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IN THE COURT OF APPEALS OF INDIANA

ADOLPH BRATEMAN, ADRIENNE BRATEMAN, and MICHAEL BRATEMAN,	)	
Appellants-Defendants,	)	
vs.	)	No. 02A03-1103-PL-162
HANNING & BEAN ENTERPRISES, INC.,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable David J. Avery, Judge
Cause No. 02C01-1101-PL-6

November 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Adolph and Adrienne Brateman and their son, Michael Brateman, (collectively referred to as Lessor) appeal the entry of declaratory judgment and a preliminary injunction in favor of Hanning & Bean Enterprises, Inc. (Lessee), which were entered upon the trial court's determination that a lease between the parties did not terminate as a result of the installation of a sign on the leased premises. On appeal, Lessor contends that the lease terminated upon Lessee's use of the leased premises in a manner that constituted a violation of an ordinance.

We affirm.

The facts favorable to the judgment follow. The parties entered into a five-year lease (the Lease) in December 2007, with the Lease to commence on February 1, 2008. The Lease contains a five-year option to renew and the right of first refusal to purchase the property. The leased property is a portion of a surface parking lot in downtown Fort Wayne that has sixteen parking spaces as well as a throughway from Main Street.[1] Lessee entered into the Lease to service adjacent commercial property owned by Lessee (directly or through wholly-owned entities). Specifically, parcels owned by Lessee include one parcel to the west (lot 535) and three to the south (lots 518-520) of the leased premises. The southern parcels are separated from the leased premises by a public alleyway.

Located on lots 518 and 519 is a commercial building commonly known as the Metro Building, a multi-storied structure with a number of tenants. Fifth Third Bank (the Bank) is a tenant of the Metro Building and opened up a branch in October 2009. Around this time, the Bank inquired of Lessee whether the Bank could install a small sign on the leased premises

[1] The Lease described the leased premises as "the E. 40 feet of Lot 536 Hanna Add, City of Fort Wayne". *Appendix* at 49.

directing the public on Main Street to the Bank's drive-up window and ATM. Lessee expressed no objection so long as the Bank financed the installation and maintenance of the sign and complied with any applicable regulations. The Bank installed the sign on the northern edge of the leased premises, along Main Street, in the fall of 2009.[2]

After becoming aware of the presence of the sign, counsel for Lessor contacted Lessee by letter dated July 27, 2010 and demanded its removal. The letter stated in relevant part as follows: "This sign has been erected in violation of Article 5 of the lease, which does not allow for commercial signage to be placed on the premises. Additionally, the increased traffic to the lot, invited by the sign, greatly increases the wear and tear on the premises." *Appendix* at 53. Lessee called Lessor's counsel to discuss the matter. In the discussion, Lessee specifically noted that Article 5 allows for use of the leased premises as a throughway in addition to parking and that correction of any wear and tear was the responsibility of the Lessee under the Lease.[3]

On August 26, 2010, counsel sent another letter on behalf of Lessor. Counsel indicated that he had spoken with Lessor and that Lessor was now requesting "the lease amount be increased by $150.00 per month should the sign continue to be placed on the leased premises." *Exhibit Binder*, Plaintiff's Exhibit 14. If this additional compensation was agreeable to Lessee, counsel indicated that the terms of the Lease could be modified to permit the signage. Lessee did not agree with the request for additional compensation, as

[2] Lessee has never charged the Bank a fee for placement of the sign.

[3] Article 4 provides that Lessee shall pay for maintenance and repair of the parking lot during the Lease, and Article 2 provides that upon termination, Lessee shall restore the property to the same or better condition than when originally leased.

Lessee believed the sign did not violate the terms of the Lease.

Lessor filed a small claims action against Lessee in October 2010, claiming a violation of the Lease. Following a hearing, on January 5, 2011, the small claims court dismissed the action because the Lessor was seeking injunctive relief (i.e., removal of the sign), and the court lacked equitable jurisdiction.

Shortly thereafter, on January 13, 2011, Michael Brateman went to the City of Fort Wayne Department of Planning Services (the Department of Planning) and filed a complaint regarding the sign. That same day, the Department of Planning sent a letter to Lessor (that is, Michael's parents) stating in part as follows:

> The Department of Planning received a complaint about an off-premise sign that is located at the above referenced address. Our records do not show that the proper permits were issued. Our office requires an Improvement Location Permit (ILP), a plot plan showing the property and labeling the location of the sign along with paying for the permit.
>
> Please contact our office by the 28th of January 2011 so we can bring your property into compliance with the Zoning Ordinance should it be required.

Exhibit Binder, Plaintiff's Exhibit 1.

On January 21, Lessor sent Lessee a notice of immediate termination of the Lease. The letter indicated, for the first time, that Lessee had defaulted on the Lease by violating a local zoning ordinance. Lessee received the notification on January 24, and that evening, Lessor had the sign removed. The following day, Michael Brateman placed written notices on the vehicles of Lessee's tenants informing them that the Lease had been terminated and threatening to have vehicles towed if the tenants failed to contact Lessor and enter into arrangements to rent the parking spots.

Lessee filed the instant action on January 27, 2011, requesting declaratory and injunctive relief, as well as damages for breach of contract and interference with business relationships, against Lessor and Michael Brateman.[4] The trial court heard evidence on February 24, 2011 regarding the requests for declaratory and injunctive relief. On February 28, the trial court entered an order in favor of Lessee. Specifically, the court declared that the Lease did not terminate as a result of the sign being placed on the leased premises and enjoined Lessor and Michael Brateman from contacting Lessee's tenants, removing vehicles, or preventing traffic from crossing the leased premises to and from the Metro Building. Thereafter, the parties stipulated to the dismissal without prejudice of all remaining claims, including Lessor's counterclaim, and the trial court entered final judgment. Lessor now appeals.

Lessor initially argues that the sign violated the City of Fort Wayne Sign Ordinance[5] because it was an off-premises sign for which no permit and/or variance had ever been sought or obtained. For purposes of our analysis, we assume without deciding that the sign violated the relevant ordinance. Given this assumption, however, it does not follow that the Lease terminated upon such an ordinance violation.

Article 5 of the Lease, which is of primary relevance in this case, sets forth the use of the leased premises as follows:

> The Leased Premises are to be used by Lessee and his permittees only for the purposes of parking and vehicle related access on or through the above site.

[4] Lessor filed a counterclaim on February 19. The details of the counterclaim, however, are not in the record before us.

[5] *Appendix* at 57-72.

> Lessee shall not use the Leased Premises (or fail to maintain the Leased Premises) in any manner constituting a violation of any ordinance, statute, regulation or order of any governmental authority, including, but not limited to, zoning ordinances, nor will Lessee maintain or permit any nuisance to occur on the Leased Premises. Lessee covenants and agrees that Lessee will use, maintain and occupy the Leased Premises in a careful, safe and proper manner, and will not commit waste thereon. Lessor grants to Lessee, that all present driveways front, rear, and at the sides, shall be kept open for ingress and egress at all times.
>
> So long as Lessee is not in default under this Lease, Lessee shall be entitled to peaceably possess, hold and enjoy the Leased Premises.

Appendix at 50.

Contrary to Lessor's apparent assertion on appeal, Article 5 does not provide for termination of the Lease upon any minor default by Lessee. We agree with Lessee that the Lessor's interpretation of the lease excises the word "peacefully" from the Lease.[6] In short, we read the last sentence of Article 5 to mean plainly that Lessor will not interfere with Lessee's quiet enjoyment of the premises unless Lessee is in default.

Moreover, even if the Lease had expressly provided for termination upon default, we would still look to whether termination was warranted. *See Ream v. Yankee Park Homeowner's Ass'n, Inc*., 915 N.E.2d 536 (Ind. Ct. App. 2009), *trans. denied*. "Our determination as to whether the termination of the lease…was warranted depends upon whether the breach is a material one, going to the heart of the contract." *Id*. at 543. *See also Collins v. McKinney*, 871 N.E.2d 363, 375 (Ind. Ct. App. 2007) ("as a general rule, an express provision in a lease that allows the breach of a covenant to work a forfeiture of the agreement is enforced if the breach is material").

> In determining whether a breach is material, the following five factors are to be considered:
>
> > (A) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> > (B) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> > (C) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> > (D) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
> > (E) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Ream v. Yankee Park Homeowner's Ass'n, Inc., 915 N.E.2d at 543 (citations omitted).

Lessor does not discuss these five factors, which all weigh in favor of a determination that the alleged breach in this case was not material. With regard to the first two factors, we observe that the presence of the sign has not deprived Lessor of any benefit reasonably expected under the Lease. To be sure, Lessor continued to receive monthly rent payments and any additional wear and tear occasioned by the sign remained Lessee's responsibility to remedy before termination of the Lease. Further, no fines were ever levied against Lessor due to the presence of the sign. The third factor also weighs in favor of Lessee, as Lessee would suffer forfeiture of parking and throughway access for tenants of the Metro Building and lose the right of first refusal to purchase the leased premise. Fourth, the likelihood that Lessee would have cured the ordinance violation if given the chance was high. The facts favorable to the judgment reveal that Lessee was first notified of the alleged ordinance violation upon termination of the Lease, which was followed immediately thereafter by

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[6] Lessor baldly asserts: "The Lease prepared by the Lessee provides that the Lessee only gets use of the Leased Premises 'so long as' it is not in default." *Appellant's Brief* at 8.

Lessor's removal of the sign. Finally, there is no indication of bad faith on the part of the Lessee. There is no credible evidence in the record to suggest that Lessee knew or should have known about the permitting/ordinance issue regarding the sign before notification from Lessor in late January 2010.[7]

In sum, even assuming that the sign constituted an ordinance violation, this did not amount to a material breach of the Lease. Lessor's unilateral decision to consider the Lease immediately terminated upon receiving the initial notice of a possible ordinance violation from the Department of Planning was unreasonable and not supported by the law of forfeiture or the plain language of the Lease. The trial court properly found in favor of Lessee.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.

[7] Lessor's earlier communications with Lessee made no mention of a possible ordinance violation. Rather, as the trial court found, Lessor did not believe the Lease gave Lessee the right to allow the signage and, therefore, Lessor proposed a modification of the Lease to allow the sign in exchange for increased rent.