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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002393-MR

LUMAX REALTY CORPORATION;
TOMLIN DEVELOPMENT CORPORATION;
KARLIN REALTY CORPORATION; AND
KARTOM INVESTMENT CORPORATION — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 07-CI-010864

THE KROGER COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Lumax Realty Corporation, Tomlin Development Corporation, Karlin Realty Corporation and Kartom Investment Corporation seek

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

our review of the trial court's grant of summary judgment to The Kroger Company whereby the Court established the termination date of a lease agreement to be January 2019. Upon review, we affirm.

The underlying facts are substantially unchanged since we first examined issues between these parties in our not to be published opinion of *Lumax Realty Corporation v. The Kroger Company,* 1995-CA-0741-MR (Ky.App. September 27, 1996).

> Appellants developed and own a shopping center known as Breckinridge Plaza in Louisville, Kentucky. Appellants by a written lease dated August 5, 1966, leased the property to Retail Centers of the Americas, Inc. for a twenty-five year period beginning on January 29, 1967 and ending on January 28, 1992, with five successive renewal options for terms of five years each.[2] The lease provided that exercise of the five year option must be given at least six months preceding the expiration of the initial twenty-five year lease term.
>
> Following several other irrelevant lease assignments, the lease was assigned to Parkview-Gem of Kentucky, Inc. (Parkview-Gem) in 1972. By recorded instrument dated March 12, 1974, Parkview-Gem assigned all of its right, title and interest in the lease to Cook-United, Inc. (Cook). The instrument assigning the lease to Cook stated that the rights were assigned from March 13, 1974, for the remainder of the initial term of the lease ending January 28, 1994, and for the five renewal terms provided for in the lease. Officers for the appellants consented to the terms of the assignment. Apparently, no one raised the issue that the ending date should have been 1992 rather than 1994.
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> In 1984, Cook suffered economic hardships and filed for bankruptcy. It sought to dispose of its real estate holdings including the Breckinridge Plaza lease. It advertised the lease, and the said advertisement showed

[2] The recorded memorandum of lease however, incorrectly reflected a starting date of March 1, 1967, and an ending date of February 28, 1992.

that the lease would end January 28, 1994. Kroger responded to the advertisement and ultimately acquired the lease for the property through a transfer approved by the bankruptcy court. Kroger assumed Cook's obligation under the lease and paid $975,000 for the assignment. Kroger also agreed to pay an increase in annual rent from $180,000 to $292,500 and agreed to pay for substantial improvements and repairs to the shopping center. Kroger subleased to several tenants, and the subleases reflected an ending date of 1994. Appellants approved these subleases.

In October 1991, a Kroger employee contacted Thomas Green (Green), the primary officer with appellants, to inquire concerning exercising the option on the lease and was told by Green that he assumed Kroger would be vacating the premises on January 28, 1992, since it had not exercised the option. Kroger notified appellants of its intention to exercise its option to renew the lease on October 17, 1991, but appellants rejected this notification as untimely and inadequate. Appellant notified Kroger that it would take possession of the property on January 28, 1992.

Kroger brought an action in January 1992, seeking a declaration of rights that the initial term of the lease expired on January 28, 1994. Alternatively if the court declared that the initial term of the lease ended January 28, 1992, Kroger sought a declaration that its exercise of the option was valid and thus, sought a judgment against appellants rescinding the lease and an award to Kroger of damages that it incurred. Appellants filed a counterclaim seeking a determination that 1992 was the expiration date of the leasehold and that Kroger failed to timely exercise its first option. They also sought any rents due after the expiration date of the original lease which would be collected from Kroger's subleases.

Kroger moved for summary judgment in November 1994. The circuit court in an order dated June 27, 1994, granted summary judgment for Kroger, stating that even assuming January 28, 1992, was the proper termination date for the lease, Kroger would be entitled to equitable relief from its failure to give timely notice. Appellants subsequently filed a motion pursuant to Kentucky Rule of Civil procedure (CR) 59.05 to alter,

> amend, or vacate the entry of summary judgment. The circuit court denied the motion.

Id.

Our opinion affirmed the grant of summary judgment that provided Kroger with equitable relief and determined Kroger provided notice of its intent to exercise the option to extend the lease in a timely manner. The question of whether the lease actually terminated in 2019 or 2017 was not before us at that time.

On February 16, 2009 both parties filed cross-motions for summary judgment and the trial court referred the matter to a master commissioner. The master commissioner's report recommended that the term of the final five year lease extension should expire in 2019 instead of 2017. The trial court adopted the master commissioner's report and determined there were no remaining genuine issues of material fact and granted judgment to Kroger while denying the request of Lumax. The trial court found "that the final term of subject lease will expire on January 28, 2019." Lumax then brought the current appeal.

This entire conflict between Kroger and Lumax revolves around what appears to be a typographical error in the recorded assignment of the lease from Parkview-Gem to Cook-United in 1972. That instrument misstated the termination of the lease as 1994 instead of 1992. That error cascaded throughout the history of the lease and subsequent assignments. Kroger provides numerous examples where the 1994 date is utilized and Lumax provides compelling instances where the 1992

original lease termination date is used and acknowledged by the parties. The trial court and master commissioner made a thorough evaluation of both arguments and determined that Kroger was entitled to the equitable relief of having the final lease extension terminate in 2019 instead of 2017 as Lumax wishes.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). Here, both sides filed cross motions for summary judgment arguing there were no genuine material issues of fact and are foreclosed from now saying otherwise. As there are no facts in contention and the issue is a matter of summary judgment, normally, "[w]e engage in a *de novo* review[.]" *Conseco Finance Servicing Corp. v. Wilder,* 47 S.W.3d 335, 340 (Ky.App. 2001). The trial court's decision was however based in equity and not contract law. As we stated previously, "[t]he true issue in this case is whether the circuit court's ruling in equity for Kroger was clearly erroneous or an abuse of discretion." *Lumax Realty Corporation v. The Kroger Company,* 1995-CA-0741-MR (Ky.App. Not To Be Published Opinion rendered September 27, 1996). A trial court's decision in a matter of equity will not be disturbed unless clearly erroneous. *Price v. Pike,* 458 S.W.2d 440, 442 (Ky. 1970).

We can find no fault with the trial court's balancing determination. Both sides produced evidence indicating the date of the termination of the lease was either 2017 or 2019. Lomax produced instruments recorded by Kroger that

specified the 2017 termination date as well as internal Kroger documents indicating a question existed regarding the exact date of termination. Likewise, Kroger produced evidence showing expiration in February instead of the correct January date as well as numerous examples of Lomax's acquiescence to the 2019 date.

Critical to our own determination are the facts that the initial error occurred in 1974. Kroger was not involved with the lease until ten years later in 1984. At that time Kroger expressed interest in the lease that was advertised as terminating in 1994 instead of the correct 1992 date. Kroger then acquired that lease everyone thought terminated in 1994 through a transfer approved by the bankruptcy court. Certainly, the price Kroger paid reflected the value of the lease ending in 1994 and not a lesser price for a lease ending two years earlier. The subleases used the 1994 date of termination and Lumax approved those as well.

As we determined in our first review of this lease, Kroger was entitled to the benefit of its bargain. It is not any single factor but a balancing of the equities between the parties to determine which would suffer an unconscionable hardship. We can find nothing in the trial court's decision that leads us to believe there is an abuse of discretion or that it is clearly erroneous. Our own review yields the same result. There are sufficient facts to justify the trial court's decision and we agree. We therefore affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Randall L. Gradner
Louisville, Kentucky

BRIEF FOR APPELLEE:

Kenneth S. Handmaker
John M. Matter
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