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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000337-MR

HARRY S. COHEN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 00-CI-02535

FRIDA MARTHA BARRON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, MINTON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Harry S. Cohen has appealed from an order of the Fayette Circuit Court entered on January 10, 2002, which determined as a matter of law that Frida Martha Barron was entitled to a judgment of $5,000.00 pursuant to the terms of the parties' lease agreement. Having concluded that the trial court did not err by granting Barron's motion for summary judgment, we affirm.

The facts of this case are simple and are not in dispute. For a majority of the time period between 1979 and 2000, Cohen and Barron enjoyed an amicable relationship as lessor/lessee.[1] Cohen, as lessor, was the owner of a building in downtown Lexington, Kentucky, in which Barron, as lessee, operated two restaurants on the first floor of the property. On May 26, 1998, the parties signed an instrument titled "Addendum To Lease," which was drafted by Cohen's property manager. The addendum provided for two, one-year lease agreements, with the first beginning on July 1, 1998, and ending on June 30, 1999, and the second beginning on July 1, 1999, and ending on June 30, 2000.

In addition to setting forth the basic terms of the lease, the addendum stated that in the event Cohen decided to sell the building, he would either give Barron the first opportunity to purchase the property, or he would provide her with three months advanced notice of the sale, as well as $5,000.00 in moving expenses.

On April 12, 2000, Cohen sold the building to Mark King. At around this same time, Barron called Cohen for the purpose of negotiating the terms for a third, one-year lease agreement. Barron was then informed that Cohen had sold the building to King, and that King was her new landlord. It is

[1] For a brief time period in the mid-1980's, Barron lived in Cincinnati and did not lease the property in question from Cohen.

undisputed that Cohen did not contact Barron before selling the building to King.[2] After Barron and King failed to reach an agreement for an extension of her lease, Barron vacated the building on or around July 5, 2000, when the last of her one-year lease periods ended.

On July 11, 2000, Barron filed a complaint in the Fayette Circuit Court, seeking $5,000.00 plus costs and attorney's fees. Barron alleged that Cohen had failed to comply with the "right of first refusal" provision in the lease, and that Cohen had refused to pay her $5,000.00 for moving expenses as provided for in the lease agreement.

On October 2, 2001, Barron filed a motion for summary judgment, arguing that based on the terms of the lease agreement, Cohen was obligated to pay her $5,000.00 in moving expenses. A hearing on the matter was held on October 26, 2001. On January 10, 2002, the trial court entered an order granting Barron's motion for summary judgment, after determining as a matter of law that Barron was entitled to $5,000.00 in moving expenses according to the terms of the lease agreement. This appeal followed.

[2] Although Cohen points out in his brief that during his deposition testimony, he could not remember whether he offered to sell the building to Barron before ultimately selling it to King, Cohen conceded in his memorandum opposing Barron's motion for summary judgment "that he did not offer [Barron] a first refusal on purchasing the property."

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[3] The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[4] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[5] This Court has previously stated that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted].[6]

Cohen's sole claim of error on appeal is that the trial court erred as a matter of law by determining that Barron was entitled to $5,000.00 based on the moving expenses provision

[3] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

[4] Steelvest, supra, (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

[5] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, supra, at 480).

[6] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

of the lease agreement. Specifically, Cohen argues that the parties' intent was to provide Barron with moving expenses in the event Barron was forced to vacate the building prior to the end of her lease. Cohen contends that since Barron was not forced to vacate the building until after the expiration of her lease, he should not be obligated to pay her $5,000.00 in moving expenses. We disagree.

The construction and interpretation of a written instrument is a question of law which is reviewed de novo on appeal.[7] The primary objective in construing a written agreement is to give effect to the intention of the parties.[8] In determining the intention of the parties, the court "will consider the subject matter of the contract, the objects to be accomplished, the situation of the parties and the conditions and circumstances surrounding them."[9] Where there is an ambiguity in a lease provision, the court will construe the instrument more strongly against the lessor who drafted it, and more favorably toward the lessee who did not take part in its

[7] Cinelli v. Ward, Ky.App., 997 S.W.2d 474, 476 (1998).

[8] Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., Ky.App., 94 S.W.3d 381, 384 (2002).

[9] McHargue v. Conrad, Ky., 227 S.W.2d 977, 979 (1950).

preparation.[10] With these principles in mind, we now turn to the specific language in the lease agreement that is at issue.

The moving expenses provision reads in full as follows:

> If landlord decides to sell building, landlord will give [Barron] first refusal to purchase the building, or give (3) three months to vacate space, and $5,000.00 would be given for moving expenses [emphasis omitted].

As we mentioned previously, Cohen's interpretation of this provision is that that the parties' intent was to provide Barron with moving expenses in the event Barron was forced to vacate the building prior to the end of her lease. Since Barron was not forced to vacate the building until after her lease had expired, Cohen argues that the moving expenses provision was not triggered. Although this is one possible interpretation of the moving expenses provision, we hold that there is a more plausible interpretation which will better effectuate the parties' intentions.

Between the years 1979 and 2000, Cohen and Barron enjoyed what both parties described as, for the most part, an amicable lessor/lessee relationship. Taking into account this

[10] See Boyd v. Phillips Petroleum Co., Ky., 418 S.W.2d 736, 738 (1967)(holding that "the proof shows that the contract was prepared by the appellee and where one of the parties prepares the contract, the construction of this contract must be construed more strongly against the party who prepared it than the other party who had no part in the preparation"); and Aetna Oil Co. v. Robertson, Ky., 258 S.W.2d 464, 465 (1953)(stating that "[t]he lease was drafted by the lessor, and, as a consequence, if there is any ambiguity it should be construed in favor of the lessees").

long-term relationship, it is reasonable to conclude that the parties' intent was to provide Barron with three forms of protection in the event Cohen decided to sell the building while Barron's lease was still in effect, i.e., if Cohen decided to sell the building, which would necessarily terminate the existing lessor/lessee relationship, Cohen would either give Barron the first opportunity to purchase the building, or Barron would be given three months advanced notice of the sale and $5,000.00 in moving expenses to assist her in making alternative arrangements for her restaurants.

Stated another way, Barron would be protected against potential hardships that might arise if she was forced to face the possibility of having to deal with a new landlord. Cohen would either provide Barron with the first opportunity to purchase the building, or he would give her time and money to assist her in making alternative business arrangements. Thus, since Cohen did not offer Barron the first opportunity to purchase the building, he became obligated to provide her with $5,000.00 to assist with her moving expenses.

Therefore, by construing the moving expenses provision more strongly against Cohen, the party who drafted the addendum, and by considering the subject matter of the lease and the circumstances surrounding the signing of the addendum, we conclude as a matter of law that this interpretation best

comports with the parties' intentions. Accordingly, the trial court did not err by granting Barron's motion for summary judgment.

Based on the foregoing, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Charles J. Lisle Lexington, Kentucky	James T. Harris Lexington, Kentucky