STATE OF MICHIGAN

COURT OF APPEALS

DRIFTWOOD SALOON, INC.,

Plaintiff/Counterdefendant/
Appellant,

v

THOMAS R. GAUTHIER and SHARON L. GAUTHIER,

Defendants/Counterplaintiffs;
Appellees.

UNPUBLISHED
September 21, 2010

No. 292896
Berrien Circuit Court
LC No. 2008-000237-CH

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

This action concerns a leasehold dispute over a building in which plaintiff operated a restaurant-bar, known as Marsooz, on the first floor of the building. A company controlled by plaintiff's president had sold the entire building to defendants, and defendants then leased the first floor back to plaintiff, thereby allowing plaintiff to continue operating its business. Under the lease agreement, plaintiff had the option to renew the lease as long as plaintiff gave defendants notice of an intent to renew 90 days prior to the end of the lease term. Plaintiff failed to provide timely notice of its renewal intent, submitting a notice of intent to exercise the option and renew the lease 60 days before the lease term ended. Defendants refused to recognize and honor the late notice and subsequently commenced summary proceedings for eviction when the leasehold terminated. Plaintiff proceeded to file the instant action, which was consolidated with the eviction case, and it sought declaratory and injunctive relief, along with money damages. Plaintiff acknowledged its failure to comply with the 90-day notice provision; however, plaintiff asked the court to invoke its equitable authority and order defendants to renew the lease. Following a one-day bench trial, the trial court declined to provide plaintiff with relief, ruling that plaintiff would not suffer an unconscionable hardship if not allowed to renew the lease. Plaintiff appeals as of right. We affirm, holding that there is no legal or equitable basis warranting reversal.

I. FACTS

Marlin Lowery is plaintiff's president and its sole shareholder. Lowery testified that another corporation that he also solely owned, Cougar's, Inc., had previously owned the multi-story building at issue but then sold it to defendants in 2002. Lowery stated that defendants then

leased the first floor of the building to plaintiff, which floor houses plaintiff's restaurant-bar. The lease-option agreement, dated April 14, 2003, was between defendants, referred to in the singular as "Landlord," and plaintiff as "Tenant." The lease term was for a five-year period, terminating at noon on April 14, 2008. The total rent to be paid covering the entire lease period was $42,000, payable in semi-monthly installments of $350 ($700 per month). The lease-option agreement contained the following two clauses:

> Tenant covenants that:
>
> * * *
>
> It will give Landlord ninety (90) days written notice from the end of the Lease of intent to renew the Lease for a five (5) year term with the understanding that only two (2) such renewals exist under the terms hereof. In the event that notice is not given prior to 90 days from the termination of the Lease, then Tenant may not renew without the written consent of the Landlord.
>
> * * *
>
> Landlord covenants that:
>
> * * *
>
> They will grant Tenant the right to renew said Lease for two (2) additional five (5) year terms under the same conditions as herein specified as long as Tenant gives Landlord ninety (90) days written notice prior to the end of the term of Tenant's intent to renew.

Lowery testified that, during the lease term, defendants engaged in various construction and improvement projects with respect to the entire building, including electrical and plumbing work and some work done on the first floor in the restaurant-bar area. Lowery complained that defendants failed to fully and/or properly complete some of the projects on the first floor, forcing plaintiff to complete the projects and incur the associated costs. Lowery also testified that defendants' work on the upper floor and other areas of the building created a mess and wreaked havoc relative to the operation of his business on the first floor, causing plaintiff to make repairs and incur extra costs related to such matters as heating, air conditioning, and exposure to the elements, including water intrusion. Lowery also testified with respect to physical improvements and upgrades that he made to the restaurant-bar. Lowery summarized as follows in regard to costs and expenses:

> Installation of a fire depression system, $2,747.50. Installation of a used and then new furnace and air conditioning system, used cost [$]450. The new one cost $4,245. Completion of projects which [defendants] commenced and then did not finish in the demised premises, $2,919.09. Upgrade of men's bathroom and kitchen area, $4,915.75. Upgrade of front and back pool rooms and dance stage area, $5,085.01. Repair of women's bathroom floor as a result of negligence of landlord, $610.

Defendant Thomas Gauthier testified that he had his own construction company and that, contrary to Lowery's claims, he or hired contractors had completed the various construction projects, which were necessary because of the building's condition.[1] Gauthier claimed that, while work on the building created the possibility of inside exposure to the elements, measures were taken to protect the integrity of the building's interior, including plaintiff's restaurant-bar, through the use of tarps, canvas, Visqueen, and other tenting steps. Gauthier testified that all of the work done on the building was performed correctly and that the design plans had been approved by the city's building department.[2] Gauthier additionally testified to the numerous costs he absorbed in improving the building, and he also indicated that certain improvements and upgrades made by plaintiff lacked defendants' consent. Sharon Gauthier testified that the building was in need of many repairs when Lowery sold it to defendants, that the defendants were able to obtain a certificate of occupancy, and that her husband received a community award for his fine work in improving the building after it was purchased.

An electrician testified on behalf of plaintiff, asserting that, for about a year during construction, there was no separate electrical service for the building other than that servicing the first floor, and thus any electrical usage on the second floor would have been accomplished by wiring into the first floor's electrical panel. Another witness for plaintiff, an employee of the restaurant-bar, testified that plaintiff was left to complete various projects on the first floor, such as doing trim work, touching up drywall, and adding insulation.

Sixty days prior to the end of the lease period, Lowery provided notice to defendants of plaintiff's intent to exercise its right to renew the lease for an additional five years. As acknowledged by Lowery, this notice was one month too late under the clear and unambiguous terms of the lease-option agreement. Lowery did testify that he had read the agreement. Defendants refused to recognize and honor the untimely notice and later initiated summary proceedings for eviction in the district court.

Lowery testified that he had no financially feasible and viable location to which he could move the business. Lowery was a land contract vendee with respect to another building located "88 paces" away from the building currently housing the business, but he claimed that it would be cost prohibitive to relocate to that property. He asserted that it would be too expensive to rehab the property to make it suitable for a restaurant-bar. When the trial court asked Lowery whether his other building would generally be suitable for a bar, Lowery replied, "Any building could be turned into one, I would have to say." Lowery, however, reiterated that moving the business to his other building would be too expensive, costing him more than the value of the

---

[1] Gauthier did indicate that work in a rear foyer area was not fully completed; however, this was because Lowery had requested permission to do some of the work, which Gauthier granted, but Gauthier then stopped Lowery from proceeding when the work being undertaken was not performed in accordance with standards demanded by Gauthier.

[2] Much of the testimony by Lowery and Gauthier was devoted to discussing the details of the various construction and improvement projects.

business and effectively making him start over from scratch. Lowery testified that it would be ridiculous to move the business.

Defendant Thomas Gauthier testified that, on failure by plaintiff to give notice of intent to renew at the 90-day point prior to the end of the lease term, defendants started speaking with other potential tenants and created drawings of the space. The plan was to gut the first floor, thereby allowing prospective tenants to visualize possible uses of the space and to get a true sense of the square footage. Defendant Sharon Gauthier testified that defendants started working with realtors when plaintiff failed to give the notice when required. She conceded on cross-examination that defendants had not expended any money relative to the first-floor space following the absence of a renewal notice 90 days prior to the end of the lease term, that no contracts as to the space had been signed, and that nothing needed to be "undone."

On submission of plaintiff's proofs at trial, defendants moved for involuntary dismissal, MCR 2.504(B)(2), given that a bench trial was involved. Defendants argued that plaintiff failed to comply with the 90-day notice provision in the lease-option agreement, that plaintiff was not entitled to recover damages under the terms of the agreement,[3] and that failure to grant relief would not result in plaintiff incurring an unconscionable hardship.[4]

The trial court, although recognizing that it did not constitute binding precedent, relied on an unpublished opinion from this Court in addressing the motion for involuntary dismissal. The trial court stated that the unpublished opinion addressed a failure by a tenant to timely exercise an option to renew a lease and that the case recognized that a court, invoking its equitable authority, could order renewal of the lease if the delay did not prejudice the landlord and if the failure to grant relief would result in an unconscionable hardship to the tenant. The trial court ruled that based on these principles there was sufficient evidence to deny the motion for involuntary dismissal.[5] The trial court also allowed plaintiff's claim for money damages to proceed.

---

[3] The covenants in the lease-option agreement provided that plaintiff would maintain the interior of the premises in good working order and that plaintiff could remodel the premises at its own expense but only with defendants' consent.

[4] We note that, with respect to plaintiff's complaint, it contained three counts. Count I sought declaratory and injunctive relief, alleging that defendants had waived strict compliance with the lease-option's notice provision by accepting rental payments after the agreement terminated. This count and theory were not pursued at trial. Count II sought declaratory and injunctive relief, alleging that a renewed leasehold interest should be recognized because plaintiff's neglect to provide timely notice was excusable, defendants suffered no prejudice, and because plaintiff would suffer an unconscionable hardship if the lease were not renewed. Count III sought monetary damages arising out of certain repairs, the completion of construction projects, and various other improvements relative to the property paid for by plaintiff. Prior to trial, plaintiff expressly withdrew any claim for lost business profits.

[5] Defendants had earlier filed a pretrial motion for partial summary disposition, arguing that the lease-option agreement was clear and unambiguous, including the 90-day notice-of-renewal

(continued…)

Defendants' case consisted solely of their own testimony, which testimony we alluded to above. On the close of proofs and arguments by counsel, the trial court ruled that plaintiff had failed to strictly comply with the notice provision relative to exercising the option to renew the tenancy. The trial court then proceeded to examine whether there was an equitable basis to provide relief to plaintiff, once again citing the unpublished opinion from this Court. The trial court found that plaintiff's delay in giving notice did not significantly prejudice defendants, that it was never made clear to the court why Lowery did not timely comply with the notice provision, and that failure to grant relief to plaintiff would not result in an unconscionable hardship. The court expressed that the issue concerning whether there would be an unconscionable hardship was the most significant factor and that it was ruling in favor of defendants because of plaintiff's failure to show an unconscionable hardship. The trial court reasoned that there was testimony that plaintiff had another building and an absence of evidence indicating that this other building would be unsuitable for housing and operating plaintiff's business. The court also observed, with regard to the expense of relocating the business, that it did not justify a finding of unconscionable hardship because there would always be some costs associated with any tenant moving out. And it would be a bit nonsensical to allow a tenant to effectively renew a lease every time a tenant gave late notice on an option to renew simply on the premise that moving costs would be incurred if the tenant were forced to relocate. With respect to the past financial investments made by plaintiff to improve and repair the first floor of the building, the trial court found that plaintiff failed to obtain permission to do much of the work and that plaintiff was required to make certain contributions in order to maintain the property and to procure insurance. The court also rejected plaintiff's claim for money damages, which ruling is not challenged on appeal, finding that the testimony was insufficient to show that expenses incurred by plaintiff were reasonable and necessary. The court then awarded possession of the property to defendants on what was characterized as defendants' counterclaim for possession, which was in fact defendants' complaint for possession filed in the district court and consolidated with the circuit court case.[6]

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in failing to grant declaratory and equitable relief in the form of an order obligating defendants to renew the lease. Plaintiff also argues that the trial court erred relative to an evidentiary ruling in which it refused to permit testimony with respect to the value of plaintiff's business.

(…continued)

provision, that the agreement should thus be enforced as written, and that there was no dispute that plaintiff failed to comply with the 90-day notice provision, thereby entitling defendants to dismissal of the first two counts in the complaint. The trial court denied the motion, ostensibly on the basis that a factual issue existed with respect to the principles of prejudice and unconscionable hardship.

[6] In the subsequent judgment issued by the trial court on June 8, 2009, a judgment of no cause of action was entered on plaintiff's complaint, possession of the property was awarded to defendants, and possession dates were set, subject to interim payments by plaintiff to cover the fair market rental value of the property pending appeal or a stay bond. The last order in the record is an order denying defendants' second request for a writ of restitution.

A. STANDARD OF REVIEW

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, equitable decisions are reviewed de novo, and the underlying factual findings made by the trial court in support of its equitable rulings are subject to the clearly erroneous standard of review. *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Questions of law, in general, are reviewed de novo. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006).

We review for an abuse of discretion a trial court's decision to admit or exclude evidence; however, where the determination of admissibility involves a preliminary question of law, such as the application or interpretation of a statute or rule of evidence, our review is de novo. *Michigan Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006).

B. PRINCIPLES GOVERNING OPTIONS AND CONTRACTS IN GENERAL

An option is a preliminary contract for the privilege to purchase or lease property, and it is basically an agreement pursuant to which the owner of the property agrees that another shall have the right to buy or lease the property at a specified price and within a particular timeframe. *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). While a lease can constitute an interest in real property, an option to lease is not such an interest. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 393; 761 NW2d 353 (2008). An option to lease essentially constitutes an offer that requires strict compliance. *Id.* In *Bowkus v Lange*, 196 Mich App 455, 459-460; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993), this Court stated:

> As a general rule, an option contract is strictly construed and the time for performance is of the essence. An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein. Acceptance of the option must be in agreement with the terms proposed and the exact thing offered. Similarly, the option must be exercised in strict compliance with the time limitations established by the option agreement. [Citations omitted.]

An option is simply an offer, and the acceptance must be made within the time allowed and in minute compliance with its terms, otherwise the optionee's rights thereunder are lost. *LeBaron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947). Substantial compliance with the terms of an option is insufficient to constitute an acceptance. *Id.* at 315-316. The holder of an option who prays for specific performance has the burden to show that he or she has complied with the terms of the option agreement. *Id.* at 315. "Failure to so

comply results in loss of the rights under the option." *Oshtemo Twp*, 77 Mich App at 37, citing *Bergman v Dykhouse*, 316 Mich 315; 25 NW2d 210 (1946), and *Bailey v Grover*, 237 Mich 548; 213 NW 137 (1927).

With respect to contracts in general, our Supreme Court in *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), observed:

> [U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations . . . as a basis upon which courts may refuse to enforce unambiguous contractual provisions.

If the parties freely established their mutual rights and obligations through the formation of an unambiguous contract, and if the contract is not contrary to public policy, the law requires a court to enforce the terms and conditions contained in the contract. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007); *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008).

C. DISCUSSION

Plaintiff contends that it was entitled to declaratory and equitable relief ordering defendants to renew the lease for a second five-year term. Plaintiff's argument on this matter consists mainly of quoting at length the unpublished opinion cited by the trial court below, followed by the assertion that an unconscionable hardship would exist here given the loss of over $20,000 in leasehold improvements and the fact that plaintiff would essentially lose the entire value of its business where the cost to relocate would exceed the value of the business. Defendants argue that the case law unassailably establishes that plaintiff was required to strictly comply with the clear and unambiguous notice provision and that resort to equitable principles to preclude enforcement of the provision would be improper. Defendants also maintain that, assuming it proper to even consider equitable principles under the circumstances, plaintiff failed to show that it would suffer an unconscionable hardship if the lease were not renewed. Defendants also contend that they would be prejudiced if plaintiff obtained the requested relief.

We first note that an unpublished opinion "is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Moreover, the binding case law cited above indicates that an option agreement requires strict compliance with its terms, including any time limitations in which to exercise the option. *LeBaron Homes*, 319 Mich at 315; *Johnson Family*, 281 Mich App at 393; *Bowkus*, 196 Mich App at 459-460.

There is no claim that the 90-day notice provision violates public policy. And only traditionally-recognized contract defenses can be invoked to avoid the enforcement of an unambiguous contractual provision, which include the defenses of duress, waiver, estoppel, fraud, or unconscionability. *Rory*, 473 Mich at 470, 470 n 23. In regard to the defense of

unconscionability, this Court in *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009), stated:

> For a contract or a contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." "Substantive unconscionability exists where the challenged term is not substantively reasonable." However, a contract or contract provision is not substantively unconscionable simply because it is foolish for one party or very advantageous to the other. "Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." [Citations omitted.]

The 90-day notice provision here, in and of itself, is certainly not unconscionable under either the principle of procedural or substantive unconscionability; it is reasonable and not the result of weak bargaining power by one party. There is no dispute that, under the terms of the lease-option agreement, plaintiff failed to give the required notice in timely fashion. And there is no dispute that defendants did not consent, in writing or otherwise, to the renewal of the five-year lease.

Moreover, assuming that equity can conceivably intervene to protect plaintiff, we find no error in the trial court's ruling. Lowery admitted that he had read and was familiar with the lease-option agreement, and he never explained why he failed to timely comply with the notice provision. Further, while plaintiff complains of losing over $20,000 in leasehold improvements, the agreement itself provided that any remodeling would be at the tenant's own expense. There was also testimony that defendants did not give consent to some of the improvements, as required by the lease-option agreement, and the trial court apparently accepted Thomas Gauthier's testimony that consent was not obtained. See MCR 2.613(C) (we defer to the trial court to judge the credibility of the witnesses who appeared before it). There was also conflicting testimony concerning the necessity of incurring some of the repair and improvement costs, and the trial court, in the context of addressing the claim for money damages, found that plaintiff presented insufficient evidence to establish necessity. Lowery himself testified that the other building in which he has an ownership interest could be suitable for housing the restaurant-bar, and said property is only "88 paces" away from the business's current location. Although plaintiff claims that relocating the business would be cost-prohibitive and that the cost to move would exceed the entire value of the business, our examination of the record reveals a complete failure by plaintiff to proffer any evidence concerning the actual cost of relocating the business, nor was there presented any relevant evidence of the business's value. Related to this subject, plaintiff also argues in cursory fashion that the trial court erred in precluding Lowery from testifying in regard to the value of the business. Plaintiff asserts that Lowery could have provided a lay witness opinion as to value under MRE 701. Plaintiff contends that the error was not harmless, where the testimony directly effected the equity analysis on unconscionable hardship.

The record reflects that plaintiff sought to introduce evidence, through the testimony of Lowery, concerning the purchase price of the building in 2002 in order to show the value of the business. The court excluded the evidence on the basis that the sale occurred roughly six years earlier and thus the sales price was no longer relevant. Initially, we fail to comprehend how the

purchase price of the entire building provides any significant insight into the value of the restaurant-bar located on the first floor; there would be multiple variables in valuing the business unassociated with the purchase price of the building. See, e.g., *Kowalesky v Kowalesky*, 148 Mich App 151, 157; 384 NW2d 112 (1986) (in general, "the value of a business is its assets, less its liabilities"). Accordingly, the evidence was irrelevant and thus inadmissible. MRE 401-402. We also find that the trial court did not abuse its discretion in excluding the evidence on the basis that the sale occurred many years ago. Utilizing the purchase price to assess value is questionable considering fluctuations in the real estate market over the years and changes in the building due to construction. See *State Hwy Comm v Abood*, 83 Mich App 612, 618; 269 NW2d 247 (1978) (proof of a sales price is competent to show value if the sale is not too remote in time). Further, plaintiff did not seek to make an offer of proof below regarding the sales price, leaving us without authority to reverse and without any idea whatsoever with regard to whether the excluded evidence had a favorable bearing on plaintiff's case. See MRE 103(a)(2) (evidentiary error may not be predicated on a ruling that excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the court by an offer of proof or was apparent from the question asked). Moreover, assuming any error, it was harmless, MCR 2.613(A), given plaintiff's failure to comply with the clear and unambiguous 90-day notice provision, the lack of relevance to the value of the business, and the failure of plaintiff to submit evidence regarding the cost of relocating the business that could be compared against the business's value. Reversal is simply unwarranted.

III. CONCLUSION

Considering the clear and unambiguous language in the lease-option agreement requiring notice to be given 90 days prior to the end of the lease term in order to exercise the renewal option, plaintiff's undisputed and unexcused failure to comply with the notice provision, the absence of any written consent given by defendants allowing renewal, and considering plaintiff's failure to establish an equitable basis for relief, assuming resort to equity is even permissible, the trial court did not err in entering judgment in favor of defendants. Furthermore, the trial court's evidentiary ruling excluding testimony concerning the purchase price of the building in 2002 did not constitute an abuse of discretion, nor was the evidence prejudicial to plaintiff, assuming error in excluding the evidence.

Affirmed. Defendants, having prevailed in full, are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray