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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SPROUTS FARMERS MARKET, LLC, an) No. 1 CA-CV 09-0117
Arizona limited liability)
company,) DEPARTMENT E
)
Plaintiff/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
WILLIAMSFIELD ROAD AND VAL VISTA,) Civil Appellate Procedure)
LLC, a Nevada limited liability)
company,)
)
Defendant/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-000540

The Honorable Edward O. Burke, Judge

VACATED AND REMANDED

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G E M M I L L, Judge

¶1 Williamsfield Road and Val Vista, LLC ("Val Vista")
appeals from the trial court's grant of summary judgment in

favor of Sprouts Farmers Market, LLC ("Sprouts"). Because we conclude that a genuine issue of material fact exists regarding the meaning of the phrase "operate a grocery store" in the lease agreement between the parties, we vacate the summary judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶12 In reviewing a grant of summary judgment, we view the evidence and reasonable inferences "in the light most favorable to the party opposing the motion." *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

¶13 Until August 2007, Val Vista owned The Shoppes at Val Vista, a shopping center located in Gilbert, Arizona. In April 2005, Val Vista and Sprouts executed a lease agreement ("Lease") whereby Val Vista agreed to lease space in The Shoppes at Val Vista ("shopping center") to Sprouts for use as a "grocery store and all related uses." The Lease, which was prepared by Sprouts, contained the following provision ("Exclusive Provision"):

7.4 Exclusives. Except as provided herein, during the Lease Term, so long as Tenant is operating as a grocery store at the Premises that provides the following operations, services and sales, and Tenant is not in default past any applicable cure period, *Landlord will not enter into, or modify, any lease with any other tenant of the Parcel that permits such tenant to a) operate a*

grocery store, meat or seafood market, produce market; b) sell vitamins and supplements; c) sell ethnic food (excluding restaurants) or natural or health food (excluding restaurants); d) sell packaged beer and wine except as ancillary sales in conjunction with a convenience store, drug store or other operation; or d)[sic] operate a full service bakery (excluding a restaurant primarily selling bagels and bagel sandwiches) or delicatessen (provided that a new tenant may sell deli-type sandwiches but cannot serve sliced meats or cheeses except for individual eat in or take home meals).

In the event of any violation of restrictions in **Article 7.4** above by another tenant in the Parcel, Tenant shall notify Landlord in writing of such violation. Landlord shall have fourteen (14) days from receipt of Tenants notice to notify the violator, in writing, that such violation must cease immediately. If such violation does not cease within thirty (30) days after the violator's receipt of Landlord's notice, then Landlord shall commence legal action to strictly enforce the Exclusive Use provisions, and Tenant's monthly installment of Minimum Annual Rent (or portion thereof) will be reduced by thirty percent (30%) for each day after such thirty (30) day period until (i) such violation ends, or (ii) the right to such Exclusive Use provision expires.

(Emphasis added in italics.)

¶14 In December 2006, Val Vista agreed to lease space in the shopping center to Dollar Tree Stores, Inc. ("Dollar Tree"). In anticipation of Dollar Tree opening a store, Sprouts and Val Vista amended the Lease ("Amendment"). The Amendment modified the Exclusive Provision, allowing Dollar Tree to sell certain

vitamins, supplements and ethnic foods within prescribed limitations.

¶15 In April 2007, Steve Jones, the Director of Construction for Sprouts, visited the Dollar Tree store located in the shopping center. According to Jones, he observed that the Dollar Tree store was selling various types of groceries in violation of the Exclusive Provision. As a result, on May 14, 2007, Sprouts notified Val Vista via e-mail that Dollar Tree was operating a grocery store in violation of the Lease. Val Vista, however, denied that Dollar Tree was operating a grocery store and declined to contact Dollar Tree.

¶16 On June 6, 2007, Sprouts, pursuant to the Exclusive Provision, notified Val Vista in writing that Val Vista was allowing Dollar Tree to operate in a manner that violated the Lease. Val Vista in turn notified Dollar Tree of Sprouts' allegations and Dollar Tree denied that it was operating a grocery store. Consequently, on January 4, 2008, Sprouts filed a complaint in superior court seeking a declaratory judgment that Val Vista, by allowing Dollar Tree to operate a grocery store, was in violation of the Exclusive Provision contained in the Lease.

¶17 On June 16, 2008, Sprouts filed a motion for summary judgment, again requesting the court declare that Dollar Tree was operating a grocery store in violation of the Lease.

Pursuant to the Exclusive Provision, Sprouts also requested the court declare that "Sprouts is entitled to a thirty percent (30%) rent reduction from May 29, 2007 until the violation ends." Sprouts argued that Dollar Tree "operates a grocery store by selling household, grocery and perishable items." Sprouts' motion listed multiple "grocery" items that were for sale at the Dollar Tree store and claimed that the sale of these items violated the Exclusive Provision.

¶18 In support of its motion, Sprouts filed a declaration from Dennis Rodriguez, the Assistant Regional Manager of Arizona for Sprouts. Rodriguez stated, under penalty of perjury, that he visited the Dollar Tree store located in the shopping center and observed that five of the Dollar Tree's seven numbered gondolas consisted almost exclusively of items found in a grocery store.¹ Rodriguez also stated that the Dollar Tree store had three aisle markers labeled "food," "drink," and "snacks." Rodriguez described Dollar Tree's groceries as "expansive in brand, variety, and/or quantity." Attached to Rodriguez's declaration were pictures of the gondolas from the Dollar Tree store. Sprouts did not, however, present any evidence as to the parties' intended meaning of the phrase "operate a grocery

¹ According to Rodriguez, the term "gondola" refers to the shelving upon which grocery items are placed. A standard gondola contains items on both the front and back side of the gondola.

store" as provided in the Exclusive Provision.

¶19 In its response to Sprouts' motion, Val Vista claimed that Dollar Tree was not operating a grocery store. Val Vista asserted that the phrase "operate a grocery store," as provided in the Exclusive Provision, was not intended to completely prohibit another tenant from selling food and other household goods. In support of its assertion, Val Vista attached to its response a declaration from Stacy Rush, a manager for Val Vista. Rush was involved in the negotiations between Sprouts and Val Vista that led to the execution of the Lease. In the declaration, Rush stated that neither party ever expressed an intention that the Exclusive Provision completely prohibit another tenant from selling food or other household goods.

¶10 Val Vista also attached to its response a declaration from James Gorry, General Counsel and Corporate Secretary of Dollar Tree. He stated, under penalty of perjury, that Dollar Tree is a discount variety store and that Dollar Tree does not consider any of its stores to be a "grocery store." He stated that between April 2007 and March 2008, food sales accounted for 11.17% of the store's revenue and that candy sales made up 7.58% of the store's sales. Furthermore, the food gondola area only consisted of 4.21% of this store's total square footage.

¶11 On December 18, 2008, the court entered summary judgment in favor of Sprouts. The court declared that Sprouts,

pursuant to the Exclusive Provision, was entitled to reduce its base rent by 30% since May 25, 2007. According to the court, Dollar Tree was "selling items which are normally thought of as groceries" and therefore fell "within the definition of a 'grocery store' even though it primarily operates as a variety store." Val Vista appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S") section 12-2101(B) (2003).

ANALYSIS

¶12 We review de novo the trial court's grant of summary judgment. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is proper only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). The moving party has the burden of showing there are no genuine issues of material fact. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115-16, ¶ 12, 180 P.3d 977, 980-81 (App. 2008). "[W]here the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶13 Val Vista contends that summary judgment was improper in this case because genuine issues of material fact existed as to (1) the parties' intended meaning of the phrase "operate a

grocery store" as provided in the Exclusive Provision, (2) whether Dollar Tree was operating a grocery store within the intended meaning of that phrase, and (3) the parties' understanding and intent with regard to the enforcement of the Exclusive Provision. We agree with Val Vista that there was a genuine issue of material fact as to the parties' intended meaning of the phrase "operate a grocery store" and conclude that the court erred in granting summary judgment in favor of Sprouts.²

¶14 The trial court concluded the Dollar Tree store was "selling items which are normally thought of as groceries" and therefore fell "within the definition of a 'grocery store' even though it primarily operates as a variety store." The parties, however, did not define in the Lease what they meant by "operate a grocery store" and Sprouts did not provide the court with any evidence as to the parties intended meaning of that phrase. Val Vista, however, presented a conflicting interpretation of "grocery store" sufficient to create an issue of fact regarding the meaning of "operate a grocery store" in the Lease.

¶15 Val Vista provided the court with a declaration from a Val Vista manager involved in the execution of the Lease stating

² Because we conclude that summary judgment was improper in light of a genuine issue of material fact as to the parties' intended meaning of the phrase "operate a grocery store," we do not reach the other issues raised by Val Vista.

that neither party ever expressed an intention or understanding that the phrase "operate a grocery store" would completely prohibit the sale of any food items or household goods. Additionally, as Val Vista points out, the Lease itself contemplates and permits the existence of a convenience store at the shopping center. It is commonly understood that convenience stores sell some food and household items. We conclude that this evidence, which we must view in the light most favorable to Val Vista, is sufficient to preclude summary judgment. See *Allyn*, 167 Ariz. at 195, 805 P.2d at 1016.

CONCLUSION

¶16 For the foregoing reasons, we vacate the trial court's summary judgment ruling in favor of Sprouts and remand for further proceedings.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Presiding Judge

_____/s/_____
PHILIP HALL, Judge