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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002410-MR

LOGAN FABRICOM, INC.; AND
GARY H. DOWNS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 03-CI-009146

AOP PARTNERSHIP, LLP
D/B/A AIRPORT OFFICE PARK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON, JUDGE; HUDDLESTON,[1] SENIOR JUDGE.

JOHNSON, JUDGE: Logan Fabricom, Inc., and Gary H. Downs (hereinafter collectively referred to as "Logan") have appealed from an opinion and order of the Jefferson Circuit Court entered on April 1, 2004, which granted summary judgment[2] in favor of AOP Partnership, LLP d/b/a Airport Office Park (AOP) on AOP's claim

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Civil Procedure (CR) 56.

for breach of a lease agreement. Having concluded that the trial court properly granted summary judgment to AOP, we affirm.

The facts of this case are not in dispute. On June 5, 1996, AOP entered into a lease agreement with Logan[3] whereby AOP leased 547 square feet of office space located in building 200 of the Airport Office Park in Louisville, Kentucky, to Logan for the period from July 1, 1996, to June 30, 1997. On July 22, 1997, the lease agreement was extended by execution of an amendment to the agreement for a period of one year, expiring on June 30, 1998. The lease agreement was amended for a second time on June 11, 1998, which extended the lease between the parties for an additional year, until June 30, 1999.

On February 3, 2000, a third amendment to the lease agreement was executed between Logan and AOP. Through this third amendment, Logan and AOP agreed that after June 30, 1999, the lease had continued on a month-to-month basis through January 2000. This third amendment also provided that Logan would relocate its offices to a larger space in the same building and that AOP would make specified improvements to the new space with the term of the lease being extended through January 31, 2002. Significantly, this third amendment contained a buyout clause which provided as follows:

[3] Logan was previously known as LFUS, Inc.

> 6. Lessee has option to buy out lease at the end of twelve months, with a payment of three (3) months' rent.

In January 2002 AOP and Logan executed the fourth and final amendment to the lease agreement. This fourth amendment extended the lease of the property to Logan through January 31, 2005. The fourth amendment did not contain a buyout provision.

In August 2003 Logan notified AOP in writing that it intended to buyout the lease agreement pursuant to the buyout provision in the third amendment to the lease and tendered a check in an amount equal to three months' rent to AOP. On September 8, 2003, AOP returned the check to Logan and informed Logan that the buyout provision had expired and demanded that Logan continue to perform its obligations under the lease agreement as amended by the fourth amendment. Logan subsequently vacated the leased premises and AOP brought this action in October 2003 to recover the amount of rent due pursuant to the fourth amendment of the lease agreement.

Logan and AOP filed cross-motions for summary judgment and the trial court entered an opinion and order on April 1, 2004, concluding that the buyout provision had expired and had not been incorporated into the fourth amendment of the lease which was in effect at the time Logan vacated the leased premises. On April 29, 2004, Logan filed an appeal with this Court from the trial court's opinion and order which was

dismissed by this Court's order of August 4, 2004, on the grounds that the trial court's order merely disposed of partial claims regarding attorneys' fees, rents, and late fees.[4] The trial court then entered a final order on November 4, 2004, awarding rents, late fees, and interest to AOP and reserving the issue of future attorneys' fees pending appeal. The trial court stated, in part, as follows:

> The only buy out option granted by AOP was contained in Amendment Three, the term of which expired on January 31, 2002. Amendment Four which was in effect at the time Fabricom vacated the leased premises specifically incorporated the Lease and all of its provisions except as follows: "In the event of any conflict between the terms and conditions of the Lease and the terms and conditions of this Amendment, this Amendment shall govern and control." Neither Amendment Four nor the Lease contained a buy out option. In fact, Exhibit A to Amendment Four specified at options: "none".

This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.[5] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,

[4] Case No. 2004-CA-000870-MR.

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

stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] In Paintsville Hospital Co. v. Rose,[7] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[8] There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[9] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citation omitted].[10] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at

[6] Kentucky Rules of Civil Procedure (CR) 56.03.

[7] Ky., 683 S.W.2d 255, 256 (1985).

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[9] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[10] Steelvest, 807 S.W.2d at 480.

least some affirmative evidence showing that there is a genuine issue of material fact for trial."[11]

The interpretation of a contract is a question of law for the courts.[12] In construing a contract, a court's primary objective is to ascertain and to effectuate the intention of the parties to the contract from the contract itself.[13] The contract must be construed as a whole giving effect to all parts and words.[14] A court must interpret the terms of the contract by assigning language its ordinary meaning.[15] Absent an ambiguity, "the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence" [citations omitted].[16] If a reasonable person would find the contract susceptible of different or inconsistent interpretations, the contract is ambiguous.[17] "The fact that one party may have intended different results, however, is

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[11] Steelvest, 807 S.W.2d at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

[12] First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky.App. 2000).

[13] Withers v. Commonwealth, Department of Transportation, Bureau of Highways, 656 S.W.2d 747, 749 (Ky.App. 1983); City of Louisa v. Newland, 705 S.W.2d 916, 919 (Ky. 1986).

[14] City of Louisa, 705 S.W.2d at 919.

[15] Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381, 385 (Ky.App. 2002).

[16] Id.

[17] Id.

insufficient to construe a contract at variance with its plain and unambiguous terms" [citation omitted].[18]

In this case, Logan asserts that the trial court erred by concluding that the buyout provision contained in the third amendment to the lease agreement had expired prior to the time Logan attempted to exercise it. We disagree. By its terms, the buyout provision in the third amendment allowed Logan to buyout the remainder of the lease "at the end of twelve months, with a payment of three (3) months' rent" [emphasis added]. The third amendment was executed by Logan on February 15, 2000, and extended the term of the lease agreement from that date through January 31, 2002. Under the plain meaning of the buyout provision, Logan could have paid AOP three months' rent at the end of 12 months after executing the third amendment to the lease and terminated the lease agreement at that time. However, Logan chose not to exercise the buyout option "at the end of twelve months," and thus, the buyout provision expired by its own terms. To construe the provision as Logan seeks would give no meaning to the inclusion of the 12-month period for exercising the buyout as contained in the provision in the third amendment. We reject Logan's interpretation of this provision as being contrary to the ordinary meaning of the words and as failing to give effect to all provisions of the contract.

[18] Cantrell Supply, 94 S.W.3d at 385.

Logan also contends that the trial court erred by failing to construe the language of the buyout provision more strongly against AOP, the party which drafted the document.[19] However, this rule has no application to the case before us because we conclude the language of the buyout provision to be plain and unambiguous.

Logan also relies heavily upon language included in the four amendments which refer back to the terms and conditions of the lease. The following provision was included, to some degree, in all four amendments:

> Except as modified herein, all terms and conditions of the Lease are hereby ratified and acknowledged to be unchanged and shall remain in full force and effect. In the event of any conflict between the terms and conditions of the Lease and the terms and conditions of this Amendment, this Amendment shall govern and control.[20]

Logan argues that every amendment to the lease "contained the language that all prior terms and conditions of the Lease were ratified by each successive Amendment and remained in full force and effect unless changed or modified therein. This ratification in the Fourth Amendment had the same effect, and there was nothing in that Amendment that in any way modified, changed or terminated the buy out provision." We reject this argument under the plain language of the fourth amendment. The

[19] Boyd v. Phillips Petroleum Co., 418 S.W.2d 736, 738 (Ky. 1967).

[20] The first amendment contained only the first sentence of this provision.

language relied upon by Logan clearly referred to "all terms and conditions of the Lease" and made no reference to the previous amendments. Thus, this language from the fourth amendment did not ratify any terms and conditions of the third amendment, but only the terms and conditions of the lease.

Based upon the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Larry C. Ethridge
Louisville, Kentucky

BRIEF FOR APPELLEE:

John S. Talbott
Lexington, Kentucky