

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002705-MR

JH PROPERTIES, INCORPORATED

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN W. POTTER, JUDGE
ACTION NO. 96-CI-005830

JPL MANAGEMENT, INCORPORATED
and JAMES E. SCHORY

APPELLEES

OPINION
REVERSING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and KNOPF, Judges.

BUCKINGHAM, JUDGE. JH Properties appeals from a judgment of the Jefferson Circuit Court rendered in favor of JPL Management, Inc., and James E. Schory after a bench trial. Having reviewed the record, the applicable law, and the arguments of counsel, we reverse.

JH Properties is a subsidiary of Jewish Hospital Healthcare Services, Inc., and is organized to manage the leases executed by Jewish Hospital. In 1986, Jewish Hospital instructed JH Properties to locate a fast food franchise to lease space inside the Jewish Hospital Outpatient Care Center. Schory, the president of JPL, a company which owned three Burger King

restaurants, contacted Ron Greenburg, senior vice-president of Jewish Hospital, and lease negotiations began.

The parties executed a lease on September 29, 1986, for an initial term of three years with the option to renew for a second term of two years, a third term of five years, a fourth term of five years, and a fifth term of five years. Section 1.3 of the lease provided that JPL could renew the initial term of the lease for a period of two years "provided that Tenant shall give and deliver a written renewal notice to Landlord not sooner than one (1) year and not later than one hundred eighty (180) days prior to the expiration of the original term of this Lease." Section 1.4 of the lease granted JPL the option to renew the lease for three additional five-year periods under the same terms and conditions that were applicable to the first renewal term. That section of the lease also stated that the renewal options for the additional terms "shall be subject to the same written notice provisions from Tenant to Landlord . . . as set forth in Section 1.3 of this Lease Agreement."

Section 2.1 of the lease provided that the commencement date of the lease was to be the earlier of (a) 60 days following the opening of the restaurant to the public, or (b) 150 days after the execution of the lease agreement. The restaurant did not open until June 12, 1987; therefore, according to the lease agreement, the commencement date of the lease was 150 days after the execution of the lease agreement. Under section 3.1, rent was due beginning on the commencement date, and under section 11.1, JH Properties' contribution for the improvements to the

leased space was also due on the commencement date. JH Properties did not pay its contribution for improvements until after June 12, 1987, and the initial rent invoice from JH Properties was dated July 27, 1987. After the initial invoice was received, JPL and JH Properties agreed that rent would be due 60 days after June 12, 1987, the date the restaurant opened.

In 1990, JPL renewed the lease for an additional two-year term. Although no written notice was given by JPL, JH Properties accepted the renewal. In 1992, JPL again renewed the lease, this time for a five-year term. As with the first renewal, this second renewal was given and accepted without written notice as required by the lease.

In 1995, JH Properties and JPL agreed to make renovations to the restaurant to keep pace with the modern renovations Jewish Hospital had made to its facilities. During the discussions concerning renovation, Schory informed Greenburg that JPL wanted to continue at the hospital location for another term. The renovations took place in 1995-1996. Jewish Hospital spent approximately \$75,000 on the renovations and paid Burger King's personnel costs as well as abated the rent during the renovation period. JPL spent \$43,000 to renovate and lost approximately \$10,000 to \$12,000 in revenue. On April 16, 1996, Schory stated in a correspondence to JH Properties that "we truly want to continue this strong relationship."

As the second renewal of the lease was coming to an end, JPL failed to give timely written notice of renewal as required by section 1.4 of the lease. Under the terms of the

lease, JPL should have given written notice of its intent to renew for another five-year term no sooner than February 27, 1996, and no later than August 30, 1996. On September 1, 1996, JH Properties sent correspondence to JPL informing JPL that the lease would expire as of February 26, 1997. After Schory received and read the correspondence, he instructed his attorney to send a letter to JH Properties indicating that JPL intended to renew the lease. JPL's formal written notice of its intent to renew was given on September 9, 1996. Nevertheless, JH Properties refused to accept JPL's renewal because written notice was not given within the time period allowed by the lease.

In October 1996, JPL and Schory filed a complaint in the circuit court for a declaration of rights under the lease. In June 1997, the circuit court conducted a bench trial and rendered an opinion and order in July 1998 which held that JPL had renewed the lease for an additional five-year term. The court specifically found that

under the peculiar facts of this case (Jewish Hospital silently waiting for the time period to expire in the hopes that Mr. Schory would forget to renew; the possible confusion about the commencement date caused by Jewish commencing rent collection late; the past oral extensions), the Court finds that Mr. Schory validly exercised his option to renew.¹

After JH Properties' motion to alter, amend, or vacate the judgment was denied, its appeal followed.

¹ The court cited no authority which would allow equitable relief.

JH Properties argues that the trial court erred in disregarding the express terms of Sections 1.3 and 1.4 of the lease which required JPL to give a written notice within a certain time frame of its intent to renew the lease. It argues that Kentucky courts have consistently required strict compliance with notice requirements for the renewal of leases. See Bryant v. Fowler-Comer Co., 252 Ky. 466, 67 S.W.2d 700 (1934), and Pieck v. Carran, 271 Ky. 32, 111 S.W.2d 444 (1937). These cases generally hold that where a lease provision requires notice to the landlord of an option to renew or extend the lease, "the terms of the lease must be complied with by the tenant in order to bind the landlord, and the notice must be given in the manner provided" Bryant, 252 Ky. at 469, 67 S.W.2d at 707.

More specifically, JH Properties argues that the trial court erred by allowing the lease to be renewed on equitable grounds based on "the peculiar facts of this case." JH Properties relies on Woodrum v. Pulliam, Ky., 453 S.W.2d 263 (1970), in support of its argument. In Woodrum, the lessee claimed that she should not be bound by the strict written notice requirement of the lease since her failure to give the required notice was because she "plain, plumb forgot" to exercise the option. The trial court held:

We perceive no accident, fraud, surprise, mistake or any other special circumstances requiring equitable relief.

. . . .

. . . This case does not involve forfeiture, but is a failure to exercise an option within the required time; hence we fail to see any equitable issues.

. . . .

We conclude that time is of the essence in the prime lease at law as well as in equity. This is not a matter of forfeiture or penalty; hence no equitable issue is involved.

Woodrum, supra at 265-65. JH Properties reads Woodrum to mean that equitable relief is not available in these situations, but JPL reads Woodrum to mean that equitable relief may be available in these situations where "special circumstances" exist. We agree with JH Properties' reading of the Woodrum case.

JPL cites a number of cases from other jurisdictions which have allowed equitable relief to excuse a lessee's failure to give timely notice of the exercise of a renewal option in a lease agreement. In fact, William B. Johnson, the author of the annotation Circumstances Excusing Lessee's Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease, 27 A.L.R. 4th 266 (1984), stated that "it appears that all courts which have dealt with the issue in recent years have recognized that there can be special circumstances which may warrant equitable relief from a lessee's failure or delay in giving notice to renew an option in its lease." Id. at 270. Despite how other jurisdictions may have dealt with this issue, we are compelled to follow Woodrum and hold that equitable relief is not available in these situations. See Supreme Court Rule 1.030(8)(a), which provides that "[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."

JPL also argues that JH Properties waived the written notice requirement by its past course of dealing, by not warning JPL that written notice was required, and by requiring JPL to spend over \$40,000 on renovations shortly before the end of the lease term. It cites Deane v. Mitchell, 312 Ky. 389, 227 S.W.2d 893 (1950), and Khourie Bros. v. Jonakin, 222 Ky. 277, 300 S.W. 612 (1927), in support of its argument. In these cases, the court found that the landlord waived a requirement for a written notice of renewal.

While waiver of such a lease provision may be held to have occurred in some situations, section 18.2 of the lease in the case sub judice provided in part as follows:

Non-Waiver. The failure to Landlord or Tenant to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, provisions or agreements of this Lease or to exercise any option herein contained shall not be construed as a waiver or a relinquishment for the future of any such term, covenant, condition, provision, agreement or option. . . . [T]he acceptance of performance of anything required by this Lease to be performed, with knowledge of the breach of any term, covenant, condition, provision or agreement of this Lease, shall not be deemed a waiver of such breach, . . . and no waiver by Landlord or Tenant of any term, covenant, condition, provision or agreement of this Lease shall be deemed to have been made unless expressed in writing and signed by Landlord or Tenant, whichever the case may be.

We conclude that this provision in the lease precludes any previous waiver or course of dealing from controlling. Indian Refining Co. v. Baker, 284 Ky. 423, 428, 145 S.W.2d 72, 75 (1940).

As JPL was not entitled to renew the lease due to its failure to comply with a written notice requirement and further was not entitled to equitable relief, the opinion and order of the Jefferson Circuit Court is reversed.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

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