IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60078

FLEMING COMPANY, INC., Etc., ET AL.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

PARKVIEW COMPANY N.V., ET AL.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for
the Southern District of Texas
(93-CV-530)

(May 11, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Parkview Company, N.V. (Parkview), Sunhill Corporation (Sunhill), Hameed Faidi and Inam Faidi[1] appeal a judgment entered against them and in favor of Fleming Foods of Texas, Inc. (Fleming Texas) and Fleming Companies, Inc. (collectively

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] For convenience, these appellants collectively are referred to as "the Faidis."

Fleming). Fleming cross-appeals for additional damages. We agree with the district court that, as to liability, Fleming is entitled to an award of damages and a declaratory judgment that its lease with Parkview is null and void. However, for the reasons explained below we remand the case for entry of a new judgment awarding additional damages to Fleming.

BACKGROUND

Fleming is a large grocery wholesaler. In 1988 Fleming and Parkview entered into a lease whereby Fleming leased a building from Parkview for use as a grocery store. Fleming then subleased its space to Howard Ferguson d/b/a Mainhill Operators, Inc. to operate a warehouse-type grocery store at the center. Ferguson borrowed money from Fleming to purchase certain fixtures and inventory, and signed a promissory note to Fleming. The Faidis guaranteed this loan. Ferguson's store failed, which led to several lawsuits between the Faidis and Fleming.

Eventually the parties entered into a settlement agreement to resolve the pending lawsuits. The lease between Fleming and Parkview was amended to reflect the terms of the settlement. Fleming subsequently sued the Faidis for breach of the settlement agreement, and obtained a favorable jury verdict on liability. The district court determined damages and entered judgment in favor of Fleming.

DISCUSSION

A. *Jurisdiction*

The Faidis claim that the district court lacked diversity jurisdiction because Parkview and Fleming Texas are both Texas corporations. This issue turns on whether Parkview's principal place of business is in Texas, as the Faidis claim, or in California, as Fleming claims. The district court denied a motion to dismiss for lack of subject matter jurisdiction.

On appeal the Faidis do not challenge any of the facts relied on by the district court, but only its legal conclusion that Parkview's principal place of business is in California. The undisputed facts, therefore, are as follows. Parkview is incorporated in the Netherlands Antilles. Hameed and Inam Faidi are California residents and are the sole shareholders of Parkview. Parkview's sole business operation is the ownership and maintenance of the property located in Houston. The district court further found:

> Parkview was created for the sole purpose of holding title to the Mainhill property in Texas. Parkview plays no role in the day-to-day operation of the Mainhill Grocery located upon its property. Instead, the scope of Parkview's business operations is limited to (1) obligations imposed upon real property owners by Texas and United States law, such as payment of property taxes; and (2) maintenance obligations imposed upon Parkview pursuant to the lease agreement between Parkview and Fleming Texas. From its corporate headquarters in California, Parkview makes all arrangements needed to fulfill its contractual obligations and maintain its ownership in the Mainhill property, including engaging independent contractors, some of which are Houston based, to conduct accounting, auditing, rent collection, landscaping, janitorial and electrical services, plumbing, and garbage collection. Such contractors are paid from both California and

> Houston accounts established by Parkview for that purpose. . . . Additionally, the lease agreement between Parkview and Fleming Texas provides that all rent payments, invoices, and correspondence are to be sent to Parkview's executive office in Mill Valley, California.

Our analysis is guided by *J.A. Olson Co. v. City of Winona*, 818 F.2d 401 (5th Cir. 1987). We reverse the district court only if its determination of principal place of business is clearly erroneous. *Id*. at 412. Our circuit applies the "total activity" test in deciding a corporation's principal place of business, a flexible test which considers both the "nerve center" and "place of activity" of the business. *Id.* at 404, 406. In particular, we consider the corporation's contact with the community. *Id*. at 406, 411. "[T]he principal place of business of a corporation with its corporate headquarters in one state and its single activity in another will generally be in the state of its operations." *Id*. at 409. However, "when the activity of a corporation is passive and the `brain' of the corporation is in another state, the situs of the corporation's `brain' is given greater significance." *Id*. at 411. We evaluate the "activity" of a corporation by looking to "whether it is active or passive and whether it is labor-intensive or management-demanding. . . . nerve center considerations take on added significance when the activities of the corporation are far-flung or passive or management-oriented as opposed to labor intensive activities." *Id*. at 411-12.

Following this approach, we find no error in the district court's determination that California is Parkview's principal

place of business. While Parkview's main business asset is the property in Houston, its contact with that community is limited, and, as the district court noted, its business "is essentially that of an absentee Houston landowner." Its activities are management-oriented and passive, as opposed to labor intensive.

B. *Sufficiency of the Evidence*

The jury charge asked whether the Faidis breached the settlement agreement and whether Fleming breached that agreement. Since the jury was correctly instructed that a party to a contract is excused of its obligation to perform by the repudiation or material breach of the other contracting party,[2] the jury was in essence asked to decide which party first breached the contract. The Faidis claim insufficient evidence to support the verdict.

The Faidis moved for judgment under FED. R. CIV. P. 50. In reviewing the denial of a motion for judgment, a jury verdict "must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary." *Western Co. of North America v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892 (1983).

We find the evidence sufficient to support the jury's finding that the Faidis first breached the settlement agreement. Fleming alleged several breaches of the agreement and offered

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[2] *See Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 689 (Tex. 1981); *Glass v. Anderson*, 596 S.W.2d 507, 511 (Tex. 1980).

evidence in support thereof. By way of example, the evidence is sufficient that the Faidis breached the agreement first, by failing to make repairs to the store's parking lot and by failing timely to provide a management company to manage the shopping center where the store was located.

As to the parking lot, it was in serious need of repair. While the Faidis proposed resurfacing the entire shopping center lot with one inch of asphalt, Fleming believed that 1 1/2 inches were necessary due to the heavy traffic at the store and frequent visits by large trucks. Although the Faidis eventually agreed to a proposal for 1 1/2 inches of asphalt for the store's portion of the lot, the Faidis never gave a directive to the chosen contractor to begin work. The Faidis argue that Fleming was obligated to repair the parking lot from "escrowed funds" consisting of prior rental payments under Fleming's control. Fleming contends that the Faidis were obligated to make the repairs. We find the evidence sufficient to support a jury finding in favor of Fleming's position. Although the settlement agreement contemplated the use of the escrowed funds to pay for the parking lot repairs, and provided for Fleming's approval of the contractor and the repair work, it does not specify which party bore the ultimate responsibility to effect those repairs.[3]

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[3] The settlement agreement provides:

> The parties agree that Fleming/Fleming Texas may use the Escrowed Funds . . . for the resurface or repair of the parking lot . . . . The contractor performing the work and the work itself shall be acceptable to Fleming/Fleming Texas, such acceptance to not be

Fleming offered evidence, however, that the parties intended the Faidis to bear that obligation, because they were the landlord and owner of the property, and because the original lease placed that responsibility on them.[4] In addition, the settlement agreement itself supports this position, since giving Fleming the right to approve the contractor and the repair work suggests that the onus of finding a contractor and effecting the repairs was on the Faidis.[5]

As to the retention of a management company, the settlement agreement provided that the Faidis "agree to engage a real estate management company acceptable to Fleming/Fleming Texas to fully manage the shopping center where the leased premises are located, and shall secure such management company within thirty (30) days from the effective date of this Agreement." The Faidis concede that they did not retain a management company within 30 days of the execution of the agreement, but argue that the delay was not

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> unreasonably withheld . . . . With respect to future necessary repairs to the leased premises . . . including any parking lot . . . repairs not already paid for or capable of being paid for from Escrowed Funds, the parties agree that rental hereinafter due under the terms of Amendment No. 1 to the Lease may be withheld by Fleming/Fleming Texas until the Faidis . . . have provided sufficient evidence that all necessary repairs have been completed.

[4] The lease provided that "[t]he lessor shall resurface the sidewalk, parking and driveway areas when the same shall be reasonably necessary, together with restripping the parking areas."

[5] The testimony of Fleming's Houston division president, Carroll McLarty, was consistent with this view: "I think the settlement agreement says that if it's agreeable to us, that [the Faidis are] to go ahead and have the work done, yes, sir."

material. Again, we conclude that a reasonable jury could find that this breach was material. Fleming offered evidence that the repair needs were causing serious business problems for the grocery store, and that customers were abandoning the store and not returning. When asked to explain the time frame specified for the hiring of the management company, McLarty testified: "Because of the deplorable conditions that our customers were trying to deal with. They wanted to shop with us, but they were finding it impossible. Time was of the essence, and we just had to get that parking lot and lighting fixed so that we could conduct business in the store."

The Faidis also argue that if there is insufficient evidence as to any of the contractual breaches alleged by Fleming at trial, the judgment must be reversed because it is impossible to determine the alleged breach upon which the jury premised its answer. There is some authority that such a rule applies when multiple theories of liability are presented to the jury but a general verdict form is used. *E.g., Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 176 (5th Cir. 1985). The simple response to this argument is that we do not believe that a general verdict form was used here. Instead, the court submitted three interrogatories to the jury -- two on breach of contract and one on damages -- together with instructions on the law of contracts.

C. *Damages*

The Faidis contend that the court erred in its calculation of damages. The judgment consists of the sum of the monthly rent

reductions (discussed below) from the date that Fleming vacated the premises to the time of trial, plus prejudgment interest and less an offset for unpaid rent.

The settlement agreement is a strange document. Unlike the typical settlement agreement designed to resolve pending litigation, this agreement did not release all prior claims. At the time of the agreement the Faidis owed on paper substantial sums under the guaranty they had signed, although they were contesting Fleming's claim under the guaranty. To be sure, the settlement agreement states that the parties desire to settle all claims asserted in the three pending suits. It contains release provisions, but states in those provisions that the obligations evidenced by the settlement agreement itself shall survive and not be released.

Most important for our purposes, paragraph 1 of the agreement states, in its entirety:

> The Faidis and Sunhill acknowledge that the sum of One Million One Hundred Fifteen Thousand dollars ($1,115,000.00) is due and owing at the present time to Fleming Texas pursuant to that certain guaranty of payment dated September 17, 1989. Said sum is the amount of indebtedness remaining after all credits and offsets to the obligations guaranteed by the Faidis and Sunhill including proceeds of foreclosure, have been allowed. Parkview acknowledges the debt to Fleming Texas because of the above described lease dispute. The Faidis, Sunhill and Parkview agree that the sums due Fleming Texas shall be paid in equal monthly installments for a period of ten years (10) commencing January 1, 1990 in the sum of Nine Thousand Two Hundred Ninety-Two Dollars ($9,292.00). Such payment shall be made in the form of a reduction of rentals otherwise due pursuant to that certain lease agreement (the "Lease"), dated February 19, 1988, by and between Fleming and Parkview, as more fully set forth in Amendment No. 1 to the Lease, attached hereto as

> Exhibit "A" and incorporated herein which Amendment Fleming and Parkview agree to execute and deliver concurrently with the execution of this Agreement.

We believe that the only fair reading of the agreement is that it continued the lease, but independently created a structured settlement of the substantial guaranty obligation, calling for the repayment of that obligation through monthly payments over a ten-year period. The monthly payments were to take the form of reduced rent so long as the lease arrangement endured, for the simple reason that the rent was greater than the monthly reduction in the guaranty obligation. However, we do not read the agreement as terminating the obligation to pay off the guaranty over time if Fleming terminated the lease for cause, as happened here.[6]

The Faidis argue that the settlement agreement operated as an accord and satisfaction of the guaranty, and that Fleming cannot now sue under the guaranty. We think the plain language of paragraph 1 of the settlement agreement reaffirmed the Faidis' obligation to pay the amount owed under the guaranty, albeit under an altered payment schedule. The Faidis argue alternatively that under Texas law the measure of damages to a lessee who is denied use of the leased premises is the difference

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[6] The lease gave Fleming the right to terminate the lease for violation of any covenant, agreement or stipulation of the lessor, and Amendment No. 1 to the lease specifically shortened the notice period for covenants relating to the customer parking area from 30 to 15 days.

between the market value of the lease and the contract rentals,[7] and that Fleming offered no proof of damages under this measure. Again, this argument fails because it does not recognize that the settlement agreement was more than a simple lease; it independently reaffirmed the Faidis' obligation to pay off the guaranty of the Mainhill note. The settlement agreement consists of a modified lease, a structured settlement of the guaranty obligation, and other agreements as well.

The district court agreed with our analysis set out above, but only awarded the sum of monthly payments due to the date of trial. The obligation to make monthly payments, however, continued after trial. Accordingly, we remand the case for the district court to award additional back payments to the date the court acts, plus prejudgment interest.

Fleming argues by cross-appeal that it is entitled to the present value of the entire $1.115 million indebtedness, which can be calculated by discounting to present value the future payments due from the Faidis. Unlike an ordinary bank note, however, the settlement agreement did not have an acceleration clause giving Fleming the right to demand immediate recovery of future payments in the event of default. The essence of the provision regarding the guaranty obligation, as explained above, was to create a new, extended term for the repayment of that obligation. We therefore reject the cross-claim. We do believe,

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[7] *See, e.g., Briargrove Shopping Ctr. Joint Venture v. Vilar, Inc.*, 647 S.W.2d 329, 336 (Tex. App.--Houston [1st Dist.] 1982, no writ).

however, that Fleming is entitled to a declaratory judgment on remand that future monthly payments of $9292 are due from the Faidis until the obligation is discharged in full.

For the foregoing reasons, we remand the case for entry of judgment consistent with this opinion.

Affirmed in part, Vacated in Part, Case Remanded.