

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001345-MR

SAUL HOLDINGS, LIMITED PARTNERSHIP;
SAUL CENTERS, INC., A GENERAL PARTNER;
AND ALL LIMITED PARTNERS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CI-02083

CINEMA 'N' DRAFTHOUSE SYSTEMS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Saul Holdings, Ltd. Partnership (Saul Holdings) has appealed from an order and opinion entered by the Fayette Circuit Court on May 23, 2001, which denied Saul Holdings relief in its action for breach of contract against Cinema 'N' Drafthouse Systems, Inc., (CDS). Having concluded that the trial court's factual findings were not clearly erroneous and that its conclusions of law were correct as a matter of law, we affirm.

On April 22, 1998, Saul Holdings entered into a lease agreement with C & C, Inc. (C & C), a franchisee of CDS. Under the terms of the lease, C & C agreed to operate a combination

movie theater and restaurant inside the Lexington Mall, located on Richmond Road in Lexington, Kentucky. As part of the agreement, CDS consented to stand as guarantor, and to guarantee C & C's payment of rent and performance of the lease terms.

In April 1999, C & C defaulted on the lease and filed for bankruptcy. Accordingly, Saul Holdings sent notice of C & C's default to CDS, reminding it of its obligations as guarantor of the lease. After receiving the notice, CDS executed a lease assignment and assumption agreement which essentially made CDS the new tenant under the lease. In a letter dated April 18, 1999, CDS informed Saul Holdings of its intention to assume the rights, terms and obligations of C & C's lease, and stated in bold print that "[i]n accordance with the Corporate Guaranty [agreement], notice is hereby given that Landlord's [Saul Holdings's] failure to deliver the executed Assignment and Assumption Agreement within thirty (30) days shall result in the release of the Corporate Guarantor from liability under the lease" [emphasis added]. According to CDS, the letter was faxed to the office of M. Victoria Dean, a lawyer who represented Saul Holdings.

Having received no response from Saul Holdings, CDS did not assume tenancy of the movie cinema and restaurant. On June 14, 1999, Saul Holdings filed an action in the Fayette Circuit Court to enforce the original corporate guaranty agreement against CDS. CDS responded by claiming that it had fulfilled its obligations under the guaranty agreement by executing the lease

assignment and assumption agreement; and that Saul Holdings, by its failure to respond within 30 days to CDS's assumption of the lease as referred to in the letter faxed on April 18, had released CDS from all further obligations under the guaranty agreement. CDS also filed a counterclaim against Saul Holdings for damages related to Saul Holdings's failure to deliver the premises to CDS.

After the trial court denied the parties' cross-motions for summary judgment, a bench trial was held on May 9, 2001. On May 23, 2001, the Fayette Circuit Court entered an order and opinion in favor of CDS. The trial court found that the action taken by CDS in executing the assignment of the lease on April 18 was valid, and that Saul Holdings's failure to execute the assignment released CDS from liability under the lease as guarantor. The trial court also dismissed CDS's counterclaim. This appeal followed.

Saul Holdings advances numerous arguments on appeal. In regard to CDS's contractual obligations, Saul Holdings argues: (1) that by the terms of the agreement, the lease assignment and assumption agreement that was executed by CDS did not relieve CDS of liability under the corporate guaranty; (2) that the lease assignment and assumption agreement was invalid because it was not signed by both personal guarantors; (3) that the lease assignment and assumption agreement was not in substantial compliance with the model assignment document attached to the original lease; and (4) that the lease assignment and assumption

agreement was invalid because it was not approved by a secretary's certificate. In regard to the trial court's dismissal of CDS's counterclaim, Saul Holdings argues that it was prejudiced by the dismissal because the counterclaim amounted to a judicial admission that CDS considered itself a tenant under the lease; and therefore, it was liable to Saul Holdings for rent payments. Finally, in regard to the trial court's finding that CDS "was entitled to possession upon default of C & C but that such possession was to be obtained through C & C pursuant to the agreement," Saul Holdings argues that CDS could have taken possession of the premises upon C & C's default, but that it failed to do so, giving Saul Holdings the right to lock them out of the premises.

Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."¹ A factual finding is not clearly erroneous if it is supported by substantial evidence.² Substantial evidence is evidence of substance and relevant consequence sufficient to induce

¹Kentucky Rules of Civil Procedure (CR) 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998 S.W.2d 505, 509 (1999).

²Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991); Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997).

conviction in the minds of reasonable people.³ "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."⁴

However, "[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court."⁵ "The cardinal rule of contract interpretation is that all words and phrases in the contract are to be given their ordinary meanings."⁶ Under Kentucky law, contracts should be interpreted according to the parties' mutual understanding at the time they entered into the contract and "[s]uch mutual intention is to be deduced, if possible, from the language of the contract alone."⁷ Thus, as to the trial court's factual findings, we are limited in our review to determining whether a finding is clearly erroneous; but as to any legal issue involved in the interpretation of the lease

³Golightly, supra at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

⁴Garland, supra at 118.

⁵First Commonwealth Bank of Prestonsburg v. West, Ky.App., 55 S.W.3d 829, 835 (2000) (citing Hibbitts v. Cumberland Valley National Bank & Trust Co., Ky.App., 977 S.W.2d 252, 254 (1998)).

⁶Fay E. Sams Money Purchase Pension Plan v. Jansen, Ky.App., 3 S.W.3d 753, 757 (1999) (citing O'Bryan v. Massey-Ferguson, Inc., Ky., 413 S.W.2d 891 (1966)).

⁷Nationwide Mutual Insurance Co. v. Nolan, Ky., 10 S.W.3d 129, 131-32 (1999) (quoting Simpsonville Wrecker Service, Inc. v. Empire Fire & Marine Insurance Co., Ky., 793 S.W.2d 825, 828-29 (1990)).

agreement, our review is de novo, and we need not give any deference to the trial court's legal conclusions.

Since there is substantial evidence in the record to support the trial court's factual findings that the April 18 assignment was an authentic document which substantially complied with the model assignment in the original lease agreement, the only remaining matter to consider in addressing Saul Holdings's first issue on appeal are the legal questions of whether CDS was in compliance with the original guarantor agreement when it executed the assignment, and whether Saul Holdings's failure to respond to that assignment constituted a release of CDS from all liability under the lease. We affirm the trial court's ruling as to both aspects of this question of law.

The "Corporate Guaranty" agreement attached to the original lease provided in pertinent part as follows:

As an inducement to Corporate Guarantor entering into this Corporate Guaranty, and in consideration thereof, if this Lease is assigned in accordance with Article 15(h) of the Lease and the Corporate Guarantor, pursuant to said assignment required Landlord's execution of an assignment document, then Corporate Guarantor shall deliver to Landlord a notice of the assignment ("Assignment Notice") in accordance with the notice provision as set forth in Article 36 of the Lease, an "Assignment and Assumption Agreement" in a form substantially similar to that set forth in Exhibit E of this Lease, executed by Tenant, Personal Guarantors, Corporate Guarantor and Assignee, for the Landlord's execution. Landlord shall execute said Assignment and Assumption Agreement within thirty (30) days after its receipt. Subject to the following, if Landlord fails to

execute said agreement within the thirty (30) day period, then notwithstanding anything contained herein to the contrary, Corporate Guarantor shall be released from any further liability under this Lease from and after the expiration of said thirty (30) day period. Corporate Guarantor's Assignment Notice shall specifically contain therein a statement, in bold, that Landlord's failure to deliver the executed Assignment and Assumption Agreement (provided the same is substantially similar to that form attached hereto as Exhibit E) within thirty (30) days after receipt of same, shall result in the release of the Corporate Guarantor from liability under the Lease, from and after the expiration of said thirty (30) day period [emphasis added].

Article 15 (h) of the original lease agreement clearly allows for an assignment of the lease to CDS, and the guaranty agreement clearly details the process to be followed in the event of such an assignment. The trial court found that all of the procedural steps were met. Further, the trial rejected Saul Holdings's allegations that the assignment was not properly executed by both personal guarantors and that the assignment document was not in substantial compliance with the model assignment document appended to the original lease by making factual findings to the contrary. As to Saul Holdings's argument that the assignment was invalid because a secretary's certificate was not attached to it, we agree with the trial court's legal conclusion that such a certificate was not mandated by the terms of the guaranty agreement. Accordingly, we hold that the trial court's factual findings that all of the procedural mandates of the clause were met were supported by substantial evidence and thus were not clearly erroneous; and that the trial court

correctly concluded as a matter of law that the applicable contract language was not ambiguous, and that the contract provisions operated to release CDS from liability under the lease guaranty when Saul Holdings failed to execute the assignment within 30 days of the notice of assignment as required by the terms of the contract.

Furthermore, we see no merit in Saul Holdings's argument that it was prejudiced by the trial court's dismissal of CDS's counterclaim. Since the counterclaim was not a judicial admission by CDS that it was liable under the lease, the trial court's dismissal of the claim did not prejudice Saul Holdings.

Finally, Saul Holdings's claim that it was not required to deliver possession of the premises to CDS is moot. The property has long since been rented to another tenant, and the trial court made no finding that Saul Holdings was liable for damages due to its refusal to deliver the premises to CDS.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Sean M. Pierson
Lexington, Kentucky

BRIEF FOR APPELLEE:

John P. Watz
Lexington, Kentucky