Affirmed and Memorandum Opinion filed February 15, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00063-CV

AMERICAN PROPERTIES OF HOUSTON, LLC AND PAUL A. HOEFKER, Appellants

V.

DETERING OFFICE PARTNERS, LTD., Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2009-03053

MEMORANDUM OPINION

In this lease dispute, American Properties of Houston, LLC, and Paul Hoefker appeal the trial court's grant of summary judgment in favor of Detering Office Partners, Ltd. The appellants contend that the trial court erred by failing to follow the applicable summary-judgment standards and by failing to enforce the unambiguous terms of the parties' lease. We affirm.

I

In 2004, Detering Office Partners, Ltd. ("Detering"), agreed to lease to American Properties of Houston, LLC ("American Properties"), the premises located at 99 Detering Street, Suite 100, in Houston. To induce Detering to enter into the lease, Hoefker, the managing member of American Properties, executed a guaranty by which he unconditionally guaranteed American Properties' performance under the lease. In April 2008, the parties executed a "Modification and Ratification of Lease Agreement" extending the term of the lease to February 2010.

In September 2008, Hurricane Ike damaged the leased premises. Detering repaired the damage in less than sixty days, but American Properties failed to pay rent and abandoned the leased premises. Detering sued American Properties for breach of the lease and Hoefker for breach of his guaranty. American Properties and Hoefker answered and counterclaimed for breach of the lease's Fire Clause, which they contended required Detering to provide written notification of its intent to either terminate the lease or to repair the leased premises.

Detering moved for summary judgment, asserting that no fact issue existed as to Detering's claims against American Properties and Hoefker because American Properties had defaulted under the lease by failing to pay rent and abandoning the premises, and Hoefker failed to cure American Properties' defaults. Detering further asserted that American Properties and Hoefker could not prevail on their counterclaim because they did not provide notice of any default by Detering as the lease required, and in any event, Hoefker had personal knowledge of the post-hurricane repairs and therefore could not show any damages for any alleged breach of the Fire Clause. American Properties and Hoefker responded, contending that genuine issues of material fact existed regarding whether Detering failed to give written notice as required concerning its intent to repair the lease premises, and asserting that Detering's failure to give the written notice rendered the lease unenforceable.

On September 15, 2009, the trial court granted summary judgment in favor of Detering. American Properties and Hoefker filed a motion for new trial, which the trial court denied. This appeal followed.

II

A

We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The party moving for a traditional summary judgment has the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). In determining whether a disputed material fact precludes summary judgment, we take as true evidence favorable to the non-movant, and we must resolve any doubt in the non-movant's favor as well as make reasonable inferences in the non-movant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

B

According to American Properties and Hoefker, the trial court erred in granting Detering's motion for summary judgment because the lease expressly required Detering to give written notice of its intent, following Hurricane Ike, regarding its decision whether to rebuild. American Properties and Hoefker point to the written notice provision in the lease's Fire Clause:

> F. FIRE CLAUSE: If at any time during the Lease term, the Leased Premises or any portion of the Building shall be damaged or destroyed by fire or other casualty, then Lessor shall have the election to terminate this Lease or to repair and reconstruct the Leased Premises and Building to the condition in which they existed immediately prior to such

> damage or destruction and Lessor shall give Lessee written notice of such election within sixty (60) days from the date of such damage or destruction.

American Properties and Hoefker assert that, under the express and unambiguous terms of the Fire Clause, if Detering does not give the written notice within sixty days, the lease terminates. Detering failed to give the required written notice, and therefore the lease terminated and became unenforceable against either American Properties or Hoefker. Further, Detering's failure to give the written notice is not curable. American Properties and Hoefker contend the trial court wrongfully interpreted the lease and ignored Hoefker's testimony that the required notice was not given, which at the very least should have created a genuine issue of material fact.[1]

Detering responds that the Fire Clause does not state that the lease automatically terminates if Detering fails to give written notice of its election, and therefore American Properties and Hoefker's argument is without merit. We agree. Nothing in the Fire Clause provides for an automatic termination in the event Detering fails to give the written notice. This conclusion is supported by the lease's requirement that in the event of a default by Detering, American Properties is to give Detering written notice specifying the default and giving Detering thirty days to cure the default:

> In the event of any default by Lessor, Lessee's exclusive remedy shall be an action for damages (Lessee hereby waiving the benefit of any laws granting it a lien upon the property of Lessor and/or upon rent due Lessor), but prior to any such action Lessee will give Lessor written notice specifying such default with particularity, and Lessor shall thereupon have thirty (30) days in which to cure any such default.

[1] American Properties and Hoefker also assert that parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. *See David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008), and therefore Detering "cannot satisfy the written contractual requirement through parol evidence testimony." But they do not identify the alleged parol evidence they contend the trial court should not have considered or explain any ambiguity such parol evidence created.

Thus, assuming Detering's failure to give the notice contemplated under the Fire Clause constitutes a default, the lease provides that American Properties is to give notice of the default and an opportunity to cure. This paragraph would be rendered meaningless if Detering's failure to provide written notice resulted in automatic termination, because Detering would be deprived of any opportunity to cure the alleged default. And, it is undisputed that neither American Properties nor Hoefker gave notice of a default by Detering under this provision.

Additionally, Detering provided undisputed summary-judgment evidence that Hoefker had actual notice of the repairs. In an affidavit, Gordon Pilmer, the vice president of Detering's general partner, attested that (1) he personally informed Hoefker of the damages from Hurricane Ike and informed him that Detering had engaged a contractor to begin renovations which commenced within seventy-two hours of the hurricane; (2) Hoefker personally observed the renovation process during numerous visits to the leased premises to remove files and other belongings; (3) Hoefker communicated directly with the project manager for the renovation contract numerous times regarding the status of the repairs; and (4) the leased premises were completely repaired by November 1, 2008. American Properties and Hoefker did not dispute any of these facts in response to Detering's summary-judgment motion.

Under these facts, the trial court did not err by concluding that American Properties and Hoefker's actual notice of Detering's intent to repair the leased premises rendered the written-notice requirement of the Fire Clause unnecessary. *See Cole Chem. & Distrib., Inc. v. Gowing*, 228 S.W.3d 684, 690–91 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that, even though lessor was statutorily required to post lockout notice, lessee's actual notice negated the need for any statutory notice and lessee did not argue that he was prejudiced or damaged by lessor's failure to post notice); *see also Jasper Fed. Sav. & Loan Ass'n v. Reddell*, 730 S.W.2d 672, 674–75 (Tex. 1987)

(borrower's actual notice of rights in deed of trust excused lender's failure to provide notice required by deed of trust).

Further, we note that in answers to requests for admissions filed in support of Detering's summary-judgment motion, American Properties admitted that it had abandoned the leased premises, it had made no lease payments since September 2008, and it did not vacate the leased premises because Detering refused to repair the damage to the leased premises caused by Hurricane Ike. We therefore overrule American Properties and Hoefker's issue.

* * *

The trial court's judgment is affirmed.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Boyce, and Jamison.