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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001676-MR

THEODORE H. LAVIT — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE WAYNE T. LIVELY, JUDGE
ACTION NO. 13-CI-00245

CAROL S. MATTINGLY and
JOSEPH H. MATTINGLY, III — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Theodore H. Lavit appeals a declaratory judgment entered in favor of Carol and Joseph Mattingly, III, in this dispute regarding the proper construction and interpretation of their lease agreement. Upon review, we reverse.

On June 1, 1990, Lavit entered into an agreement with Vivian R. Johnston to lease the second floor of Johnston's building located at 104 West Main Street, Lebanon, Kentucky, for a basic term of ten years. The lease also contained a renewal provision. Lavit owned the building next door that shared a common wall with Johnston's. Lavit's goal was to expand the size of his law office by connecting the second floor of his building with the second floor of Johnston's building for additional office space. Lavit subsequently renovated the second floor of Johnston's building and has been using it as part of his law office to date. However, on September 16, 1997, the appellee, Carol Mattingly, purchased Johnston's building with knowledge of the lease.

The parties do not dispute that at all relevant times Mattingly has been bound to the terms of the lease as Johnston's successor. No party contends the lease has been breached in any fashion in the approximately twenty-four years after the lease was executed. This declaratory action was filed in Marion Circuit Court by Lavit on September 12, 2013, to determine the duration of the lease. Lavit argued in his pleadings that the lease actually provided for "automatic perpetual renewals unless he, as lessee, provided written notice that he did not intend to renew within the time period prescribed by Paragraph 24 of the lease." Paragraph 24 provides as follows:

> 24. OPTION TO RENEW. Upon the expiration of the basic term of this Lease, Lessee shall have the right and

> option to renew this Lease, provided, however, that the monthly rental during any or all of said renewal periods shall not exceed $200.00 per month. Said option shall be automatically exercised for said renewal period unless, at least sixty (60) days prior to the expiration of the original term of the Lease, or any subsequent renewal period thereof, as the case may be, Lessee gives written notice to Lessor of his intention to cancel the option for said subsequent renewal period.

Carol and her husband Joseph counterclaimed. They argued the lease had actually expired on or about June 1, 2010, upon the expiration of the second ten-year term of the lease; that Lavit had been a holdover tenant ever since; and that they were entitled to immediate possession of the premises.

Following a period of discovery, the issue of the proper interpretation of the contract was submitted to the circuit court by cross-motions for summary judgment. The circuit court chiefly relied upon *Farris v. Laurel Explosives, Inc.*, 797 S.W.2d 487 (Ky. App. 1990), holding that the lease at issue in this matter could not have been renewed more than once because it did not include "such terminology as perpetual lease, perpetual successive renewals or forever which is more descriptive of the actual legal significance imposed and which may place an ordinary person on notice." Due to its conclusion that the lease had expired, the circuit court further determined Lavit had been a holdover tenant since 2010; Mattingly was entitled to immediate possession of the premises; and that Lavit was

required to immediately vacate the property. Lavit moved the circuit court to alter, amend, or vacate its judgment; his motion was overruled; and this appeal followed.

In cases where a summary judgment has been granted in a declaratory judgment action and no bench trial held, the standard of review for summary judgments is utilized. *Godman v. City of Fort Wright*, 234 S.W.3d 362, 368 (Ky. App. 2007). We review a grant of summary judgment *de novo* because only legal questions and the existence, or non-existence, of material facts are considered. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Additionally, we owe no deference to the circuit court's interpretation or construction of a contract, including questions regarding ambiguity, because these are likewise questions of law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); *see also Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

Here, there are no genuine issues of material fact in dispute. Lavit argues his interpretation of the lease was correct, the appellees' counterclaim should have been dismissed, and that it was error for the circuit court to interpret the lease as providing for only one renewal solely on the ground that it did not include "such terminology as perpetual lease, perpetual successive renewals or forever which is more descriptive of the actual legal significance imposed and which may place an ordinary person on notice." Lavit points out that in *Vokins v.*

McGaughey, 206 Ky. 42, 266 S.W. 907 (1924), one of the other cases the circuit court cited as authoritative on the subject of perpetual leases, the former Court of Appeals affirmed the validity of a perpetual lease even though the perpetual lease in question included no similar wording.

At least one jurisdiction, North Carolina, has followed the approach taken by the circuit court of requiring words like "forever," "everlasting," or "perpetual" to be present to create a right of perpetual renewals. *See, e.g.*, *Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 329 S.E.2d 346 (1985). We also agree with the *Lattimore* Court's assessment that requiring clear and unequivocal language in a provision intended to convey a right to perpetual renewals appropriately protects "property owners from inadvertently leasing away their property forever," and forces "the parties to a lease to specifically consider and directly express their intent." *Id*. at 348-49. In addition, while no binding Kentucky precedent requires certain words to be present to create a right of perpetual renewals (indeed, the language to that effect, cited by the circuit court and which originated in *Farris*, was equivocal and nonbinding *dicta*),[1] it can at

[1] In *Farris*, *supra*, a lease provision was discussed that, according to one of the parties, authorized perpetual renewals. The *Farris* Court described the provision in relevant part as follows:

> "At the expiration of the first renewal term, and each renewal term thereafter, this lease shall be automatically renewed for an additional three (3) years upon the same conditions . . ." at the election of and in writing of the appellee only. The lease further provides for automatic increases until a cap of $5,000 is reached, and then the amount of rent shall "remain constant."

least be said that Kentucky law would not permit interpreting a lease's failure to set an express limit on the number of extensions as an indication that the parties intended the tenant to have the right to extend the lease forever, or as long as the law possibly allows.

In light of *Vokins* and in the context of this particular lease, however, we agree with Lavit's contention that a lack of words like "forever," or similar words unambiguously indicating a "perpetual" right to renew, was not a ground for determining this particular lease permitted no more than one renewal period. To explain, the lease at issue in *Vokins* provided:

> As a part of this contract it is further agreed that the party of the second part is to have the option on or before January 1, 1912, of leasing the aforesaid property for the year beginning January 1, 1912, and ending January 1, 1913, at the same rental, that is, twenty dollars ($20.00) per month, payable on the last day of each month; and on

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Farris, 797 S.W.2d at 490.

For two reasons, we do not incorporate or analogize to the *Farris* Court's analysis of this provision, or its conclusion that this provision or one substantially like it is not indicative of a provision allowing for multiple renewals. First, it is *dicta*. The issue of the lease's perpetuity became moot because the lease in that matter, as determined in *Farris*, was never binding upon several non-signing owners of the leased property and was thus void. *Id*. at 491.

Second, it is contradictory. The *Farris* Court explained perpetual leases are "not upheld unless the language [is] clear, plain and unambiguously expressed." *Id*. at 489. The *Farris* Court noted that "such terminology as 'perpetual lease,' 'perpetual successive renewals' or 'forever' [. . .] is more descriptive of the actual legal significance imposed" by a perpetual lease. *Id*. at 490. If the absence of such language rendered the renewal provision ambiguous—and we are not implying it did—the *Farris* Court's analysis should have ended there. Nevertheless, the *Farris* Court only determined the renewal provision was not "perpetual" after weighing the equities and construing the contract "more strongly against the drafter"—which are legal devices of construction that are only employed *after* a determination of ambiguity is made. *Id*. at 490; *see also True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003) (explaining "[o]nly actual *ambiguities*, not fanciful ones," are required to be construed against the drafter. (Emphasis added)).

> or before January 1, 1913, party of the second part is to have the option of renting said property for the year beginning January 1, 1913, and ending January 1, 1914, at the same rental, that is, twenty dollars ($20.00) per month, payable on the last day of each month; and on or before the end of each succeeding year, *if party of second part continues to occupy said premises*, she is to have the option of renting said premises for the following year at the rental of twenty dollars ($20.00) per month, payable on the last day of each month.

Vokins, 266 S.W. at 908 (emphasis added).

In *Vokins*, the lessee contended that under this provision "*she* was given the right to *perpetually* renew or extend the lease at her option on or before the end of each succeeding year." *Id*. (Emphasis added.) Reviewing this contention, the former Court of Appeals seized upon the word "perpetually," ignored the word "she," and analyzed the lessee's argument from the standpoint that the lease at issue was a "perpetual lease." *Id*. at 908-910. In doing so, the *Vokins* Court missed the absurdity of the lessee's contention that a lease renewal provision contingent upon *her continued occupation* of the premises was "perpetual." As noted by the highest court of one of our sister states, "For obvious reasons no lease which limits the right to renew to the lessee himself could be construed as a lease in perpetuity." *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E.2d 199, 201 (1952).

This is because a "perpetual lease" is "an ongoing lease not limited in duration." BLACK'S LAW DICTIONARY 899 (7th ed. 1999). It "is substantially *the*

grant of a fee" (*i.e.*, an inheritable property interest)[2] and is regarded by the law as potentially lasting "forever." *Farris v. Laurel Explosives, Inc.*, 797 S.W.2d 487, 490 (Ky. App. 1990). By contrast, a human being's life is *finite*. A property interest measured by the duration of a human being's life, without more, ends with his or her death and is considered "less than a fee" interest. *See* 28 Am. Jur. Estates § 91. There is obviously no such thing as a life estate or life occupancy that lasts "forever" or "in perpetuity."

Vokins actually recognized something that has been characterized as "more limited" than a "perpetual lease." *See Farone v. Mintzer*, 133 A.D.2d 1009, 521 N.Y.S.2d 158, 159-60 (1987) (lease renewable for successive five-year terms, held to be for the lessees' lifetimes only, held valid and a "more limited" property interest than a perpetual lease); *see also Gleason v. Tompkins*, 84 Misc.2d 174, 375 N.Y.S. 2d 247, 253 (N.Y. Sup.1975), explaining:

> [where] the right to renew ran only to the tenant personally, but [. . .] the right could be exercised only while the tenant lived and continued on the property [. . .] [t]he subject lease is not to be construed as one in perpetuity and, although of indefinite duration, will, if continually renewed, reach termination upon the expiration of the renewal term in which [the tenant] dies."

[2] *See* BLACK'S at 629 (defining "fee," in this context, as "[a]n inheritable interest in land, constituting maximal legal ownership").

The lease at issue in this appeal is similar to the lease at issue in *Vokins*. The initial term is granted to Theodore H. Lavit only, and the lease refers to him as "lessee." In the renewal clause, the privilege is extended only to the "lessee." The lease does not give the "lessee" any right of assignment, absent the lessor's consent. And, while the lease provides it is "binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors, personal representatives and assigns," insofar as the lessee is concerned it means only that he may renew so long as he lives and if he dies within one of the renewal terms the lease will continue and both protect and bind his heirs and assignees until the renewal term expires.[3] Considering this, we have no difficulty holding that it would have been absurd for this lease—like the lease in *Vokins*—to have included words like "perpetual," "forever," or "for all time." At most both leases are, or were, only capable of being renewed within the limited expanse of one person's lifetime.

Inasmuch as this appeal is concerned, the value of *Vokins* is primarily in the substance of its holding that a clear lease provision expressly granting multiple renewals *can* confer upon a lessee a personal right, only exercisable while the lessee lives and continues on the property, to renew for successive terms; and

[3] For parity of analysis regarding a substantially identical term, *see Gleason*, 375 N.Y.S. 2d at 253.

its reaffirmation of the principle that a provision that does not certainly and unequivocally allow for multiple renewals of a lease only confers a right to one renewal period upon the same terms as in the original lease.[4] *See Vokins*, 266 S.W. at 909, stating:

> We have carefully considered the provision for successive renewals contained in the involved lease, in connection with other provisions inserted therein and we are forced to the conclusion that it was the intention of the parties to provide, and they did so provide, for the right on the part of the defendant to perpetually renew the lease from year to year at her option upon the same terms. The language employed can be given no other meaning, and the intention to so provide could not have been expressed more certainly and unequivocally.

Stated differently, *Vokins* requires renewal provisions dependent upon life occupancy to be scrutinized as strictly as "perpetual renewal" provisions. They will "not be upheld unless the language [is] clear, plain and unambiguously expressed." *Farris*, 797 S.W.2d at 489 (interpreting *Vokins*). Thus, if the renewal provision in the lease in this matter is at all susceptible to two or more meanings, the proper course is not, as Lavit further suggests, a remand to the circuit court for a trial in which the parties may introduce extrinsic evidence to prove their intent as

[4] For a more extensive discussion of this principle, *see Raff v. Freiberg*, 207 Ky. 246, 268 S.W. 1110 (1925).

to the number of extensions. The provision will simply be construed as providing for one, and only one, renewal.[5]

From our reading of *Vokins*, what made the lease in that case clearly indicative of allowing for multiple renewals was its inclusion of language to the effect that the right to renew would be included in each renewed lease. This was also a characteristic of another type of limited but successively renewable lease at issue in *Hite v. Carmon*, 486 S.W.2d 715 (Ky. 1972); the *Hite* Court described the relevant provisions of that lease as follows:

> First, a recitation that the lease was 'for the purpose of erecting buildings, offices, storing of pipe, erection of racks, oil containers and other material containers, of storing materials and equipment and the erection of such fencing as the lessee shall deem necessary to protect said buildings, materials and equipment . . .'; second, the lease was for an original term of five years, 'at an annual rental of $60.00,'to be paid to lessors' credit at the Morganfield National Bank; third, a recitation that '*lessee shall have the option of extending the original term of this lease from year to year, upon the same terms and conditions and for a like rental*, and any annual payment shall automatically extend the term for an additional year.'

Id. at 716 (emphasis added).

[5] For parity of reasoning, *see Pults v. City of Springdale*, 745 S.W.2d 144, 147 (Ark. Ct. App. 1988) (explaining whenever there is any uncertainty as to whether an agreement was intended to be renewable in perpetuity, it "will nevertheless be construed as importing but one renewal[.]" (citation omitted)); *see also Ginsberg v. Gamson*, 141 Cal.Rptr.3d 62, 79 (Cal. Ct. App. 2012) (opining that this "longstanding rule" of construction is a "better approach" than remanding the case to the trial court to allow it to consider extrinsic evidence).

As an aside, the *Hite* Court determined the above-referenced lease was not perpetual, but nevertheless allowed for multiple renewals until the business activity for which the original lessee leased the premises had ceased, because it contained:

> several provisions strongly indicative of intent that *the term of the lease was limited to a period measured by the commercial activity of the lessee or 'its successors or assigns' on the leased property*. The lessee or its 'successors and assigns' are given the right to remove improvements at the termination of the lease. The option of renewal recites that it is upon the same terms as the original lease. One of those terms is the purpose clause that we have quoted earlier. These expressions emphasize the contemplation of the parties that the lessee's business activity on the premises was an integral part of the contractual understanding between them. The purpose clause of the lease and the right-to-remove-improvements clause of the lease both are provisions ordinarily inserted in leases of relatively limited term or duration rather than in leases intended to operate in perpetuity at the sole instance of the lessee.

Id. at 717 (emphasis added).

With that said, we turn once again to the renewal provision of the lease in this matter. It provides:

> 24. OPTION TO RENEW. Upon the expiration of the basic term of this Lease, Lessee shall have the right and option to renew this Lease, provided, however, that the monthly rental during any or all of said renewal *periods* shall not exceed $200.00 per month. Said option shall be automatically exercised for said renewal period unless, at least sixty (60) days prior to the expiration of the original term of the Lease, *or any subsequent renewal period*

> *thereof*, as the case may be, Lessee gives written notice to Lessor of his intention to cancel the option for said subsequent renewal period.

(Emphasis added.)

While we agree that this provision could have been written more perfectly, it is not so inartfully drafted as to become ambiguous. It contemplates multiple renewal periods and indicates the 60-day notice period and right to renew would be included in each renewed lease. The lease also includes four other provisions defining obligations between the lessee and lessor during the basic term of occupancy "and any renewals."[6] By limiting the right of renewal only to Lavit and not anyone in privity with him, the lease also provides the renewal provision will be operative for a limited and measureable length of time. It further recites the premises are to be used "by the Lessee as a law office[.]" Based upon *Vokins* and

[6] Those provisions are in relevant part as follows:

> 4. SURRENDER OF PREMISES. That the Lessee will surrender and deliver up said premises at the end of the basic term or any renewals hereof [. . .]
>
> . . .
>
> 11. COVENANT OF TITLE, AUTHORITY, ETC. That the Lessor has the full right and lawful authority to enter into, execute and acknowledge this Lease for the full term and any renewals hereof [. . .]
>
> . . .
>
> 13. TAXES AND OBLIGATIONS. The Lessor shall pay the ad valorem taxes assessed upon and against the demised real estate for the entire term of its occupancy herein and any renewals thereof;
>
> . . .
>
> 14. INSURANCE. [. . .] If during the basi [sic] term hereof or any renewals, the demised premises are totally or substantially destroyed [. . .]

Hite, we conclude the lease at issue is capable of being renewed for multiple periods at Lavit's option during his lifetime until he ceases occupying it or using it as a law office.

CONCLUSION

Accordingly, the Marion Circuit Court is REVERSED. Consistent with this opinion, the circuit court is directed to enter an order granting Lavit's motion for summary judgment and dismissing the appellees' counterclaim.

JONES, JUDGE, CONCURS IN RESULT.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Thomas E. Clay
Louisville, Kentucky

Cameron C. Griffith
Lebanon, Kentucky

BRIEF FOR APPELLEES:

Kaelin G. Reed
Robert Spragens, Jr.
Lebanon, Kentucky