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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 8, 2023 Session

MADISON HOLDINGS, LLC ET AL. v. THE CATO CORPORATION

Appeal from the Circuit Court for Madison County
No. C-20-216 Roy B. Morgan, Jr., Judge

No. W2022-00685-COA-R3-CV

In litigation commenced by landlord to recover unpaid rent, the tenant asserted a counterclaim alleging violations of the parties' lease agreement and seeking a declaration of the parties' rights and obligations. Featuring prominently in the parties' dispute is a lease provision providing for, among other things, rent abatement if a non-party to this litigation, the designated "Major Anchor Tenant," ceases operations in the shopping center where the tenant's store is located. Under another lease provision, which is also at issue, the right to rent abatement is triggered, subject to certain exceptions, if landlord enters into another lease agreement "with or by any national or regional tenant having . . . more than one store for whom the majority of its revenue is from the sale of apparel and/or clothing accessories." In this case, the tenant has asserted rights to relief with respect to both of these provisions. Following a bench trial, the trial court rejected various defenses raised by landlord in the litigation and determined that the tenant was entitled to relief under the parties' lease. As part of its order, the trial court awarded the tenant a monetary judgment against landlord related to rent overpayments the tenant had made during a period when rent abatement was in effect. Although we conclude that the trial court erred in awarding a monetary judgment related to the rent overpayments given that the remedy provided under the relevant lease provision specifically provides only for an offset against current or future rent, we otherwise affirm the trial court's order in this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part, and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

L. Clayton Culpepper, III, Memphis, Tennessee, for the appellants, Madison Holdings, LLC, and Hammitt Regency Plaza Limited Partnership.

Brandon W. Reedy, Jackson, Tennessee, for the appellee, The Cato Corporation.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

This case involves a dispute surrounding a commercial lease agreement entered into by The Cato Corporation ("Cato"), the lessee, and Madison Holdings, LLC, and Hammitt Regency Plaza Limited Partnership (collectively referred to in the singular as "Landlord"). In order to distinguish this agreement from other lease agreements referenced in this Opinion, this lease involving Cato will be referred to specifically as "the Lease." The leased premises consist of approximately 9,990 square feet of retail store space and are located in The Vinings Shopping Center in Jackson, Tennessee. The "Term" of the Lease is defined as the "Initial Term as it may be extended or renewed." Although the initial term of the Lease was from August 1, 2011, through January 31, 2019, the parties' agreement contains provisions providing for automatic five-year renewal periods if Cato does not provide prior notice of a contrary intention. Per the Lease, these periods operate consecutively upon the expiration of the preceding period, with the last contemplated period scheduled to run from February 1, 2029, to January 31, 2034.

Cato operates an "It's Fashion Metro" store in and from the premises at issue and operates numerous other stores across the country under various names, including "Cato," "It's Fashion," "It's Fashion Metro," and "Versona." "It's Fashion Metro" is Cato's trade name for its chain of stores offering the latest trendy fashions for the entire family at low prices. These stores feature fashions for juniors, junior plus sizes, men and big men's sizes, and boys and girls, while also offering jewelry, shoes, and accessories. At the time Cato entered into the Lease, Holliday's Fashions was also a tenant in the shopping center. Holliday's Fashions used its premises only for the sale of women's apparel and accessories in accordance with its lease.

A TJ Maxx store ("TJ Maxx") was also present in the shopping center when the parties entered into the Lease, occupying the largest space in the shopping center at approximately 27,000 square feet. It is undisputed that TJ Maxx's continued presence and operation was a material inducement for Cato to enter into and remain a party to the Lease, and of note, prior to entering into the Lease, Cato negotiated for the inclusion of lease language providing for a reduction of rent if TJ Maxx vacated the shopping center. In relevant part, Article 25 of the Lease provides as follows:

> **INDUCEMENT**. As an inducement to LESSEE to enter into, remain a party to, and/or extend the Term, LESSOR represents and warrants to LESSEE that the following tenant (the **"Major Anchor Tenant"**) is Open for Business, or will Open for Business, in its premises located as shown on the Site Plan attached hereto as **Exhibit A** prior to or concurrently with opening for business in the Premises by LESSEE:

TJ MAXX DISCOUNT FAMILY APPAREL STORE Containing Approx. 27,000 SQ. FT.

For purposes of this Section and the following Section of this Lease entitled "Shopping Center Occupancy", **"Open for Business"** means that a tenant of the Shopping Center is open for business as a retail store consistent with such tenant's normal operations in substantially all of its other operating store locations. LESSOR agrees that in the event the Major Anchor Tenant is not Open for Business when LESSEE is scheduled to open for business in the Premises, then LESSEE may delay its opening date and the Rent Commencement Date until the first of LESSEE's scheduled store opening seasons after the Major Anchor Tenant is Open for Business. In addition, if the Major Anchor Tenant should at any time during the Term cease to be Open for Business for more than three (3) consecutive months, then LESSOR shall notify LESSEE of such fact in writing promptly after LESSOR learns of such fact. LESSEE shall have the right to terminate this Lease by notice to LESSOR if LESSOR does not, within twelve (12) months after such Major Anchor Tenant ceases to be Open for Business, cause all of the premises of such Major Anchor Tenant to be occupied by a single tenant Open for Business and operating substantially the same type of retail business as that of the Major Anchor Tenant that ceased to be Open for Business. Without limiting the foregoing, a national or regional Major Anchor Tenant operating a discount family apparel store must be replaced by another national or regional tenant operating a discount family apparel store.

If LESSEE terminates this Lease as provided above, the termination shall be effective thirty (30) days after the date of LESSEE'S notice of termination. Upon any such termination, neither party shall have further obligation under this Lease from and after the effective date of termination except for obligations that survive termination under the express terms of this Lease, including without limitation the payment or refund of any difference due upon reconciliation of LESSEE's payments for its Pro Rata Share of Common Area Maintenance Charges, Taxes and insurance costs under this Lease, and pro ration of Rent to the effective date of termination.

Separate and apart from any other remedy stated herein, during any period after the Rent Commencement Date that the Major Anchor Tenant is not Open for Business, and effective retroactively to the date thirty (30) days after the Major Anchor Tenant ceases to be Open for Business, LESSEE may abate Fixed Rent and all other Rent and recurring charges payable hereunder by LESSEE, and pay LESSOR in lieu thereof, on a monthly basis, an amount equal to one-half (½) of the Fixed Rent that would otherwise then be due

> under this Lease. In the event that LESSEE has paid any Rent above such reduced rent during a period when such rent abatement was in effect, LESSEE reserves the right to offset such excess Rent paid by LESSEE against current or future Rent due to LESSOR. Notwithstanding the foregoing, effective as of February 1, 2023, in the event LESSEE remains on reduced rent pursuant to a violation of this article for a period of twelve (12) consecutive months, then at the end of such twelve (12) month period LESSEE shall either terminate this Lease with thirty (30) days prior written notice to LESSOR or LESSEE shall promptly cease its payment of reduced rent hereunder in connection with that particular violation of this article and thereupon resume payment of the Fixed Rent and all other Rent and charges that would otherwise then be due under this Lease.
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> LESSEE'S election of any one remedy as stated herein shall not preclude its exercise of any other remedy as stated herein.

TJ Maxx ceased operations and vacated the shopping center on or about May 16, 2015. Although Article 25, as evident above, contains language requiring Landlord to promptly notify Cato of TJ Maxx's departure in writing if TJ Maxx "cease[s] to be Open for Business for more than three (3) consecutive months," it is not disputed by the parties that Landlord failed to provide such written notice to Cato in this case. In December 2015, Landlord entered into a lease with Ollie's Bargain Outlet ("Ollie's") for the space vacated by TJ Maxx, and the following year, on May 11, 2016, Ollie's opened for business. Per a stipulation in the record transmitted to us on appeal, Ollie's website describes its business as "one of America's largest retailers of closeout merchandise and excess inventory."[1]

On June 8, 2018, Julie Dobler from Cato reached out to the leasing agent for Landlord and asked if Landlord would consider not increasing the rent during the first renewal period of the Lease, which was scheduled to commence on February 1, 2019. A few months thereafter, on September 26, 2018, Ms. Dobler reached out to Landlord's leasing agent again regarding this matter. Landlord denied the request. According to a finding made by the trial court upon the conclusion of the trial in this case, when Cato had attempted to negotiate a reduced rent amount for the first renewal period, it had actual and constructive knowledge of the fact that TJ Maxx had vacated the shopping center and that Ollie's had moved into that space. A prior internal report received by Cato's corporate real estate department indicated that a "TJ Maxx closed on 05/16/15" in Jackson, Tennessee, and other prior internal reports received by that department indicated "Ollie's opening 5/11/16" in the shopping center.

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[1] Per the stipulation, the website also comments as follows concerning Ollie's business: "You'll find real brands at real bargain prices in every department, from housewares to sporting goods to flooring and to food." As part of its final order in this case, the trial court ultimately noted that Olllie's was not a national or regional tenant operating a discount family apparel store.

The parties do not dispute that Cato had an absolute right to renew the Lease, and by letter dated November 2, 2018, Cato provided notice to Landlord of its intent to renew. In pertinent part, Cato's November 2, 2018, letter stated as follows:

> [Our lease] will expire on January 31, 2019. The Lease provides for a renewal option for an additional five (5) year term; the renewal option will take place automatically unless ninety (90) days prior to January 31, 2019, Cato notifies you otherwise.
>
> Although the Lease does not require formal notice, this letter is to advise you that Cato will allow the renewal option to take effect, thereby extending the Lease for the period from February 1, 2019 to January 31, 2024.
>
> On behalf of Cato this letter is also to advise that it is not the intention of Cato to waive any rights that it has or may have pursuant to the Lease and any amendments or modifications thereto, whether or not Cato has insisted on strict compliance in the past. Cato emphatically does not waive but expressly reserves any and all rights in the Lease and any amendments or modifications thereto, and intends to rely on the exact terms and conditions of the Lease referenced above and any written amendments or modifications thereto.

Cato continued to pay rent in the full amount required by the Lease through March 31, 2020, but by letter dated March 11, 2020, Cato provided notice to Landlord that Landlord was in violation of Article 25 of the Lease because TJ Maxx had vacated the shopping center and Landlord had failed to provide notice to Cato of this fact. Because Cato was paying full rent during the time rent abatement was in effect after TJ Maxx vacated, Cato advised Landlord that it was exercising its right to a credit and/or offset against current and future rent owed until it recouped its overpayments. The following month, Landlord sent Cato a notice of default for nonpayment of rent.

Litigation ensued in June 2020 when Landlord filed a detainer summons in the Madison County General Sessions Court against Cato seeking unpaid rent, eviction, and attorney's fees. Although Cato made payments in July 2020 and August 2020 (in the amount of $4,786.88 each month), it has not paid any other amounts for rent since. On August 10, 2020, this matter was removed to the Madison County Circuit Court.

Following removal, on August 20, 2020, Cato filed an answer and counterclaim, alleging that Landlord was in breach of the Lease, seeking restitution of overpayments, and requesting a declaratory judgment regarding the parties' rights and obligations under the Lease, including in relation to Article 25. Landlord subsequently denied Cato's assertion that Cato was damaged and entitled to restitution of overpayments, but Landlord agreed

there was a controversy under the Lease "with specific regard to whether and to what extent rent is due to [Landlord], a refund of rent overpayments is owed to [Cato], and/or a setoff."

During the pendency of the lawsuit, on October 30, 2020, Landlord entered into a lease concerning a City Gear store that was to be located in a space in the shopping center. Under the terms of the City Gear lease, City Gear has the right to sell "men's, women's and children's branded clothing, and men's, women's and children's athletic footwear and related accessories and such other items as sold in Tenant's other retail locations." On January 30, 2021, the City Gear store opened for business in a 8,130 square foot space immediately to the east of Cato's location in the shopping center.

By letter dated March 16, 2021, Cato provided notice to Landlord that Cato would be reducing its rent payments due to the City Gear lease and Landlord's permitting the City Gear store to be open at the shopping center in violation of Article 27 of the Lease. Article 27 of the Lease states as follows:

> **COMPETITIVE STORES**.
>
> Except as expressly provided otherwise in this Section 27, LESSOR covenants and agrees that during the Term it shall not, directly or indirectly, enter into any lease of any space or area in the Shopping Center that is owned or controlled by LESSOR, or otherwise permit or allow the use of any space or area in the Shopping Center that is owned or controlled by LESSOR, including without limitation any out-parcels, **with or by any national or regional tenant having (either directly or by way of affiliates and/or subsidiaries) more than one store for whom the majority of its revenue is from the sale of apparel and/or clothing accessories**. Without limiting LESSEE's other remedies, upon any breach of such covenant, Fixed Rent and all other Rent payable hereunder by LESSEE shall abate during the period of the violation retroactively to the date that the violation first occurred, and LESSEE shall pay, in lieu thereof, a monthly amount determined by the following formula: ONE DOLLAR ($1.00) times the number of square feet in the Premises divided by twelve. In the event that LESSEE has paid any Rent above such reduced rent during a period when such rent abatement was in effect, LESSEE reserves the right to offset such excess Rent paid by LESSEE against current or future Rent due to LESSOR. In addition, LESSEE, at its option, may elect to terminate this Lease by sixty (60) days written notice to LESSOR, provided such notice is given before the violation of this Section 27 has been cured. Upon any such termination, LESSEE shall have no further obligation under this Lease from and after the effective date of termination except that LESSOR and LESSEE agree that obligations for the payment or refund of any difference due upon reconciliation of LESSEE's payments for its Pro Rata Share of Common

> Area Maintenance Charges, Taxes and insurance costs under this Lease shall survive termination, and Rent shall be pro rated to the effective date of termination. LESSOR agrees to indemnify and hold harmless LESSEE from and against LESSEE's loss of the unamortized value of LESSEE's leasehold improvements to the Premises as incurred by LESSEE as a result of LESSOR's violation of the terms of this Section, which obligation shall survive any termination of this Lease. The exercise of any of the foregoing remedies shall not preclude LESSEE's exercise of any other remedies for such violation, either in law or in equity. The terms of this Section shall constitute a covenant running with the Land, together with any other land that may be added to the Shopping Center owned or controlled by LESSOR. Notwithstanding anything to the contrary contained herein, the terms of this Section shall not apply to (i) any tenant occupying less than 5,000 square feet of space in the Shopping Center, or (ii) any tenant existing in the Shopping Center as of the date of this Lease, or their replacements in kind, provided, however, so long as LESSEE is open for business and actively operating a retail store in the Premises under one of the trade names listed in Article 11 of this Lease, in no event shall LESSOR, either directly or indirectly, enter into any lease for any space or area in the Shopping Center owned or controlled by LESSOR, or otherwise permit any space in the Shopping Center owned or controlled by LESSOR, including, without limitation, any out-parcels owned or controlled by LESSOR, to be leased, with or by Citi Trends and/or any of its affiliates or subsidiaries. Notwithstanding the foregoing, any change in use by a Shopping Center tenant in existence on or prior to the execution of this Lease shall not be deemed a violation of the restriction set forth above unless LESSOR has the ability under such tenant's lease to approve such change in use and/or to prohibit any requested assignment or sublease of such tenant's lease.

(emphasis added).

Cato later amended its counterclaim to allege that Landlord had violated Article 27 of the Lease and sought a declaration regarding its rights under that article.

The case was eventually tried without a jury in February 2022. On May 12, 2022, the trial court entered its "Order of Final Judgment," wherein it concluded, among other things, that Landlord had violated Article 27 of the Lease by entering into the City Gear lease. Notably, the trial court found that City Gear was "a national or regional tenant for whom the majority of its revenue is from the sale of apparel and clothing accessories," while further determining that potential exceptions under Article 27 did not apply. As to this latter point, the trial court noted that "the space occupied by City Gear exceeds 5,000 square feet, and City Gear is not a replacement in kind of Holliday's Fashions." In light of its determination that Article 27 had been violated, the trial court held that "Cato is entitled

to rent abatement effective retroactively to October 30, 2020," calculating Cato's obligation to be $832.50 per month.

Concerning Article 25 of the Lease, which contains the "Major Anchor Tenant" provision involving TJ Maxx, the trial court observed that Cato was seeking a "credit and/or offset against current and future rent owed until it has recouped the amounts it overpaid during the time rent abatement was in effect after TJ Maxx vacated." The trial court found that Landlord had violated Article 25 by failing to provide written notice to Cato regarding TJ Maxx's departure from the shopping center, and the court further observed that TJ Maxx had not been replaced with a national or regional tenant operating a discount family apparel store. Upon rejecting various defenses advanced by Landlord, the trial court ultimately found that Cato was "entitled to the remedies available under Article 25," stating, "Cato is entitled to rent abatement effective retroactively to June 15, 2015, during which time Cato was entitled to pay an amount equal to one-half (½) monthly fixed rent in lieu of all other charges due under the Lease." In further outlining the consequences stemming from the rent abatement implicated on account of Article 25 and Article 27 of the Lease, the trial court noted as follows:

> (a) From June 15, 2015 through January 31, 2019 (the end of the initial Lease term), Cato's monthly rent obligation was $2,664.00 per month;
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> (b) From February 1, 2019 (the beginning of the first renewal period) through October 30, 2020 (the date Landlord violated Article 27), Cato's monthly rent obligation was $2,872.13 per month; and
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> (c) Beginning November 1, 2020 and continuing through the end of the Term of the Lease, as it may be extended or renewed, Cato's monthly rent obligation is/was $832.50 per month.

The trial court further determined that, in light of these rent amounts, Cato had made overpayments during the period of time rent abatement was in effect. Noting that a balance of $256,660.99 had existed in Cato's favor as of October 31, 2020, and noting that Cato had invoked its rights to offset its monthly rent obligations, the court stated that the balance "began reducing at a rate of $832.50 per month beginning November 1, 2020." After reconciling certain common area maintenance charges and calculating the balance existing in Cato's favor as of April 30, 2022, the trial court ultimately determined that "Cato is entitled to . . . $266,282.77." The trial court ruled that Cato was entitled to a judgment in this specific amount, while also declaring that "Cato is entitled to the remedies available under Articles 25 and 27 of the Lease." This appeal followed.

DISCUSSION

Landlord raises multiple issues for this Court's review, the first several of which are

devoted to contesting Cato's ability to rely on the rights and remedies afforded to it under Article 25 of the Lease in connection with TJ Maxx's departure from the shopping center. These issues are generally centered around Landlord's position that Cato waived its rights, while also focusing on asserted defenses of estoppel and gross laches. Landlord further contends in this appeal that the trial court erred in holding that it violated, and remains in violation of, Article 27 of the Lease. For its final two issues, Landlord respectively asserts as follows: (1) that the trial court erred in failing to make any finding with respect to a defense under the voluntary payment doctrine and (2) that, in the alternative to the positions advanced through the other raised issues, the trial court erred in awarding Cato a monetary judgment as opposed to the Lease-prescribed offset under Article 25.

Because this case was adjudicated following a bench trial, our "review of findings of fact by the trial court . . . shall be 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). Questions of law, such as the interpretation of the Lease, are reviewed de novo with no presumption of correctness. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006) (noting that the interpretation of written agreements, like a lease, is a matter of law); *Glass v. SunTrust Bank*, 523 S.W.3d 61, 66 (Tenn. Ct. App. 2016) ("[W]e review the trial court's resolution of legal questions de novo with no presumption of correctness."). As for discretionary decisions by the trial court, such as whether to apply an equitable doctrine such as laches, we review for an abuse of discretion. *See, e.g.*, *In re Estate of Baker v. King*, 207 S.W.3d 254, 264 (Tenn. Ct. App. 2006) (noting that "a trial court's application of the equitable doctrines of estoppel or laches lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion").

We turn first to the matter of the trial court's determination that Cato was entitled to relief stemming from TJ Maxx's departure from the shopping center. Whereas Article 25 plainly provides, as outlined earlier, that "during any period after the Rent Commencement Date that the Major Anchor Tenant is not Open for Business, and effective retroactively to the date thirty (30) days after the Major Anchor Tenant ceases to be Open for Business, LESSEE may abate Fixed Rent," and further provides that, "[i]n the event that LESSEE has paid any Rent above [the] reduced rent during a period when such rent abatement was in effect, LESSEE reserves the right to offset such excess Rent paid by LESSEE against current or future Rent due to LESSOR," Landlord submits that Cato "waived Article 25's requirement that T.J. Maxx be the Major Anchor Tenant." As observed by Cato on appeal, Landlord appears to reason in its principal appellate brief that its position on waiver is somehow supported by the notion that, according to Landlord, a new lease was created incident to the first renewal of the Lease. Regarding this underlying premise, which is something Landlord originally submitted as being "pivotal" to the required analysis,[2] we

[2] By the time of the filing of the reply brief, Landlord took the position that the "distinction between a renewal and an extension . . . is not necessarily determinative to the analysis of whether Cato waived its

respectfully disagree that a new lease was established upon the renewal. Without question, the Lease uses "renewal" language in places, and such language can, under one meaning, "include[] an entirely new contract." *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93 (Tenn. 2012). It can also, however, as we conclude is the case here given our reading of the Lease,[3] be used as synonymous with extension. *Id.* Indeed, "[w]hen used in the sense of a contract extension, a renewal is a contract for an additional period of time with the same terms and obligations as a prior contract and does not confer new obligations or rights." *Id.* Interestingly, counsel for Landlord acknowledged at the oral argument for this appeal that a new lease was not executed in this matter and candidly stated: "Depending on how it's looked at it's an extension of the original terms of the lease, Yes. . . . It is not a newly-executed lease."

Regarding the issue of waiver from another point of consideration, we observe that the trial court specifically rejected Landlord's waiver defense by referencing and relying upon Tennessee Code Annotated section 47-50-112(c) and Article 51 of the Lease. Under the former, the law provides that, "[i]f any . . . contract contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid unless such waiver is in writing, no court shall give effect to any such waiver unless it is in writing." Tenn. Code Ann. § 47-50-112(c). Although this statute does not apply to a general non-waiver clause, *see Davenport v. Bates*, No. M2005-02052-COA-R3-CV, 2006 WL 3627875, at *9 (Tenn. Ct. App. Dec. 12, 2006) (emphasizing the "unless . . . in writing" language included in the statute and observing that the statute "does not address the effect of general non-waiver clauses which completely prohibit any type of waiver"), and further, although its language has been referenced as not applying "to an oral rescission of a written contract by subsequent mutual agreement," *Tenn. Traders Landing, LLC v. Jenkins & Stiles, LLC*, No. E2017-00948-COA-R3-CV, 2018 WL 3343592, at *8 (Tenn. Ct. App. July 9, 2018), this Court has noted that the statutory language is itself unambiguous. *See Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 602 (Tenn. Ct. App. 1999) ("Tenn. Code Ann. § 47-50-112(c) requires little construction because its words are unambiguous and its meaning clear. It prohibits oral waivers or waivers by conduct of any provision of a written contract that contains a 'provision to the effect that no waiver of any terms or provisions . . . [of this contract] shall be valid unless such waiver is in writing.'"); *Hardison Law Firm, P.C. v. Howell*, No. W2002-01945-COA-R3-CV, 2003 WL 22718427, at *16 (Tenn. Ct. App. Nov. 17, 2003) (referencing the language of the statute as "unambiguous"). The "to the effect" language in Tennessee Code Annotated section 47-50-112(c) "signals the General Assembly's decision that the statute could be triggered by provisions that did not incorporate the exact language in the statute." *Realty Shop, Inc.*, 7 S.W.3d at 602. Indeed,

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rights."

[3] Among other things, we observe that Article 5 of the Lease, which deals with renewal options, discusses the Term of the Lease being renewed for additional time "under the same terms and conditions" save for specified increased rent. Article 25 itself points to a continuation of the Lease's provisions during the first renewal period, while also specifically relating the presence of TJ Maxx "[a]s an inducement to . . . enter into, remain a party to, and/or extend the Term."

as this Court has commented, "the General Assembly decided that provisions having the same import, significance, or meaning should be given the same legal effect." *Id.*

Here, the trial court's order regarded the aforementioned Article 51 of the Lease to contain a "clear and unambiguous 'no waiver' provision" in the vein of Tennessee Code Annotated section 47-50-112(c). We agree. Containing a provision to the effect of that described in the statute, Article 51 provides as follows:

> No waiver by either party of any term, covenant or condition ("Provision") under this Lease by the other party will be effective or binding upon such party unless given in the form of a written instrument signed by such party, and no such waiver will be implied from any omission by such party to take action with respect to such Provision. No express written waiver of any Provision will affect any other Provision or cover any period of time other than the Provision and/or period of time specified in such express waiver. One or more written waiver(s) of any Provision will not be deemed to be a waiver of any subsequent Provision.

Given this provision, the statutory authority in Tennessee Code Annotated section 47-50-112(c), and the trial court's finding that "Cato never provided Landlord with a signed, written waiver of its rights under Article 25," we agree with the trial court's conclusion that the Landlord's asserted waiver defense is without merit.[4]

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[4] Through one raised issue, Landlord has attempted to claim, in the alternative to other arguments, that a writing satisfying Article 51 was implicated by way of internal Cato reports that pointed to TJ Maxx's departure. There is no indication in this record that Cato ever provided any writing to Landlord that signaled a waiver of rights, and respectfully, we do not understand how the internal reports discussed by Landlord establish a waiver of rights. We also reject Landlord's reliance on its estoppel and gross laches defenses. Even ignoring the fact that Landlord does not properly state that it is seeking relief regarding these defenses in the conclusion section of its principal appellate brief, as is required under Rule 27(a)(8) of the Tennessee Rules of Appellate Procedure, we find no occasion to disturb the trial court's refusal to countenance them. Whereas Landlord's estoppel issue focuses on the notion that Cato renewed the Lease without any notice of alleged defaults, we note that the same conditions of the Lease remained (even Landlord's issue speaks to a renewal "Under Those Same Conditions") and, further, that Cato had, prior to renewal, specifically communicated to Landlord that it did not waive, but expressly reserved, any and all rights in the Lease. Indeed, Cato stated by letter that it intended to rely on the exact terms and conditions of the Lease. Moreover, to the extent that some of Landlord's argument on estoppel speaks to how Cato allegedly "locked [it] into the renewal," we observe that the Lease provides for automatic renewals absent prior notice of a contrary intention by Cato. As for the gross laches defense, there does not appear to be any challenge to the trial court's finding that the prejudice claimed by Landlord in this matter is solely economic. Thus, the gross laches defense is without merit. *See Assocs. Asset Mgmt. LLC v. Blackburn*, No. W2016-00801-COA-R3-CV, 2017 WL 1077060, at *6 (Tenn. Ct. App. Mar. 22, 2017) ("A review of relevant Tennessee cases indicates that economic injury, without some accompanying injury or prejudice to the defendant's ability to defend against the lawsuit, is not sufficient to invoke the doctrine of gross la[]ches.").

One of Landlord's asserted issues on appeal relates to a defense under the voluntary payment doctrine. Of note, as presented in the "statement of the issues" section of Landlord's brief, the raised issue concerning the voluntary payment doctrine asks whether the trial court erred in failing to make any finding regarding the defense. Respectfully, this raised issue misapprehends the record of the trial court. The trial court did make a finding concerning the voluntary payment doctrine defense, stating as follows in an oral ruling incorporated into the trial court's final judgment: "I want to make it very clear that I'm not making any finding in favor of the lessor's defense of voluntary payment. I don't think that clause is a proper defense on the facts of this case, voluntary payment." Curiously, Landlord's reply brief references this ruling, but Landlord nonetheless maintains that the trial court "simply failed to make any finding at all with respect to this defense" and argues that "this case should be remanded for such findings" in light of the trial court's failure. Although not completely clear, Landlord may perhaps be of the opinion that no finding was made because the ruling on the matter appears within a court transcript; indeed, Landlord's reference to the ruling in its reply brief, which immediately follows its assertion that the trial court failed to make a finding with respect to the defense, is accompanied by the observation that the court's statement was "[i]n the transcript." Undeniably, the ruling on the matter is found in a transcript, but we note again that said ruling was explicitly *incorporated* into the final judgment.[5] Inasmuch as the record therefore shows that the trial court did make a finding regarding the doctrine, the particular issue presented for our review on this matter is without merit.[6]

We next shift our attention to concerns Landlord raises in connection with Article 27 of the Lease. As we perceive it, there are two broad concerns raised in Landlord's principal appellate brief regarding Article 27. First, Landlord submits that any recovery under Article 27 is precluded because, allegedly, Cato committed the first material breach of the Lease by failing to make rental payments. We respectfully reject this articulated concern given our prior rejection of Landlord's defenses regarding Article 25. Simply put, given TJ Maxx's departure, Cato's right to rent abatement in light of that departure, and Cato's invocation of its contractual right to offset its monthly rent obligations given overpayments made during the abatement period, we reject Landlord's premise that Cato committed the first material breach of the Lease.

The second broad concern that Landlord asserts as it relates to Article 27 is that the trial court erred in holding that it violated Article 27 by entering into the City Gear lease. As noted earlier, Article 27 contains a general covenant that Landlord will not enter into a lease with "any national or regional tenant having . . . more than one store for whom the majority of its revenue is from the sale of apparel and/or clothing accessories." Article 27

[5] Not only was the ruling incorporated by reference, the transcript containing the incorporated ruling was attached to the trial court's judgment.

[6] Having addressed the narrow issue raised, we do not consider the subject of the voluntary payment doctrine any further in this case.

provides for remedies if Landlord breaches this covenant, but as is relevant to the dispute on appeal, it excepts from its scope, among other tenant situations, "any tenant existing in the Shopping Center as of the date of this Lease, or their replacements in kind." Although the trial court determined that Landlord violated Article 27 by entering into the City Gear lease, noting that City Gear is "a national or regional tenant for whom the majority of its revenue is from the sale of apparel and clothing accessories," Landlord argues that the City Gear lease does not run afoul of the parties' contract because, allegedly, the City Gear lease qualifies under the Article 27 exception concerning "any tenant existing in the Shopping Center as of the date of this Lease, or their **replacements in kind**." (emphasis added). In support of its position, Landlord points to the fact that Holliday's Fashions was a tenant in the shopping center at the time Cato entered into the Lease and specifically argues that City Gear is a replacement in kind for Holliday's Fashions. There is no dispute that Holliday's Fashions occupied a space in the shopping center at the time Cato entered into the Lease. This pre-existing lease concerned approximately 6,630 square feet of space to the west of TJ Maxx's location and contained a use restriction for the "sale of women's apparel and accessories and for no other purpose." According to testimony at trial, another business, "2U Beauty," came in as a replacement for the space previously occupied by Holliday's Fashions.

As defined in Black's Law Dictionary, "in kind" means "[i]n a similar way." *In kind*, Black's Law Dictionary (10th ed. 2014). Here, in view of this definition and the facts implicated in this case, we agree with the trial court that City Gear is not a replacement in kind for Holliday's Fashions. Indeed, whereas Holliday's Fashions was restricted to the sale of women's apparel and accessories, the City Gear store, which opened in a 8,130 square foot space to the east of Cato's space, was not. As noted earlier, the City Gear lease specifically allows City Gear to sell "men's, women's and children's branded clothing, and men's, women's and children's athletic footwear and related accessories and such other items as sold in Tenant's other retail locations."[7] Because we agree with the trial court that the City Gear lease violated Article 27, we uphold its determination that Cato is entitled to remedies under the Lease as a result.[8]

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[7] This broad array of offerings is similar to the broad array of offerings available at Cato's "It's Fashion Metro" store. As the trial court found, and as the parties present in their briefs, "It's Fashions Metro" is the trade name of a chain of stores that offer fashions for the entire family.

[8] In reaching our conclusion that Landlord violated Article 27, we reject its argument that, because there is evidence that Cato operates stores in other shopping centers where City Gear stores are located, City Gear should not be considered "competitive" within the meaning of Article 27. That Cato decided, in other markets, to be located in shopping centers with City Gear stores does not in any way dictate that we construe the Lease in Landlord's favor as it concerns Article 27. Per the Lease, which governs Landlord's responsibilities to Cato in this shopping center, Article 27 excepts replacements in kind for tenants existing in the shopping center as of the date of the Lease, but as already noted, we find no error in the trial court's conclusion that City Gear is not a replacement in kind for Holliday's Fashions. Moreover, under the Lease, in the absence of an exception, it is clear that the City Gear lease runs afoul of Article 27 given that Landlord agreed under Article 27 to not enter into a lease with "any national or regional tenant having . . . more than one store for whom the majority of its revenue is from the sale of apparel and/or clothing accessories."

Although we agree with the trial court's declaration that Cato is entitled to the remedies available under Article 25 and Article 27 of the Lease in light of the above discussion, the remaining question is whether, as it concerns Cato's remedies pertaining to the TJ Maxx issue in this case, the trial court's decision to award Cato a monetary judgment was permissible. Indeed, Landlord's final issue on appeal posits that, even if the trial court's order is generally affirmed as to its findings and conclusions, Cato should have been limited to an offset in connection with the rent overpayments made in the wake of TJ Maxx's vacation from the premises as opposed to a monetary judgment.[9]

The consequences stemming from TJ Maxx's vacation from the premises are, of course, spelled out in Article 25. Article 25 allows for multiple remedies stemming from TJ Maxx's departure, even stating that "LESSEE's election of any one remedy as stated herein shall not preclude its exercise of any other remedy stated herein." For instance, in addition to containing a provision allowing for the termination of the Lease under certain conditions, the Lease, as discussed earlier, provides for an abatement of rent. The question that begs, of course, is, notwithstanding the availability of multiple remedies under Article 25, what remedies are provided for by the contractual agreement when rent payments are made but in an amount higher than that required during a period of rent abatement? Concerning this question, which is the particular issue of concern here, the Lease specifies as follows: "In the event that LESSEE has paid any Rent above such reduced rent during a period when such rent abatement was in effect, LESSEE reserves the right to offset such excess Rent paid by LESSEE against current or future Rent due to LESSOR." Landlord has argued, and we agree, that this language signals that Cato's Article 25 remedy for overpayments made during a period of rent abatement is limited to an offset against "current or future Rent due to LESSOR." Indeed, there is nothing else in Article 25 that speaks to the issue. Although Cato has cited certain language appearing in the Lease in support of its position that it is entitled to monetary restitution for its overpayments, language which points to the potential availability of remedies "either in law or in equity" for violations, we observe that this language appears in Article 27, not Article 25, and serves as qualifying language for the remedies outlined for violations of Article 27. Under our analysis herein, Cato is unquestionably entitled to relief under Article 25 for its rent overpayments relative to TJ Maxx's departure; under Article 25, however, the prescribed relief is limited to an offset against current or future rent. In light of our conclusion on this matter, we vacate the trial court's award of a monetary judgment against Landlord, and we remand the case for the entry of a modified judgment consistent with this Opinion.

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[9] At oral argument of this matter, there was no dispute between opposing counsel concerning the proposition that the monetary judgment awarded in this case was specifically related to the TJ Maxx issue. Cato's counsel, for instance, stated as follows: "The money judgment that was awarded is based on the overpayments that . . . Cato had made in rent due to the TJ Maxx Article 25 violation."

CONCLUSION

Consistent with the above discussion, we generally affirm the trial court's order, but we vacate the monetary award and remand the case for the entry of a modified judgment consistent with this Opinion.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE