IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 2000 Session

CGR INVESTMENTS, INC., v. HACKNEY PETROLEUM, INC.

Direct Appeal from the Circuit Court for Knox County
No. 3-217-94 Hon. Wheeler A. Rosenbalm, Circuit Judge

FILED SEPTEMBER 12, 2000

No. E2000-00256-COA-R3-CV

In a dispute over the meaning of a notice of termination provision in the Lease, the Trial Judge ruled the notice given did not comply with the Lease and awarded damages for breach. We reverse.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Reversed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

Barry K. Maxwell, Knoxville, Tennessee, for appellant, Hackney Petroleum, Inc.

Arthur G. Seymour, Jr., Knoxville, for appellee, CGR Investments, Inc.

OPINION

In this contract dispute between a landlord and tenant, the Trial Court ruled a notice provision in the lease was ambiguous, heard evidence, and ruled in favor of the landlord. The tenant has appealed.

The lease between the parties was signed on June 13, 1990, providing for a five year term beginning on July 1, 1990 and contained a provision for early termination reading as follows:

> Anything herein to the contrary notwithstanding, lessee shall have the option of terminating this Lease at the end of the twenty-fourth month of the initial term provided lessee gives lessor at least six (6) months advance written notice of its intention to so terminate.

By certified letter dated March 13, 1992, Tenant notified Landlord that Tenant was giving a six months notice of its election to terminate the Lease effective October 1, 1992. Landlord, through his attorney, advised tenant that he did not agree with tenant's interpretation of the termination provision, and it was landlord's position that tenant could only terminate the lease on July 1, 1992 - the date that was twenty-four months after the inception of the lease.

After the Trial Judge heard evidence on the issue, he entered judgment for the landlord for the unpaid rent, totaling $52,500.00, less a credit, and plus attorney's fees incurred by the landlord.

On appeal, the tenant insists the Trial Court erred in its interpretation of the provision in the parties' lease by finding that tenant had wrongfully terminated the lease.

At the outset, we note that North Carolina law applies, as the subject property was located in North Carolina.

While the Trial Judge heard evidence on the basis that the provision was ambiguous, he essentially based his judgment on the case of *M. Fine Realty Co. v. City of New York*, 53 Misc. 246; 103 N.Y.S. 115 (Sup. Ct. N.Y. 1907), in construing the clause "at the end of the 24th month". In that case, the lease was for five years with the following provision:

> With the privilege, however, to either party to terminate the lease at the expiration of one year on sixty (60) days' notice in writing.

The Court found that the lessor, by terminating the lease three years after its inception, violated the lease agreement. The Court interpreted the termination clause as allowing early termination only at the end of the first year. The Court said:

> The phrase "at the expiration of one year" defines the limit of time. It marks the close of a period, not its beginning . . .

Id. at 116.

Contract language which is "plain an unambiguous on its face" can be interpreted as a matter of law; however, if it is ambiguous, it is a question for the factfinder. *Cleland v. Children's Home*, 306 S.E.2d 587, 589 (N.C. Ct. App. 1983). Ambiguity exists where the "language of the [contract] is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Maddox v. Colonial Life & Accident Insurance Co.*, 280 S.E.2d 907, 908 (N.C. 1981). Under North Carolina law, only when the language of the lease is found to be ambiguous, may the court consider evidence of the negotiations between the landlord and tenant prior to the execution of the lease. See *IRT Property Co. v. Papagayo, Inc.*, 449 S.E.2d 459 (N.C. 1994); *Mosley & Mosley Builders, Inc. v. Landin LTD*, 389 S.E.2d 576 (N.C. Ct. App. 1990).

We conclude that neither case law in general, nor the evidence submitted on the issue of ambiguity, supports the Trial Court's judgment in this case.

It is undisputed that an earlier draft of the lease agreement stated that the lessee could opt for an early termination "only at the end of the twenty-fourth month", and the word "only" was taken out of the sentence at the insistence of the tenant. The parties seem to agree that the original phrase "only at the end of the twenty-fourth month" meant that tenant could only terminate the lease on the last day of June, 1992, requiring notice to be given by December 31, 1991. Tenant did not want to be bound by such a narrow window for termination, and refused to sign with the word "only" in the sentence. Landlord's attorney advised landlord that he would not sign the lease without the word "only" in the lease, but acknowledged that the decision was up to the landlord to decide what he wanted to do. Landlord argues that the tenant knew the landlord was not agreeing to an open-ended option to terminate that would continue for the life of the lease. Landlord made it clear that he did not want to have to worry for the remaining three years that tenant would be able to terminate the lease on only six months notice. Accordingly, landlord argues that the lease could only be terminated on June 30, 1992, with notice in December of 1991. However, this does not comport with the evidence that tenant told the landlord that tenant would agree to a limited window because "after twenty-four months, we're [tenant] going to know whether it will go or not."

While the Trial court relied on a 1907 case out of New York State for his interpretation of the lease, we conclude the prevailing view on this issue from other jurisdictions is contrary to that case.

The case of *Texas Co. v. Blackman-Scarbrough, Inc.*, 38 S.E.2d 890 (Ga. Ct. App. 1946), involved a ten-year lease which was "subject to termination at the end of the fifth year by lessee or lessor upon ninety days written notice." The Trial Court found that the lessor could give notice at the end of the fifth year or within a reasonable time thereafter. The Court of Appeals affirmed.

> The work 'at' is a term of considerable elasticity of meaning, and is somewhat indefinite. It is not a word of precise and accurate meaning, and it has been said that the connection furnishes the best definition. As used to fix a time, it does not necessarily mean eo instanti, or the identical time named, or even a fixed, definite moment. The work 'at' in this contract, is equivalent in meaning to 'after.' It was held in Annan v. Baker, 49 N.H. 161, 169, cited in 1 Am. & Eng. Enc. Law (1st Ed.) p. 893, note, that 'at the end of one year,' and 'at,' is equivalent in meaning to after. . . As the election could be made after the expiration of the time limited, of course a reasonable time was allowable for this purpose.

Id. at 891. In a later case, the Georgia Court clarified that the court had not interpreted "at" to mean "at time after", but rather a "reasonable time after" the end of the specified period. *See Interstate North Associates v. Hensley-Schmidt, Inc.*, 226 S.E.2d 315, 317-318 (Ga. Ct. App. 1976).

The construction by the Georgia courts mirrors the construction used in several other jurisdictions. In *Thompson v. Fairleigh*, 187 S.W.2d 812 (Ky. Ct. App. 1945), the Court of Appeals of Kentucky held that a corporation's right to redeem stock "at the end of five years from this date" meant that it had the right to retire the stock within a reasonable time thereafter, and that more than twelve years was not a reasonable time. The Court looked at many cases, and ultimately held:

> [T]he word "at" is used in the sense of "after" but "near to" the date, and that action within a reasonable time after the expiration of the period satisfies the contractual provision. (Citations omitted).

187 S.W.2d at 815.

Similarly, in *Central Guarantee Co. v. Fourth & Central Trust Co.*, 244 Ill.App. 61, 65 (Ill. Ct. App. 1927), the court said

> The phrase "at the end of" or "at the expiration of" does not always necessarily imply that action must take place on the day of expiration in order to be a literal compliance with the contract. The work "at" is not invariably used to denote a fixed or definite time. It sometimes may be used to mean "about" or "after."

The Court held that the holder of the option to terminate could cancel within a "reasonable time" after the cancellation date. *Accord, Central Guarantee Company v. Nation Back of Tacoma*, 241 P. 285 (Wash. 1925).

Landlord cites to the recent case of *Norton v. McCaskill*, 12 S.W.3d 789 (Tenn. 2000), to support its construction of the relevant phrase. However, there are significant differences between that case and the case under consideration. In *Norton*, the court found that when a lease stipulates that the option to renew must be exercised "at the end of" or "at the termination of" the lease, the lessee must exercise that option on or before the day the original lease term expires. 12 S.W.3d at 793-794. The reasoning behind this is the option to renew is part of the lease and therefore expires at the same time the lease expires. *Id* at 793. This reasoning is inapplicable to cases involving early termination, since the lease is still in effect for some time thereafter.

We adopt the prevailing interpretation of the phrase "at the end of", when used in relation to an early-termination clause, which allows the party with the option to terminate to exercise that option within a reasonable time following the expiration of the period provided. Considering the construction given to the phrase "at the end of" by these courts, as well as the negotiation between the parties, we construe the clause to allow early termination for a reasonable time after the end of twenty-four months. Tenant gave notice of its intention to terminate on March 13, 1992, with termination on October 1, 1992, which we find to be reasonable. Our construction is in accord with the principle that contracts are to be interpreted equitably, and as a matter of law the phrase allowed termination for a reasonable time after the end of the time period, but not an open-ended time. Accordingly, we reverse the judgment of the Trial Court on this issue.

Since we have determined that the tenant did not breach the lease when he opted to terminate, there is no basis for a claim for damages, and as to the issue of attorney's fees, the lease provides that if one party obtains a judgment against the other, the losing party shall pay the attorney's fees and expenses of the prevailing party. Accordingly, tenant is not responsible for the landlord's fees and expenses.

We reverse the judgment of the Trial Court, and remand with cost of the appeal assessed to appellee, CGR Investments, Inc.

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HERSCHEL PICKENS FRANKS, J.