

IN THE SUPREME COURT OF FLORIDA

Case No: SC08-2113

WSG WEST PALM BEACH
DEVELOPMENT, LLC,

Petitioner/Defendant,
v.

PERRIN L. BLANK, D.D.S.,

Respondent/Plaintiff.
_____ /

L.T. Case Nos:
4TH DCA 4D06-4308,
4D07-1620 & 4D07-2927
(consolidated)

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Respondent/Plaintiff, PERRIN L. BLANK, D.D.S. ("Dr. Blank"), responds to Petitioner/Respondent's, WSG WEST PALM BEACH DEVELOPMENT, LLC ("Petitioner"), brief seeking discretionary review of the Fourth District's decision in WSG West Palm Beach Development, LLC v. Blank, 990 So. 2d 708 (Fla. 4th DCA 2008) ("WSG"). WSG properly affirmed a damages award in favor of Dr. Blank for special damages he incurred following Petitioner's breach of lease and wrongful eviction. Petitioner moved for rehearing before the Fourth District claiming, as here, WSG conflicted with the proper measure of damages permissible pursuant to Young v. Cobbs, 83 So. 2d 417 (Fla. 1955)("Young I") and Young v. Cobbs, 110 So. 2d 651 (Fla. 1959) ("Young II"). Petitioner also claimed conflict with Koplowitz v. Girard, 658 So. 2d 1183 (Fla. 4th DCA 1995), arguing that the damages award was an impermissible windfall to Dr. Blank. The Fourth District denied the motion for rehearing and issued a revised opinion affirming the damages award.¹

Petitioner's position was that it could evict Dr. Blank and his dental practice from Northwood Medical Center in West Palm Beach ("Northwood") with nearly

¹ WSG also reversed the award of attorney's fees to Dr. Blank pursuant to the parties' pretrial stipulation and lease agreement, which determination Dr. Blank intends to present to this Court should the Court take jurisdiction of this matter.

three years left on his lease and compensate him with only nominal damages. Such position ignored the evidence before the trial court and considered on appeal that a dental office requires a specialized build-out to properly outfit a space to accommodate a dental practice. (A.3) At trial, Petitioner offered no rebuttal to any of Dr. Blank's relocation expenses, instead "strategically choosing to object to such testimony as irrelevant to the issue of legally cognizable damages." (A.3) As to almost every finding, "the trial court noted the lack of rebuttal testimony on the part of the [Petitioner]". Id.

STATEMENT OF THE CASE AND FACTS

Since 1982, Dr. Blank practiced dentistry from his office at Northwood. In late 2004, Petitioner sent estoppel letters to Dr. Blank informing him of its intent to acquire Northwood. Petitioner acquired Northwood in January 2005. (A.1) In February 2005, based upon the estoppel letters, Dr. Blank located an alternate site to which he would be able to relocate his practice and sought a release from his current lease which had nearly three years left to run. Petitioner refused to release Dr. Blank from his Northwood lease and the alternate property was leased to another tenant. (A.2)

In June 2005, Petitioner advised Dr. Blank that he was to be evicted from Northwood in breach of the lease and provided him less than six months to relocate

his practice. Dr. Blank sued Petitioner for breach of contract and sought special damages including “lost profits; ... relocation costs and expenses []; ... cost of non-movable equipment and fixtures; moving expenses of movable equipment and computers ...” and like expenses. (A.2) Dr. Blank ultimately located, leased, built out, and equipped suitable space for the relocation of his dental practice at a cost to him of over \$500,000. (A.2-4)

Following a bench trial at which Petitioner elected to put on no rebuttal evidence to counter Dr. Blank's claims for damages, the trial court awarded Dr. Blank his necessary and reasonable expenses necessitated by Petitioner's breach. The damage award was affirmed in WSG. In affirming, WSG held that Rost v. Bowling, 861 So. 2d 1246, 1247-48 (Fla. 2nd DCA 2003) specifically permits a wrongfully evicted tenant to recover both general damages and special damages “that are the natural, direct and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties.” (A.4) WSG also followed Moses v. Autoono, 47 So. 925, 927 (1908) as further support for this proposition.

To adequately compensate Dr. Blank, WSG followed Young I and Young II in concluding that the proper measure of damages permitted the trial court to (a) consider the evidence as to improvements, the use of which was lost for the

unexpired term, and (b) because the property was leased for a specialized purpose – a dental practice – Dr. Blank was entitled to his actual and necessary expenses incurred in preparing to continue his dental practice at a new location. (A.4-5)

Petitioner's sole position at trial was that it could breach Dr. Blank's long standing lease, evict him with nearly three years left to run, and pay him only nominal damages. Petitioner argues that Dr. Blank received some sort of "windfall" by being wrongfully evicted from the space he occupied for over 24 years and from which he operated a successful dental practice. Petitioner downplays the fact that it chose to offer absolutely no counterevidence at trial to the damages evidence accepted by the trial court and affirmed on appeal. Dr. Blank did not experience any windfall; he merely recovered the actual and unrebutted costs to relocate his practice in order to meet his financial and professional obligations, which relocation was the sole result of Petitioner's breach of the lease.

SUMMARY OF ARGUMENT

Dr. Blank lost the ability to practice dentistry at Northwood due to Petitioner's breach of lease and wrongful eviction. At that point, Dr. Blank had but two choices: (1) shut down his practice and sue for lost profits for the remaining term of his lease, see Young I, or (2) mitigate his damages by relocating his practice and incurring the reasonable and necessary expenses required by a

relocation, see Young II. Dr. Blank chose the latter and proved his damages at trial to a reasonable certainty, which damages were affirmed on appeal in WSG.

Petitioner is incorrect on all counts raised in its brief. The decision in WSG is supported by (and not in conflict with) the decisions in Young I (lost profits to evicted tenant are recoverable for remaining term of lease if proven with reasonable certainty) and Young II (wrongfully evicted tenant may recover as damages his actual and necessary expenses that are the natural, direct and necessary consequences of the breach), Koplowitz v. Girard, 658 So. 2d 1183 (Fla. 4th DCA 1995)(plaintiff is legally entitled to pursue method of recovery that makes it whole), Natural Kitchen, Inc. v. American Transworld Corp., 449 So. 2d 855, 860 (Fla. 2nd DCA 1985)(parties need not have anticipated precise injuries that occurred, but simply that the nature of the loss is one that ordinarily flows from the breach), and Beefy Trail, Inc. v. Beefy King International, Inc., 267 So. 2d 853, 856 (Fla. 4th DCA 1972)(damages for breach of contract must put injured party in as good a position he would have occupied had the contract been performed).

ARGUMENT

POINT I

**THE FOURTH DISTRICT COURT FOLLOWED
FLORIDA LAW AND AFFIRMED DR. BLANK'S
RECOVERY OF SPECIAL DAMAGES AS
PLEADED AND PROVED IN THE TRIAL COURT**

Petitioner's argument that WSG contravenes Young II is based upon Petitioner's misperception of the application of Young II as well controlling Florida law that permits Dr. Blank to plead, prove and recover special damages as a result of his wrongful eviction by Petitioner.

Florida's courts have consistently held that "[s]pecial damages...may be recoverable if the trial court ultimately finds that [the tenant was] wrongfully and prematurely evicted from the...premises which necessitated the rental of substitute...property." Iglesia Bautista De Renovacion Cristiana v. Tamiami Baptist Church of Miami, Inc., 678 So. 2d 1, 2 (Fla. 3d DCA 1996) citing 17 Fla.Jur.2d Damages, §§ 9, 126 (1980). While denying liability initially, at trial, Petitioner admitted liability, *i.e.*, that it wrongfully breached Dr. Blank's lease.

WSG properly concluded that the trial court reached a legally sustainable conclusion under the general theory of damages for a breach of contract. As noted *supra*, WSG relied on Rost and Moses in sustaining the trial court's judgment for damages that were proven to be the "natural, direct, and necessary consequences of

the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties.” WSG (A.4) See also Beefy Trail v. Beefy King Int’l, Inc., 267 So. 2d 853 (Fla. 4th DCA 1972). The purpose of awarding damages for breach of contract is to put the injured party in as good a position he would have occupied had the contract been performed. Id.

To remedy the harm caused by Petitioner’s breach, Dr. Blank was required to lease replacement space, build out that space to accommodate a dental office (a specialized use), and acquire new equipment since his existing equipment could not be moved. (A.4) Importantly, Dr. Blank didn’t choose to leave – he was evicted. Dr. Blank’s only alternative to a relocation of his practice was to shut it down. A complete shutdown would have caused Dr. Blank to incur 33 months of lost profits to a practice earning an average profit of \$375,000 per year for damages in excess of \$1,000,000. Id. To properly mitigate against such a loss, Dr. Blank took the reasonable and foreseeable action of relocating his practice to an alternate and suitable location. See Young II, 110 So. 2d at 653 (some mitigation of damages might be reasonably allowed if plaintiff were able to secure other premises already fitted for its special purpose).

Young II, as properly applied in WSG, permits a wrongfully evicted tenant to recover the cost of actual expenditures that were reasonably necessary to prepare

the premises for the specified occupancy. Id. Petitioner had the right at trial to demonstrate that Dr. Blank's expenditures were extravagant or unnecessary for purposes of equipping his practice. Petitioner declined to make such a showing.

Hanna v. Martin, 49 So. 2d 585 (Fla. 1951), cited by Petitioner, actually supports the decision in WSG. Hanna holds,

The fundamental principle of the law of damages is that the person injured by the breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of defendant's act which give rise to the action. In other words, the damages awarded should be equally to and precisely commensurate with the injury sustained.

Id. at 587 (emphasis added). WSG affirmed the trial court's determination that just compensation for the wrongful eviction of Dr. Blank was his actual, reasonable, necessary and foreseeable relocation expenses incurred by reason of Petitioner's breach. Such a damage award is consistent with the law of Florida and not in conflict with Young II, Moses v. Autuono, 47 So. 2d 925 (Fla. 1908), or Rost v. Bowling, 861 So. 2d 1246, 1247-48 (Fla. 2nd DCA 2003).

POINT II

**WSG DOES NOT CONFLICT WITH FLORIDA
LAW BANNING WINDFALL RECOVERY; IT
PROPERLY AFFIRMED THE AWARD TO DR.
BLANK OF HIS SPECIAL DAMAGES
NATURALLY FLOWING FROM WSG'S BREACH**

Petitioner incorrectly posits that Dr. Blank received a “windfall” by being wrongfully evicted from the space he occupied for over 24 years and from which he operated a successful dental practice. Petitioner ignores that it offered absolutely no counterevidence at trial to rebut the competent, substantial damages evidence introduced by Dr. Blank. Dr. Blank did not experience any windfall; he merely relocated his practice in order to meet his financial and professional obligations, which relocation was the sole result of Petitioner's breach of the lease. Dr. Blank was legally entitled to pursue a method of recovery that made him whole. See Koplowitz v. Girard, 658 So. 2d 1183 (Fla. 4th DCA 1995); Hanna, supra.

WSG correctly relied on Natural Kitchen, Inc. v. American Transworld Corp., 449 So. 2d 855, 860 (Fla. 2nd DCA 1985) to affirm the award. (A.4) Dr. Blank's losses were reasonably within the contemplation of the parties and naturally flowed from Petitioner's breach such that Dr. Blank operated a “dental practice in a prime medical location, appropriately outfitted for decades. It is

reasonable for the landlord to expect that [upon a wrongful eviction, Dr. Blank] would need to either move his existing equipment or outfit a new location with new equipment.” (A.6) In note 1, WSG expressly noted that the damage award may have been reduced had Petitioner endeavored to set forth a more modest estimate of build-out expenses in which case the trial court would have had a basis to reject some of Dr. Blank's actual expenditures. By contending that none of the build-out expenses were foreseeable, Petitioner limited the scope of review at trial and on appeal. (A.6, n.1)

CONCLUSION

For the reasons expressed above this Court should decline to accept jurisdiction of this matter as there exists no express or direct conflict between the decision in WSG and existing Florida law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Answer Brief on Jurisdiction was delivered via U.S. Mail this ____ day of December, 2008 to: **Neil J. Berman, Esq. and Jason R. Block, Esq.**, Berman Rennert Vogel & Mandler, P.A., 2900 Bank of America Tower at International Place, 100 SE Second Street, Miami, FL 33131.

By: _____
MICHAEL J. NAPOLEONE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210(a)(2), this brief has been printed in Times New Roman 14-point proportionate type.

By: _____
MICHAEL J. NAPOLEONE