RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000592-MR

OAKWOOD ANIMAL KINGDOM, INC.
and GARY S. CROWE — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 00-CI-01025

KNOX BINGO HALL, INC. — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, Chief Judge; TACKETT, Judge; and EMBERTON, Senior Judge.[1]

COMBS, CHIEF JUDGE. Appellants, Oakwood Animal Kingdom, Inc. (Oakwood), and Gary S. Crowe appeal from an order of the Hardin Circuit Court entered on January 27, 2003. The court awarded

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the sum of $8,830.60 to Knox Bingo Hall, Inc., pursuant to the terms of the parties' rental agreement. We reverse.

The appellee has failed to file a brief on appeal. Under the provisions of CR[2] 76.12(8), this Court has three options to consider as possible responses or penalties. We may:

> (i)accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

We have declined to invoke any of those possible penalties and instead have considered the merits of the case.

On April 2, 2000, the parties entered into a written agreement for the rental of space in which Oakwood would conduct charitable gaming sessions. The hall was to be rented for limited periods as set forth in separate rental pricing agreements. The rental payment was calculated on a per session basis. The agreement provided the following rates:

1. rent for each morning session would be $390.00;

2. rent for each afternoon session would be $640.00;

3. rent for each evening session held Monday through Thursday would be $940.00;

4. rent for each evening session held Friday, Saturday, or Sunday evening would be $1040.00;

[2] Kentucky Rules of Civil Procedure.

5. rent for each midnight session would be calculated at $815.00.

In a separate provision, the agreement recited: "Tenants[‘] agreed upon rental session(s) and rate(s) is attached hereto as Exhibit A, and incorporated by [r]eference as if fully restated herein." Attached to the agreement were two documents, each entitled "Exhibit A Rental Pricing Agreement." The first document provided as follows:

> The TENANT leases the Knox Bingo Hall, Inc.’s premises for the following bingo session:
>
> Date: Thursday
>
> Session: 7:30
>
> Rental Amount: 940.
>
> Less goods and services provided by TENANT
>
> i. Janitorial Services 50.00
> ii. Security Services 80.00
>
> Total: 810.00

The document was signed by Gary Crowe as tenant. The second document provided as follows:

> The TENANT leases the Knox Bingo Hall, Inc.’s premises for the following bingo session:
>
> Date: Friday
>
> Session: 7:30
>
> Rental Amount: $1040.

Less goods and services provided by TENANT

i. Janitorial Services 50.00
ii. Security Services 80.00

Total: 910.00

This document, too, was signed by Gary Crowe as tenant.

Shortly after the agreement was executed, the owner of Knox Bingo Hall was indicted for violation of Kentucky's gaming laws. Oakwood quickly sought to terminate its agreement as its revenues apparently suffered from the adverse publicity that followed the indictment. There is a discrepancy in the pertinent dates and activities surrounding Oakwood's notice of termination. Oakwood recites in its brief that it sent Knox Bingo Hall a certified letter containing its notice of termination on May 20, 2000 (Appellant's brief, p. 1); that the last bingo session was conducted in the hall of May 19, 2000 (p. 2); and that the lawsuit was filed against it on June 19, 2000 (p. 2).

The complaint filed by Knox Bingo Hall omits these pertinent dates completely while apparently seeking damages for the thirty-day notice period. While the judgment of the trial court relies on the 30-day notice period in assessing damages, it recites relevant dates as June 1 – June 30 as the basis of the judgment rather than calculating the thirty-days' notice

period from the day after the last session was held; *i.e.*, from May 20 through June 20.

On June 19, 2000, Knox Bingo Hall filed a complaint in Hardin Circuit Court, seeking $8,730.60: $7,690 for unpaid rents and the two additional sums of $890 and $150.60 for checks on which Oakwood stopped payment. Knox also sought lost profits from concession sales, costs, and attorney's fees. Following a bench trial, the court determined that Oakwood and Crowe owed rent for the abandoned June sessions as claimed by Knox Bingo Hall. However, the trial court did not award any amount for the hall's lost concession sales. This appeal followed.

The appellants contend that the trial court erred as a matter of law by interpreting the parties' rental agreement to require thirty-days' notice for proper termination. They also contend that the trial court erred by permitting the plaintiff to prosecute its claim *in absentia* and by permitting the plaintiff to call a witness who was not timely identified pursuant to the court's pretrial order. (We note that a party in a civil action may choose not to be present at the trial of the case and may elect instead to be represented solely by counsel.) Because our analysis of the nature of the agreement itself resolves the appeal, the remaining arguments need not be addressed.

The construction of a written instrument is a question of law, which is subject to our *de novo* review. Cinelli v. Ward, Ky. App., 997 S.W.2d 474 (1998).

In its analysis, the trial court relied on the following provision of the rental agreement:

> Either party hereto may cancel any unused bingo sessions provided for under this lease by giving thirty (30) days (sic) written notice prior to such **scheduled** leased session to the other party. (Emphasis added.)

The trial court concluded that the quoted provision required Oakwood and Crowe to give notice on or before June 1, 2000, in order to terminate their rental agreement effective June 30, 2000. In essence, it held that the written notice of May 20, 2000, was ineffective to terminate the appellants' obligation to pay rent for sessions to be held June 1 through June 30, 2000.

Oakwood argues persuasively that the absence of a definite term in the lease has created a tenancy at will, terminable at will as to the period mutually understood to govern the rental agreement. Such an arrangement is deemed to be a "periodic tenancy" pursuant to KRS[3] 383.695, which provides in part as follows:

> (1) The landlord or the tenant may terminate a week-to-week tenancy by a written notice given to the other at least seven (7) days before the

[3] Kentucky Revised Statutes.

termination date specified in the notice.

(2) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty (30) days before the periodic rental date specified in the notice.

Oakwood argued that its tenancy was from one bingo session to the other and that, therefore, the interval of mere days between sessions constituted adequate notice pursuant to the statute. Its letter of notice followed its last session by one day.

We have discovered no evidence to support the implicit finding of the trial court that the parties had agreed to a reservation of space to be rented and held by Oakwood for sessions scheduled in advance up to and including June 30. The only evidence before us indicates that Oakwood and Crowe rented space for a single Thursday and a single Friday evening with no commitment to schedule space beyond those two sessions and no concomitant promise by Knox to hold space for Oakwood for any specific sessions.

We conclude that the “agreement” itself was essentially a price schedule. This price schedule set a series of rates for whatever intermittent, periodic sessions Oakwood might elect to hold rather than guaranteeing a definite reservation of space for a definite term. It was not a contract for tenancy requiring a specific notice provision in order to

terminate a tenancy. Periodic occupancy under these circumstances does not amount to a tenancy requiring notice for termination. We hold that Oakwood gave adequate notice of its intent to cancel usage of the hall as that usage was a matter of session to session. No rental amount is due or owing.

Therefore, we reverse the judgment of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willie M. Neal, Jr.
Radcliff, Kentucky

NO BRIEF FOR APPELLEE