

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 11, 2007 Session

**BEVERLY C. SMITH v. RONNIE R. SMITH ET AL.**

**Appeal from the Chancery Court for Wilson County  
No. 02402 C. K. Smith, Chancellor**

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**No. M2007-00511-COA-R3-CV - Filed February 21, 2008**

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Buyers of commercial property, who were denied possession of that property for a period of two years, appeal from the trial court's determination that they failed to carry their burden of proving a fair rental value for one of the three units of the property. Finding that the evidence preponderates against the trial court's determination, we reverse.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and SHARON G. LEE, J., joined.

August C. Winter, Brentwood, Tennessee, for the appellants, Ronnie R. Smith and Betty Jo W. Smith.

Robert Evans Lee, Lebanon, Tennessee, for the appellee, Beverly C. Smith.

**OPINION**

This is the second appeal in a dispute over ownership of commercial property. The first appeal addressed the issue of whether a valid contract existed for the sale of the property. After determining that the seller was estopped from asserting the statute of frauds to avoid the sale, we concluded that the buyers were entitled to specific performance.<sup>1</sup> The current appeal presents the single issue of whether, on remand, the trial court erred in finding that the buyers failed to establish a fair rental value for one unit of the property for the time when the buyers were not in possession of the property.<sup>2</sup>

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<sup>1</sup> This court's opinion in the first appeal is located at *Smith v. Smith*, No. M2004-00257-COA-R3-CV, 2005 WL 3132370, \*1 (Tenn. Ct. App. Nov. 22, 2005) (no Tenn. R. App. P. 11 application filed).

<sup>2</sup> A second issue originally briefed on appeal concerning the trial court's failure to award fair rental value damages for the month of December 2003 has now been resolved by agreement of the parties that the buyers are entitled to damages for December 2003.

## I. FACTUAL BACKGROUND

In June 2000, defendant Ronnie Smith entered into an oral agreement with his uncle, Benton Smith, the now-deceased husband of plaintiff Beverly Smith. Benton Smith agreed to sell commercial property located at 14111 Lebanon Road in Hermitage, Tennessee, owned by Benton and Beverly Smith, to Ronnie Smith for \$140,500.00. Ronnie made a \$10,000.00 down payment and began paying his uncle \$1,500.00 per month toward the purchase price. After Benton Smith died in November 2001, a dispute arose as to ownership of the property, and Beverly Smith filed a declaratory judgment action in November 2002 asserting that Ronnie Smith's contract to buy the property violated the statute of frauds. Following a bench trial in November 2003, the trial court entered an order in December 2003 declaring that the property was owned by Beverly Smith. In November 2005, this court reversed the decision of the trial court. For a period of approximately two years,<sup>3</sup> during the pendency of the appeal, Ronnie Smith was denied possession of the Lebanon Road property.

Prior to the original sale in June 2000, the Lebanon Road property consisted of two adjoining units, A Building and B Building. A Building, 1,234 square feet in size, was rented to Ronnie Smith for \$500 per month; he used the unit for his home repair and painting business. This unit consists of an office, a work bay, and a rest room. B Building, 4,416 square feet in size, was rented to Randy Dillingham (Beverly Smith's son from a previous marriage) for \$600 per month; Mr. Dillingham used the property for his automotive body shop business. After he purchased the Lebanon Road property, Ronnie Smith entered into a new lease with Mr. Dillingham on B Building for a monthly rental of \$1,000. About six months later, Mr. Smith built an addition onto the back of A Building; this addition is known as C Building and is 1,132 square feet in size. Mr. Smith moved his business into C Building and rented A Building to a used car dealer, Robbie Buckner, for \$600 per month.

When the trial court awarded the property to Beverly Smith in December 2003, Ronnie Smith moved his business out of C Building after refusing an offer from Beverly Smith's attorney-in-fact, her son Brian Dillingham, to rent the unit for \$1,000 per month. Mr. Buckner remained in A Building, but his rent was increased from \$600 to \$800 per month. Beverly Smith reduced her son Randy Dillingham's rent for B Building from \$1,000 to \$600 a month. Randy Dillingham was also permitted to use C Building for storage free of charge.

After the decision of this court reversing the trial court's judgment in November 2005, Ronnie Smith regained possession of the property in January 2006. He increased Randy Dillingham's rent for B Building to \$1,100 per month. Robbie Buckner agreed to rent both A and C Buildings for a total of \$1,225 per month. The C Building contains two work bays and space for shelving and equipment.

A hearing was held on November 22, 2006 for an accounting to determine the balance owed by Ronnie Smith to Beverly Smith after all proper credits, debits, and adjustments were made. At the hearing, there was testimony by Brian Dillingham, attorney-in-fact for Beverly Smith, and by

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<sup>3</sup> The parties have agreed that fair rental value is owed for a period of 25 months.

Ronnie Smith concerning the rental value of C Building. Mr. Dillingham testified that, after his mother was awarded ownership of the property by the trial court in December 2003, he offered Ronnie Smith a proposed lease change for C Building at a rate of \$1,000 per month. When asked if he thought this was a fair price for C Building, Mr. Dillingham stated that he did. Brian Dillingham further explained that his brother, Randy Dillingham, had paid rent of \$600 a month for B Building when Benton Smith owned the building and that Ronnie Smith had raised the rent to \$1,000 when he became the owner. Randy Dillingham testified: "So, when we won it in court, we thought it would be fair to charge Ronnie the \$1,000. So, we turned it around." Ronnie Smith declined to accept the \$1,000 rental offer because he did not think the unit was worth that much.

Ronnie Smith testified that, after his initial purchase of the Lebanon Road property, he entered into a verbal agreement with Robbie Buckner, the tenant in A Building, for a long-term lease at \$600 a month "without going up on him." Mr. Smith stated that he let Randy Dillingham have B Building for \$1,000 a month "because I considered him family." Mr. Smith testified that he thought the fair rental value of B Building was higher than \$1,000 per month and that he felt it was worth from \$1,800 to \$2,000 per month.

Ronnie Smith further testified that, after the trial court's decision was reversed and he was named the rightful owner of the Lebanon Road property, he increased Randy Dillingham's rent for B Building to \$1,100 a month to account for an increase in property taxes. He agreed to rent both A and C Buildings to Robbie Buckner, who had previously used only A Building, for \$1,225 a month, an amount reflecting a rent of \$600 for each unit and a \$25 increase for property taxes. Mr. Smith agreed to give Mr. Buckner a \$200 discount on A Building for the first two years to make up for the increased rent (\$800) charged by Beverly Smith during the period when Mr. Smith was not in possession of the property.

On the issue of the fair market value of the units, the following exchange occurred between Ronnie Smith and his attorney:

Q. Now, Mr. Smith, you talked about the fair market values of these particular spots. There has been testimony from Randy Dillingham that the A spot, where Robbie Buckner [sic] is and has been through this whole litigation, is worth \$800 a month. Do you agree with that?

A. That is a fair market rental for that piece of property.

Q. All right. And, for your space, the C space, what do you think the fair market value for that property was for 2004 and 2005 when Beverly Smith had control of the property?

A. Well, 600 is, I mean, it's a real good bargain.

Mr. Smith again explained that he had an agreement with Mr. Buckner for a long-term lease for eight years on A Building, which was the reason the rent remained low at \$600. Without objection, Mr. Smith entered into evidence ten cancelled checks made payable to Mr. Smith from Mr. Buckner for \$1,025 each; the memo line on each check indicated that these payments were for rent on the Lebanon Road shop.<sup>4</sup>

After the testimony, the chancellor heard arguments from the parties. The chancellor made the following comment concerning the evidence on rental value: “Nobody has really rebutted anybody’s testimony. In all honesty, everybody that’s testified, there would have been no way anybody could rebut.” The chancellor also stated: “[n]obody’s credibility as far as I’m concerned, has really been attacked.”

The court announced its findings from the bench. As to the fair rental value of the three units, the court stated:

And, one of the issues before this Court was stated in the Bush case [*Bush v. Cathey*, 598 S.W.2d 777 (Tenn. Ct. App. 1979)] that the buyers were entitled to fair rental value. And, I found that a fair rental value of B was \$1000 per month, based upon the testimony. That is what it was being rented for before I made an error in the judgment. That’s what it was being rented for after Mr. Smith took possession of it. And, due to the size of it and the rental on the other properties, and this is the only evidence I have is what’s before me, these three pieces of property, I think that is a fair amount. It had been agreed upon and it had been paid before.

And for A, I think a fair amount on that piece of property was \$600 per month. Because that’s what he agreed to with Buckner; Robbie Buckner. What Ronnie Smith had before. And, that’s what he’s receiving for A now.

And, for C, I tell y’all, I found that speculative. And, I couldn’t come up with an amount of rent. Because Ronnie Smith was not paying himself anything before. The \$1000 is obviously based on the fact that it’s unfinished. It’s rough. It’s raw. It was too much. If what Randy Billingham [Dillingham], was reasonable, which is what I found. It was like 25 percent of the size of it. So, \$1000, it had no road frontage. Not even a front door. You know, it only had access to the other offices. And, access to a bathroom by going through to A. Ultimately, a door was put in from B to C. But, not at that time. Not originally. So, you know, when I looked at Brian’s testimony, Brian Dillingham, who was the power of attorney for Ms. Smith. . . . Ronnie [Smith] testified he thought it would be \$600 a month. But, that’s hard for me to believe it would be \$600 a month, due to the small size; unfinished. And, you

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<sup>4</sup> In accordance with Ronnie Smith’s testimony, the checks were for \$1,025 instead of \$1,225 because Mr. Smith was giving Mr. Buckner a \$200 a month discount on A Building for the first two years of the lease.

know, it didn't have a front. The one in the front up there that can advertise and everything is just renting for \$600 a month.

I just -- I feel like there is a little animosity going both ways. . . . This property -- Furthermore, this C was never rented. There is some testimony it was used for storage by Randy, I guess. But, I don't know what the storage cost or value would be. It would be speculative for me to say anything about the value of it. Of the rental value or -- They didn't collect any rent on it. So, I'm finding there was no rental on that.

The court later stated:

I find it difficult to believe that the back C is worth as much as A, as I've stated above without reiterating it. Plus, I find a little problem here with Robbie Buckner not here to testify. The absence of his testimony. I think it would have sheared [sic] up Ronnie Smith's position had Mr. Buckner been here to verify all this.

In an order dated January 3, 2007, the court made the following findings of fact and conclusions of law:

1. Based upon the amortization schedule introduced by [Beverly Smith], the payoff amount owed by [Ronnie Smith] as of December 1, 2006, is \$76,663.84.
2. [Ronnie Smith is] entitled to offsets of \$12,544.00 against said payoff amount.
3. [Beverly Smith] is entitled to additional credits of \$10,124.18 to said payoff amount.
4. The payoff amount, as of December 1, 2006, adjusted for the offsets and credits referred to above, is \$74,243.82.

On appeal, the only issue concerns the fair market value of C Building. Ronnie and Betty Smith seek additional damages of \$15,000.00, an amount representing 25 months of lost rent at \$600 per month for the fair rental value of C Building. Beverly Smith asserts that the chancellor correctly assigned no rental value to C Building because Ronnie Smith failed to meet the required burden of proof.

## II. STANDARD OF REVIEW

The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our consideration of the preponderance of the evidence "is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice*, 983 S.W.2d 680, 682 (Tenn. Ct. App. 1999). Review of a question of law is also de novo, but "with no presumption of correctness afforded to the conclusions of the court

below.” *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

### III. ANALYSIS

In a breach of contract action, damages “are permissible even when the [injured party] is unable to prove the exact amount of those damages.” *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 230 (Tenn. Ct. App. 2006). The evidence presented “to prove damages must be sufficiently certain to enable the trier of fact, using its discretion, to make a fair and reasonable assessment of damages.” *Id.* at 230 (citing *Wilson v. Farmers Chem. Ass’n, Inc.*, 444 S.W.2d 185, 189 (Tenn. Ct. App. 1969)). All that is required is “proof of damages within a reasonable degree of certainty.” *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 561 (Tenn. Ct. App. 1985). The burden of proof is on the party seeking damages. *BancorpSouth*, 223 S.W.3d at 229.

The proof in this case regarding the fair rental value of C Building consists of the testimony of Ronnie Smith regarding his opinion as to the fair rental value and the terms of his lease with Mr. Buckner, as well as cancelled checks evidencing payments by Mr. Buckner in accordance with that agreement. None of this proof was rebutted or contested in any way by Brian Dillingham (on behalf of Beverly Smith). In fact, Brian Dillingham testified that he had offered to rent the C space to Ronnie Smith for \$1,000 per month, although Mr. Smith did not accept the offer. The chancellor specifically noted that none of the evidence was rebutted and that no one’s credibility had been called into question. The court concluded, however, that there was no rental value for C Building.

The unrebutted testimony of Ronnie Smith established a fair rental value of \$600 per month for C Building. Moreover, the cancelled checks of Mr. Buckner supported Mr. Smith’s testimony concerning his current rental agreement with Mr. Buckner, which includes \$600 in rent for C Building. The amount Ronnie Smith and Mr. Buckner agreed to in an arms-length transaction is at least some evidence of the rental value at the time of the breach. *See BancorpSouth*, 223 S.W.2d at 231; *Myer v. Whitacre*, No. 01-A-01-9701-CH00014, 1997 WL 367483, at \*2 (Tenn. Ct. App. July 2, 1997). The chancellor expressed some doubt as to the validity of the \$600 figure when compared to the rents on the other two units: “I found that [rent on C Building] speculative. And, I couldn’t come up with an amount of rent. . . . But, that’s hard for me to believe it would be \$600 a month, due to the small size; unfinished.” It is not proper for a judge to “consider his own personal knowledge in order to reduce the fair rental value.” *Bush v. Cathey*, 598 S.W.2d 777, 782 (Tenn. Ct. App. 1979). Moreover, Brian Dillingham rented A Building to Mr. Buckner for \$800 per month, an amount that Ronnie Smith agreed to be the fair rental value; Ronnie Smith only charged \$600 per month to Mr. Buckner for A Building due to a long-term lease agreement. Furthermore, A and C Buildings are of comparable size--1,234 square feet and 1,132 square feet, respectively. As to B Building, Ronnie Smith only charged \$1,000 to Randy Dillingham because he considered him like family. He opined that the unit actually had a higher fair rental value, which he estimated at \$1,800 to \$2,000 per month. In this context, the \$600 rental value for C Building does not seem disproportionate, speculative, or unfair.

We have concluded that the evidence preponderates against the trial court's finding regarding the rental value of C Building. The unrebutted proof supports Ronnie Smith's claim for a fair rental value of \$600 for C Building.

#### **IV. CONCLUSION**

The trial court's decision on the fair rental value of C Building is reversed. The appellants are entitled to additional damages in the amount of \$15,000.00, representing 25 months of rent at \$600 per month on Building C. Moreover, in accordance with the parties' agreement, the appellants are entitled to an additional award of \$1600.00 for the fair rental value of A and B Buildings for the month of December 2003. Costs of the appeal are assessed against the appellees, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE