Affirmed and Memorandum Opinion filed April 8, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01180-CV

PAUL AVENELL, Appellant

V.

CHRISMAN PROPERTIES, L.L.C., Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2006-38301

MEMORANDUM OPINION

In this breach of contract case, appellant Paul Avenell asserts that the trial court erred (a) in finding him liable both "Individually and d/b/a K & S Contracting" for unpaid rent pursuant to a lease agreement and (b) in calculating the damages suffered by appellee, Chrisman Properties, L.L.C. ("Chrisman"). We affirm.

I. Background

In late 2004, Paul Avenell, as trustee for the Avenell 1996 Family Trust (the "Trust"), sold property located at 14041 Chrisman Road in Houston (the "property") to

Michael Ewer. Through an addendum to the purchase agreement, Avenell, on behalf of the Trust, agreed to lease back the property from Ewer.[1] A sixty-six month lease agreement (the "lease") was signed on October 1, 2004; the landlord listed in the lease was "Michael Ewer and/or assigns"[2] and the tenant was listed as "Mr. Paul Avenell – K&S Contracting." The lease specified as the permitted use of the property: "For the business use of the K&S Contracting Company – HVAC Design and Installation." In an article entitled "Assignment and Subletting," "Tinco, Tempature [sic] Systems, Inc., and K&S Contracting" were identified as "existing subleases currently in the leased premises."

The lease additionally contained several sections regarding defaults and remedies, including provisions that the tenant could be liable for all rent due under the lease in the event of default and that the tenant must pay the landlord "all reasonable costs and expenses" incurred by the landlord in re-leasing property, including court costs and expenses. The lease was executed by Ewer as landlord and "K & S Contracting" as tenant, with Paul Avenell signing for "K & S Contracting."

Over the next several months, the rent under the lease was paid to Chrisman. However, in November 2005, lease payments for the property stopped, and in April 2006, K&S Contracting abandoned the property. As is relevant here, in January 2007, Chrisman filed a claim against "Paul Avenell, Individually and DBA K&S Contracting, Paul Avenell, as Trustee for the 1996 Avenell Family Trust, [and] K&S Contracting, Inc." for breach of the lease. Avenell responded by generally denying Chrisman's allegations.

[1] In addition to a cash payment by Ewer for the property, Chrisman executed a promissory note in favor of the Trust. When the lease tenant(s) stopped paying rent, Chrisman apparently ceased payments on the promissory note, and Avenell, as trustee for the Trust, filed suit against Chrisman on the note. Chrisman countersued for damages under the lease agreement. The suit on the note was settled, and the trial court re-aligned the parties with Chrisman as plaintiff and Avenell et al. as defendants before the bench trial.

[2] Ewer subsequently assigned the lease to Chrisman.

The case was tried to the bench on April 30, 2008. At the trial, Ewer testified that he had not thoroughly reviewed the lease prior to signing it and that he intended for the Trust to be the tenant, per the addendum to the property purchase agreement. However, he also stated, "The intention under the contract [the property purchase agreement] was that the tenant should be the trust. The tenant under the lease is Mr. Paul Avenell." He further testified that he "should have paid more attention to the fact that [the lease] said Paul Avenell and not the . . . Trust." He stated that he leased the property to either Paul Avenell or K&S Contracting, but that he believed neither of these entities was a corporation. Ewer also explained the method he used to calculate his damages and provided a spreadsheet to the trial court. According to Ewer, he offset the rent he should have received under the lease by the amount he was due under a new lease he was able to negotiate with another tenant. He included a "lease commission" in the damages figure he arrived at, for a total of $134,104.50 in damages for breach of the lease. Ewer also stated that he was no longer in possession of the property.

Avenell testified that he, like Ewer, had not thoroughly reviewed the lease before signing it. He explained that he signed the lease on behalf of K&S Contracting as "operations manager" and never intended for the Trust to be a tenant under the lease. He also testified that he was not an officer, a director, or an owner of K&S Contracting, Inc. He stated that the individual companies that had submitted rent checks under the lease to Chrisman were predominantly owned by various members of his family. He also explained that K&S Contracting, Inc. was still in business, but more than likely had more debts than assets and no longer had any employees.

After the hearing, the trial court entered judgment in favor of Chrisman. The trial court concluded that (a) the lease was ambiguous as a matter of law, (b) Avenell "Individually and dba K&S Contracting" was the tenant under the lease, and (c) Chrisman was entitled to damages in the amount of $134.104.50, plus pre-judgment interest and attorney's fees. Avenall filed a motion for new trial, challenging these legal conclusions; the motion was overruled by operation of law. This appeal timely ensued.

II. Issues Presented

In his first issue, Avenell asserts that the trial court erred in finding the lease ambiguous and holding him individually and d/b/a K&S Contracting liable for unpaid rent pursuant to the lease. He contends the trial court erred in calculating Chrisman's damages in his second issue.

III. Analysis

A. Construction of the Lease

Whether a contract is ambiguous is a legal question we review de novo. *See Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009). Our primary concern in construing a written contract is to ascertain the true intentions of the parties as expressed in the instrument. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005). However, a contract is not ambiguous merely because the parties disagree about its meaning. *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009).

Here, the trial court concluded that the lease was ambiguous as to whom the tenant was; the court determined that the tenant was either "Paul Avenell, Individually and DBA K&S Contracting" or "K&S Contracting, Inc." However, we see nothing in the contract to indicate that Avenell entered into the lease agreement on behalf of "K&S Contracting, Inc." Instead, each time his name is included in the contract, it is associated with "K&S Contracting." For example, in Article 1.1 of the lease, "Mr. Paul Avenell – K&S Contracting" is listed as the tenant. Further, on the signature page, the signature block for "Tenant" was completed as follows:

TENANT:

K&S Contracting (handwritten)

By: Paul Avenell (signature)

Name: Paul Avenell (handwritten)

Title: Op. Mgr. (handwritten)

Thus, we conclude that the lease is unambiguous and that K&S Contracting is the tenant.

Avenell asserts that the contract contains a reference to "K&S Contracting Company," which is sufficient to notify Chrisman that K&S Contracting is incorporated. However, the only place in the lease where "K&S Contracting Company" is mentioned is in the section designating the "permitted use" of the premises. All other references in the lease to "K&S Contracting" do not contain the word "company" or any other indication that K&S Contracting is structured in such a manner as to protect Avenell from personal liability. Courts do not presume agency. *Bernsen v. Live Oaks Ins. Agency, Inc.*, 52 S.W.3d 306, 309 (Tex. App.—Corpus Christi 2001, no pet.); *Virani v. Cunningham*, No. 14-08-01166-CV, 2009 WL 2568349, at *2 (Tex. App.—Houston [14th Dist.] Aug. 20, 2009, pet. denied) (mem. op.). An agent is personally liable on a contract he signs if he fails to disclose the fact and intent of his agency. *Virani*, 2009 WL 2568349, at *2 (citing *Ward v. Prop. Tax Valuation, Inc.*, 847 S.W.2d 298, 300 (Tex. App.—Dallas 1992, writ denied)). It is the burden of the agent to prove that he properly disclosed his principal. *Id.* (citing *DiGiammatteo v. Olney*, 794 S.W.2d 103, 104 (Tex. App.—Dallas 1990, no writ)). Avenell did not disclose that the principal was K & S Contracting, Inc., and the court did not find in favor of Avenell on this point. *See Sw. Bell Media, Inc. v. Trepper*, 784 S.W. 2d 68, 72 (Tex. App. —Dallas 1990, no writ).

It appears from the face of the contract that "K&S Contracting" may be a trade name. But "the use of a tradename is generally an insufficient disclosure of the principal's identity and the fact of agency so as to protect the agent against personal liability." *Burch v. Hancock*, 56 S.W.3d 257, 261–62 (Tex. App.—Tyler 2001, no pet.); *see also Lachman v. Houston Chronicle Publ'g Co.*, 375 S.W.2d 783, 785 (Tex. Civ.

App.—Austin 1964, writ ref'd n.r.e.) (stating that use of a trade name in a contract is not sufficient disclosure of the identity of a principal and the fact of agency).

Crisman sued Avenell as "Paul Avenell, Individually and DBA K&S Contracting." Avenell did not respond to Chrisman's allegation that Avenell was operating under the trade name "K&S Contracting" by filing a verified pleading. *See* TEX. R. CIV. P. 93(14) (requiring a verified pleading to establish "[t]hat a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged). Failure to file verified pleadings as required by Rule 93 waives a party's right to complain about the issue. *Cf. Pledger v. Schoellkopf*, 762 S.W.2d 145, 146 (Tex. 1988) (per curiam) (concluding that failure to file a verified pleading denying liability in capacity sued results in waiver of right to complain); *see also Thomas v. Sun Indus., Inc.*, No. 05-92-02559-CV, 1994 WL 21898, at *2 (Tex. App.—Dallas Jan. 27, 1994, writ denied) (not designated for publication) (concluding that defense that appellant was not doing business under assumed name was waived because defendant failed to file verified denial). Because Avenell failed to file a sworn affidavit that he was not operating under the trade name "K&S Contracting," the trial court did not err in concluding that he was individually liable on the contract. We therefore overrule his first issue.

B. Damages

Avenell next asserts that the trial court erred in calculating damages under the lease because Chrisman sold the property in May 2007 and the damages awarded to Chrisman included unpaid rent through the entire term of the lease.[3] Ordinarily, damages

[3] Avenell contends, "Once a landlord conveys the property to a third-party, he is no longer entitled to collect rent on the property." The cases he cites to support this contention, however, are inapposite. First, in *Ellison v. Charbonneau*, a 1936 case from the Fort Worth court of appeals, the court concluded that when a landlord evicts a tenant, he is not entitled to the rent due under the lease. *See* 101 S.W.2d 310, 314–15 (Tex. Civ. App.—Fort Worth 1936, writ dism'd). But Chrisman did not evict Avenell; instead, Avenell defaulted on the lease. Second, in *Evans v. First Guaranty State Bank of Southmayd*, a 1917 case from the Amarillo court of appeals, the court held that a landlord who conveys land by general warranty deed without reserving rents loses any interest he may have had in the rents. *See* 195 S.W. 1171, 1172 (Tex. App.—Amarillo 1917, no writ). Neither case addresses a contractual remedy under a lease.

in a breach-of-contract case are measured by the "benefit of the bargain," the purpose of which is to restore the injured party to the economic position it would have been in had the contract been performed. *Mays v. Pierce*, 203 S.W.3d 564, 577 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Generally, the parties to a contract can agree on the remedy to be applied if the agreement is breached; such an agreement should be enforced unless it is illegal or against public policy. *Gilbane Bldg. Co. v. Two Turners Elec. Co.*, No. 14-05-00908-CV, 2007 WL 582252, at *7 ((Tex. App.—Houston [14th Dist.] Feb. 27, 2007, pet. denied) (mem. op.) (citing *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 440 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.)).

In this case, the lease defined failure to pay rent and abandonment of the leased property as "events of default." Avenell does not dispute that K&S Contracting defaulted on the lease. Further, as noted above, the lease provided remedies for default, including all unpaid rent under the lease and "all amounts required to be paid by Tenant to Landlord until the date of expiration of the Lease Term . . . , diminished by all amounts received by Landlord through reletting of the Leased Premises during such remaining term . . . ." The lease further provided that, in the event of a default, the "Tenant shall also pay to Landlord all reasonable costs and expenses incurred by Landlord, including … reletting all or any part of the Leased Premises."

Ewer provided an exhibit to the trial court calculating damages under the lease, including the rent due from the date of K&S Contracting's default through the end of the lease. Ewer also included in this exhibit the amount of the broker's fee he paid to re-lease the property. Finally, Ewers included an offset for the rent he expected to receive from the substitute tenant through the entire term of the original lease. Avenell has not claimed that the agreed-upon remedies contained in the lease are illegal or against public policy, and the damages awarded conform to the terms of the contract. *See id.*

In fact, not upholding such a lease provision could lead to unintended results. If tenants knew that they could breach their lease before a sale of a building and suffer no

consequences for a breach of lease, the value of a leased building would be seriously undermined. Any tenant with unfavorable lease terms could breach and then re-negotiate with the new buyer. Under these circumstances, we overrule Avenell's second issue.

IV. Conclusion

In sum, although we disagree with the trial court's legal conclusion that the lease is ambiguous, we agree that Avenell, individually, is liable under the lease. We further conclude that the trial court did not err in calculating damages under the lease. We therefore overrule Avenell's two issues and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.