O, R & L COMMERCIAL, LLC *v.* COLT GATEWAY, LLC, ET AL.
(AC 36635)

Lavine, Keller and Bishop, Js.

Argued January 6—officially released April 7, 2015

(Appeal from Superior Court, judicial district of Hartford, Schuman, J.)

Michael G. Albano, for the appellant (plaintiff).

Lewis K. Wise, for the appellees (defendants).

Opinion

LAVINE, J. In this breach of contract action, the plaintiff, O, R & L Commercial, LLC, appeals from the trial court's granting summary judgment in favor of the defendants, Colt Gateway, LLC, Colt Gateway/East Armory, LLC, and Colt Gateway/South Armory, LLC.[1] On appeal, the plaintiff claims that the court improperly (1) concluded that the listing agreement between the parties did not support the plaintiff's claim for a commission, and (2) granted summary judgment because the intent of the parties is a genuine issue of material fact. We reverse the judgment of the trial court.

The standard of review of a motion for summary judgment is well known. "The judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. An appellate court's "review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Coley* v. *Hartford*, 140 Conn. App. 315, 321, 59 A.3d 811 (2013), aff'd, 312 Conn. 150, 95 A.3d 480 (2014). "[S]ummary judgment is to be denied where there exist genuine issues of fact and inferences of mixed law and fact to be drawn from the evidence before the [c]ourt." (Internal quotation marks omitted.) *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 379, 260 A.2d 596 (1969).

The matter in dispute is whether the defendants breached a certain listing agreement by failing to pay the plaintiff a commission when, in 2012, the defendants leased a portion of the Colt Gateway complex (Colt complex) in Hartford to the Capital Regional Education Council (council). The legal issue is whether the dispute is amenable to resolution by means of summary judgment on the basis of the parties' listing agreement. We conclude that summary judgment should not have been granted in this case.

The court found that the underlying facts were not in dispute. In 2002, the plaintiff, a commercial real estate brokerage firm, was the tenant representative of the council in its search for a building suitable for use as a school. The plaintiff introduced the council to the Colt complex, which the council found suitable for its purposes. The council thereafter leased a portion of the Colt complex from Homes for America Holdings, Inc. (Homes), the defendants' predecessor in interest. On November 5, 2002, Homes agreed to pay the plaintiff a commission on the basis of the space the council leased at the Colt complex. On September 23, 2003, the council and the defendants amended the lease to expand the amount of space the council rented at the Colt complex, and the plaintiff was paid a commission.

On March 31, 2003, the council leased 45,000 square feet of space from the defendants for a term of ten years and the plaintiff was paid a commission. Over the next number of years, the council continued to increase the amount of space it rented at the Colt complex and the defendants paid the plaintiff a commission.

On October 24, 2006, the plaintiff and the defendants entered into a listing agreement pursuant to which the plaintiff became the defendants' exclusive agent for the leasing of all of the office and retail space owned by the defendants in the Colt complex.[2] The term of the listing agreement expired on October 23, 2008. On November 19, 2008, the parties agreed to extend the listing agreement until May 31, 2009. On June 10, 2009, pursuant to paragraph 6 (b) of the listing agreement, the plaintiff informed the defendants by letter of the prospective tenants with which it had dealt during the term of the listing agreement. Paragraph 6 (b) of the listing agreement required the defendants to pay the plaintiff a commission if they entered into a lease with any of the prospective tenants listed in the registration letter within one year of the expiration of that agreement.

On May 27, 2010, the council entered into a ten year sublease with the defendants for the premises at 140 and 170 Huyshoppe Avenue, which are located in the Colt complex. The defendants paid the plaintiff a commission in two installments.

On August 29, 2012, the council entered into a lease with the defendants for the premises at 25 and 75 Van Dyke Avenue also known as 140 Huyshoppe Avenue, and 170 Huyshoppe Avenue (2012 lease), properties located within the Colt complex.[3] The plaintiff demanded payment of a commission for the 2012 lease, claiming that it was entitled to a commission for all future leases between the defendants and the council. The defendants refused to pay the plaintiff a commission, claiming that it was not required to do so pursuant to the listing agreement.

The plaintiff commenced the present action and filed an amended two count complaint on February 20, 2013, which alleged breach of contract and requested certain declaratory relief. The parties filed cross motions for summary judgment as to their respective constructions of the listing agreement. The parties agreed that the resolution of their dispute turned on the construction of paragraphs 6 and 7 of the listing agreement, which define the type of transactions that obligate the defendants to pay the plaintiff a commission. In their motion for summary judgment, the defendants argued that the 2012 lease does not obligate them to pay the plaintiff a commission under either paragraph 6 or 7 of the listing agreement. In its motion for summary judgment, the plaintiff contended that it is entitled to a commission on the basis of the rate schedule contained on the sec-

ond page of the listing agreement and referenced in paragraphs 6 and 7.

The relevant language of the two page listing agreement states: "6. THE COMMISSION. You will pay Us a commission per the schedule on the back of this Agreement IF during the term of this Agreement:

"(a) If a Lease of the Property is entered into during the listing term; Or

"(b) A LEASE of the property is consummated within twelve (12) months after the expiration or termination[4] of the Agreement with person(s) with whom AGENT has dealt with during the term thereof (either directly or through another broker or agent) and whose names the AGENT shall have registered with the OWNER no later than 15 days following the expiration or termination of this listing Agreement; and You agree that the [plaintiff's] Commission Rate Schedule, which is printed on the reverse side of this Agreement, states the full terms and conditions of the commission.

"7. RENEWALS. You also will pay Us commissions, when exercised, of purchase or other options for the same property at the commission rates set forth on the reverse side of the Agreement."

The reverse side of the listing agreement is captioned "Commission Rates," and states in relevant part: "Commissions are due and payable per the rate schedule above for lease renewals, extension, enlargements, exercise of options, or new leases for the same property. Owner's commission obligations for transactions consummated during the term of this Listing shall survive the expiration or termination of the Agreement."

On May 15, 2013, the defendants filed a motion for summary judgment claiming "pursuant to the unambiguous language of the [listing] agreement, no commission has been earned." The defendants also claimed that the "controversy involves only the interpretation of this agreement and . . . the material facts are not in dispute."

On November 22, 2013, the plaintiff filed a cross motion for summary judgment claiming that the listing agreement supports its claim for a commission for the 2012 lease. In the memorandum of law in support of its motion for summary judgment, the plaintiff recites the business relationship between the parties and notes that after they entered into the listing agreement, the defendants paid the plaintiff a commission for the ten year lease into which the council and the defendants entered in 2010, but not the 2012 lease that is an expansion of an existing lease.

In its memorandum of decision, the court stated that the plaintiff believes that it is entitled to a commission pursuant to the language on page 2 of the listing agreement, which, as noted, is captioned "Commission

Rates," and which states: "Commissions are due and payable per the rate schedule above for lease renewals, extensions, enlargements, exercise of options, or new leases for the same property. Owner's commission obligations for transactions consummated during the term of this Listing shall survive the expiration or termination of the Agreement." The court presumed that the plaintiff believes that it is entitled to a commission for the 2012 lease because that lease "is some form of 'enlargement' of a previous lease for other parcels of the defendants' property or a 'new [lease] for the same property.' "

The court had "two difficulties with the plaintiff's interpretation." First, the court found that the plaintiff's interpretation seemed contrary to the rule that the "individual clauses of the contract . . . cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998). The court also found the structure of the listing agreement is that page 1 addresses different subjects than page 2. Paragraph 6 on page 1 entitled "Commission" begins with the language: "You will pay Us a commission per the rate schedule on the back of this Agreement IF during the term of this Agreement . . . ." Paragraph 6 defines two specific transactions that generate a commission: 6 (a) described a lease entered into during the term of the listing agreement, and 6 (b) describes a lease entered into with certain registered persons within twelve months after the expiration of the agreement. Paragraph 6 also states that the language on page 2 provides the full terms and conditions of this commission. Paragraph 7 on page 1 entitled "Renewals," the court found, concerns another type of transaction, one that generates a commission of purchase or other options for the same property at the commission rates set forth on the reverse side of the agreement. The court found that page 2 is entitled "Commission Rates" and most of it addresses the rates for, computation of, and time of payment for commissions, rather than delineating those events that generate a commission.

As a general matter, the court found that paragraphs 6 and 7 on page 1 of the listing agreement define one type of transaction that generates a commission and page 2 contains the rate schedule referred to in paragraphs 6 and 7. The court determined that the plaintiff's argument ran counter to that scheme in that it purported to identify another type of transaction on page 2 that also generates a commission, i.e., any future lease transaction between two parties who already were subject to the agreement for the same property. The court stated that although the "plaintiff's interpretation *was plausible* when one looks at this language in isolation, it makes less sense when one views the language in the context of a contract that defines the type of lease transactions subject to a commission on page [1] and the formula

and details of the commission on page [2]."

The second problem the court identified with respect to the plaintiff's construction of the listing agreement is that it renders paragraphs 6 and 7 on page 1 superfluous, contrary to the rule of interpretation that calls for every provision of a contract to have full meaning and effect. See id. The court concluded that "the plaintiff's view is that the phrase 'lease renewals, extensions, enlargements, exercise of options, or new leases for the same property' on page 2 encompasses all future lease transactions between the parties concerning the same property, regardless of whether they fall within paragraph 6 (b) or paragraph 7. Under this view, page 2 swallows up paragraphs 6 (b) and 7 and makes their limitations irrelevant," which is inconsistent with the rules of contract construction.

The court concluded that the defendants' construction of the listing agreement was "better." The defendants' construction, the court found, is that the "rate schedule detailed elsewhere on page [2] will apply to all transactions defined on page [1] regardless of whether they are in the nature of a 'renewal, extension [or] enlargement . . . .' " The court found that the "defendants' interpretation is that the 'renewal, extension [or] enlargement' language on page [2] implicitly includes the added phrase 'as defined in paragraphs 6 and 7 on page [1].' While arguably this interpretation makes the language in question also suffer from a lack of necessity, the language at least serves the purpose of synthesizing the entire agreement. Although the defendants' interpretation is not foolproof, that fact is because the contract simply is poorly written and the phrase on which the plaintiff relies is superficially confusing." The court concluded: "Given the two choices, the court accepts the defendants' interpretation of the contract." The court, therefore, granted the defendants' motion for summary judgment and denied the plaintiff's cross motion for summary judgment. The plaintiff appealed.

The law regarding the construction of contracts pertains to this appeal. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . The intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [writ-

ten instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitment is a question of law." (Citations omitted; internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 7–8, 35 A.3d 177 (2011).

"When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . To identify and to apply the appropriate standard of review, we must, therefore, initially determine whether the agreement . . . was ambiguous." (Citation omitted; internal quotation marks omitted.) *McKeon* v. *Lennon*, 147 Conn. App. 366, 373, 83 A.3d 639 (2013).

"The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . *If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous.*" (Emphasis added; internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005).

We conclude that the court improperly granted summary judgment in favor of the defendants. Its own conclusion that the language of the listing agreement was poorly drafted and that it could be construed differently by the parties causes us to doubt whether the terms of the listing agreement were clear and unambiguous. The court nonetheless decided to accept the defendants' construction of the language, although it was "not foolproof." In essence, we conclude that the court found the listing agreement to be susceptible to different reasonable interpretations. As a matter of law, summary judgment is inappropriate when the language of a contract as to the parties' intent is ambiguous. See *Yellow Book Sales & Distribution Co.* v. *Valle*, 311 Conn. 112, 119, 84 A.3d 1196 (2014) (where language of contract is ambiguous, parties' intent question of fact). Summary judgment is warranted only in the absence of genuine issues of material fact.

On appeal, the defendants have argued that, if the listing agreement is ambiguous, any ambiguity must be construed against the drafter of the agreement. See *Hartford Electric Applicators of Thermalux, Inc.* v. *Alden*, 169 Conn. 177, 182, 363 A.2d 135 (1975). The defendants contend that the plaintiff drafted the listing agreement, but the court made no such finding. Nonetheless, even if the plaintiff drafted the agreement, the listing agreement is not a contract of adhesion that was not subject to bargaining by the parties.[5] See, e.g., *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 264

n.6, 757 A.2d 526 (2000) (standardized insurance contracts prime example of contracts of adhesion, whose most salient feature is that they are not subject to normal bargaining process of ordinary contracts). By their pleadings, the parties admit to being sophisticated business entities. The defendants' argument that the listing agreement should be construed against the plaintiff fails.[6]

Moreover, on the basis of our review of the various leases and the listing agreement, it is not clear to us whether the 2012 lease is a new lease or an enlargement of the 2010 ten year sublease. Whether it is deemed a new lease, or an enlargement, could very well affect the court's analysis of whether summary judgment should be granted. On this record, we conclude that there is sufficient lack of clarity as to the meaning of the key contractual terms so as to render summary judgment inappropriate. We therefore conclude that there is a genuine issue of material fact as to whether the defendants owe the plaintiff a commission for the 2012 lease.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

[1] The defendants own various properties that comprise the Colt Gateway complex, as described in this opinion. For clarity and convenience, we refer in this opinion to various transactions as involving the defendants, collectively, even when, in reality, one or more of the entities was involved. The listing agreement that is central to this appeal treats each entity individually and collectively as "owner."

[2] The agreement states in relevant part: "1. APPOINTMENT AS AGENT. Owner, [the defendants] a Limited Liability Companies with an address of . . . ('You'/'Owner') appoint [the plaintiff] of . . . ('US') as your Exclusive Agent. You give us the Sole and Exclusive right to LEASE the properties known as 1 Van Dyke Avenue (East Armory) and 8 Van Dyke Avenue (Foundry Building), 22 Sequassen Street (North Armory), 24 Sequassen Street (U Shape), 27 Sequassen Street (South Armory) 170 Huyshoppe Avenue (Saw tooth Building) all in Hartford . . . Includes all office and retail space in all Buildings within the Colt Gateway complex, consisting of approximately 175,000 +/- square feet. (excludes residential space)."

[3] We note inconsistencies between certain of street numbers, e.g., 25 or 55, among the listing agreement, the complaint, the answer, and affidavits. The parties also refer to buildings within the Colt complex by a variety of names. See also footnote 2 of this opinion. These inconsistencies are not material to the issues in this appeal.

[4] The phrase "or termination" was twice added as a handwritten addition to the printed terms of paragraph 6 (b) and initialed by the parties.

[5] The defendants' argument is undercut somewhat in that the printed listing agreement contains handwritten amendments that were initialed by the parties. See footnote 4 of this opinion.

[6] The defendants also have argued that this case is indistinguishable from *William Raveis Real Estate, Inc.* v. *Newtown Group Properties Ltd. Partnership*, 95 Conn. App. 772, 898 A.2d 265 (2006). We have reviewed that case and find the language contained in the contract at issue to be distinguishable from the language in the listing agreement.