

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002045-MR
AND
NO. 1997-CA-002983-MR

CHARLES A. BROWN, JR. AND
NORMAN NOLTEMAYER, D/B/A BROWN NOLTEMAYER CO. APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS KNOFF, JUDGE
ACTION NO. 95-CI-00731

BLUE BOAR CAFETERIA COMPANY
AND BB HOLDINGS, INC. APPELLEES

OPINION AFFIRMING IN 1997-CA-002983-MR
AND ORDER DISMISSING 1997-CA-002045-MR
** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Blue Boar Cafeteria Company (Blue Boar) appeals from the following three orders of the Jefferson Circuit Court: (1) the order entered on July 20, 1995, which held Blue Boar's discontinuance of use of the leased premises did not terminate its obligations to Brown Noltemeyer Company (Brown Noltemeyer); (2) the order entered on August 11, 1995, which denied its motion to reconsider and vacate; and (3) the order entered on February 1, 1996, which awarded damages to Brown Noltemeyer in the amount of \$301,534.10. Brown Noltemeyer appeals from an

order of the Jefferson Circuit Court entered on July 11, 1997, which held that BB Holdings, Inc. was not liable for the judgment against Blue Boar. The two cases have been consolidated for our review.

In February 1986, Brown Noltemeyer leased certain real property in Clarksville Towne Center in Clarksville, Indiana, to Blue Boar for a term of fifteen years. In January 1995, Blue Boar gave notice to Brown Noltemeyer that it planned to discontinue use of the leased premises in thirty days. According to Blue Boar's interpretation of the lease, discontinuance of the use of the premises terminated the lease. Brown Noltemeyer disagreed and filed suit in circuit court. Blue Boar filed a counterclaim alleging negligence, mismanagement, and breach of the lease by Brown Noltemeyer.

The circuit court found the pertinent provision of the lease, Article X, section 10.10, was not ambiguous and Blue Boar did not have the power to terminate the lease. Blue Boar then filed a motion to reconsider claiming the court's order was inconsistent with its finding that Article X, section 10.10 was unambiguous and asking the court to specifically review the "sole remedy" language. The circuit court denied Blue Boar's motion to reconsider and set a hearing to determine damages. On February 1, 1996, the circuit court awarded \$301,534.10 in damages in favor of Brown Noltemeyer. Blue Boar then appealed the orders.

In August 1997, this Court dismissed Blue Boar's notice of appeal as interlocutory because the circuit court had not adjudicated Blue Boar's counterclaim and the requisite language

under Kentucky Rules of Civil Procedure (CR) 54.02 was not included in the February 1, 1996 order. On October 10, 1997, the circuit court amended the order to include the CR 54.02 language. This appeal followed.

On appeal, Blue Boar alleges the circuit court erred by failing to find Article X, section 10.10 of the lease was ambiguous and that Blue Boar had the power to terminate the lease. Second, Blue Boar alleges that the circuit court misinterpreted the introductory language to the pertinent provision of Article X, section 10.10 and the "sole remedy" language which followed. Finally, Blue Boar argues that the circuit court erred by awarding damages under the default provisions of the lease and by not granting Blue Boar a credit for the leasehold improvements left on the demised premises.

Article X, section 10.4 of the lease provided that the "[l]ease shall be governed by and construed in accordance with the laws of the State of Indiana." Despite a choice of law clause, Kentucky will apply its own laws when there are sufficient contacts and no overwhelming interests to the contrary. Paine v. La Quinta Motor Inns, Inc., Ky. App., 736 S.W.2d 355 (1987). Brown Noltemeyer, a Kentucky partnership, filed this suit against Blue Boar, a Kentucky corporation, alleging breach of a lease of real property located in Indiana. Because Kentucky and Indiana law are significantly similar in their approach to contract interpretation, we will address Blue Boar's claims in concurrence with both states laws.

The construction of a contract, as a matter of law, is one for the court. Phelps v. Sledd, Ky., 479 S.W.2d 894, 896 (1972); Battershell v. Prestwick Sales, Inc., Ind. App., 585 N.E.2d 1 (1992). In the absence of ambiguity, a contract will be enforced according to its terms, applying the plain and ordinary meaning of the language. Obryan v. Massey Ferguson, Inc., Ky., 413 S.W.2d 891 (1966); City of Evansville v. Braun, Ind. App., 619 N.E.2d 956 (1993). "A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract." Overberg v. Lusby, 727 F. Supp. 1091, 1093 (E.D. Ky. 1990), affirmed in 921 F.2d 90 (6th Cir. 1990).

The dispute over Blue Boar's alleged power to terminate the lease arises from the language found in Article X, section 10.10 of the lease. The pertinent portions are:

Tenant shall...operate one hundred percent (100%) of the Leased Premises during the entire Term... with due diligence and efficiency so as to produce all of the Gross Sales which may be produced by such manner of operation....Notwithstanding the foregoing, or anything else in this Lease to the contrary, in the event the Tenant elects to discontinue its business and the use and occupancy of the Demised Premises, or to substantially reduce its use thereof ("Discontinuance of Use"), Tenant may, upon not less than 30 days notice to Landlord, do so and Landlord's sole remedy for such Discontinuance of Use shall be the right to elect to terminate this Lease. Landlord may elect such termination at any time within thirty (30) days following the receipt of notice of Discontinuance of Use.

Blue Boar alleges the circuit court tacitly acknowledged that this language was ambiguous by finding its alleged right to terminate the lease rendered Brown Noltemeyer's right to terminate the lease under the same section meaningless.

This finding does not acknowledge any ambiguity, but rather, points out the shortcomings of Blue Boar's argument by applying its interpretation to the plain language of the lease. We agree with the circuit court's interpretation of Article X, section 10.10 as being unambiguous.

Blue Boar argues the circuit court erred in its interpretation of the introductory phrase, "[n]otwithstanding the foregoing, or anything else in this Lease to the contrary...." While the circuit court did state that the phrase "clearly is referring to the language immediately above it", the court did not, as Blue Boar contends, expressly negate its application to the entire lease. Inasmuch as the circuit court may have implied such a limiting interpretation, we find the plain language of the phrase makes it applicable to the entire lease.

It is clear that the obligation to operate one-hundred percent of the premises and other obligations in the lease, such as the contingent obligation to pay percentage rent, were subject to Blue Boar's right to discontinue use of the premises. Because Blue Boar had the right to discontinue use of the premises, Brown Noltemeyer could not treat such discontinued use as a default under the lease. Once Blue Boar discontinued use of the premises, Brown Noltemeyer had the option of; (1) terminating the lease and looking for a new tenant who would operate one-hundred percent of the premises and trigger the payment of percentage rent, or (2) not terminate the lease and maintain Blue Boar as a tenant knowing that the obligation to pay percentage rent would

never become due.¹ Ultimately, Brown Noltemeyer decided to keep Blue Boar as a tenant and not terminate the lease.

Finally, Blue Boar argues the circuit court erred by awarding damages under the default provisions and by not giving Blue Boar a credit for the leasehold improvements left on the premises. The damages were broken down into the following categories: unpaid rent, common area maintenance, taxes, late charges, real estate commissions, and renovation costs. Specifically, Blue Boar contests the damages awarded as a result of renovation costs incurred by Brown Noltemeyer.

Because the lease was not terminated, Blue Boar continued to have an obligations under the lease. Only when Blue Boar refused to perform these obligations, such as the obligation to pay the fixed rent, did it default on the lease. Therefore, it was not clearly erroneous for the circuit court to calculate damages in accordance with the default provisions. Furthermore, the circuit court correctly applied Article VII, section 7.1.10 and Article IX, section 9.2 in denying Blue Boar a credit for the leasehold improvements left on the premises which were not used in the renovation by Brown Noltemeyer.

In an attempt to enforce the judgment, Brown Noltemeyer discovered that Blue Boar had distributed a majority of its assets to BB Holdings, Inc. In April 1996, Brown Noltemeyer filed an amended complaint seeking to enforce the judgment

¹ Article III, section 3.1 (b) provides: "A percentage rent in an amount equal to 5% of the Gross Sales in excess of \$1,300,000 for each Lease year payable during the initial period of the Lease Term;"

against BB Holdings, Inc. On July 11, 1997, the circuit court found that BB Holdings, Inc. was not liable for the judgment against Blue Boar. Brown Noltemeyer appeals the order.

Brown Noltemeyer's notice of appeal was "clocked and dropped" on August 8, 1997, but the filing fee was not paid until August 12, 1997, one day after the time period required by CR 73.02 (1) (a) had expired. Pursuant to CR 73.02 (1) (b), the circuit clerk did not file the notice of appeal until the filing fee was paid on August 12, 1997. Brown Noltemeyer argues that the notice of appeal was timely filed despite the failure to pay the filing fee.

Brown Noltemeyer incorrectly relies on Foxworthy v. Norstam Veneers, Inc., Ky., 816 S.W.2d 907 (1991). In Foxworthy, the Kentucky Supreme Court held that the failure to pay the filing fee was not automatically fatal or jurisdictional. In that case, the appellant had timely mailed a notice of appeal and the clerk entered it in the docket sheet as filed, even though the filing fee had not been paid. The appellant then proceeded under the mistaken belief that he had strictly complied with CR 73.02 (1) (a). Foxworthy is not applicable to the case at bar. Here, the circuit clerk did not record the notice of appeal in the docket sheet until after the filing fee was paid, not before. There was no justifiable reason to believe that Brown Noltemeyer had met the requirements of CR 73.02. Accordingly, we find the failure to timely pay the filing fee to be fatal to the appeal.

For the reasons stated above, the orders of the Jefferson Circuit Court finding Blue Boar had breached the lease

and awarding damages pursuant to the default provisions are hereby affirmed. And, it is ORDERED that appeal No. 1997-CA-002045-MR be DISMISSED.

ALL CONCUR.

ENTERED: May 7, 1999

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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