

63 Ohio St.3d 497, 589 N.E.2d 23

Supreme Court of Ohio.
WARREN PLAZA COMPANY, Appellant,
v.
GIANT EAGLE, INC. et al., Appellees.
No. 90-1526.
Submitted Sept. 11, 1991.
Decided April 15, 1992.

**23 APPEAL from the Court of Appeals for Trumbull County,
No. 88-T-4122.

Ulmer & Berne and Marvin L. Karp, Cleveland, Richards,
Ambrosy & Frederick and Charles L. Richards, Warren,
for appellant.

Marcus & Shapira and Bernard D. Marcus, Pittsburgh, Pa.,
Henderson, Covington, Stein, Donchess & Messenger and
James L. Messenger, Youngstown, Kohrman, Jackson & Krantz
and Gregory M. Lichko, Cleveland, for appellees.

The appeal is dismissed as moot.

MOYER, C.J., and SWEENEY, HOLMES, DOUGLAS, WRIGHT and
RESNICK, JJ., concur.

HERBERT R. BROWN, J., concurs separately.

*498 HERBERT R. BROWN, Justice, concurring.
herbert R. Brown, J., concurring. I concur in the court's
dismissal entry. However, I disagree as to the reasons for
dismissal. This case may be factually moot, but I believe the
issues it presents are capable of repetition, yet evading review.

Nonetheless I must concur in the dismissal entry because we
lack jurisdiction to decide the case. Civ.R. 65(B)(2) allows a trial
court to consolidate a preliminary injunction hearing with a trial
on the merits. Here, the court of appeals held that the trial court
consolidated without sufficient notice to all parties.

The entire case was remanded for a hearing on the merits.
Appellant did not timely appeal this ruling, and therefore the
case is not properly before us.

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Warren Plaza Co. v. Giant Eagle, Inc.
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• 1991 WL 11240209 (Appellate Brief)
Reply Brief of Appellant (Mar. 26, 1991)

• 1991 WL 11240208 (Appellate Brief)
Brief of Appellees on Merits (Feb. 07, 1991)

• 1991 WL 11240207 (Appellate Brief)
Brief of Appellant on Merits (Jan. 08, 1991)

END OF DOCUMENT

Not Reported in N.E.2d, 1990 WL 82537 (Ohio App. 11 Dist.)

Judges and Attorneys

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.
THE WARREN PLAZA CO., Plaintiff-Appellee,
v.
GIANT EAGLE, INC., et al., Defendants-Appellants.

No. 88-T-4122.

June 15, 1990.

Civil Appeal from Trumbull County Court of Common Pleas, Case No. 88 CV 955.

Atty. Charles L. Richards, Warren, Atty. Marvin L. Karp, Cleveland, for plaintiff-appellee.

Atty. Bernard D. Marcus, Pittsburgh, Pa., Atty. James Messenger, Youngstown, Atty. Gregory Lichko, Cleveland, for defendants-appellants.

Before MAHONEY, P.J., and JOHN R. MILLIGAN, J., Fifth Appellate District, Sitting by assignment, and EDWIN T. HOFSTETTER, J., Ret., Eleventh Appellate District, Sitting by assignment.

OPINION

MAHONEY, Presiding Judge.

*1 On June 21, 1977, defendant-appellant, Fisher Foods, Inc., ("Lessee") entered into a twenty-year lease with plaintiff-appellee, The Warren Plaza Company ("Lessor") for a storeroom at the Warren Plaza Shopping Center. The lease was negotiated by the Lessor's general partner, Alan Krause, who in the past has conducted numerous lease negotiations for shopping centers and other commercial real estate. During negotiations, Krause suggested inclusion of an express covenant in the lease which would require Lessee to continuously operate a supermarket on the premises for the entire lease term. Such an express covenant for continuous operation was included in many other leases entered into by the Lessor. However, Lessee refused to agree to a covenant of continuous operation and, therefore, it was not included in the lease.

The parties agreed to an annual fixed rent; however, there was no rent based on the percentage of sales. The annual rent was \$121,584 plus common area charges and real estate tax increases. There was no evidence presented that this amount was unfair or below the rental market value for such premises.

Lessee remodeled the storefront into a supermarket and was ready to open for business in May 1978; however, a labor dispute erupted and the supermarket was closed for nearly two years. No action was taken by the Lessor during this time against Lessee for failing to operate the supermarket continuously.

On approximately July 23, 1988, the Lessee closed its supermarket and assigned the lease to defendant-appellant, Giant Eagle, Inc. Section 6.5 of the lease provides that Lessee may assign or reassign the lease or sublease the whole or part of the premises without obtaining the consent of the Lessor.

Alan Krause stated that in April 1988 he had discussions with Richard Nimtz, the vice president of

Giant Eagle, regarding Giant Eagle's rental of a store in a shopping plaza in Solon, Ohio. During these discussions, Krause claims he learned that Giant Eagle was trying to acquire Fisher Foods' lease in the Warren Plaza and that, if Giant Eagle was successful, it would close the store down and not allow a food store in the Warren Plaza since it had a new franchise operator, Value King, six-tenths of a mile down the road in another small shopping center and did not want to compete with that franchise.

According to Krause, Giant Eagle indicated that it might be willing to cancel the lease if appellee-Lessor would agree not to put another supermarket in the shopping center.

Lessor then notified Lessee of these communications and Giant Eagle's intentions and warned Lessee that any closing of the store would violate the implied covenants of the lease and would be financially devastating to the Lessor and the other tenants of the plaza.

On July 8, 1988, Lessee announced that the lease was being transferred to Giant Eagle and that its supermarket would close on July 23, 1988.

On July 15, 1988, the Lessor filed a complaint for an injunction and other equitable relief. At the same time, the Lessor filed a motion for a preliminary injunction, seeking to enjoin the appellants from ceasing to operate a supermarket at the Warren Plaza.

*2 On July 25, 1988, Giant Eagle filed a "Motion to Dismiss Complaint and for Sanctions Under Ohio Civ.R. 11," and Fisher Foods filed a "Rule 12(B)(6) Motion to Dismiss."

On July 26, 1988, the trial court held a hearing on Lessor's motion for preliminary injunction and motions to dismiss filed by Lessee and Giant Eagle.

On August 9, 1988, the trial court filed its judgment entry and findings of fact and conclusions of law. The trial court found for the appellee and ordered the appellants to vacate the premises within 30 days and, further, overruled the motions to dismiss and for sanctions.

On August 29, 1988, the appellants filed a joint motion for supersedeas and motion to set bond which was denied by the trial court on August 30, 1988. On September 1, 1988, the appellants filed a "Motion to Stay Pending Appeal" in the appellate court. On September 7, 1988, this court of appeals granted the motion for stay, conditioned upon the posting of a \$10,000 supersedeas bond. On September 21, 1988, the judgment on the motion to stay was amended to increase the bond to \$35,000. On November 1, this court's judgment entry of September 21, 1988 was further amended to indicate that the stay was conditioned on Giant Eagle operating a supermarket in the plaza by November 16, 1988.

Giant Eagle's franchisee, Value King, opened a supermarket at the Warren Plaza in November, and it is still in operation.

Appellants have filed a timely appeal and assigned the following as error:

"1. The trial court erred to the prejudice of defendants-appellants in overruling/denying Fisher Food's (sic) Motion to Dismiss.

"2. The trial court erred to the prejudice of defendants-appellants in finding that Lessor was entitled to injunctive relief.

"3. The trial court erred to the prejudice of the defendants-appellants by treating the hearing on the motion for preliminary injunction as a final trial on the complaint without prior notice to the parties."

Lessor argues that this appeal is moot since the appellant, Giant Eagle, has reopened a supermarket on the premises. The trial court ordered appellants to vacate the premises but also gave them an option to reopen a supermarket which would be *monitored by the court*. Then this court of

appeals stayed the execution of the trial court's judgment *on the condition that Giant Eagle open a supermarket on the premises*. Therefore, this appeal is not moot, and all of the appellants' assignments of error will be addressed.

In the first assignment of error, appellants argue that the trial court erred in denying Fisher Foods' motion to dismiss because the lease contained no covenant of continuous operation and the court cannot imply it under the relevant law. In the second assignment of error, appellants argue that the trial court erred in granting injunctive relief to the Lessor. Since these two issues are interrelated, they will be discussed together.

Appellants' arguments that the trial court erred in implying a covenant of continuous operation into the lease and granting Lessor injunctive relief have merit.

*3 The rights of the parties under the lease at issue are set out in the following sections of the lease. Section 4.1 provides for an annual fixed rent. There is no provision for additional rent based on the percentage of sales. Section 6.1 states that Lessee *may* use the premises for the operation of a supermarket. Section 6.2 provides that, as an inducement for Lessee to enter into the lease, Lessor covenants that no other store which sells food for consumption off the premises will be allowed in the shopping center. Section 6.3 provides a further inducement to Lessee in establishing a two-mile radius from the shopping center in which Lessor promises not to allow a supermarket on any of its land within that radius. Section 6.5 permits Lessee to assign or reassign the leased premises without obtaining consent of the landlord.

The lease does not contain an express covenant of continuous operation. Furthermore, Section 14.9 provides that the lease "contains the entire agreement of the parties and cannot be changed orally, but only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification or discharge is sought." In *Downtown Associates, Ltd., v. Burrows Bros. Co.* (1986), 34 Ohio App.3d 296, the court stated that:

" * * * The object of contract construction and interpretation is to ascertain and effectuate the intent of the parties to the agreement when drafted. This intent is determined by the language of the lease, in relation to its objectives, and the surrounding circumstances.

"Implied covenants in leases are disfavored at law, and are justified only when necessary to effectuate the intentions of the parties, and certainly not where the subject matter is clearly delineated in the contract. * * * "

The court stated that *Kretch v. Stark* (1962), 26 O.O.2d 385, was the law in Ohio on the subject of implied contracts.

In *Kretch v. Stark*, *supra*, a case of first impression, the court held that:

" * * * "

"Where a lease provides for rental based on a percentage of sales with a *fixed substantial adequate minimum*, and there is no express covenant or agreement to occupy and use the premises, no implied covenant or agreement will be inferred that the lessee is bound to occupy and use the premises for the purpose expressed in the lease. Under such a lease, lessee has no obligation to occupy and use the premises for any stated definite period of time and his obligation under such a lease is limited to the payment of the basic minimum rental to the end of the term when he no longer occupies and uses the premises for the purpose expressed in the lease. * * * " *Id.* at 393. (Emphasis supplied.)

In deciding whether to exercise judicial authority in implying covenants, the court stated that:

" * * * "

"The implication must arise from language used or it must be indispensable to effectuate intention

of parties; it must appear from language used that it was so clearly within contemplation of parties that they deemed it unnecessary to express it; implied covenants can only be justified on grounds of legal necessity; promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; there can be no implied covenant where subject is completely covered by contract." *Id.* at 392, citing *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal.App.2d 141, 113 P.2d 878.

*4 The *Kretch* court stated that the whole matter of whether to imply a covenant turned upon whether there was a substantial adequate minimum rental provision in the lease. Finding that there was a substantial fixed minimal rental, the court refused to imply a covenant of continuous operation.

Lessor cites a Nevada Supreme Court case, *Hornwood v. Smith's Food King No. 1* (Nev.1989), 772 P.2d 1284, in support of its argument that the trial court correctly implied a covenant of continuous operation into the lease. Upon review, we neither conclude that *Hornwood* is controlling precedent nor is it applicable to the facts *sub judice*, which are easily distinguished. Unlike the Warren Plaza lease, the lease in *Hornwood* provided for a minimum annual rent *and* a rent based on a percentage of sales. More importantly, there is no evidence in *Hornwood* that the parties expressly negotiated over a continuous operation clause.

The evidence presented in the case *sub judice* shows that the lease was a product of negotiations between knowledgeable businessmen. The issue of a continuous operation covenant was specifically addressed, and Fisher Foods refused to agree to such a clause. For the court to imply the covenant goes directly against the intention of the parties and, in effect, rewrites the lease. Thus, the trial court erred in making such an implication.

In deciding to grant equitable relief, the trial court made the following findings of fact which were unsubstantiated by the evidence presented at the hearing:

" * * *

"FACT THREE: The closing of the supermarket will cause a devastating result to the shopping center and its tenants and particularly to the Plaintiff.

"FACT FOUR: The closing of the supermarket by the Defendants jointly or severally, by reason of the fact that Giant Eagle is a rent assignee, is for the purpose of enhancing the operation of another Defendant-aligned supermarket in close proximity.

" * * *

"FACT SIX: The Plaintiff is prohibited from allowing another supermarket or grocery store in the plaza or, strangely enough, within two miles of the plaza-obviously, a one-way street and a failure of mutuality of contract.

"FACT SEVEN: Recently, in the past few years, it has become common place (*sic*) for large conglomerates to purchase other stores for the purpose of eliminating competition, and, in the opinion of the Court, restraining trade."

There was no evidence presented, except for conclusory pronouncements, that the closing of the supermarket would be "devastating," as fact three alleges. There was testimony that Fisher Foods previously had closed the store for two years, and no action was taken by the lessor nor was there devastation or destruction of the plaza.

Similarly, there is no evidence that the closing of the supermarket was "for the purpose of enhancing the operation" of another supermarket aligned to the appellant, Giant Eagle. This is merely an unsupported accusation made by Lessor's agent, Krause.

*5 In "Fact Six," the court found that prohibiting another supermarket in the plaza or within two miles of the plaza was a failure of mutuality of contract. The language of the lease itself seems to

contradict this finding. These two provisions were added as an inducement to the appellant, Fisher Foods, to enter into the lease. Sections 6.2 and 6.3. Furthermore, Exhibit C attached to the lease shows that an "exclusive clause" was included in the leases of the other tenants also.

The court's comment in "Fact Seven" is not in evidence and, moreover, is irrelevant to the issue before the court.

Next, the trial court refuses to apply the case of *Kretch v. Stark, supra*, noting that it is a "1962" case and, thus, no longer applies. However, *Kretch* has never been overruled and has been cited by an appellate court as the law in Ohio on implied covenants. See *Downtown Associates, Ltd., v. Burrows Bros., supra*.

It was speculative for the trial court to reason that:

" * * *

"The predominant purpose of the purchase of the assignment of the lease by Giant Eagle, Inc. is to reduce competition by eliminating its assignor, Fisher Foods, as a competitor to an affiliated Giant Eagle store a short distance away. *No other reason could possibly exist.*

"It is obvious that the Defendant, Giant Eagle, Inc., has a substantial interest in a Valu King store in the immediate vicinity. *Purposely closing* the Warren Plaza supermarket is a small price to pay by the Defendant and an unbearable loss to the Plaintiff. *Why else would the Defendants refuse to surrender the premises if not for the purpose of insuring the success of the other supermarket in the area. * * **" (Emphasis added.)

In an action for a temporary or permanent injunction, the plaintiff must prove, by clear and convincing evidence, that irreparable injury has been done or that the threat of injury is immediate and impending. *Yunker v. Nationwide Mut. Ins. Co.* (1961), 18 O.O.2d 381, reversed on other grounds, 191 N.E.2d 145; *Baltimore & O.R. Co. v. Pittsburgh, Cincinnati & St. Louis Railroad Co.* (1885), 1 Ohio C.C. 100. See generally, 56 Ohio Jurisprudence 3d (1984) 75, *Injunctions, Sections 20, 32 and 169.*

Clear and convincing evidence has been defined by the Supreme Court in *Cross v. Ledford* (1954), 161 Ohio St. 469, 477:

" * * * Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal. See *Merrick v. Ditzler*, 91 Ohio St., 256, 110 N.E., 493. * * * " (Emphasis supplied.)

Lessor argues that it will suffer a loss in rent from the other tenants with percentage rent clauses and that, eventually, the whole plaza will be destroyed if appellants are allowed to pay rent but keep the supermarket closed.

*6 First of all, appellant, Giant Eagle, never stated that the supermarket would forever remain closed but, instead, stated that several options were being explored at the time and no final decision had been made. Secondly, there is no evidence that the plaza would be destroyed. On the contrary, the evidence shows that Fisher Foods closed down its supermarket for nearly two years and the plaza was not destroyed. In short, lessor failed to prove by clear and convincing evidence that it would suffer irreparable harm unless injunctive relief was granted.

Thus, the trial court erred in granting the injunctive and equitable relief by ordering appellants to vacate the premises or opt for reopening a supermarket which would be monitored by the court.

Appellants' first and second assignments of error are well taken.

In the third assignment of error, appellants argue that the trial court erred in treating the hearing on the motion for a preliminary injunction as a final trial on the complaint without prior notice to the parties.

Appellants' argument has merit.

The motion for preliminary injunction was filed contemporaneously with the complaint for injunctive and equitable relief on July 15, 1988. Giant Eagle filed its answer and Fisher Foods filed a motion to dismiss under Civ.R. 12(B)(6) on July 25, 1988. The following day, July 26, 1988, the trial court held a hearing on the motion for preliminary injunction and motion to dismiss. At the outset of the hearing the court identified that the hearing was only on the motion for preliminary injunction and the motions to dismiss. No discovery was taken or conducted by either party up to this point.

The trial court issued its "Findings of Fact and Conclusions of Law" on August 9, 1988 in which it stated, without any notice to the parties, that it " * * * treats this matter as calling for a determination of the case on the merits * * * and the court is prepared to make a final determination of the case at this level."

Civ.R. 65(B)(2) states that the trial court may order consolidation of the hearing on the preliminary injunction with the trial on the merits. However, the court must issue a "consolidation" order before the hearing in order to provide the parties with notice that the hearing will be on the merits. *Turoff v. Stefanac* (1984), 16 Ohio App.3d 227.

The court reasoned in *Turoff v. Stefanac, supra*, that:

" * * *

"Civ.R. 65(B)(2) and Fed.R.Civ.P. 65(a)(2) require that a court *order* the consolidation of a hearing on the application for a preliminary injunction with a trial on the merits, thus providing the parties with notice that the case is, in fact, being heard on the merits. As stated by the United States Supreme Court in *Univ. of Texas v. Camenisch* (1981), 451 U.S. 390, 395:

"Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (C.A.7 1972); *Nationwide Amusements, Inc. v. Nattin*, 452 F.2d 651 (C.A.4 1971). * * *

*7 "See, also, *Wolfahrt v. Memorial Medical Center* (C.A.5, 1981), 658 F.2d 416, and this court's decision in *Ohio Assn. of Public School Employees v. Mayfield City School Dist. Bd. of Edn.* (June 23, 1983), Cuyahoga App. Nos. 44932 and 45118, unreported. * * * " (Emphasis supplied.)

The trial court clearly stated on the record that the hearing was on the motion for a preliminary injunction and the motions to dismiss. Thus, the parties were not aware that the case was being heard on the merits until the court revealed this in the findings of fact and conclusions of law. Appellants had no opportunity to conduct discovery or prepare for a trial on the merits and, therefore, were prejudiced by the lack of notice.

Appellants' third assignment of error is well taken.

For the reasons stated herein, the judgment of the trial court is reversed; and the within cause is remanded for further proceedings consistent with this opinion.

MILLIGAN, J., Fifth Appellate District, sitting by assignment, and HOFSTETTER, J., Ret., Eleventh

Appellate District, sitting by assignment, concur.

Ohio App., 1990.

Warren Plaza Co. v. Giant Eagle, Inc.

Not Reported in N.E.2d, 1990 WL 82537 (Ohio App. 11 Dist.)

Judges and Attorneys ([Back to top](#))

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Judges

- **Mahoney, Joseph E. Hon.**

State of Ohio Court of Appeals, 11th District
Ohio

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