IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

January 22, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

THE CAIN PARTNERSHIP, LTD.,	)	
Plaintiff/Appellant,	)	KNOX LAW
	)	Hon. Harold Wimberly, Judge
v.	)	
PIONEER INVESTMENT SERVICES COMPANY,	)	No. 03A01-CV-00224
Defendant/Appellee.	)	
and	)	
FIRST NATIONAL BANK OF LOUISVILLE,	)	
Intervenor.	)	

FOR APPELLANT:

Dean B. Farmer
HODGES, DOUGHTY & CARSON
Knoxville, Tennessee

Larry E. Parrish
LARRY E. PARRISH, P.C.
Memphis, Tennessee

FOR APPELLEE:

G. Wendell Thomas, Jr.
KENNERLY, MONTGOMERY &
FINLEY, P.C.
Knoxville, Tennessee

OPINION CONCURRING IN RESULTS

O'BRIEN, SP. J.

I concur in the results reached in the lead opinion, however, I conclude that in this case, involving only a commercial lease, it is not necessary to engage in a discourse on "The Uniform Residential Landlord and Tenant Act," or make reference to a general text on real property law, neither of which resolve the issue at hand. There is adequate precedent under Tennessee law.

This action was brought under the Tennessee detainer statutes, T.C.A. §§ 29-18-101 et seq., seeking possession of the premises from the tenant-appellee, Pioneer Investment Services ("Pioneer"). The complaint alleged that the leased property had been assessed for city and county taxes under several different parcel numbers and gave a history of the non-payment of taxes by the tenant. The original lease was executed in April, 1974, between the plaintiff-appellant, The Cain Partnership, Ltd. and Colonial Enterprises. Pioneer became assignee on the original lease in April, 1987, after other previous assignments.

The lease does not contain any termination clause in the event of the breach of one of its material provisions. The crux of the dispute between the parties is contained in the provisions of the original lease agreement requiring payment of real estate taxes, "promptly when due", and whether, in the absence of a termination clause, the lease can be terminated by the lessor for failure to comply with that condition.

First National Bank of Louisville was permitted to intervene in the trial court, asserting that it held a deed of trust lien on a portion of the property; and that by written agreement, the lessor was obligated to give the intervenor notice of

and an opportunity to cure any defaults prior to initiation of any action to declare the lease terminated. In the interval since the application for permission to appeal was granted, the National City Bank, successor to First National Bank of Louisville, has apparently relinquished any interest in the subject matter of this litigation and is no longer a party litigant.

The trial court found the phrase "promptly when due" to be ambiguous and held that the payment of real property taxes by the tenant at any time before such taxes became delinquent was sufficient to meet its obligation under the lease. It also found that since the lease did not have a termination provision that would permit the lease to be terminated on default, a default under the lease could not result in a termination of the term of the lease.

Finding that in the past there had been a breach of the lease by the tenant in failing to pay taxes before they became delinquent the trial court set a hearing to submit proof on the issue of entitlement to recover attorney fees provided for under the terms of the lease.

(1) The trial court dismissed the complaint insofar as plaintiff sought to terminate the lease;

(2) A motion to amend seeking to terminate the lease as a result of non-payment of 1992 taxes was denied as failing to state a claim for which relief could be granted.

The Cain Partnership appealed the trial court judgment.

The Court of Appeals ruled solely on the issue raised by the intervenor. It held, "The conditions precedent to maintaining this action were not met by the failure of the lessor to give the intervenor notice of the alleged default and an

opportunity to remedy such default prior to instituting this action", saying the trial court should have sustained the motion to dismiss. It affirmed the judgment of the trial court as modified. Due to the action taken by the intervenor, it must be concluded that the judgment of the Court of Appeals is of no further significance in resolving the issue.

The ultimate issue to be determined is whether or not the common law or any controlling statute prohibits the lessor from terminating a commercial lease of real property which does not have a termination clause when a tenant breaches a collateral condition of the lease.

Appellant forcefully argues that this court in Planters v. Diggs, 67 Tenn. 563(1876), followed the English common law ruling that the requirement in a real property lease that the tenant pay real property taxes was a condition the breach of which terminated the lease at the discretion of the landlord and without prior notice.

It is not clear that Planters v. Diggs supports appellant's issue to the extent it would have this court rule. The lease involved in Planters contained a forfeiture clause. The court said "Forfeitures are not favored in law, and when a forfeiture is once waived, the court will not assist it, and that leases, to be void on conditions such as we have now before us will only be void at the option of the lessor, which requires some affirmative act on his part, and do not take effect until this is done."

The Planters court went on to say "This case is to perform a collateral condition, however, that is to pay the taxes but the principle is substantially the same. In such case we think that the sound rule deducible from the authorities,

that if the payment be made before the forfeiture is taken advantage of by re-entry by the landlord for this purpose, in accordance with the provision contained in the lease, the forfeiture is saved. The forfeiture is only enforceable by such affirmative action, the option being with the landlord, and if the tenant pay before the option is exercised and re-entry for this purpose, he has paid while the contract is in existence, the condition terminating it not having been taken advantage of, and he thereby saves himself from the forfeiture."

Appellant also refers to an earlier English case, Davis v. Merrill and Lane, dating from the year 1851 which in substance held that where a lessee covenants to pay taxes, no demand was necessary to constitute a breach, so as to entitle lessor to avail himself of the provision for re-entry. The lease in this case contained a covenant to pay rates and taxes, with a proviso for re-entry for breach of any of the covenants. We think that this proviso could be construed as a termination clause of sorts and the ruling is of very little assistance in the case before us.

Since the older cases are obscure and do not provide any definitive answer to the issue before us we must look to the language contained in the lease at hand in order to give it a construction applicable to modern day analysis of commercial leases generally. There has been much litigation between the parties including an adversary proceeding in the United States Bankruptcy Court, Eastern District of Tennessee, subsequent to a voluntary petition under Chapter 11 of Title 11 of the Bankruptcy Laws, facets of which ultimately were decided by the Sixth Circuit Court of Appeals. It is of some assistance for us to take note of some of the findings and determinations of the Federal Courts in the course of the proceedings involving Pioneer Investment Services application for Chapter 11

relief. It was observed by the Bankruptcy Court in the course of those proceedings that the lease involved in this case had not been automatically terminated prior to bankruptcy as a result of Pioneer's failure to pay taxes assessed against the leasehold estate, because under Tennessee Law *affirmative conduct is required by a lessor to terminate a non-residential lease which lacks a forfeiture clause.*[1] (Emphasis supplied.) The Sixth Circuit in affirming the Bankruptcy Court and the District Court stated, in substance, that the lower courts properly interpreted and applied Tennessee law in their conclusion "that the Colonial Lease, which lacked a termination or forfeiture clause was not terminated prior to the filing of Pioneer's bankruptcy petition because the Cain Partnership had not taken any action to terminate the lease."

The case of Javins v. First National Realty Corporation, U.S. Ct. of App., D.C., 428 F2d 1071, 1074, (1970) which, while going far beyond the parameters of this case, dealt with a landlord, tenant dispute and contains relevant language:

> Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law......, more than almost any other branch of law, has been shaped by

[1]The bankruptcy proceeding was filed 12 April 1989. The complaint in this case relates that defendant was first put on notice on or about 29 August 1991 and again on 19 September 1991 that it had failed to pay, promptly, when due, certain of the real property taxes and that plaintiff intended to institute suit as a result of that failure.

> distinctions whose validity is largely historical. *Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life - particularly old common law doctrines which the courts themselves created and developed. As we have said before, the continued vitality of the common law .... depends upon its ability to reflect contemporary community values and ethics"*......(emphasis supplied).

> Ironically, however, the rules governing the construction and interpretation of " predominately contractual" obligations in leases have too often remained rooted in old property law....
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> "Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases. Proceeding piecemeal has, however, led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy but because of the lingering impact of rules whose policies are long since dead."

In Tennessee, a lease must be construed most strongly against the lessor and most favorably to the lessee, and especially in regard to the payment of taxes where the taxes are required to be paid by the lessee; *but where the wording of the lease is not ambiguous, it must be construed according to the wording thereof*. (emphasis supplied). The court can only construe a lease as written, and cannot make a new contract for the parties. The intention of the parties as ascertained by the language of the instrument controls construction of a

lease. 17 Tenn. Juris., Landlord and Tenant, §5, (1993 Rep. Vol.)

Following that precept it is necessary to look to the lease agreement to determine the intention of the parties and the requirement for a termination clause in the agreement in order to allow the lessor to declare the lease void for breach of a material provision of the instrument on the part of the lessee. The lease which is the subject of this litigation states in pertinent part:

> That for and in consideration of the covenants and conditions herein contained, to be kept and performed by the lessee, the lessor does hereby let, grant and lease unto the lessee, ... the following described premises, to-wit:........
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> To have and to hold the aforesaid premises unto the lessee for the term aforesaid, subject to the terms and conditions stated herein.
>
> In consideration of the lease aforesaid, the lessee contracts and agrees to pay for the aforesaid premises an annual rental of $18,000.00, payable at the rate of $1500.00 per month in advance, the first said monthly payment to be due on the 1st day of January, 1975. The rental shall be paid at the office of the general partner of lessor in Knoxville, Tennessee, *promptly when due* and without demand either upon the premises or elsewhere. (emphasis supplied.)
>
> As further consideration for said lease, and in addition to the monthly payment provided herein, the lessee shall pay all real property taxes assessed against said property by taxing authorities during the term of this lease and renewal thereof. *Said taxes shall be paid promptly when due during the entire term.* (emphasis supplied.)

There certainly is not any ambiguity in the wording of these simple provisions of this lease. The intention of the parties is ascertained from the language of the lease itself, as well as the conduct of the lessee in paying

the *rent promptly when due*. There is no evidence in this record that the lessee did not understand and adhere faithfully to the terms of the lease by payment of the rent in accordance with its terms. On the other hand, as noted by the bank-ruptcy judge in his final memorandum, "Pioneer.....has antagonized the situation by failing to pay the taxes on its leasehold estate except at its whim".[2] Although the issue is moot because the appellee ultimately allowed the tax payments to become delinquent, the fact that the tax collector and the legislature grant a grace period after the date taxes become due for payment prior to the time they become delinquent does not alter the terms of the contract between the parties.[3] There is no possible way, within reason, that the terms of this contract, or the intention of the parties could be misconstrued based on the language contained in the instrument. It is not a case where a lessor is taking advantage of an unknowing or unlettered lessee. In this case, two corporate entities entered into a contract for the lease of a large tract of very valuable property. There is no evidence of any overreaching or fraud. Where a contract is clear and not ambiguous, the parties intentions are to be determined from the four corners of the contract. See Boker v. Holder 722 S.W. 2d 676, 679 (Tenn. App. 1986). It is inconceivable that in this case the lessee could clearly understand the provision for the

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[2]Pioneer was assigned the lease on 13 April 1987. Apparently the first default in payment of taxes occurred in 1989. Taxes due on 1 October 1989 (T.C.A. §67-2-701), became delinquent on 1 March 1990 and were not paid until 23 July 1991.

[3]T.C.A. §67-5-1804 provides for a discount for early payment.

payment of rent, *promptly when due*, on the first day of each month, and not understand, with equal clarity, payment of the taxes, *promptly when due,* meant on the date the taxes were to be paid. This was a condition of the lease vulnerable to termination upon violation of the condition.

The problem confronting the court in making an appropriate analysis in this case is that many of the older cases are primarily involved with land leases as opposed to commercial leases as considered in present day law. Moreover, they intermingle the consequences of a breach of a covenant and a violation of a condition. There is some enlightment in the more recent opinion in Matthews v. Crofford 129 Tenn. 541, 167 S.W. 695, (1914), in which Chief Justice Neil delivered the opinion in a somewhat complicated unlawful detainer suit. The case involved a two year lease on certain real estate in the City of Memphis. The lessee fell behind on the payment of notes executed for the purpose of securing the rent and an unlawful detainer suit was filed by the lessor. The suit came to trial and judgment was rendered in favor of the lessor for possession. The case was appealed, and ultimately reached the Supreme Court. In the far ranging decision, Justice Neil discussed the multiple facets of the case and insofar as is relevant, cited a number of authorities to the effect that the action of unlawful detainer is the legal substitute for personal entry. He observed that the reason underlying these cases is that the statutes on this subject, and on forcible entry and detainer, were designed to preserve peace and good order of society and to prevent the collisions that are so likely to follow invasions of real estate. The Court ruled that the service of process in the unlawful detainer suit operated as a constructive re-entry, and actual re-entry by the landlord was unnecessary.

On the question before us, "does the omission of the termination clause in the lease agreement prevent a termination of the lease for the violation of one of its material conditions", certainly, such a clause would most probably preclude or minimize litigation. The absence of a termination clause, or a forfeiture provision authorizing re-entry is an invitation to disputation. However, review of the cases impels me to say the omission is not always fatal. It is our duty to determine the intent of the parties in this case. The intent was that the lease could be terminated if there was a default in the terms and conditions stated. Implied contracts are creations of the law arising in the absence of express contracts to do that which the law says ought to be done as a matter of right and justice. They are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. Generally an implied contract is one which is inferred from the conduct of the parties; it is not necessarily expressed in words. 7 Tenn. Juris., Contracts, §98. There is no doubt that there was a meeting of the minds in this case between the lessor and the lessee. There is nothing in this record to indicate that the rent, *was not paid prom*ptly *when due* in accordance with the terms of the lease. There is nothing in the record to indicate that the taxes were *not paid promptly when due* during the term of the lease *by any predecessor lessee to the appellee in this case*. Pioneer cannot dispute that it stands in its assignor's place so as to assume the burden of its contract. It is charged with notice of the terms of the lease and by accepting possession of the leased premises has subjected itself to all the covenants which run with the land and the conditions of the lease agreement.

In courts of equity the rule is settled that forfeitures are relieved against wherever compensation can be made. That rule is inapplicable under the facts

of this case. The defendant in this case has allowed the taxes to become delinquent. The only compensation that could be made would to be pay the taxes, accrued penalties, and incidental expenses prescribed in the lease in the event of default. A lessee cannot ignore a condition to pay taxes contained in a lease agreement and obligate a lessor to either pay the taxes or suffer the consequences of having the leasehold sold to the highest bidder at a tax sale. Such a result would be unconscionable.

The primary rule for interpreting instruments is to ascertain the intention of the parties. In determining the parties intentions, the words and phrases contained in the instrument will be giving the ordinary and usual meaning, unless expressly provided, where the language contained therein is unambiguous. Jaffe v. Bolton, 817 S.W. 2d 19, 21 (Tenn. App. 1991). The cardinal rule of construction of written instruments is that the intention of the parties as ascertained from the language of the instrument controls. In construing contracts the words expressing the parties intentions should be given their usual, natural and ordinary meaning, and neither party is to be favored in the construction. In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought harsh and unjust. This Court cannot make a new contract for the parties but can merely construe the lease as written. See St. Paul Surplus Lines v. Bishops Gate Insurance , 725 S.W. 2d 948, 951 (Tenn. App. 1986). The lease agreement before us unequivocally requires lessee to pay the taxes promptly when due. In accordance with the analysis we have made here, we find that the lessor was entitled to terminate the lease under the terms of the lease agreement, with the reservation that since the lease did not contain a termination clause, termination is not automatic. Under the circumstances, in the absence of a termination

clause, the lessee is, at the least entitled to notice of the impending proceedings. Appellant alleged in its complaint in the trial court that on at least two occasions defendant was put on notice that its failure to pay real property taxes, promptly when due, would precipitate suit for result of that failure. The record does not indicate if the trial court considered such notices, or had the opportunity to do so, before rendering judgment. Whether or not these notices constitute affirmative action sufficient to justify re-entry is first a matter for the determination of the trial court. This court made clear in Matthews v. Crofford, supra, that the service of process in the unlawful detainer suit operated as a constructive re-entry, and actual re-entry by the landlord is unnecessary. To paraphrase that court, the question is not whether the court will enforce a penalty or forfeiture, but whether it will recognize a contract which the parties have made upon a contingency which they have provided for in terms agreed upon between them. The conduct of the original lessee and prior assignors is relevant on this issue.

I would hold that an implied contract existed between the parties to the lease agreement to pay the real estate taxes on the leasehold property, promptly when due. That the appellee in this case as assignee stands in the assignor's place and assumes the burden of its contract. The assignee is charged with notice of the terms of the lease and by accepting possession of the leased premises subjected itself to all the covenants running with the land and conditions inherent within its terms. I would further hold that the lack of a termination clause in the lease does not inhibit the lessor from terminating the lease in the event of violation of its conditions. That in the absence of a termination clause any such termination is not automatic and the lessee is entitled to a notice of intent. I would hold that filing of the detainer action constituted re-entry and the required notice of intent to terminate the lease.

The appellate costs in this case should be assessed against the defendant-appellee, Pioneer Investment Service Company as the instigator of this litigation.

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SPECIAL JUDGE

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