

RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001145-MR

AMERICAN FOUNDERS BANK, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01973

DAVID WARNER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: American Founders Bank (“AFB”), Inc. appeals from an Order of the Franklin Circuit Court granting David Warner’s Motion to Alter, Amend or Vacate a prior Opinion and Order. In granting the motion, the Franklin Circuit Court ruled that AFB created a condition precedent to the assignment of the leasehold interest. The court determined that the assignment never became

effective because the condition was never met. AFB argues that the condition precedent was met, and that the circuit court erred in failing to so rule. Finding no error, we affirm the Order on appeal.

HMN 127, LLC owns a parcel of commercial property located in Franklin County, Kentucky. On November 1, 2006, HMN 127 leased the parcel to Consolidated Energy Holdings, LLC (“Consolidated”). The following month, AFB loaned to Consolidated the sum of \$1,131,533.00, and took as collateral an assignment of rights under the November 1, 2006 lease. The assignment appointed AFB as Consolidated’s attorney in fact to execute the transfer in the event of Consolidated’s default. Consolidated later defaulted on the loan.

On April 10, 2009, David Warner made an offer to AFB to assume/purchase the lease. Warner and AFB then entered into a purchase contract with two contingencies. The first related to environmental issues which are not relevant herein. The second contingency provided that the contract was “subject to approval of assignment by landowner, HMN 127, LLC.” At the time of the contract’s execution, neither Warner nor AFB was aware that the HMN 127 and Consolidated lease contained a provision under which HMN 127 granted to Consolidated the right to assign the lease at Consolidated’s sole discretion.

In order to fulfill the second condition, Warner sought HMN 127’s approval to purchase the lease. After his attempts were not successful, Warner informed AFB that the contract could not be performed because the approval of HMN 127 could not be obtained.

On November 20, 2009, AFB filed the instant action in Franklin Circuit Court seeking a declaratory judgment and requiring Warner to perform under the contract. AFB alleged that the underlying lease between HMN 127 and Consolidated gave it the authority to approve the sale without conferring with HMN 127. Warner answered and counterclaimed, and proof was taken. On December 2, 2010, the Franklin Circuit Court rendered an Opinion and Order holding that the purchase contract's contingency (i.e., the approval of the landowner) was met when HMN 127 granted to Consolidated the right to assign the lease without HMN 127's consent.

Warner subsequently filed a Motion to Alter, Amend or Vacate the Opinion and Order. After hearing oral arguments, the Franklin Circuit Court rendered an Order on June 14, 2011, granting Warner's motion. In so doing, the court determined that the clause "subject to approval of assignment by landowner HMN 127, LLC" was a condition precedent to the contract's performance which waived AFB's right to assign the leasehold interest without the approval of HMN 127, that HMN 127's approval was never obtained, and that a condition precedent to the performance of the contract was never satisfied. The practical effect of the Order was that the contract never became effective and Warner was excused from its performance. This appeal followed.

AFB now argues that the circuit court erred in concluding that Warner was excused from performance under the contact because a condition precedent to the contract was not met. AFB contends that the underlying HMN 127 lease

constituted sufficient approval as required by the contract of sale dated April 10, 2009; that this satisfied the condition precedent; and that the circuit court erred in failing to so rule. It notes that neither AFB nor Warner had a copy of the underlying HMN 127 lease when the April 10, 2007 contract was executed, and therefore could not have known the terms of the lease. AFB maintains that it inserted the clause “subject to approval of assignment by landowner HMN 127, LLC” as a clearly reasonable precaution for both parties. It contends, however, that this turned out to be an unnecessary precaution as it later became clear that the HMN 127 lease allowed for such an assignment. AFB argues that it could not have waived something it had no knowledge of (i.e., its right under the HMN 127 lease to assign the leasehold), and because the circuit court’s decision was based on waiver, that decision was clearly erroneous. AFB also maintains that Warner failed to act in good faith by seeking HMN 127’s approval after it was known that this approval was memorialized in the HMN 127 and Consolidated lease, and that an additional, subsequent or renewed approval was not necessary. In sum, AFB argues that the Order on appeal was erroneous, and should be reversed and remanded for a calculation of damages based on Warner’s breach.

The central issues for our consideration are whether the Franklin Circuit Court erred in concluding that AFB’s insertion of the phrase “subject to approval of assignment by landowner HMN 127, LLC” in the purchase agreement constituted a condition precedent, and if so, whether that condition was satisfied by the language of the HMN 127 and Consolidated lease. In answering the first

question in the affirmative, the court cited the general rule that where an agreement is made conditional on the consent or approval of a third person, it is a conditional agreement which does not become effective until consent is given. *Green River Steel Corp. v. Globe Erection Co.*, 294 S.W.2d 507, 510 (Ky. 1956). The contract at issue was made conditional on the consent of HMN 127, and we find no error in the circuit court's characterization of the phrase "subject to approval of assignment by landowner HMN 127, LLC" as a condition precedent to the parties' performance.

Having determined that the contract contained a condition precedent, the next question is whether that condition was satisfied. According to the record, Warner made repeated attempts to obtain HMN 127's consent, but was unable to do so. AFB argues that the language set out in the HMN 127 and Consolidated lease, which predated the execution of the instant contract and which neither AFB nor Warner had seen, operates to satisfy the condition precedent in the instant contract. On one hand, the HMN 127 and Consolidated lease evinced HMN 127's consent to assign the leasehold, which would appear to satisfy the condition precedent in the instant contract. Conversely, AFB clearly had no knowledge of that consent when it inserted into the contract by handwritten notation the caveat that HMN 127 must consent to the sale of the leasehold.

We find persuasive the circuit court's reasoning on this issue. The HMN 127 and Consolidated lease allowed Consolidated to assign the lease without HMN 127's consent. AFB, as Consolidated's attorney in fact (by virtue of the loan

agreement), stepped into the shoes of Consolidated for the purpose of any lease assignment. However, by inserting handwritten language in the instant contract expressly requiring the approval of HMN 127, and thus creating a condition precedent to performance, AFB waived its right to assign the leasehold without the approval of HMN 127. A waiver may be expressed or implied, and may also be inferred from the conduct of a party. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. App. 2001). In the matter at bar, the circuit court concluded that AFB's insertion of the condition precedent constituted an express waiver of its right to assign the leasehold without HMN 127's consent.

We review questions of law *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). In so doing, we conclude that AFB's insertion of the condition precedent constituted a waiver of its right to assign the leasehold without HMN 127's consent. AFB expressly and volitionally erected a roadblock to the execution of the contract, which could be overcome only by obtaining HMN 127's consent to the assignment. This condition precedent, which was inserted by AFB, is found within the four corners of the agreement and is clearly prospective in nature. That is to say, it is clear from the face of the agreement that AFB intended the condition to be satisfied at some time in the future, and not retrospectively. Additionally, since AFB stepped into Consolidated's shoes for the purpose of assigning the leasehold, AFB is imputed with knowledge of Consolidated's rights and responsibilities under the original lease. By inserting the requirement that

HMN 127 approve the assignment of the leasehold to Warner, AFB created a new condition which was never fulfilled. We find no error.

For the foregoing reasons, we affirm the June 14, 2011 Order of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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