[Cite as *NCS Healthcare of Ohio L.L.C. v. Van Cleef Asset Mgt., Inc.*, 2010-Ohio-5353.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94215

NCS HEALTHCARE OF OHIO LLC

PLAINTIFF-APPELLANT

vs.

VAN CLEEF ASSET MANAGEMENT, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-630239

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 4, 2010

ATTORNEY FOR APPELLANT

Scott S. Weltman
Weltman, Weinberg & Associates
Lakeside Place, Suite 200
323 Lakeside Avenue, West
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

William P. Gibbons
1525 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114-1444

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, NCS Healthcare of Ohio, LLC ("NCS"), appeals the trial court's judgment in favor of defendant-appellee, Van Cleef Asset Management, Inc. ("Van Cleef"), on its claim for money purportedly owed under a sublease agreement. We affirm.

Procedural History and Facts

{¶ 2} The complaint alleges the following facts. On October 10, 2000, NCS Healthcare, Inc. — an entity separate from the plaintiff — and Van Cleef entered into a sublease. Van Cleef allegedly failed to comply with its payment obligations, and as a result of said default, Van Cleef owed $96,721.03 plus interest under the agreement. NCS identified itself as being the assignee of all

of the rights of "NCS Healthcare, LLC f.k.a. NCS Healthcare, Inc."

{¶ 3} Van Cleef answered the complaint and countered, among other things, that NCS's complaint is barred by the existence of a novation with a party not named in the complaint, i.e., Omnicare, Inc., and that NCS has no privity of contract with Van Cleef. It specifically asserted that Omnicare acquired NCS sometime in 2003 under a hostile takeover and that Omnicare "wrote off its books for financial as well as tax purposes substantially all of the leases and subleases of NCS Healthcare, Inc.," including the sublease at issue in this case. Van Cleef further denied that NCS was the successor and/or assignee of NCS Healthcare, Inc. under the sublease. Van Cleef also filed a third-party complaint against Omnicare, alleging claims of breach of contract and fraud. It further sought a declaratory judgment, asking the court to declare that a novation of the sublease occurred between Van Cleef and Omnicare and that Van Cleef fully performed all of its obligations under the agreement.

{¶ 4} The following facts are undisputed and stipulated by the parties:

{¶ 5} Van Cleef and NCS Healthcare, Inc. entered into a sublease agreement on October 10, 2000, wherein Van Cleef was the sublessee and agreed to a term of payment starting on November 1, 2000 and ending on October 31, 2005.

{¶ 6} NCS Healthcare, Inc. was a Delaware corporation, which was registered to do business in Ohio until it surrendered that registration on

December 31, 2003. On May 12, 2003, NCS Healthcare, Inc. sent a letter to Van Cleef, asking it to forward payments to Ron Pyles at the Hilliard, Ohio location. (Prior to this time, Van Cleef hand-delivered to NCS Healthcare, Inc.'s office in Beachwood the checks for rent and other charges due under the sublease for the months November 2000 through May 2003. These checks were made payable to NCS Healthcare, Inc. and were cashed.) The letter further informed Van Cleef that its invoices would now be coming from the Hilliard office as well. Van Cleef subsequently mailed checks each and every month on a timely basis covering June 2003 through November 2004 to Hilliard, Ohio as directed under the May 12, 2003 letter. Checks for the months of October 2003 through November 2004 were never negotiated. NCS Healthcare, Inc. claims to have not received those checks. The amount of money that NCS claims is owed under the sublease, i.e., $96,971.03, arose out of this period from October 2003 through November 2004.

{¶ 7} In December 2004 or January 2005, representatives of Omnicare contacted Van Cleef to advise it that rent checks had not been received from October 2003 through November 2004. Van Cleef was instructed to issue all checks to Omnicare, Inc. and to send them to Omnicare's Covington, Kentucky's offices. Thereafter, Van Cleef issued all rent checks to Omnicare, Inc. and sent them to Covington, Kentucky for the balance of the sublease term. There is no dispute regarding rent and other charges for the period from

December 2004 through October 2005.

{¶ 8} The parties further stipulated that Omnicare, Inc. was never a party to the lease or sublease and that NCS Healthcare, Inc. was acquired by Omnicare, Inc. sometime in 2003. NCS and NCS Healthcare, LLC are subsidiaries of Omnicare, Inc.

{¶ 9} As for the disputed facts, the primary issue centered around whether there was a novation to the original sublease. NCS contended that there was no novation of the original sublease. And although not a party to the sublease, NCS relied on an amended agreement dated May 2007 between itself and NCS Healthcare, LLC, formerly known as NCS Healthcare, Inc., wherein it was assigned NCS Healthcare, LLC's right, title, and interest in the underlying sublease dated October 10, 2000 by and between NCS Healthcare, Inc. and Van Cleef. Based on this assignment, NCS contended that it was entitled to collect the rent payments for the 14-month period of October 2003 through November 2004. It further contended that there was no novation, as evidenced by the fact that no separate writing had been executed.

{¶ 10} Conversely, Van Cleef contended that NCS had no rights under the sublease agreement and that the 2007 purported assignment was invalid. It further argued that a novation had occurred wherein it agreed to pay Omnicare, Inc., rather than NCS Healthcare, Inc., for the remaining term of the lease. According to Van Cleef, it was further negotiated that "if those payments were

made as agreed upon by Van Cleef, all obligations of Van Cleef under the sublease would be duly performed and satisfied."

{¶ 11} In lieu of a bench trial, the parties agreed that the matter would be decided on the briefs and all other evidentiary materials that were made part of the record, including the parties' previously filed motions for summary judgment and joint stipulations. After consideration of the issues and applicable law, the trial court found in favor of the defendant on plaintiff's claim, holding that defendant did not owe any money under the sublease agreement. In support of this holding, the trial court found that a novation did occur for the rent due for the period of October 2003 through November 2004, noting the following:

{¶ 12} "It is clear from the evidence presented that the corporate entities, preceding the current plaintiff in this case, went through various changes as evidenced by their own letter informing defendant to send payments to a different address in May of 2003. The payments were undisputedly timely tendered each month and then never processed. Then Omnicare, an entity that was not even licensed to operate in Ohio, surfaced as the parent company after acquisition of the sublessor of this lease in November 2004. Omnicare was clearly uncertain as to any rights it may have under the original sublease with the defendant. Therefore, it is logical that it would agree to continue the lease with the defendant for the remaining period (October 2005) and not require any other payment, thus creating a novation. Further supporting the

novation is the fact that there was no attempt to collect this alleged 'debt' until defendant completed the lease and vacated the premises."

{¶ 13} Van Cleef subsequently dismissed its counterclaim and third-party complaint.[1] NCS now appeals the trial court's decision that found in favor of Van Cleef, raising the following three assignments of error:

{¶ 14} "[I.] The trial court committed reversible error when it found that a novation occurred for rent due by the defendant for the period of October 2003 through November 2004, even though defendant continued to make lease payments thereafter in accordance with the original lease terms.

{¶ 15} "[II.] The trial court committed reversible error when it found that the parties entered into an enforceable subsequent mutual agreement to discharge the original contract for lease of premises by defendant from plaintiff.

{¶ 16} "[III.] The trial court committed reversible error when it found that the lease terms could be orally modified as the statute of frauds requires all contracts relating to real estate to be in writing."

{¶ 17} The issue of whether the trial court properly determined that a novation occurred is dispositive of all three assignments of error; we will therefore address them together.

Standard of Review

[1]Although Van Cleef had filed a cross-appeal seeking to recover its attorney fees, the parties subsequently filed a joint agreement to dismiss the cross-appeal, which this court granted.

{¶ 18} Because the parties agreed that the claims be tried to the court on the briefs and other evidentiary materials submitted, the trial court acted in the capacity of fact finder. We therefore review the court's judgment to determine whether it was against the manifest weight of the evidence. See *Seiber v. State*, 8th Dist. No. 81314, 2002-Ohio-6816. When reviewing a judgment under a manifest-weight-of-the-evidence standard, we will not disturb the trial court's judgment provided that it is supported by competent, credible evidence going to all the material elements of the case. See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

{¶ 19} With this foregoing standard of review in mind, we turn to NCS's assignments of error.

Novation

{¶ 20} NCS contends that the trial court wrongly concluded that a novation of the sublease agreement occurred, thereby relieving Van Cleef of any rent obligations for the period of October 2003 through November 2004. It contends that there was no evidence of any consideration to support a novation and that Van Cleef's own actions, i.e., continuing to pay in accordance with the terms of the original sublease agreement, negates any claim of novation. We disagree.

{¶ 21} In *Snell v. Salem Ave. Assoc.* (1996), 111 Ohio App.3d 23, 32, 675 N.E.2d 555, the court set forth the requirements for a novation as follows:

{¶ 22} "'A contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by the substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration. * * * The discharge of the existing obligation of a party to a contract is sufficient consideration for a contract of novation.' *McGlothin v. Huffman* (1994), 94 Ohio App.3d 240, 244, 640 N.E.2d 598, 601."

{¶ 23} "Intent, knowledge and consent are the essential elements in determining whether a purported novation has been accepted." *Bolling v. Clevepak Corp.* (1984), 20 Ohio App.3d 113, 125, 484 N.E.2d 1367. These elements "need not be express, but may be implied from circumstances or conduct." *Natl. City Bank v. Reat Corp.* (1989), 64 Ohio App.3d 212, 216, 580 N.E.2d 1147.

{¶ 24} "The effect of a novation is to discharge the obligation of the parties under the original contract." *Union Cent. Life Ins. Co. v. Hoyer* (1902), 66 Ohio St. 344, 64 N.E. 435.

{¶ 25} Here, we find that competent, credible evidence exists to support the trial court's decision that a novation occurred. Van Cleef submitted affidavits from two of its officers, averring that Regis Robins, on behalf of Omnicare, Inc., contacted Van Cleef and negotiated a resolution of outstanding obligations under the sublease. They further averred that it was agreed that Van Cleef submit payment for rent directly to Omnicare rather than to NCS

Healthcare, Inc., and that "upon payment of all such remaining obligations, all obligations of Van Cleef under the sublease would be fulfilled and satisfied." Further, as noted by the trial court, the fact that Omnicare never attempted to collect this alleged "debt" until after Van Cleef completed the lease and vacated the premises substantiates Van Cleef's claim that a novation occurred. And Omnicare never rebutted Van Cleef's claim that Omnicare had abandoned and written off the sublease as part of its acquisition of NCS Healthcare, Inc. This act likewise supports the trial court's conclusion that a novation occurred.

{¶ 26} NCS further argues in its second assignment of error that the trial court wrongly concluded that a novation occurred, ignoring express provisions of the original sublease agreement and failing to recognize that it is the assignee of the original sublessor. We find NCS's argument misplaced. Once the trial court found that a novation occurred, the terms of the original sublease are irrelevant. See *RMI Titanium Co. v. Occidental Chem. Corp.* (Sept. 11, 1997), 8th Dist. Nos. 71471, 71486, and 71487; *Natl. City Fin. Corp. v. Quinn*, 8th Dist. No. 83257, 2004-Ohio-2335.

{¶ 27} As for NCS's claim that a novation could not have occurred in this case because it was never memorialized in writing, we find that the full performance of the parties' obligations precludes enforcement of R.C. 1335.05, Ohio's version of the statute of frauds. See, generally, *Vargo v. Clark* (1998), 128 Ohio App.3d 589, 716 N.E.2d 238 (recognizing that a court may enforce an

oral agreement to transfer real estate if the parties have either partially or fully performed the agreement).

{¶ 28} NCS's three assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recovers from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

PATRICIA A. BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR