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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001140-MR

W.D. COWHERD and
BETTY COWHERD — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 96-CI-01574

CITY OF ELIZABETHTOWN — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, HUDDLESTON, and KNOPF, Judges.

COMBS, JUDGE: The appellants, W.D. and Betty Cowherd (the Cowherds), appeal from the judgment of the Hardin Circuit Court granting summary judgment in favor of the appellee, the City of Elizabethtown (the City), and dismissing their counterclaim. Having reviewed the record, we affirm the judgment of the circuit court.

Since 1971, the City has operated and maintained a gas storage field known as the Cecilia Storage Field, which is located in Hardin County and comprises approximately 1500 acres. The gas storage field includes a 252-acre farm, which the City

originally leased in 1971 from W.D. Cowherd's parents. In 1985, the City re-negotiated and renewed its lease on the farm with the Cowherds, who had purchased the farm from W.D.'s parents pursuant to a land contract in 1964. However, title to the farm was not transferred to them until 1976.

In renewing the lease, the parties executed three documents: a lease entitled "Oil and Gas Lease"; an amended lease entitled "Amended Oil, Gas and Gas Storage Lease"; and a third document entitled "Supplemental Agreement." All three documents were signed by the parties and dated September 26, 1985. The "Oil and Gas Lease" provided that the term of the lease was for ten years and that the City was to pay the Cowherds quarterly rentals of one dollar per acre per annum. However, pertinent to this appeal, the "Amended Lease" changed the term of the original lease and the rentals payable by the City. It amended the term of the lease from ten years to a "term of one year from the date hereof, and the same shall continue in force and effect from year to year." It also required the City to pay the Cowherds annual rentals of one dollar per acre as well as one hundred dollars for each well drilled on the farm. The City's rental payments were due on or before the first day of October. The "Supplemental Agreement" incorporated the provisions of the original lease and the amended lease and primarily addressed issues related to the City's access to the farm and any damages that might result from its use of the property. In addition to the rentals set forth in the original and amended leases, this last document provided that the City was to pay the Cowherds an amount equal to the value of

835,000 cubic feet of gas to be calculated at the general rate schedule in effect at that time.

In 1996, the City failed to pay the Cowherds the rentals due under the lease on or before the first day of October. The Cowherds sent a letter to the Mayor of Elizabethtown dated October 8, 1996, notifying the City that it had breached the lease by failing to pay the rentals on time and that they were terminating the lease. Subsequently, on October 10, 1996, the City sent the Cowherds a check by registered mail for the 1996 rentals; the Cowherds refused to accept the check.

On October 22, 1996, the City filed an action for a declaratory judgment to determine the parties' rights under the lease. The City also sought a temporary injunction to allow it access to the Cowherds' property in order to continue maintenance and operation of the gas storage field pending the outcome of the declaratory action. The Cowherds filed a counterclaim seeking damages for the City's wrongful retention, possession, and use of their property and alleging that the lease agreement with the City was unconscionable. The circuit court entered an agreed order on October 28, 1996, setting out a month-to-month agreement between the parties which allowed the City to continue to use the farm for its storage field operations during the pendency of the litigation for $400.00 per month — subject to further orders of the circuit court.

On May 23, 1997, the City filed a motion for summary judgment as to the declaratory action, which the circuit court granted on September 2, 1997. The court found that the City's

10-day delay in paying its rentals did not constitute a breach of the lease and that "forfeiture of the lease agreements between the parties [was] not justified under the facts of this case." The court did not address the Cowherds' counterclaim but noted that it was still pending. Subsequently, on February 3, 1998, the City filed a motion for summary judgment as to the counterclaim. On April 9, 1998, the court granted summary judgment in favor of the City as to all remaining issues, holding that the lease agreement was not unconscionable and dismissing the Cowherds' counterclaim. This appeal followed.

The Cowherds first argue that the City forfeited the lease in failing to pay the 1996 rentals on time. They contend that the court erred in denying the forfeiture and in granting summary judgment in favor of the City.

The standard of review of a summary judgment on appeal is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03. "The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. at 480. "Only when it appears impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." Id. at 482.

In general, forfeiture is not a favored creature in the law. In the case before us, the Hardin Circuit Court concluded that based upon the facts, a "forfeiture of the lease agreements between the parties [was] not justified" and that "[t]o hold otherwise would be a gross injustice and violative of well established equitable principles." In reaching its conclusion, the court relied upon Ledford v. Atkins, Ky., 413 S.W.2d 68 (1967). In Ledford, the Kentucky Supreme Court analyzed the issue of whether the trial court erred in refusing to declare a forfeiture of an oil lease where the lessee was thirteen days late in making his rental payment. The lessee had been stricken with a serious illness around the time that the rentals where due under the lease. The evidence showed that the lessee had been in the hospital and in a comatose state for approximately 23 days. Upon regaining his health a few days after the rentals were due, the lessee had a check immediately mailed to the lessor. The Supreme Court upheld the trial court's refusal to declare a forfeiture of the lease, reasoning that:

> [W]e believe the better rule, the one generally followed by the majority of states, is to make allowances for extraordinary circumstances and not to order a forfeiture where the only failure has been a short delay in making payment. Especially when the forfeiture would result in the loss of substantial investment on the part of the lease and unjustly enrich the lessor. [sic] This rule is recognized in 5 A.L.R.2d, pp. 994 and 995.
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> 'With allowances to be made for ordinary variances in rulings from state to state, explained in part at least by differences in the circumstances of cases, and except for negative doctrines supported with more or less consistency in

> one or two jurisdictions, the correct general conclusion seems to be that equity will grant relief from termination of an 'unless' lease , or from forfeiture of an 'or' or other lease, for nonpayment of delay rental, where it appears the leaseholder had fully intended to pay the full amount, but, without gross negligence, and because of accident, mistake, inadvertence, mischance, etc., failed to do so strictly on time.'

Ledford v. Atkins, Ky., 413 S.W.2d 68, 69-70 (1967). (Emphasis added). The Supreme Court continued: "[t]o forfeit the lease under these conditions and especially so where the lessee stands to lose a substantial investment already made in developing the lease, in our opinion, would be a gross injustice." Id. at 71.

The Hardin Circuit Court found that the City had not paid the 1996 rental due to an administrative error by one of its employees. In an affidavit, Cynthia J. Bailey, the secretary to the superintendent of the City's gas system, explained the reason for the City's late payment of the rentals. She stated that during the first week in September 1996, she prepared the Purchase Orders for the rentals due in October on the City's gas leases — including the Cowherd's lease. Bailey explained that she thought it was too early to process the orders, and so she set them aside, intending to process them on September 25, 1996. However, she was co-chairman of the City's United Way campaign, a position which required her to be away from the office much of the week of September 22, 1996; she inadvertently forgot to process purchase orders for the 1996 rental checks. Bailey further stated that she turned in the purchase orders for the

October rentals to be processed on October 9, 1996; the checks were mailed to the lessors on October 10, 1996.

The record indicates that the City had invested over $1,500,000.00 in the Cecilia Storage Field. Samuel Patrick Ritchie, the Superintendent of the City's gas system, testified in his deposition that 50% to 60% of the City's investment was made on the Cowherds' farm; that much of the operation and maintenance of the storage field took place on the Cowherds' property; and that without access to this property, the City's natural gas service would be curtailed. W.D. Cowherd acknowledged that over the entire course of the lease, the City had made timely rental payments, and he admitted that he had suffered no damages as a result of the late payment of the 1996 rentals.

Based upon these facts and circumstances, we find that the court did not err in failing to declare a forfeiture of the lease. The court correctly held that it would be inequitable to declare a forfeiture based upon the City's 10-day delay in making payments where the facts show that the delay was not intentional and that it was the result of an accident or mistake which did not cause the Cowherds to suffer any damages.

The Cowherds next argue on appeal that the court erred in granting summary judgment in favor of the City as to their claim that the terms of the lease were unconscionable. Specifically, they allege that the rentals paid by the City pursuant to the lease were unconscionable. In dismissing the counterclaim, the court found that the Cowherds' belief that they

may have made a bad bargain was not sufficient reason to set aside or to permit a re-negotiation of the lease agreement. We agree.

An unconscionable contract is a contract "which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." Louisville Bear Safety v. South Central Bell Telephone Company, Ky. App., 571 S.W.2d 438,439 (1978), (quoting Black's Law Dictionary 1694 (4th ed. 1976).

> In summary, the doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain . . . Wille v. Southwestern Bell Telephone Co., 219 Kan. 755, 549, P.2d 903 (1976).

Id. at 440.

The Cowherds did not allege that the City had engaged in oppressive bargaining tactics. In his deposition, W.D.Cowherd testified that the City re-negotiated the lease in 1985 at his request. He negotiated the lease himself, and Ritchie (representing the City) stated that the parties went "back and forth" regarding the provisions of the lease until they reached an agreement. The re-negotiated lease contained essentially the same provisions as the original lease except for the changes requested by Cowherds. The record clearly substantiates that the Cowherds actively engaged in the negotiations for the renewal of the lease and that the lease was not the result of one-sided, oppressive bargaining by the City. There are no genuine issues

as to the material facts of this case, and the court properly found that the City was entitled to summary judgment as a matter of law. The Cowherds' belief that they may have made a bad bargain does not render the lease unconscionable.

Finally, the Cowherds argue that the court should have held that the lease with the City was invalid for equitable reasons. They argue that the City failed to pay its rentals when they were due and that this failure entitled them to terminate the lease. We have already found that the circuit court correctly applied the Supreme Court's reasoning in Ledford v. Atkins, Ky., 413 S.W.2d 68, (1967), to this case. The inequity in this case would be for the City to have to forfeit an investment of more than $1,500,000.00 because of the ministerial mistake of one of its employees. There is nothing in the record to show that the City conspired or intended to make a late payment. We agree with the circuit court that "[t]o impose such a penalty for a minor delay in payment is so extreme and severe that equity cannot require such a result."

Based upon the foregoing reasons, we affirm the judgment of the Hardin Circuit Court.

ALL CONCUR.

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