

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA09-715

FIDENCIO MENDEZ

APPELLANT

V.

CARMEN AGUILAR

APPELLEE

Opinion Delivered March 31, 2010

APPEAL FROM THE YELL COUNTY
CIRCUIT COURT
[NO. CV-2006-67]

HONORABLE DAVID H.
MCCORMICK, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

The parties entered into a written contract under which appellant would rent a market in Danville, Arkansas, from appellee. The contract granted an option to purchase under specified conditions. Appellee filed an unlawful-detainer action, asserting that appellant had failed to pay rent after February 2006. Appellant counterclaimed, alleging that appellee breached the agreement by failing to sell the property on demand. After a bench trial, the trial court found that appellant failed to prove breach of the purchase-option clause because he failed to prove an agreement as to the sale price or to adduce evidence regarding the reasonable value of the property at the time that he attempted to exercise the option. The trial court further found that appellant did breach the contract by failing to pay rent, and it awarded appellee back rental and treble damages pursuant to Ark. Code Ann. § 18-60-309(b)(2). For reversal, appellant argues that the trial court erred in finding that he failed to

prove that appellee breached the purchase option and that appellant suffered damages resulting from that breach. Appellant also contends that the trial court erred in refusing to dismiss the treble-damages claim as untimely or, in the alternative, in awarding treble damages on the facts of this case. We find no error, and we affirm.

The rental contract was written in Spanish and signed by both parties. The following English translation was introduced without objection:

RENTAL CONTRACT

15th of October of 2004

I, Carmen Aguilar, owner of Morena's Market located at 714 N. Cleveland Danville, Arkansas 72833 am going to rent my location to Fidencio Mendez for the term of two years beginning October 14, 2004.

Mr. Mendez [b]ought all of the contents at the market and is only renting the locale.

The price of the locale will be \$150,000.00 only if paid before the 15th of December, 2004.

If the locale is bought after the two years it will be sold at the dollar value of the locale at that time.

The monthly payment of \$1340.00 will be tendered the fourteenth of each month.

The contract will be fulfilled by both people.

Mr. Mendez can make renovations to the store only if he complies with state and local laws.

The payments will go towards the price of the sale of the store.

If Mr. Mendez has the option to purchase before the contract it will be sold.

But if he breaks the contract he will be responsible for up to the two years.

The standard of review on appeal from orders resulting from bench trials is whether the judge's findings are clearly erroneous or clearly against the preponderance of the evidence. *Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001).

Giving due regard to the trial court's superior position to weigh disputed evidence, it appears that appellant occupied the premises pursuant to the rental agreement but did not exercise his option to purchase by tendering \$150,000 before December 15, 2004. Appellant continued to make rental payments and, in January 2006, offered appellee \$110,000 for the property. This offer was rejected. When appellant failed to make the February rental payment in a timely fashion, appellee, through her attorney, sent appellant Mendez a letter demanding that he pay the delinquent rent and quit the premises. The February rent was received sometime after April 2006, but appellant made no further rental payments. Appellee filed an unlawful-detainer action against appellant in August 2006, and appellant vacated the premises at the end of that month.

We first address appellant's argument that the trial judge erred in finding that he failed

to prove that appellee breached the purchase option and that appellant suffered damages resulting from that breach. Appellant concedes that a fair reading of the agreement is that he had a two-year option to purchase the property and that, after December 15, 2004, the price would be the reasonable value of the property. Appellant argues, however, that he established the reasonable value of the property as \$140,000 because appellee orally agreed during negotiations to sell the store to him for that amount. Nevertheless, the fact remains that appellee reconsidered her tentative agreement and refused to execute the offer and acceptance prepared at the direction of appellant. In the absence of any other evidence of the reasonable market value of the store, we cannot say that the trial judge clearly erred in finding that appellant failed to prove that appellee breached the option agreement to sell the property to appellant for its reasonable value. In light of our holding that appellant failed to prove breach, we need not address his argument that the trial court erred in finding that he failed to prove damages resulting from that breach. *See South County, Inc. v. First Western Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994).

Nor do we agree with appellant's argument that the trial court erred in refusing to dismiss appellee's claim for treble damages because it was not pled until the day of trial. Arkansas Code Annotated section 18-60-309(b)(2) (Supp. 2009) provides that a successful plaintiff in an unlawful-detainer action involving commercial property shall receive liquidated damages at the rate of three times the rental value per month for the time that the defendant has unlawfully detained the property. Although it is true that no prayer for treble damages

under this section was made in the initial pleadings, the issue did arise at trial. The trial court should allow liberal amendment of pleadings under Ark. R. Civ. P. 15, and Rule 15(b) expressly grants the trial court discretion to allow amendment of the pleadings at trial over objection and to grant the objecting party a continuance to enable it to meet such evidence. Here, it was apparent from the commencement of the proceeding that the property involved was commercial and, in the absence of any request for a continuance by appellant, we cannot say that the trial court abused its discretion in refusing to dismiss the treble-damages claim. *See Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

Finally, we find no error in the trial court's award of treble damages for the period prior to the filing of the formal notice to vacate. Appellant's argument that notice to vacate is required to commence an action for unlawful detainer is correct. However, all the statute requires in cases of failure to pay rent is three days' written notice to quit and demand for possession. Ark. Code Ann. § 18-60-304(3) (Supp. 2009). According to appellee's testimony, that was provided by her attorney's letter at the end of February. We do not agree that the subsequent filing of a formal Notice to Vacate invalidated this prior notice.

Affirmed.

HENRY and BAKER, JJ., agree.