LAW BY RULING THAT THE PLAINTIFF/APPELLANT HAD NO DUTY TO MITIGATE ITS DAMAGES. [PROPOSITION OF LAW 2]."

In Lemstone's second assignment of error, Lemstone essentially argues that the trial court erred by determining that a commercial landlord does not have a duty to mitigate damages by attempting to rent the premises once it is abandoned by the lessee. Lemstone argues that Frenchtown Square's reliance on this Court's decision in *White v. Smith* (1917), 8

Ohio App. 368, for the proposition that a commercial landlord does not have a duty to rent the premises once a lessee vacates the premises is misplaced. First, Lemstone argues that the *White* decision gave no indication whether or not the lease in question was residential or commercial. Second, Lemstone argues that this court's subsequent 1997 decision in *Sandusky Mall Co. v. Pet Corner, Inc.* (1997), 117 Ohio App.3d 198, appeal dismissed (1997), 79 Ohio St.3d 1411, which relied on *White*, conflicts with the overwhelming majority of appellate courts in Ohio which have addressed the issue and decided that a commercial landlord, like any other party to a contract, has a duty to mitigate his damages by attempting to rent the property.

In response to Lemstone's arguments, Frenchtown Square argues that the trial court did not err in determining that it had no duty to mitigate its damages. Frenchtown Square argues that this court correctly settled the no-duty to mitigate rule in *White v. Smith* (1917), 8 Ohio App. 368, and reaffirmed this rule roughly three years ago in *Sandusky Mall Co. v. Pet Corner, Inc.* (1997), 117 Ohio App.3d 198. Frenchtown Square argues that *White* and *Pet Corner* are well reasoned and consistent with the Restatement of the Law 2d, Property (1977) 391-92, Section 12:1, Comment i, and Frenchtown Square further contends that the facts

of *Pet Corner* and the present case are indistinguishable, making the legal precedent of *Pet Corner* applicable in this case.

In *White v. Smith*[2] (1917), 8 Ohio App. 368, this Court examined the issue of whether or not a lessor/landlord had a duty to mitigate his damages by attempting to rent the premises once the lessee has abandoned the premises. This court ruled that a landlord was not obligated to do so. *Id.* at 373.

This approach appeared to mirror the approach taken by the Second Restatement of Property, which provides in pertinent part:

> "If the tenant has abandoned the leased property and the landlord stands by and does nothing, the lease is not terminated. A tenant who abandons leased property is not entitled to insist on action by the landlord to mitigate the damages, absent an agreement otherwise." Restatement of the Law 2d, Property (1977) 392-393, Section 12:1, Comment i.

This approach was also adopted by the Lucas County Court of Appeals in *Rosenberger v. Hearsnip* (1930), 42 Ohio App. 536, overruled by *New Towne L.P. v. Pier 1 Imports (U.S.), Inc.* (1996), 113 Ohio App.3d 104, 107. In *Rosenberger,* the court

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[2] It is not apparent from the facts in *White* and *Rosenberger* whether the leases at issue in these cases were of a residential or a commercial nature. Therefore, it appears that the court in *White* and the court in *Rosenberger*, who relied upon our decision in *White*, held that a landlord in general has no duty to mitigate damages by attempting to rent the property once a lessee has abandoned the premises.

relied upon *White* in holding that where a tenant abandons the leased premises, the landlord is under no duty to mitigate its damages and rent the premises. *Rosenberger,* at 538.

However, thereafter a trend developed amongst Ohio Courts whereby a commercial landlord had a duty to mitigate damages once the tenant had abandoned the premises. This development was tracked by the Lucas County Court of Appeals in *New Towne L.P.*, 113 Ohio App.3d at 107-08, where the court stated:

> "The trial court relied on *Rosenberger v. Hearsnip* (1930), 42 Ohio App. 536, 182 N.E. 596, and *White v. Smith* (1919), 8 Ohio App. 368, as authority for its determination that appellee had no duty to mitigate its damages. However, the majority view among Ohio courts of appeals is that a landlord in a commercial lease has a duty to mitigate damages once the tenant has abandoned the premises. See *Stern v. Taft* (1976), 49 Ohio App.2d 405, 3 O.O.3d 463, 361 N.E.2d 279; *Master Lease of Ohio, Inc. v. Andrews* (1984), 20 Ohio App.3d 217, 20 OBR 264, 485 N.E.2d 820; *Lyon v. Howard* (Nov. 10, 1984), Hancock App. No. 5-86-22, unreported, 1987 WL 20290; *Kay v. Vasilakis* (Jan. 7, 1988), Cuyahoga App. No. 54155, unreported, 1988 WL 1538; *Tokai Fin. Serv., Inc. v. Mathews, Gallovic, Granito & Co.* (Nov. 24, 1995), Lake App. No. 95-L-098, unreported, 1995 WL 803582."

The court then went on to analyze the policy and reasoning behind this trend:

> "Imposing such a duty assures that an award of damages will put the injured party in as good a position as if the contract had not been breached while affording the least

> amount of cost to the defaulting party. *F. Ent., Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154, 160, 1 O.O.3d 90, 93-94, 351 N.E.2d 121, 125. This is in conformity with the tenets of contract law. *Id.* Requiring a landlord to mitigate damages by attempting to relet the abandoned premises also promotes the most productive use of the land while at the same time, it discourages injured parties from suffering avoidable economic losses. [Smith, Extending the Contractual Duty to Mitigate Damages to Landlords When a Tenant Abandons the Lease (1990), 42 Baylor L.Rev. 553, 561.]
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> "As in other types of contracts, the duty to mitigate stems from the implied covenant of good faith and fair dealings. [Barker, Commercial Landlord's Duty Upon Tenant's Abandonment--To Mitigate? (1995), 20 J.Corp.L. 627, 644.] Imposing a duty to mitigate upon a landlord inflicts no greater burden than that imposed upon a party to any other contract. *Id.* at 644. [*sic*]" *Id.* at 108.

The reason for the different outcomes between the cases following *White* and the cases following *New Towne L.P.* arises out of the manner in which the lease was originally viewed. For example, in *New Towne L.P.,* the court tracked the "evolution of the lease", and noted the way in which the courts have changed their views and treatment of the lease:

> "Historically, courts considered a lease an interest in property. Based on property principles, lease agreements were viewed as a conveyance of an interest in land to the lessee.

> "In the event of abandonment of the lease, a landlord had two options. First, the landlord could do nothing with the leased premises until the interest in the property reverted to the landlord at the end of the lease term. Alternatively, the landlord could recover possession of the premises, terminate the lease and relieve the tenant of the duty to pay future rent. Traditionally, the landlord was under no duty to mitigate damages once the tenant abandoned the premises.
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> "* * *
>
> "Recently, various jurisdictions shifted the law regarding commercial leases away from traditional property rules towards the more modern approach of analyzing leases under contract principles. * * * It has been suggested that commercial leases reflect numerous and complex negotiations similar to other contracts. There are an increasing number of covenants included in commercial leases, emphasizing the idea that a modern commercial lease is essentially an exchange of promises, and should be viewed under the principles governing the law of contracts." (Citations omitted.) *Id.* at 107.

In addition, the Ohio Supreme Court has noted that leases are treated as contracts and has also imposed contractual remedies for breach thereof. See *U.S. Correction Corp. v. Ohio Dept. of Indus. Relations* (1995), 73 Ohio St. 210, 216, and *F. Enterprise, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154.

This court reexamined the no-duty to mitigate rule in *Sandusky Mall Co. v. Pet Corner, Inc.*, (1997), 117 Ohio App.3d

198, appeal dismissed (1997), 79 Ohio St.3d 1411, where once again, we held a landlord had no duty to mitigate damages by attempting to rent the premises. *Id.* at 201. Recently, in *Dennis v. Morgan* (2000), 89 Ohio St.3d 417, the Ohio Supreme Court addressed the issue of whether or not a landlord has a duty to mitigate its damages by renting the property. The court stated:

> "The important corollary to that is that *landlords have a duty, as all parties to contracts do, to mitigate their damages caused by a breach. Landlords mitigate by attempting to rerent the property.* Their efforts to do so must be reasonable, and the reasonableness should be determined at the trial level." (Emphasis added.) *Id.* at 419.

A lease is a contract. *U.S. Corrections Corp.* (1995), 73 Ohio St.3d at 216. Thus under the law of contracts, the aggrieved party bears the duty of mitigating its damages. This rule is reflected in *Dennis,* "[L]andlords have a duty, *as do all parties to a contract* do, to mitigate their damages caused by a breach. Landlords mitigate by attempting to rerent the property." (Emphasis added.) *Id.* A lease is a contract, and as such the laws and remedies governing breach of contract govern these instruments regardless of the commercial or residential nature of the lease.

As such we find that the evolution of the governance of a lease from property to contract principles and the language

enumerated in the Supreme Court's opinion in *Dennis,* effectively overrules our holding in *White v. Smith* (1917), 8 Ohio App. 368, and *Sandusky Mall Co. v. Pet Corner, Inc.* (1997), 117 Ohio App.3d 198, where we held that a landlord does not have a duty to mitigate damages by attempting to rent the property.

Lemstone abandoned the leased premises approximately six months before the expiration of the lease. As a result of Lemstone's breach, Frenchtown Square argued that they were entitled to roughly $44,000 in damages.

The failure to mitigate damages is an affirmative defense. *Wehrley v. Sunchase American, LTD. dba Olde Towne Apartments* (Jan. 29, 2001), Butler App. CA99-11-191, unreported, 2001 WL 88202, citing *Young v. Frank's Nursery & Crafts, Inc.* (1991), 58 Ohio St.3d 242, 244. Thus, Lemstone has the burden of proving that Frenchtown Square failed to mitigate its damages. In order to prove that Frenchtown Square failed to mitigate its damages, Lemstone was required to introduce evidence tending to establish that Frenchtown Square failed to use ordinary care and reasonable diligence to offset the damages resulting from the breach of the lease agreement. *Id.*, citing *Fousts v. Valleybrook Realty Co.* (1988), 4 Ohio App.3d 164, 168, and *Endersby v. Schneppe* (1991), 73 Ohio App.3d 212, 218.

Lemstone presented evidence that it had abandoned the premises six months prior to the termination date of its lease. Lemstone also presented affidavits by Norman Doyle (Doyle) and Steve Worshan (Worsham) in which Doyle and Worsham alleged that Kyle Morre, manager of Renhill Personnel, had informed them that Frenchtown Square had refused to rent the property during its vacancy to Renhill Personnel. Therefore, when viewing the evidence in a light most favorable to Lemstone, Lemstone presented evidence tending to raise a genuine issue of material fact as to whether or not Frenchtown Square properly mitigated its damages.

Lemstone's second assignment of error has merit.

Lemstone's tenth assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY OVERRULING THE DEFENDANT'S/APPELLANT'S MOTION FOR SUMMARY JUDGMENT WHICH WAS SUPPORTED BY AFFIDAVITS SETTING FORTH MATERIAL FACTS THAT WERE NOT CONTROVERTED BY THE OTHER PARTY. [PROPOSITION OF LAW NO. 3]"

Lemstone's eleventh and final assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY (IMPLICITLY) ASSESSING CREDIBILITY, WEIGHING THE EVIDENCE[,] AND DRAWING INFERENCES IN REACHING ITS DECISION TO DISMISS THE COUNTERCLAIM. [PROPOSITION OF LAW NO. 3]"

In Lemstone's final argument, Lemstone argues that the trial court erred by failing to sustain its motion for summary

judgment as to its counterclaim for tortious interference with contract. Lemstone essentially argues that Frenchtown Square tortiously interfered with the contract that it entered into with its franchisee in Frenchtown Square's mall by permitting Alpha to open up a second religious gifts store in a high traffic area. Lemstone argues that this had the overall effect of substantially decreasing the patronage and profits to Lemstone's franchisee's store, thereby causing the franchisee to default on its franchise payments and breach its contract with Lemstone.

Recently, in *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, the Ohio Supreme Court set forth the elements which one must prove in order to establish an action for tortious interference with contract. They are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) *the wrongdoer's intentional procurement of the contract's breach,* (4) the lack of justification, and (5) resulting damages. *Id.* at 176, citing *Kenny v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415.

After thoroughly reviewing the evidence and the record in a light most favorable to Lemstone, we find that the trial court did not err in granting Frenchtown Square summary judgment as to Lemstone's claim for tortious interference with contract.

Specifically, given the fact that (1) Frenchtown Square was free to lease its premises to whom it chose, (2) that Lemstone did not negotiate for a restrictive covenant restricting the types of goods that Frenchtown could permit its other lessees to sell, and (3) that there are no terms in the lease which provide for exclusivity with respect to Lemstone being the only religious oriented store in the mall, Frenchtown Square acted justifiably by choosing to lease its vacant space to a possible competitor of Lemstone. Hence, because no questions of fact remains as to whether or not Frenchtown Square breached the lease or whether it tortiously interfered with Lemstone's contractual relations, the trial court did not err in granting Frenchtown Square summary judgment as to Lemstone's counterclaims.

Lemstone's tenth and eleventh assignments of error are without merit.

For the foregoing reasons, the judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded to the trial court for the determination of whether Frenchtown Square properly mitigated its damages.

Vukovich, J., concurs
Waite, J., concurs