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IN THE COURT OF APPEALS OF INDIANA

SUSAN ROYER, DDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0701-CV-18
	)	
FOUR SEASONS GROUP, LLC,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo J. Arredondo, Judge
Cause No. 45C01-0506-CC-215

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Susan L. Royer, DDS (Dr. Royer), appeals the trial court's judgment entered in favor of appellee-plaintiff Four Seasons Group, LLC (Four Seasons), claiming that the judgment was clearly erroneous because evidence presented at trial "extended beyond the four corners of the complaint and answer." Appellant's Br. p. 6. More specifically, Dr. Royer argues that the trial court resolved issues concerning subletting of the property at issue, language contained in the lease between the parties regarding the computation of common area maintenance (CAM) charges on the property, and the replacement of signage on the building that neither she nor Four Seasons knew would be at issue at trial. As a result, Dr. Royer contends that the trial court's judgment must be set aside because these issues were not "properly or fully developed and tried to a finder of fact." Id. at 20.

In a related issue, Dr. Royer claims that because these issues were not properly before the trial court, the trial court's conclusions of law were erroneous "because they are not supported by the special findings of fact, the pleadings, or evidence presented." Appellant's Br. p. Therefore, Dr. Royer claims that the trial court's judgment must be set aside. Finding no error, we affirm the judgment of the trial court.

FACTS

Dr. Royer entered into an agreement with Williamson and Robin Newsom (collectively referred to as the Newsoms) for the rental of commercial office space in Crown Point that was to commence on May 19, 1999. A Memorandum of Lease acknowledging the existence of the rental agreement was recorded in Lake County on June 9, 1999.

Thereafter, on January 27, 2004, in accordance with the terms of the lease, Dr. Royer exercised an option to renew the agreement in writing for an additional five years. A written notice of the option to renew was served upon the Newsoms' agent, First American Management on January 30, 2004, and recorded in Lake County.

On July 1, 2004, Dr. Royer was notified that Four Seasons had purchased the leased premises and that Network Property Management would manage the property as the new owner's agent. Thereafter, on June 20, 2005, Four Seasons filed a complaint against Dr. Royer "For Order of Possession and Damages," asserting that it was entitled to immediate possession of the premises. More specifically, Four Seasons alleged that

> A. [Dr. Royer] failed to pay her pro rata share of the reconciliation or common area expenses within fifteen . . . days of being presented with an invoice for same . . . and when presented with invoices for same, pursuant to the terms of the Lease totaling $13,874.49 for the years 1999, 2000, 2001, 2002, 2003, and 2004.
>
> B. [Dr. Royer] has failed to pay full rent for the previous Lease term, even after being pressed with demand for same, in the amount of $1,313.84.

Appellant's App. p. 416-17. The complaint specifically demanded an expedited hearing, an order for immediate possession of the property, termination of the lease, judgment in the amount of $15,188.33, late fees, rent accrued as damages due to Dr. Royer's holdover, interest, fees, costs, attorney's fees, and all other just and proper relief.

Dr. Royer answered the complaint with affirmative defenses and setoffs, claiming that Four Seasons improperly removed her signs from the building, failed to follow the proper procedure for assessing the CAM expenses, and failed to permit Dr. Royer to conduct a proper inspection of the records that led to the charges. Dr. Royer also asserted that she was

improperly charged for various CAM expenses and that Four Seasons intentionally or negligently damaged her property. Moreover, Dr. Royer asserted that she had made all rental payments and that Four Seasons was not entitled to immediate possession of the premises because various representatives of Four Seasons had harassed her. Appellant's App. p. 463-65; Appellant's Br. p. 4-5.

The trial court conducted a three-day fact-finding hearing. Thereafter, on April 24, 2006, the trial court granted Dr. Royer's request for special findings of fact and conclusions of law. Those findings and conclusions, entered on September 18, 2006, provided in relevant part as follows:

> 21. Ms. Schwartz (agent for the landlord) used a "stop," defined as the "floor" above which CAM charges would be reimbursed by the Defendant, of $1,760.00, or $1.10 X 1600 Square Feet, in her calculations of Defendant's liabilities under paragraph 3.34, but could not find any language in the Lease that defines "stop" or its calculation.
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> 22. Defendant's only witness was Martell B. Royer.
>
> 23. Mr. Royer, who has been an Indiana licensed attorney for 37 years, has acted as accountant, business manager, and legal advisor for the Defendant, his daughter, since she commenced her dental practice on the Leased Premises in 1995. Mr. Royer also shares the office space with Dr. Royer, but is not a party to the lease.
>
> 24. In May of 1999, he negotiated the terms of the written lease with First American Management, Inc., the property manager and agent for the first landlords and owners, Dr. Williamson Newsom and Robin Newsom, husband and wife.
>
> 25. The product of the negotiations, a written five-year term lease, with an additional five-year term option to the tenant, was prepared by First American Management and executed on May 18, 1999, by Dr. and Mrs. Newsom, as Landlords, and Dr. Royer as Tenant.

26. Paragraph 3.4 of the Lease was replaced by the language of paragraph 3.4 in the Addendum to the Lease. The paragraph states in part as follows: "Tenant shall have the right to audit Landlord's expense claims and any dispute shall be resolved by and [sic] independent arbiter, the cost of which shall be paid by the losing party."

. . .

38. Upon purchasing the Leased Premises, the plaintiff endeavored to make changes to the façade of the building, and, in so doing, removed Defendant's signage.

39. Defendant, after being forced to have the wiring for the signs replaced, and storing the signs at her own cost and expense, attempted to have the signs reinstalled.

40. However, during the reinstallation process, the installers were purportedly ordered to cease the installation process by Plaintiff, and they did.

41. As of the date of the hearings in this cause, the signage has not been replaced by Plaintiff, who removed it, nor has Defendant been permitted to reinstall the signs, which are still being stored at Defendant's sole cost and expense.

. . .

48. The evidence indicated that Attorney Royer had been sharing Defendant's office space at the Leased Premises for some time, with the knowledge of, and with no objection from, the Newsoms and First American Management.

49. The Court finds that the lack of objection from the Newsoms and First American Management to the office sharing arrangement constituted permission.

50. The Court finds the failure of the Newsoms and First American Management to provide Defendant with an estimate of the CAM expenses constitutes a waiver of those expenses.

CONCLUSIONS OF LAW

. . .

14. Plaintiff may withdraw permission to continue said office sharing arrangement, upon reasonable notice with sufficient time for Attorney Royer to relocate his practice, which time the Court estimates to be at least ninety days.

15. The court finds that Plaintiff has the authority under the lease to change the signage requirements at the Leased Premises, and Plaintiff can require Defendant to put up new signs conforming with the new requirements. Plaintiff is not in breach of the lease on the signage issue.

. . .

17. The Court finds that the stop or floor above which Defendant will be responsible for CAM expenses shall be calculated based on the square footage of the unit Defendant leases, or 1600 square foot.

. . .

20. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that:

1. Plaintiff's request to evict Defendant from the Leased Premises and for immediate possession of the premises must be and is hereby DENIED, as Defendant is not in material breach of the lease.
2. Plaintiff may withdraw permission of Defendant to share the Leased Premises with Attorney Royer upon reasonable written notice, and with no less than ninety days in which to relocate Attorney Royer's practice.
3. Plaintiff may require Defendant to pay for and install new signs at the Leased Premises at Defendant's expense.
4. Plaintiff may recover future CAM expenses only for time periods in which Plaintiff owned the premises and for which Plaintiff provided Defendant with an estimate of the anticipated expenses as provided in the lease.
5. Plaintiff is hereby ORDERED to make repairs at the Leased Premises within thirty days.

Appellant's App. p. 11-17. Dr. Royer now appeals.

DISCUSSION AND DECISION

I. Issues Litigated at Trial

Dr. Royer asserts that the trial court lacked the authority to decide the issues concerning the signage on the premises, subleasing, and the interpretation of the clauses in the lease that pertained to the CAM charges. More specifically, Dr. Royer claims that Four Seasons's "complaint only alleges that [Dr. Royer] breached the lease by failing to pay [CAM] expenses and one monthly rent installment," and there is no mention of "Attorney Royer's presence or law practice on the leased premises." Appellant's Br. p. 10 (Emphasis in original). Therefore, Dr. Royer claims that the judgment must be reversed because the evidence presented at trial necessarily did not support the trial court's findings.

In addressing Dr. Royer's contentions, we note that Indiana Trial Rule 15(B) provides in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(Emphasis added). In construing the term "implied consent" under the rule, the evidence presented in the case must be examined. Huffman v. Foreman, 163 Ind. App. 263, 323 N.E.2d 651, 658 (1975). When the trial has ended without objection as to the course it took, the evidence is the controlling factor in awarding relief to the parties based upon the

applicable rules of substantive law. Id. at 658. Additionally, notice may be implied where the evidence presented at trial is such that a reasonably competent attorney would have recognized the unpled issue as being litigated. Samar, Inc. v. Hofferth, 726 N.E.2d 1286, 1291 (Ind. Ct. App. 2000).

In support of her claims, Dr. Royer directs us to this court's opinion in Aldon Builders, Inc. v. Kurland, 284 N.E.2d 826, 833 (Ind. Ct. App. 1972), where it was observed that

> [t]he Special Findings of Fact do support the conclusion of law urged by Aldon Builders, Inc., that the contract was breached by the Kurlands. Our examination of the entire record fails to disclose that the issue of rescission was ever litigated or tried by the parties. Evidence brought into the record collaterally on pleaded issues may reflect superficially upon the theory of rescission. The issue of rescission was never tried by the parties during the trial.
>
> . . .
>
> A party is entitled to some notice that an issue is before the Court which has not been pleaded or has not been agreed to in a pre-trial order. This is especially true where the new issue is not unequivocally clear by the evidence being submitted. This is not being technical. This is being fair. A party should be given an opportunity to meet the issues which the court is considering. The evidence shown by this record would not be sufficient notice to a reasonably competent attorney that the issue of rescission is being considered by the court. The court's own "Special Findings of Fact" do not support a conclusion of law founded upon the theory of rescission.

Notwithstanding Dr. Royer's reliance on Aldon Builders, our review of the transcript reveals that the issues regarding the signs, subleasing, and the interpretation of the lease clauses pertaining to the CAM charges were, in fact, litigated. Appellant's App. p. 32, 43, 60, 67, 68, 69, 71, 84, 93, 100, 130, 147, 149, 156, 162, 189, 194-95, 199, 206, 210, 230,

240, 246. Moreover, Dr. Royer did not specifically object to the litigation of these matters at trial.[1]

In our view, inherent in the allegation that Dr. Royer did not pay the CAM expenses for so many years were the questions as to what the expenses covered, what should have been assessed, how the expenses were to be calculated, how the tenant should be billed, and other apparent ambiguities concerning those expenses. Moreover, as noted above, Dr. Royer raised the signage issue as an affirmative defense in her answer and the parties presented evidence regarding that issue. Indeed, all of the issues about which Dr. Royer complains were specifically litigated at trial without any specific objection. Therefore, we reject Dr. Royer's contention that the judgment must be reversed because Four Seasons obtained relief regarding issues that were "not properly or fully developed and tried." Appellant's Br. p. 20.

II. Conclusions of Law and Judgment

In a related claim, Dr. Royer argues that even if it was proper to try the issues discussed above, the evidence and findings of fact and the evidence presented at trial did not support the conclusions of law regarding the removal and placement of signs on the building,

[1] When counsel for Four Seasons cross-examined Martell Royer about whether Dr. Royer suffered damages because the sign on the building was no longer present, the only objection that Dr. Royer lodged with regard to the litigation of that matter was as follows:

> [Counsel for Dr. Royer]: Your Honor, I'm going to object to that question, because it's my understanding of the proceedings is concerned with the eviction. This is a complaint for possession, and . . . for damages. And the possession issue, in my understanding, would be decided first. If the possession is awarded to them or awarded to Dr. Royer, whichever the case may be, there would then be a damage hearing to determine if there are any damages. We have not countersued; we have only requested . . . a set aside if any damages are granted to the plaintiff, for the amount that we've suffered by their injury upon us.

The trial court then overruled the objection. Appellant's App. p. 213-14.

attorney Royer's presence and law practice on the premises, or the "floor above which [Dr. Royer] will be liable for CAM expenses." Appellant's Br. p. 16. Hence, Dr. Royer asserts that the judgment must be vacated.

In addressing these contentions, we initially observe that when the trial court enters special findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), we engage in a two-tiered standard of review. First, we determine whether the evidence supports the trial court's findings, and second, we determine whether the findings support the judgment. Id. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Id. In other words, a judgment is considered to be clearly erroneous when there is "no evidence supporting the findings or the findings fail to support the judgment and when the trial court applies the wrong legal standard to properly found facts." Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). In determining whether the findings or the judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Id.

We next observe that where a contract is unambiguous, the language set forth in the document should determine the parties' intent. OEC-Diasonics v. Major, 674 N.E.2d 1312, 1314 (Ind. 1996). In other words, if the contract is unambiguous, we give effect to the intentions of the parties as expressed within the four corners of the document. Art Country Squire, L.L.C. v. Inland Mortgage Corp., 745 N.E.2d 885, 889 (Ind. Ct. App. 2001).

Moreover, we will neither construe clear and unambiguous provisions nor add provisions not agreed upon by the parties. Id. The meaning of a contract is to be determined from an examination of all of its provisions, not from a consideration of individual words, phrases, or even paragraphs read alone. Id.

With regard to the removal and replacement of signage on the premises, we note that section 13.1 of the addendum to the lease agreement provides that the original signs placed on the premises were Dr. Royer's property, and she was permitted to "remove or replace them at any time or upon termination of [the] lease." Appellant's App. p. 441-42. However, the "Rules and Regulations" contained in the lease state that Four Seasons reserved the right, at its expense, "to change from time to time the format of the signs or lettering on the signs, and to require replacement of any signs previously approved . . . to conform to [Four Seasons's] new standard sign criteria." Id. at 454. In light of the provisions set forth in the lease and the rules and regulations contained therein, the trial court properly concluded that Four Seasons could compel Dr. Royer to remove the existing signage that was originally on the building and replace it with signage that Four Seasons might approve.

As for Four Seasons's withdrawal of its alleged permission allowing Dr. Royer's father to continue practicing law in the leased space, the evidence is undisputed that the Newsoms and First American Management did not object to the office-sharing arrangement even though Dr. Royer's father was not a party to the lease. Id. at 48. Dr. Royer asserts that the addendum to the lease agreement provides that Four Seasons's consent to an assignment or subletting of the premises "will not be unreasonably withheld." Appellant's app. p. 420.

However, the terms of the lease provide for "the right to sublease to any additional dentists as tenant finds necessary to operate a 6 day week . . . ." Id. at 381 (emphasis added). Moreover, the addendum makes clear that its terms were to control "to the extent that those terms were inconsistent with the terms of the lease." Id. at 418 (emphasis added). That said, there is no inconsistency between the lease provisions and the addendum with regard to subletting and assignment. Therefore, the trial court properly concluded that Four Seasons could withdraw its permission to continue the office-sharing arrangement between Dr. Royer and her father.

Finally, Dr. Royer attacks the following conclusion of law with regard to her obligation to pay CAM expenses:

> The Court finds that the stop or floor above which Defendant will be responsible for CAM expenses shall be calculated based on the square footage of the unit Defendant leases, or 1600 square foot.

Id. at 16. In essence, Dr. Royer maintains that the judgment regarding the payment of these expenses is erroneous because Four Seasons did not mention or reference any precise "stops" or "floors" in its request for CAM expenses. Appellant's Br. p. 16.

Notwithstanding Dr. Royer's claim, the undisputed evidence established that Dr. Royer's office occupied approximately 1600 square feet. Appellant's App. p. 14. The specific terms of the addendum to the lease—which, once again, do not conflict with the terms of the original agreement—provide for the payment of CAM expenses "in excess of $1.10 per square foot for which tenant agrees to pay her proportionate share." Id. at 418. Four Seasons's witness testified that the floor or "stop" above which CAM charges would be reimbursed by Dr. Royer amounted to "$1760.00, or $1.10 x 1600 Square feet" under the

lease. Id. at 11. When considering these terms and the evidence presented at trial, it is apparent to us that the trial court simply applied the precise directives set forth in the lease agreement and addendum when determining the amount of CAM expenses that Dr. Royer should pay. As a result, Dr. Royer's claim fails.

In sum, the conclusions of law that Dr. Royer challenged were supported by the findings of fact and the evidence at trial. As a result, Dr. Royer has failed to show that the judgment was clearly erroneous.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.