

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-085

SEPTEMBER TERM, 2017

BAI Rutland, LLC	}	APPEALED FROM:
	}	
v.	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
Copper Bottom Entertainment Group, LLC and Kent Liker	}	DOCKET NO. 226-4-15 Rdcv
	}	

Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

In this dispute over a commercial lease agreement, defendants Copper Bottom Entertainment Group, LLC and Kent Liker appeal from the civil division’s judgment in favor of plaintiff BAI Rutland, LLC. We affirm.

Following a bench trial in December 2016, the civil division issued a written decision in which it found the following facts to be established by a preponderance of the evidence. In 2012, Copper Bottom entered into an agreement with plaintiff’s predecessor, Gemini Property Management LLC, to lease restaurant space in the Diamond Run Mall in Rutland. The lease called for Copper Bottom to pay \$3,000 per month for two years, after which rent would increase incrementally over the remainder of the ten-year lease period. Gemini’s business failed, and ownership of the mall and the rights under the leases were transferred to a company called L & R, and then to plaintiff. No documents pertaining to these transfers were introduced into evidence, so it was not established whether L & R agreed to assume Gemini’s liabilities. However, it was undisputed that plaintiff did not take on the liabilities of Gemini when it purchased the mall from L & R. Plaintiff’s CEO testified that all liabilities for acts that occurred prior to 5:00 p.m. on the day of closing of the purchase and sale agreement were allocated to the seller, and defendants presented no evidence to rebut this testimony.

When plaintiff took over the property, it agreed not to collect past due rent from Copper Bottom for September to December 2013, and Copper Bottom agreed to stay open rather than close the restaurant in late 2013. Copper Bottom paid rent until June 2014 and vacated the premises in September 2014. Plaintiff immediately began trying to re-let the property, but did not obtain a new tenant until June 2016. Past due rent and utilities, excluding the unpaid rent for 2013, totaled \$80,201.84.

Plaintiff sued both Copper Bottom and Liker, asserting that Liker had personally guaranteed the lease in an attachment to the lease. The trial court found that the personal guarantee attached to the lease inherited by plaintiff was fraudulent. Based on Liker’s testimony and an email from a Gemini representative, it found that Liker only agreed to guarantee the leasing fees and the tenant improvement allowance, an amount totaling \$78,400.

Defendants asserted counterclaims for fraud, breach of the lease, conspiracy, and breach of contract, but only presented evidence regarding the fraud claim at trial. Liker and his wife testified that they decided to start their restaurant in Rutland instead of another location based upon an emailed document from Gemini containing sales data for two previous restaurants that had occupied the space. The document showed sales data for the months of December 2009 to March 2010 for the New American Grill and Taproom, and for an unspecified period for Sports Legends Bar and Grill.

The New American Grill data showed that March sales (\$51,259) were approximately half of those in December (\$92,415), and that the “average” monthly sales figure was based on the four months listed. The document stated that “[t]enant failed to report sales following March 2010.” Liker indicated to the court that he intended to call the owner of the New American Grill to testify, but that person did not appear at trial. Liker made a proffer, which plaintiff agreed the court could take into account, that the owner would have testified as follows: he did report sales after March 2010; sales were between \$25,000 and \$40,000 per month for the next few months; he would not rent a space with figures like that; and he believed Gemini intentionally omitted that information from the sales data.

The data for Sports Legends Bar and Grill, which occupied the space from November 2007 to April 2009, showed a high income of \$150,643 for the opening month in 2007. It listed a low income of \$55,265, but did not state the month to which that figure corresponded. Nor did it explain what period was used to calculate the average monthly income of \$82,488. The trial court found that “the fact that the highest income came in the first month should have been a red flag for anyone analyzing the numbers.” The court also noted that defendants presented no evidence as to their restaurant’s sales, so it had no way of determining how different defendants’ sales figures were from those provided by Gemini.

The court concluded that Copper Bottom owed past due rent and utilities to plaintiff in the amount of \$80,201.84. It found that defendants had not proved their fraud counterclaim, because they failed to show that Gemini intentionally misrepresented material facts or that they reasonably relied upon any alleged misrepresentations. Because the elements of fraud were not met, the court did not determine whether any fraud by Gemini would be attributable to plaintiff. The court entered judgment in favor of plaintiff against Copper Bottom for \$80,201.84 and jointly and severally against Liker for \$78,400.

On appeal, defendants challenge several of the court’s factual findings as well as its conclusion that they failed to prove their fraud counterclaim. They further claim that the entire lease agreement was invalid. We review the factual findings of a trial court in the light most favorable to the prevailing party, without considering any modifying evidence. N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 438 (1999). “We will not disturb the trial court’s factual findings unless they are clearly erroneous, even if the record contains inconsistencies or substantial evidence to the contrary.” Adams v. Adams, 2005 VT 4, ¶ 10, 177 Vt. 448. Our review of the court’s legal conclusions, however, is “nondeferential and plenary.” Pafundi, 169 Vt. at 438.

Defendants first challenge the court’s statement that “the evidence is undisputed that [plaintiff] did not take on the liabilities of Gemini when it purchased the mall from L&R.” They point to the allegation in the complaint that when plaintiff took over the mall in December 2013, it “assumed all obligations, duties and liabilities as the landlord, under the terms of the lease.” Defendants’ argument fails to recognize that this finding was irrelevant to the civil division’s decision below. Because the court concluded that defendants had failed to prove fraud on the part of Gemini, it ultimately stated that it need not rule on the question whether fraud by Gemini would

be attributable to plaintiffs. Its decision in favor of plaintiff rested on defendants' failure to prove the alleged fraud by Gemini, not on any determination that Gemini's fraud was not imputable to plaintiff for the purposes of defendants' defenses or counterclaims. See Tetreault v. Tetreault, 148 Vt. 448, 453 (1987) (noting that "unessential findings do not provide grounds for reversal even where those findings are incorrect").

Defendants next claim the trial court erred in finding their decision to open the restaurant in Rutland was based solely on the sales data provided by Gemini. We discern no error in this finding. Defendants testified repeatedly that the figures provided were the basis for deciding to lease the space in the mall. Liker said that the sales data "were a deciding factor in why we chose this space," and that their decision "was largely based on the numbers provided." Similarly, when asked what made them choose the property, Mihaela Liker testified "[t]he numbers, the money [from] the previous tenants." Defendants presented no evidence at trial that they conducted any further investigation into the sales data or other aspects of the space before signing the lease with Gemini.

Finally, defendants challenge the trial court's finding that they claimed to have spent "in the ballpark of \$400,000" in start-up costs, when his actual testimony was that he spent "in excess of \$430,000 dollars trying to make this work" over the year plus that they operated the restaurant.<sup>1</sup> Even if the court's finding were incorrect, it would not be a basis for reversal. The court concluded that defendants failed to establish fraud, and therefore did not reach the issue of damages, so this finding was not essential to the decision. See Tetreault, 148 Vt. at 453 (noting that "unessential findings do not provide grounds for reversal even where those findings are incorrect").

In addition to their factual disputes, defendants raise two legal arguments. First, they claim that the court did not address their argument that fraud may be established without a showing of intent. The trial court found that defendants had not shown that Gemini intentionally misrepresented the income of prior tenants. "Where there is no intent to mislead or defraud, but the other elements of fraud are met, we have held that a seller may be liable for constructive fraud." Sugarline Assocs. v. Alpen Assocs., 155 Vt. 437, 444 (1990). The court did not address whether plaintiff could be held liable for constructive fraud. Any error in this regard was harmless, however, because the record supports the trial court's conclusion that defendants failed to meet the other elements of fraud. See Silva v. Stevens, 156 Vt. 94, 102 (1991) (listing elements). Specifically, defendants failed to show that there was a material misrepresentation—intentional or otherwise—by plaintiff or its predecessor Gemini. Defendants presented no evidence that the sales figures provided by Gemini were inaccurate. To the contrary, in an email presented by defendant, the owner of the New American Grill, Max Turner stated "[u]nfortunately, those numbers don't seem that far off."

The only evidence of an alleged misrepresentation is Turner's statement that he did report his sales figures to Gemini after March 2010. Assuming this is true, defendants failed to prove that the post-March data was otherwise unavailable to them. Defendants did not ask Gemini for more information about that data, nor did they attempt to contact the previous tenant directly prior to leasing the space. They therefore failed to meet their burden of proving another element of

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<sup>1</sup> Liker did attempt to introduce some unspecified tax returns into evidence when he was cross-examining plaintiff's CEO, at which point plaintiff's counsel objected. The court properly ruled that the evidence could not come in through that witness, as there was no showing that plaintiff's CEO had personal knowledge of the documents.

fraud, which was that the misrepresented fact was not open to their knowledge. See Silva, 156 Vt. at 102.

The record also supports the trial court's determination that it was unreasonable for defendants to rely solely upon the document provided by Gemini in deciding to sign the lease where that document clearly did not provide a sufficient representation of overall profits for the space. "[W]here it is clear from the full text of a representation or from facts about the relationship of the parties that reliance should only follow an independent inquiry, such an inquiry must be made." Silva, 156 Vt. at 105 (quotation omitted). Plaintiff's CEO testified that the winter months were the busiest time of year in the mall due to Christmas and ski season. Both plaintiff's CEO and one of defendant's own witnesses testified that the restaurant business has ups and downs, and that a person considering opening a restaurant should obtain data from a broad period of time including high and low periods in order to properly evaluate a potential space. There is no evidence that defendants even attempted to obtain more information about the space from Gemini or anyone else before opening their restaurant. We agree with the trial court that defendants' reliance upon the limited sales data provided by Gemini was unreasonable in this context. Their own negligence defeats their fraud claim.

Defendants also argue that because the trial court found the personal guarantee attached to the lease to be fraudulent, the entire agreement is invalid. However, the lease contains a severability clause stating that if any term or provision is held to be invalid or unenforceable, the remainder of the lease shall not be affected. The lease agreement therefore continued to be enforceable in spite of the personal guarantee.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice