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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001341-MR
AND
NO. 2017-CA-001411-MR

BLUE STALLION BREWING, LLC — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 14-CI-00005

ERIKA STRECKER — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, NICKELL AND SMALLWOOD,[1] JUDGES.

ACREE, JUDGE: This appeal and cross-appeal are taken from a Fayette Circuit Court judgment after a bench trial holding Appellant/Cross-Appellees, Blue

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

Stallion Brewing, LLC (BSB), liable to Appellee/Cross-Appellant, Erika Strecker, for use of a parking lot Strecker leased from a third party. After careful consideration, we reverse and remand for further proceedings.

FACTS AND PROCEDURE

The parties to this appeal saw a mutual opportunity in an "adaptive reuse" program the Lexington-Fayette Urban County Government (LFUCG) created to encourage a higher and better use for distressed property adjacent to downtown.[2] BSB wanted to lease eligible property owned by Strecker so it could establish a brewery and taproom there (the "Leased Premises"). However, the Leased Premises was imperfectly suited for the adaptive reuse program because it lacked sufficient parking. Before Strecker could allow BSB to begin fit-up, she had to assure LFUCG that sufficient parking was available.[3] BSB and Strecker agreed to solve the problem by including in the Commercial Lease Agreement for the Leased Premises a separate provision to secure parking offsite.

[2] The adaptive reuse program is codified at LFUCG Code of Ordinances § 8-21(o)4 (2011) and "adaptive reuse" is defined at § 1-11 as: "The process of adapting abandoned, vacant or underutilized buildings and structures for new purposes, which amounts to a change in the structure's primary purpose, a significant change in the way in which the structure is incorporated into and operates within the exterior environment, or which incorporates a nontraditional yet compatible combination of purposes or uses within the site plan. The adaptive reuse should incorporate changes that rejuvenate and/or increase the sustainability of the site and/or neighborhood while retaining historic features of the original building(s) and/or structure(s)."

[3] Under the LFUCG adaptive reuse program, the landowner was responsible for compliance.

Paragraph 7 of the Commercial Lease Agreement became the subject of the dispute now under review. It reads as follows:

> The parking lot located on the Leased Premises shall be available to Lessee and its customers on an exclusive basis, other parking on Lessor's leased adjacent property across the street shall be pursuant to a sub-lease agreement between the parties to include eighteen (18) spaces at a cost of $1,100.00 per month or thirty (30) spaces at a cost of $1,600.00 per month. In the event Lessor cannot obtain a prime lease from the owner of that lot to allow for the sub-lease contemplated herein, then, in that event, the Lessee may terminate this Lease at its option.

(Record 185).

Although this paragraph memorializes the parties' agreement to enter into a sublease agreement, they never did. However, the paragraph succeeded in its purpose to satisfy local government that sufficient parking could be made available. The lease was executed, and the first five-year term began on November 1, 2012. BSB began fitting up the brewery and taproom which took more than six months. It could not open for business, however, until LFUCG was satisfied that sufficient parking, in fact, had been secured.

The first step contemplated by the parties' agreement to agree to a sublease was Strecker's acquisition of the prime lease. She began negotiating with a third party to lease the unimproved lot across the street. (R. 242). It soon became important that Strecker nail down the terms of the sublease before she

committed to paying lease payments to the third party. The first undetermined material term essential to the formation of a sublease was whether BSB would be leasing 18 parking spaces or 30. On January 11, 2013, Strecker sent an email to BSB electing the 18-parking space option stating, "I will build the 18 parking spaces at the agreed 1100. [sic] price[.]" (R. 234). BSB apparently did not agree that the option was Strecker's to exercise because, on January 15, 2013, BSB emailed Strecker, electing to sublease "30 parking spaces on the adjacent lot for the agreed price of $1,600 per month. What is the expected date of completion of this parking lot?" (R. 233). As the circuit court noted, Paragraph 7 "does not state . . . which of the parties has the right to decide whether BSB could use 18 or 30 spots in the parking lot . . . ." (R. 679-680). But this was not the only term left undetermined.

The circuit court correctly noted that Paragraph 7 "does not state . . . that the lot to be constructed would be for the exclusive use of BSB . . . [nor does it state] any time by which the construction of the parking lot must be completed." (*Id.*). Although there is no dispute between the parties that the unimproved lot required paving and related improvements, Paragraph 7 does not say who would bear that cost. The parties' emails show the cost of parking lot improvement was a

point of contention and negotiation.[4] The following were among some other terms not addressed by Paragraph 7: (1) when the term of the parking sublease would begin and the first month's rent for parking be due; (2) who would be responsible for maintenance and repair of the improved parking lot during the term of the sublease; (3) who would be responsible for "policing the lot"; (4) what hours the lot would be accessible by BSB; and (5) who would provide insurance for liability on the parking premises. (R. 220-240; 263-264; 275-284).

Furthermore, despite having agreed to sublease payments of either $1,100 (for 18 spaces) or $1,600 (for 30 spaces), the parties attempted to renegotiate those prices. (R. 226-230). Consideration was given even to a proposal to renegotiate Paragraph 7 itself, to abandon the sublease arrangement in favor of an addendum to the Commercial Lease Agreement to supply necessary material terms. (R. 181).[5]

[4] Strecker sought an increase in per space rates from those established in the Commercial Lease Agreement to offset an increase in her costs not anticipated when the Commercial Lease Agreement was executed.

[5] In a letter between the parties' respective counsels, dated November 20, 2013, the following proposal was made: " . . . the parties have been addressing the execution of a separate lease agreement . . . set out in paragraph 7 of the Commercial Lease Agreement. . . . [T]o simplify the situation and move things forward, the parties should simply execute a simple addendum to the existing lease in paragraph 7 . . . so that things can move forward and the landlord can comply with the city's adaptive reuse requirements and comply with her obligation to provide the parking spaces as set forth in paragraph 7 of the lease." (R. 181 (emphasis omitted)).

The dilemma faced by these parties was that although Paragraph 7 memorialized their agreement to agree to a sublease, it did not anticipate all the pressures they would face – pressures over which they had little control. Obviously, the proposed sublease was conditioned on Strecker's ability to negotiate a lease with the third party who owned the "adjacent property across the street." When it came time to pursue that lease, the third party demanded more in lease payments than Strecker had hoped. Then, "[c]onstruction costs and permitting for building this parking lot has gone WAY over [Strecker's] projected amount." (R. 236). Additionally, compliance with LFUCG's adaptive reuse program became an issue.[6]

These pressures made negotiating the sublease more challenging and delayed Strecker's ability to have additional parking available when BSB was ready to open. When BSB finished fitting up the Leased Premises as a brewery and taproom in June 2013, there was no sublease for additional parking. BSB could not obtain its certificate of occupancy from LFUCG unless and until it secured additional parking. It was able to find that parking elsewhere in the neighborhood, but only for the minimum number of additional spaces needed to

[6] As noted, Strecker, as owner of the Leased Premises, was required to comply with the program requirements and received letters from the city concerning that compliance.

satisfy the government. BSB received its certificate of occupancy and opened for business to the public on July 17, 2013. (R. 676).

In January 2014, BSB filed a declaratory judgment action against Strecker seeking damages for her failure under Paragraph 7 "to obtain a lease and construct a parking lot on property across the street from BSB's brewery" for sublease to BSB. (R. 674). Strecker counterclaimed "alleging various violations of their Commercial Lease [Agreement], including a claim to recover her costs and damages relating to the lease on the parking lot property." (*Id.*).

At an evidentiary hearing in early 2017, Strecker presented evidence that she "built the parking lot and delivered all 30 spots to BSB for its use in June 2014" – a year after BSB was ready to open and five months after BSB had sued. (*Id.*). The circuit court identified the controversy as follows: "At the heart of the parties' dispute is their inability to agree to terms of a sublease for the parking lot . . . ." (*Id.*).

The circuit court entered a judgment describing the efforts Strecker undertook to successfully obtain a lease and construct a parking lot across the street. It also described the parties' efforts to negotiate a sublease, but that those efforts never succeeded, and no sublease was executed. The court found that once the parking lot was finished "BSB's patrons and employees began using the lot." (R. 677). Strecker did not sublease the lot to anyone else and could have erected

barriers at any time to prohibit entry but did not. (R. 678). There is no finding whether Strecker collected parking fees on an individual basis, but there is nothing in the record indicating she was prohibited from doing so.

Strecker filed a forcible detainer action in Fayette District Court to evict BSB from the Leased Premises and to prohibit parking in the lot across the street. (*Id.*). BSB had not failed to pay rent on the Leased Premises so the district court denied the forcible detainer as to the Leased Premises, but "ordered BSB's eviction from the Parking Lot" across the street. (*Id.*). The order was appealed to the circuit court and consolidated with the pending declaratory judgment action and counterclaim. (*Id.*).

The parties conducted themselves, and litigated, as though there was an enforceable contract between them for the additional parking. Consequently, the circuit court treated the cases as "an action to recover rent" and held "the tenant [BSB] has the burden of proving that it is not required to pay the rent sought by the landlord." (R. 679 (citation omitted)). The circuit court, in fact, did rule that Paragraph 7 "of the [Commercial] Lease [Agreement] regarding Strecker's agreement to obtain a lease for the construction of a parking lot and BSB's agreement to pay rent on that parking lot is a binding and enforceable contract between Strecker and BSB." (R. 680). The circuit court further found it "clear that in filing this action, BSB believed and represented to this Court that the parties had

a binding agreement . . . that Strecker was required to build the lot . . . [and it was] BSB's obligation to pay rent when the parking lot was completed and made available to it." (R. 680-681).

The circuit court further found "that Strecker defaulted initially in failing to provide the additional parking spaces" when BSB was ready to open for business and "BSB had to file this action . . . to correct that default." (R. 684). Apparently deeming the default cured, and notwithstanding BSB's need to find an alternate source for parking, the circuit court then held that, "upon Strecker's delivery of the completed parking lot to BSB on June 30, 2014, BSB was obligated to pay the rent provided under Paragraph 7 of the Lease." (R. 681). BSB was then found "in default on the Lease for its failure to make the required payments of rent on the parking lot since" June 30, 2014. (*Id.*). The court based the measure of damages on the 30-space price of $1,600 per month from June 2014 to the end of the term of the Commercial Lease Agreement. (R. 682). Turning to other paragraphs of the Lease, the circuit court found BSB liable for monthly late charges of 5% under paragraph 3 and past and future costs of maintaining the parking lot under paragraph 13. (R. 683). The court also awarded prejudgment interest at the legal rate. (R. 684). These rulings are the subject of BSB's appeal.

Strecker's cross-appeal is based on the circuit court's failure to award attorney fees pursuant to Paragraph 15 which says, "[T]he non-defaulting party is

entitled to recover 'any and all costs associated with [the other party's] default, including a reasonable attorney's fee.'" (R. 684).

STANDARD OF REVIEW

In actions tried upon the facts without a jury we review the court's findings under the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. *Largent v. Largent,* 643 S.W.2d 261, 263 (Ky. 1982). This rule provides in pertinent part that findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* Regarding the trial court's application of law to those facts, we engage in a *de novo* review. *Rehm v. Clayton,* 132 S.W.3d 864, 866 (Ky. 2004).

ANALYSIS

The judgment, BSB's appeal, and Strecker's cross-appeal are based on the finding that Paragraph 7 is sufficiently definite to be enforced. We conclude it is not.

It is well established that construction and interpretation of a written instrument are questions of law for the court. *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998) (citing *Morganfield National Bank v. Damien Elder & Sons,* 836 S.W.2d 893 (Ky. 1992)). We review questions of law *de novo*, without deference to the interpretation afforded by the circuit court. *Id.* (citing *Louisville*

Edible Oil Products, Inc. v. Rev. Cab., Commonwealth of Ky., 957 S.W.2d 272 (Ky. App. 1997)). Resolution of this appeal and cross-appeal revolves around the proper construction of Paragraph 7 of the Commercial Lease Agreement.

Paragraph 7 clearly anticipates multiple alternative futures for the parties. First, it contemplates that if Strecker "cannot obtain a prime lease from the owner of that lot" across the street, BSB would have the option of terminating the Commercial Lease Agreement, ending the business relationship between the parties. (R. 185, Paragraph 7). Paragraph 7 does not include a deadline for Strecker to obtain that prime lease, but the law provides one – "in the absence of a specified time for the performance of a contract, it must be performed within a reasonable time after its execution or after the conditions arise when performance can be made." *Kirkpatrick v. Lebus*, 184 Ky. 139, 211 S.W. 572, 576 (1919). And, of course, Strecker would have been bound to seek that prime lease by the exercise of her good faith. *Farmers Bank and Trust Co. of Georgetown, Ky. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) (The implied covenant of good faith and fair dealing imposes upon parties a duty to do everything necessary to "carry out" the contract.).

Second, because Strecker's failure to obtain a prime lease did not automatically terminate the Commercial Lease Agreement, BSB would have had the option of obtaining additional parking required by the adaptive reuse program

from any available source acceptable to LFUCG. This would have satisfied the requirement for the certificate of occupancy, allowed BSB to open for business, and continued the business relationship between the parties pursuant to the Commercial Lease Agreement.

Neither of these two possibilities occurred because Strecker, in fact, did obtain a prime lease from the owner of the unimproved lot across the street. That set up the remaining possible outcome under Paragraph 7. It anticipated the parties' cooperation in securing BSB's necessary "other parking . . . pursuant to a sub-lease agreement between the parties to include eighteen (18) spaces at a cost of $1,100.00 per month or thirty (30) spaces at a cost of $1,600.00 per month." (R. 185, Paragraph 7). Paragraph 7 does not determine, as a material term of the anticipated sublease, whether it would be for 18 parking spaces or 30, or which of the parties had the right to choose. The only material term of the sublease determinable by reference to Paragraph 7, or any part of the Commercial Lease Agreement, is what price would be paid once the parties did agree on how many spaces would be subleased. There is nothing else. As identified earlier, many terms, some more material than others, remained for negotiation.

We conclude Paragraph 7 is nothing more than an "agreement to agree" to the sublease to BSB of a parking lot Strecker had not yet acquired by lease and had not yet built. Paragraph 7 clearly contemplated the future

negotiation of the material terms of a sublease, based on a future event that may or may not happen – Strecker's acquisition of a lease between herself and the property owner.

The provision leaves open for negotiation nearly every material term. The contemplated sublease never happened because these open terms were never resolved by the parties' negotiations. "To be enforceable and valid, a contract to enter into a future covenant must specify all material and essential terms and leave nothing to be agreed upon as a result of future negotiations." *Walker v. Keith,* 382 S.W.2d 198, 201 (Ky. 1964) (quoting *Johnson v. Lowery*, 270 S.W.2d 943, 946 (Ky. 1954)). The *Walker* court concluded that the parties must either agree upon the material terms or supply a "definite method of ascertaining" them. *Id.* at 202. Similarly, the case of *Cinelli v. Ward* says:

> Where an agreement leaves the resolution of material terms to future negotiations, the agreement is generally unenforceable for indefiniteness unless a standard is supplied from which the court can supplant the open terms should negotiations fail. . . . In the case at hand, the court is not supplied any standard or agreed-upon method with which to supplant the Agreement's unresolved open terms [*i.e.*, the unresolved terms of the sublease contemplated by Paragraph 7]. Absent such standard, any attempt to supply the Agreement's unresolved open terms would be sheer conjecture. We believe the Agreement is essentially too indefinite for the court to view it as an enforceable contract . . . .

997 S.W.2d 474, 476-78 (Ky. App. 1998) (citing *Walker*, 382 S.W.2d at 201 ("an agreement to agree cannot constitute a binding contract")). We hold that the same can be said in this case.

CONCLUSION

Having concluded that Paragraph 7 does not constitute an enforceable contract, the circuit court's judgment of June 7, 2017, must be reversed. We remand this case with instructions to dismiss Strecker's counterclaim to collect rent and damages, and to dismiss BSB's petition for declaratory judgment. The sums paid into the circuit court by BSB shall be refunded.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Carroll M. Redford, III Michelle L. Hurley Lexington, Kentucky	J. Mel Camenisch, Jr. H. Derek Hall Lexington, Kentucky
ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
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