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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001363-MR

HANS KALLENBERGER AND
CHERIE LANIER BISHOP[1] APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 06-CI-003852

BREELAND DEVELOPMENT CORPORATION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Hans Kallenberger has appealed from the Jefferson Circuit Court's grant of summary judgment in favor of Breeland Development Corporation in relation to rents due and owing under a lease agreement to which he was a party and personal guarantor. After a careful review of the record, the law and the briefs, we affirm.

[1] Bishop has not participated in this appeal.

In May of 2003, Kallenberger and his then-wife, Cherie Lanier, incorporated a for-profit entity known as Let's Dance, Inc. ("LDI"). Kallenberger and Lanier were the sole owners and directors of LDI. LDI operated a dance studio where Lanier gave dance instructions. On June 17, 2003, LDI entered into a lease agreement to occupy two suites in a property owned by Breeland to house the dance studio. The initial term of the lease was for a period of fifteen months beginning on July 1, 2003, and extending until August 31, 2004, with the rent to escalate from $1,500.00 per month to $2,150.00 per month after the first six months of occupancy of the building. Kallenberger and Lanier signed the lease in their representative capacities as officers of LDI. In conjunction with the lease execution, Kallenberger and Lanier signed a guaranty agreement whereby they agreed to "unconditionally guarantee the payment of all rents" due under the lease and any renewals and extensions thereof.[2]

[2] The guaranty agreement was attached to the lease and stated as follows:

> Hans Kallenberger and Cherie Lanier (the "Guarantor") unconditionally guarantees the payment of all rents in this Lease on the part of Lessee to be paid and the prompt performance by Lessee of all of the items and conditions of this Lease. Guarantor agrees that it shall not be necessary for Lessor to resort to or exhaust Lessor's remedies against Lessee before calling upon Guarantor for payment or performance of any obligation hereby guaranteed. This Guarantee shall be binding upon Guarantor during the original terms of the Lease and any renewals of (sic) extensions thereof. Guarantor hereby agrees that Guarantor waives notice of any and all defaults under this Lease and waives all notices to which Guarantor might otherwise be entitled by law. Guarantor consents to any extension of time, extension of lease term, and any and all modifications and amendments to the Lease which might hereafter be entered into between Lessor and Lessee, or their successors and assigns, without notice to Guarantor and without in any manner affecting the liability of Guarantor as guarantor.

LDI occupied Breeland's building beyond the initial term of the lease until Lanier delivered a notice of termination to Breeland in October 2005. At the time of termination, LDI was in arrears on the rental payments in the amount of $29,500.00. Kallenberger and Lanier divorced in December 2005.

On May 1, 2006, Breeland brought the instant suit against LDI, Kallenberger and Lanier seeking payment of the delinquent amounts due under the lease. LDI did not respond to the complaint. Lanier filed a *pro se* answer admitting a default under the lease, disputing the amount due, and pleading an inability to pay the sums requested. She took no further action in the litigation. On August 20, 2009, the trial court granted summary judgment against LDI and Lanier for the $29,500.00 balance plus pre- and post-judgment interest.

Kallenberger took a significantly more active role in the litigation. He filed an answer disclaiming any liability for rents accruing after the end of the initial term of the lease on August 31, 2004. He contended LDI was run exclusively by Lanier, he had no active role in its operation, he received no profit from it, and that he resigned from LDI in January 2005. He further contended he was unaware of any lease extensions beyond the initial term and the terms of the lease required Breeland to present him with written notice or amendment of the lease documenting any extensions thereof.

Breeland argued the extensions resulted from a "holdover" provision in the lease, it was not required to give Kallenberger any notice of such extensions under the terms of the lease or guaranty agreement, Kallenberger unconditionally

agreed to guarantee payment of all rents due under the lease including those accruing during extensions or renewals of the initial term, and Kallenberger continued to be listed as an officer and director of LDI with the Secretary of State's office as late as April 30, 2006. Breeland moved for summary judgment based on these contentions and alleged Kallenberger had failed to raise any genuine issues of material fact.

In response, Kallenberger argued the plain language of the lease required all renewals to be noticed in writing and the failure of Breeland to provide such notice was fatal to its claim against him. He further argued that the guaranty agreement did not meet the requirements of KRS[3] 371.065[4] necessary to create a valid and enforceable agreement as it contained no date of termination nor did it set forth the maximum aggregate liability being guaranteed. Thus, he urged the trial court to deny the motion for summary judgment.

On February 26, 2010, the trial court issued an opinion and order granting summary judgment to Breeland. Citing *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 614-15 (Ky. 2004), the trial court found the guarantee agreement was a part of the lease and it was therefore unnecessary to

[3] Kentucky Revised Statutes.

[4] KRS 371.065(1) states:

> No guaranty of an indebtedness which either is not written on, or does not expressly refer to, the instrument or instruments being guaranteed shall be valid or enforceable unless it is in writing signed by the guarantor and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates.

expressly state Kallenberger's maximum liability or a termination date. It found Kallenberger liable under the guaranty agreement and granted judgment to Breeland in the amount of $29,500.00 plus costs, expenses and interest. Kallenberger's motion to alter, amend or vacate the judgment was denied and this appeal followed. We affirm.

Kallenberger argues the delinquent rents at issue did not arise under the lease and were not governed by the guaranty agreement, which he classifies as a separate and distinct document rather than a part of the lease. He contends the trial court erred in concluding to the contrary. He further argues the guaranty agreement failed to comply with the requirements of KRS 371.065 and was thus invalid. Based on these arguments, Kallenberger urges reversal.

First, Kallenberger contends the lease expired on its own terms on August 31, 2004, and no written notice of renewal was executed. He believes any holding over of possession of the leased premises after that date resulted in extra-contractual obligations not covered by the lease or guaranty agreement. In support of his argument, Kallenberger states that the lease specifically requires any renewals or extensions be reduced to writing and a notice of same must be received by Breeland ninety days prior to the expiration of the term. He contends the lease includes no other provisions for extending the term of occupancy. However, a careful review of the lease reveals this argument is without merit.

The first page of the lease contains a clause reading: "Notice of renewal must be in writing and received by landlord 90 days prior to expiration

date." Contrary to Kallenberger's assertion, this is not the sole provision in the lease concerning extended terms of occupancy. The second page of the lease contains numerous "additional stipulations," one of which runs directly counter to Kallenberger's argument. Paragraph 7 states: "[s]hould the lessee continue to occupy the premises after the expiration of said term, or after a forfeiture incurred, whether with or against the consent of the lessor, such tenancy shall be in accordance with the terms of this lease." This holdover provision clearly allows the lease to be extended without the necessity of a writing. We see no ambiguity or inconsistency in the two quoted provisions as the first contemplates an extension equal in length to the initial term of fifteen months, while the latter contemplates extensions of lesser—or possibly even greater—length.

The well-settled rule regarding leases extended by holding over is that a presumption exists that the original terms of the lease are carried over to the extended term. *Cass v. Home Tobacco Warehouse, Co.*, 311 Ky. 95, 223 S.W.2d 569, 571 (1949) (construing KRS 383.160, a statute concerning tenants holding over beyond the term of tenancy). However, based on the plain language contained in the lease, there is no need to resort to presumptions, as paragraph 7 clearly indicates the original terms continue into the extension. Thus, LDI's occupancy of Breeland's building from September 2004 through October 2005 was governed by the original lease terms and Kallenberger's obligation under the guaranty was not affected.

In addition, under the guaranty agreement, Kallenberger specifically waived notice of any extensions of time or lease term. Thus, Kallenberger's attempted disclaimer of liability based upon his contention that he was unaware of the extended terms of the lease is without merit and requires no discussion.

Finally, Kallenberger contends the guaranty agreement did not satisfy the requirements of KRS 371.065 as it contained no termination date nor maximum aggregate liability and is therefore invalid. He argues the trial court erred in not so holding. We disagree.

As the trial court correctly noted, our Supreme Court's opinion in *Wheeler & Clevenger* disposed of precisely the argument Kallenberger now advances. In discussing the proper interpretation of KRS 371.065, and rejecting the appellee's contention the guaranty agreement he signed was invalid for its failure to include a termination date or limitation of liability, the Supreme Court held that when the guaranty agreement is found on the document being guaranteed, the plain language of the statute does not require the inclusion of a termination date nor maximum aggregate liability. *Id.*, 127 S.W.3d at 615.

In the case at bar, the guaranty agreement was part of the lease Kallenberger executed, as the trial court correctly found. Thus, under the guidance of *Wheeler & Clevenger*, there was no necessity under KRS 371.065 to include a termination date or maximum liability provision. The guaranty agreement was statutorily sufficient and Kallenberger is obligated thereunder to pay the rents accruing under the lease. There was no error in the trial court's judgment.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT, HANS KALLENBERGER:

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BRIEFS FOR APPELLANT, CHERIE LANIER BISHOP:

No briefs filed.

BRIEF FOR APPELLEE:

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