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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000357-MR
AND
NO. 2007-CA-000360-MR

JACOBS PLAZA, INC. APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 01-CI-004302

HOLLAND-DAVID ENTERPRISES, INC. APPELLEES/CROSS-APPELLANTS
D/B/A HOLLAND INCOME TAX
AND TONY HOLLAND

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES

CLAYTON, JUDGE: Jacobs Plaza, Inc. ("Jacobs") appeals from the Jefferson Circuit Court's Order granting summary judgment in its case against Holland-David Enterprises, Inc. ("Holland"). Specifically, Jacobs takes issue with the amount of the judgment and the amount of the attorneys' fees awarded. The trial court granted a judgment to Jacobs in the amount of $5,712.83 plus $3,352.71 in pre-judgment interest. It also awarded Jacobs $10,265.60 in attorneys' fees.

Holland has filed a cross-appeal in which it argues that Jacobs is not entitled to any rents and that the award of attorneys' fees to Jacobs was in error under the lease agreements.

The parties entered into two separate lease agreements for two separate properties. In May of 1994, Jacobs and Holland entered into the first lease agreement ("Lease 1") whereby Holland leased property for a tax business. Paragraph 2 of Lease 1 provided that the term of the lease was for a period of five (5) years and fourteen (14) days, beginning May 17, 1994, and ending May 31, 1999. The second lease agreement ("Lease 2") was for a period of five (5) years. It began on October 31, 1994, and continued until October 31, 1999. Its terms are nearly identical to Lease 1 with the exception of the amount of the rent. Lease 2 was for facilities for a tanning salon.

Upon expiration of the leases, Holland had the option to enter into new leases for the same terms or to become a "hold over" tenant. Paragraph 27 deals with the "hold over" tenancy. In both leases, that paragraph provides that the "hold over" tenancy shall be month-to-month. In Lease 1, it originally provided that the tenant would pay 250% of the monthly rent and that the tenant would be bound by "all of the terms, covenants and conditions as herein specified, as far as applicable . . . ." The Hold Over Tenancy clause sets forth that such is the rental rate "unless a different rate is agreed upon . . . ." On June 1, 1994, the parties executed an Addendum to Lease Agreement wherein the 250% amount was changed to 200% in Lease 1. The Addendum was in writing and signed by representatives of both parties. Lease 2 provided the same conditions including the 200% amount from its inception.

After the end of the original terms of the leases, Holland continued to occupy the spaces. It did not notify Jacobs of any intent to renew for another five (5) year term, thus the tenancies became month-to-month under the terms of the leases.

Holland continued to occupy the space and to pay the regular rental rates rather than the inflated "hold over" rates.

In October of 2000, Holland notified Jacobs that it was being acquired and asked for an accounting. It was at this time that William Jacobs, a shareholder and director of Jacobs, reviewed the lease and discovered that, due to the "hold over" provision, Holland should be paying more in monthly rentals. The "hold over" rate was charged for the month of October 2000 and Jacobs notified Holland of the mistake for the prior months. Jacobs also demanded payment of the discrepancy in the amounts. On October 2, 2000, Jacobs notified Holland by letter that they were in default due to the amounts owed in back rent.

On June 22, 2001, Jacobs brought suit in the Jefferson Circuit Court seeking $71,791.83 plus pre-judgment interest for rents that had not been paid. Jacobs also requested an award for costs and attorneys' fees. The Jefferson Circuit Court granted summary judgment finding that Jacobs had waived its right to the "hold over" rent amounts until it noticed Holland in October of 2000. The trial court also reduced Jacobs' request for attorneys' fees, finding that it was equitable given the amount of recovery on the rents.

Jacobs now argues that the Statute of Frauds requires modification of the written lease agreement be in writing, that accepting partial payment does not constitute waiver since there was a "no modification" clause in the lease agreement and that it was entitled to additional attorneys' fees.

Conversely, Holland argues that, without a renewal of the leases, they became month-to-month tenancies. Paragraph 27 of both leases provides that the 200% rate is imposed unless a different rate is agreed upon and Holland asserts that Jacobs agreed on a different amount and even sent bills reflecting the changed amount.

Once the leases were not renewed, Holland contends that the "no waiver" clauses did not apply and that the Statute of Frauds is inapplicable given that they became month-to-month leases.

An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in determining that no genuine issue of material fact exists and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). A summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W. 3d 188 (Ky.App. 2006), *citing Blevins v. Moran*, 12 S.W.3d 698 (Ky.App. 2000).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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." CR 56.03. Both parties agree that there are no issues of fact. The issue, therefore, is whether the amount of rent due under the "hold over" clause should have applied and, if so, whether Jacobs waived that amount by continuing to accept the regular rental rates.

The interpretation of a contract is a question of law. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky.App. 2007). "In the absence of ambiguity a written instrument will be enforced strictly according to its terms." *O'Bryan v. Massey-Ferguson, Inc.,* 413 S.W.2d 891,893 (Ky. 1966), and a court will interpret the contract terms by assigning language to its ordinary meaning and without resort to extrinsic evidence. *Hoheimer v. Hoheimer,* 30 S.W.3d 176 (Ky. 2000).

During the "hold over" period, Robert Trinler (an accountant and corporate agent for Jacobs) submitted statements periodically setting forth the amounts owed by

Holland as rent. These statements did not reflect the "hold over" rates set forth in the leases. Holland argues that the conduct of both parties demonstrated that they had agreed to a different rental amount, which was allowed under the lease agreements. Jacobs, does not dispute that the language is in the leases, but argues that any different rate agreed upon had to be in writing and signed by the parties.

Holland asserts that Jacobs' rent statements were a voluntary, knowing and willing course of conduct that constituted a written waiver of the "hold over" provision amount. This Court disagrees.

Paragraph 32(i) of the lease agreements provides that "[t]his Lease contains all covenants and agreements between Landlord and Tenant . . . and the covenants and agreements of this Lease cannot be altered, changed, modified or added to except in writing signed by Landlord and Tenant." The only changes in Lease 1 were made pursuant to an Addendum to Lease Agreement. As stated above, representatives of both Jacobs and Holland changed the amount of the rent due under the "hold over" clause in Lease 1 pursuant to this Agreement, which was in writing and signed. Thus, any change in the amounts due would have to be in writing and signed by both parties. Both parties did not sign the rental statements sent by Jacobs. The only issue that remains is whether Jacobs waived the right to the entire amount of the "hold over" rents by accepting the partial payments.

Paragraph 25 of both leases provides as follows:

> NON-WAIVER OF DEFAULTS. No waiver of any default by Tenant to take any action on account of such default if such default persists or is repeated, and no expresses (sic) waiver shall affect any default other than the default specified in the express waiver, and that only for the time and to the extent therein stated. The acceptance by Landlord of rent with knowledge of the breach of any of the covenants of this Lease by Tenant shall not be deemed a waiver of any such breach. One or more waivers of any breach of any covenant, term or condition of this Lease shall not be

> construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by Landlord to or of any act by Tenant requiring Landlord's consent or approval shall not be deemed to be a waiver or render unnecessary Landlord's consent or approval to or of any subsequent similar acts by Tenant.

Under this provision, Jacobs did not waive its right to the full amount of the rents due under the "hold over" clause by accepting partial amounts from Holland. The trial court erred, therefore, when it found that Jacobs had waived its right to the total amount of the rents under the "hold over" clause. Thus, the summary judgment entered by the Jefferson Circuit Court is reversed and this case is remanded to that court for findings consistent with this Opinion.

There remains the issue of attorneys' fees. In this case, attorneys' fees are provided for in the lease agreements. They provide that Jacobs can recover its "reasonable" attorneys' fees if it is successful in its litigation against Holland. Since the Court is determining that Jacobs is entitled to the full amounts of rental under the lease agreements, it is obvious that Jacobs was "successful" in its litigation. Thus, Jacobs is entitled to reasonable attorneys' fees to be determined by the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

Bart L. Greenwald
Peter M. Cummins
Chris Johnson
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Peter M. Cummins

BRIEFS FOR APPELLEE/CROSS-APPELLANTS:

Dennis Murrell
Bradley E. Cunningham
Kevin L. Chlarson
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANTS:

Bradley E. Cunningham