DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

G & G IN-BETWEEN BRIDGE CLUB CORPORATION,

Appellant,

v.

PALM PLAZA ASSOCIATES, LTD.,

Appellee.

No. 2D21-3402

February 8, 2023

Appeal from the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Susan J. Silverman, Sarasota, for Appellant.

Beverly A. Pohl and Danna Khawam, of Nelson Mullins Riley & Scarborough, LLP, Fort Lauderdale; Todd K. Norman of Nelson Mullins Riley & Scarborough, LLP, Orlando, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

G & G In-Between Bridge Club Corporation (G & G), the operator of a bridge club located in a Sarasota shopping center, appeals the trial court's entry of summary judgment in favor of Palm Plaza Associates, Ltd., the landlord. We reverse in part and affirm in part.

The trial court ruled that G & G's written lease with Palm Plaza gave Palm Plaza the sole discretion to change the shopping center's parking rules even if those changes eliminated or severely restricted the ability of G & G's customers to park their cars. Because a reasonable

trier of fact could find on this record that Palm Plaza's adoption of the amended parking rules was unreasonable under the contract, we conclude that the court erred in granting summary judgment in favor of Palm Plaza on the parties' respective claims for declaratory relief and on G & G's claim for breach of the covenant of quiet enjoyment. With respect to the court's entry of summary judgment in favor of Palm Plaza on G & G's claim for a violation of the Florida Deceptive and Unfair Trade Practices Act, § 501.204, Fla. Stat. (2019) (FDUTPA), we affirm without further discussion.

Factual background

When G & G began leasing its space in 2017, Palm Plaza's shopping center was largely vacant. Palm Plaza badly needed tenants and was largely indifferent to how the tenants at the time, including G & G, used the front and rear parking lots. As David Rosen, who negotiated the lease for Palm Plaza, put it, "[I]f you are that vacant, it really didn't make any difference."

When Palm Plaza signed the lease, it knew exactly what kind of business G & G planned to operate. Indeed, the lease states that G & G must use the space for the "operation of a Bridge Club, and for no other purpose." What Palm Plaza may or may not have fully appreciated at that time is that the typical round of bridge takes approximately three to four hours to play and that the typical player of bridge is a senior citizen.[1]

G & G leased the space because it was an ideal location for a bridge club. The space (previously used as a bingo parlor) is the only one in the shopping center with a back entrance appropriate for customer use.

[1] G & G's owner, James Gordon, testified accordingly at his deposition.

During the first two years of the lease, G & G's customers were able to park immediately behind the bridge club in the rear lot and enter the club through the back entrance. This reduced G & G's use of the front lot. At that time, G & G customers could park in either the front or the rear lot without time limitations.

In August 2019, after the shopping center began to fill up and new and prospective tenants expressed concerns or preferences for parking, Palm Plaza first amended its parking rules. The amended rules directly conflicted with G & G's historic use of the parking lots. They prohibited G & G's customers from parking in the rear lot for any amount of time and further limited parking in the front lot to a maximum of two hours—insufficient time for G & G's customers to complete a round of bridge. Although Palm Plaza argues that it did not know G & G's full parking needs until after it had entered into the lease (a reasonable trier of fact could find otherwise on this record), Palm Plaza undoubtedly understood those needs before amending the parking rules in 2019.

G & G's owner, James Gordon, averred in his affidavit and confirmed at deposition that the 2019 parking rules immediately caused his customer count to go down, ultimately threatening the destruction of his business. According to Gordon, the bridge club was "the only tenant affected as their customers are in the location for more than 2 hours."

G & G promptly objected to the 2019 rule change in writing. Palm Plaza responded by filing an action for declaratory relief. Only *after* G & G filed its initial counterclaims seeking damages for breach of the lease did Palm Plaza propose any modification. By that time, however, G & G had already begun suffering harm.

The amended October 2020 parking rules continued to prohibit any customers from parking in the rear lot but modified the limitations in the

front lot.[2] Specifically, Palm Plaza limited parking to two hours in the spaces fronting the stores and installed signage so indicating. Although parking was unrestricted in the far reaches of the front lot, Palm Plaza did not notify customers of that fact.[3]

Significantly, the record shows that in 2019, the management company requested Chad Ritchie, the president of Sarasota Security Patrol (the company that enforces parking restrictions at the shopping center), to propose a parking plan to include specific parking areas for employees and customers. Ritchie's proposal included setting aside 111 spaces in the rear lot for G & G's customers, which would have allowed G & G to take advantage of having a back entrance while minimizing its impact on the front lot. The record does not establish why Palm Plaza and the management company ultimately rejected this proposal. According to Ritchie, "I wasn't given any answers besides that they didn't like it."[4] Palm Plaza's architect, John Bernabeo, also made proposals that would have addressed G & G's parking needs. It is similarly unclear on this record why they were rejected.

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[2] Although some of Palm Plaza's witnesses suggest that anyone may park in the rear lot under the October 2020 rules, it is undisputed that Palm Plaza still posts the "permit only" signs in the rear lot.

[3] Gordon testified at his deposition that many of G & G's customers are in their 80s or 90s and frequently suffer from mobility problems. He testified that it is difficult for them to use the more remote spaces in the front lot. Gordon also explained that the lack of any signs in the front lot describing where parking is unrestricted causes confusion for his customers.

[4] In December 2020, however, the management company allotted 160 "employee" permits in the rear lot to a new tenant operating a poker club, One-Eyed Jacks. Ritchie testified that he was "kind of shocked at the numbers" when he found this out because there "wouldn't be enough parking for the bridge club."

The key lease provisions on parking

Paragraph 7.04 of the lease permits Palm Plaza to manage the common areas—including the parking lots—through

> *reasonable* rules and regulations as Landlord may deem necessary or advisable for the proper and efficient use, operation and maintenance of the Common Area provided that all such rules and regulations affecting Tenant and its invitees and employees shall apply equally and without discrimination to all tenants of Landlord's Buildings.

(Emphasis added.) That paragraph expressly identifies parking rules as an example of rules that Palm Plaza may adopt.

The lease undoubtedly gives Palm Plaza substantial discretion in formulating parking rules. Paragraph 7.03 permits Palm Plaza to make changes to the "nature" of the common areas (including parking) when those changes "in [Palm Plaza's] opinion are deemed to be desirable and for the best interest of all persons using the Common Area." Further, paragraph 7.05 gives Palm Plaza "the sole and exclusive control, management and direction of the Common Area."

In paragraph 20.01, however, Palm Plaza covenants to permit G & G to "peaceably and quietly hold and enjoy the Premises for the Term without hindrance or interruption by Landlord . . . subject, nevertheless, to the terms and conditions of this Lease."

The claims and summary judgment motions

Palm Plaza's complaint sought a declaration that the 2019 rules are consistent with the lease. At no time has Palm Plaza moved to amend its declaratory relief claim to include the 2020 rules.

G & G alleged fourteen affirmative defenses and three counterclaims. In its first count, G & G sought a declaration that the 2019 and 2020 parking rules were unreasonable and discriminated

against it. G & G asked the trial court to declare that Palm Plaza had acted unreasonably in implementing both sets of parking rules. G & G also sought supplemental relief in the form of damages pursuant to section 86.061, Florida Statutes (2019), due to its loss of business and of a potential buyer for the club.

In count two, G & G sought damages against Palm Plaza under FDUTPA, alleging that Palm Plaza's actions were unfair, deceptive, and unconscionable acts or practices in the conduct of trade or commerce. In count three, G & G alleged that Palm Plaza breached the covenant of quiet enjoyment included in paragraph 20 of the lease, and it sought damages for that alleged breach.

Palm Plaza moved for summary judgment on both parties' claims and on all of G & G's affirmative defenses. The trial court granted Palm Plaza's motion in all respects. Principally, the court embraced Palm Plaza's argument that if G & G had wanted greater protections against an adverse change in parking rules, it should have negotiated for them and made them part of the lease:

> [T]he Landlord had discretion to implement the parking rules at issue in this case and in exercising that authority, met the criteria of the Lease doing so in a reasonable, equal and non-discriminatory manner. Defendant [G & G] had the ability to negotiate for specific parking requirements and did not do so, thus the Court must enforce the contract as written . . . .

Analysis

This court reviews de novo a trial court's grant of summary judgment. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). A movant is entitled to summary judgment if no reasonable finder of fact could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We view the

facts in the light most favorable to G & G and may not weigh the evidence or make credibility determinations. *See Lewis v. City of Union City*, 934 F.3d 1169, 1179 (11th Cir. 2019). In reviewing this case, we are mindful that commercial reasonableness is generally an issue of fact. *See L.V. McClendon Kennels, Inc. v. Inv. Corp. of S. Fla.*, 490 So. 2d 1374, 1376 (Fla. 3d DCA 1986) (reversing grant of summary judgment in part because there were disputed issues of fact about whether the defendant's conduct was commercially reasonable); *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 278 (7th Cir. 1996) ("The question of what is 'reasonable' under a contract is an issue of fact for the trier of fact."); *Eastwood Ins. Servs., Inc. v. Titan Auto Ins. of N.M., Inc.*, 469 F. App'x 596, 598 (9th Cir. 2012) (reversing summary judgment and noting that "[c]ommercial reasonableness 'primarily involve[s] questions of fact, based on all the circumstances' " (second alteration in original) (quoting *Gifford v. J & A Holdings*, 63 Cal. Rptr. 2d 253, 259 (Cal. Ct. App. 1997))); *ConSeal Int'l Inc. v. Neogen Corp.*, 488 F. Supp. 3d 1257, 1277 (S.D. Fla. 2020) (denying motion for summary judgment and holding that the reasonableness of an open price term was a question for the trier of fact).

Florence Rosen, the president of the management company and part-owner of Palm Plaza, acknowledged at her deposition that "parking has to be available for all tenants, reasonable parking." That includes G & G. We have no difficulty concluding that there is a genuine issue of fact concerning the "reasonableness" of the 2019 rules. A reasonable trier of fact could find it unreasonable for Palm Plaza to obligate G & G to pay rent for ten years and to function at that location exclusively as a bridge club and then to make it all but impossible for G & G's customers to park to play the game. This is particularly true when Palm Plaza has

failed to explain why it rejected Ritchie's proposed parking plan, which at first blush would seem to have accommodated G & G's needs without disproportionately inconveniencing any other tenant. Similarly, a reasonable factfinder could find the 2020 rules unreasonable, notwithstanding the substantial discretion afforded Palm Plaza under the lease to adopt parking rules.

Here, the requirement that Palm Plaza enact only "reasonable" rules is an express part of the lease. But even if G & G were traveling under a theory of only an implied duty of good faith and fair dealing, Palm Plaza could not disregard G & G's legitimate expectation that its landlord would refrain from adopting parking rules that precluded it from conducting the only business the landlord had authorized it to conduct. *See Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097–98 (Fla. 1st DCA 1999) (reversing summary judgment, noting that the duty of good faith protects a contracting party's reasonable expectations, and holding that even where the contract gave a party "substantial discretion to promote that party's self-interest," the duty of good faith nevertheless applied); *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1185 (Fla. 2d DCA 2000) ("[S]ole discretion [under a contract] does not permit a party to make a discretionary decision that violates the covenant of good faith"); *Local Union No. 52, Plumbers & Steamfitters Union v. Daniel of Ala.*, 479 F.2d 342, 343 (5th Cir. 1973) (holding collective bargaining agreement giving employer sole discretion to discharge employee for failure to perform was subject to duty of good faith).

For the same reason, the trial court should not have granted Palm Plaza summary judgment on G & G's count for breach of the lease's covenant of quiet enjoyment. "If a landlord authorizes acts to be done which cause substantial injury to the tenant in the peaceful enjoyment of

the demised premises, and such a result is the natural and probable consequence of the acts so authorized, the landlord is liable therefor." *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) (quoting *Carner v. Shapiro*, 106 So. 2d 87, 89 (Fla. 2d DCA 1958)). This is true even when a landlord's conduct does not rise to the level of a constructive eviction. *Id.*

Here, the trial court granted Palm Plaza summary judgment on this count, citing paragraph 20.01's language that the covenant of quiet enjoyment is subject to the other terms in the lease. But because there is a disputed issue of fact about whether the parking rules were reasonable under paragraph 7.4, there is similarly a disputed issue of fact on G & G's claim that Palm Plaza breached paragraph 20.01.

G & G's affirmative defenses

In its complaint, Palm Plaza seeks a judicial declaration that the 2019 parking rules complied with the lease. G & G alleges several "defenses" to this claim that overlap with G & G's own declaratory relief claim concerning the 2019 and 2020 parking rules and whether those rules are "reasonable" and nondiscriminatory; these defenses should likewise be resolved by the trier of fact. We therefore reverse the trial court's entry of summary judgment in Palm Plaza's favor on G & G's defenses numbered three (parking rules contrary to paragraph 7.04), four (parking rules contrary to paragraph 7.03), five (parking rules and their enforcement violate G & G's expectations and the implied duty of good faith and fair dealing), eight (Palm Plaza's elimination of rear customer parking arbitrary), and eleven (parking rules contrary to the quiet enjoyment covenant in paragraph 20.01).

We affirm the trial court's grant of summary judgment to Palm Plaza on G & G's affirmative defenses numbered seven (Palm Plaza not

enforcing parking rules equally) and fourteen (selective enforcement). G & G confuses the issue of whether Palm Plaza's parking rules are reasonable with whether Palm Plaza is selectively enforcing its parking rules against G & G. No reasonable fact finder could determine on this record that G & G is a victim of selective enforcement by Palm Plaza.

We also affirm the trial court's entry of summary judgment in favor of Palm Plaza on G & G's defenses numbered one (estoppel), two (waiver), six (failure of conditions precedent), nine (paragraph 15.02 contrary to public policy), ten (paragraph 15.01 an unlawful restraint of trade), twelve (laches), and thirteen (tortious interference). G & G contends that it was not obligated to introduce argument or evidence on these defenses because Palm Plaza failed to disprove them or to demonstrate their legal insufficiency. In so arguing, however, G & G misapprehends how affirmative defenses are handled under rule 1.510 of the Florida Rules of Civil Procedure and the new summary judgment standard.

As of May 1, 2021, Florida follows the federal summary judgment standard. *In re Amends. to Fla. R. Civ. P. 1.510*, 309 So. 3d 192 (Fla. 2020). A summary judgment movant under the federal standard need not "preemptively tackle all of [the nonmovant's] affirmative defenses." *Frerck v. Pearson Educ., Inc.*, 63 F. Supp. 3d 882, 886 (N.D. Ill. 2014). Rather, "on a plaintiff's motion for summary judgment on its claims, the defendant bears the initial burden of showing that [an] affirmative defense is applicable." *Off. of Thrift Supervision v. Paul*, 985 F. Supp. 1465, 1470 (S.D. Fla. 1997) (citing *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1552 (11th Cir. 1990)). Only upon such a showing does the burden shift to the plaintiff regarding that affirmative defense. *Weitz*, 913 F.2d at 1552 n.13; *United Cent. Bank v. Wells St. Apartments, LLC*, 957 F. Supp. 2d 978, 987–88 (E.D. Wis. 2013)

(rejecting the argument that plaintiff had to disprove the defendant's affirmative defenses in its motion for summary judgment). This is because the defendant bears the burden of proof on his or her affirmative defenses at trial. *See Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1550–51 (11th Cir. 1990).

G & G failed to carry its initial burden.[5] The trial court thus correctly granted Palm Plaza's motion for summary judgment on G & G's alleged affirmative defenses of waiver, estoppel, laches, failure of condition precedent, and tortious interference, as well as on its two defenses based on paragraph 15 of the lease.

Conclusion

Because resolution of the declaratory relief claims requires a detailed factual inquiry on a disputed record into the "reasonableness" of the amended parking rules, the trial court erred in granting Palm Plaza's motion for summary judgment on those counts. We therefore reverse the court's entry of summary judgment in Palm Plaza's favor on the declaratory relief claims and on G & G's affirmative defenses numbered three, four, five, eight, and eleven. We also reverse the entry of summary judgment in Palm Plaza's favor on G & G's claim for breach of the covenant of quiet enjoyment. We affirm, however, the entry of summary judgment in Palm Plaza's favor on G & G's FDUTPA claim and on G & G's affirmative defenses numbered one, two, six, seven, nine, ten, twelve,

[5] We note in particular that G & G provides no legal authority for the proposition that a landlord's tortious interference with a tenant's prospective business relations can serve as an affirmative defense and somehow bar a claim for declaratory relief. G & G similarly fails to provide authority or argument for its defenses based on paragraphs 15.01 and 15.02 of the lease.

thirteen, and fourteen. We remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part; remanded with instructions.

NORTHCUTT and VILLANTI, JJ., Concur.

Opinion subject to revision prior to official publication.