IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2003 Session

STAUBACH RETAIL SERVICES - SOUTHEAST, L.L.C. v. H. G. HILL REALTY COMPANY

Appeal from the Chancery Court for Davidson County
No. 01-3292-I Irvin H. Kilcrease, Jr., Chancellor

No. M2002-02661-COA-R3-CV - Filed August 29, 2003

In this action over a brokerage commission the Chancery Court of Davidson County granted summary judgment to the broker. On appeal, the owner asserts that the plaintiff failed to show by undisputed evidence (1) that the owner agreed to pay the commission upon "occupancy" of the building, or (2) that the tenant ever "occupied" the building. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM C. KOCH, JR. and WILLIAM B. CAIN, JJ. joined.

Barbara Hawley Smith, Nashville, Tennessee, for the appellant, H. G. Hill Realty Company.

Brigid M. Carpenter, Nashville, Tennessee, for the appellee, Staubach Retail Services - Southeast, L.L.C.

OPINION

I.

H. G. Hill Realty Company ("Hill") owned property on Armory Oaks Drive in Nashville. In 1998, Hill agreed with Southeast Venture LLC ("Southeast Venture") that if Southeast Venture successfully recruited a tenant, Hill would pay a six percent (6%) commission of the rent proceeds that Hill received for the first ten (10) years of the Lease.

A broker from Staubach Retail Services-Southeast, LLC ("Staubach") contacted Southeast Venture representing a home improvement retailer, dekor, Inc. ("dekor"). The Southeast Venture broker wrote a letter dated November 5, 1999 setting out the terms of the proposed brokerage

agreement. This letter stated that the brokerage commission would be $500,000.00, as allocated in the project budget. A draft Brokerage Agreement was also attached. This draft agreement stated that the commission would be split by Southeast Venture and Staubach. Hill was to pay half the commission at the closing of the Build-to-Suit Lease ("Lease") and half upon the commencement of rent payment by dekor. Staubach and Southeast Venture agreed on the amount and the division of the brokerage fee, but the final version of their agreement – which was incorporated into the lease between Hill and dekor – contained a promise by Hill to pay the second installment upon occupancy by dekor.[1]

dekor and Hill closed on the Lease on February 23, 2000. Article 44 of the lease includes the following provision:

> Landlord covenants and agrees to pay Broker's commission in accordance with a separate agreement executed by and between Landlord and Broker, and further agrees to indemnify Tenant for all claims and demands made by Broker . . . . The terms and provisions of that certain Brokerage Agreement, an unexecuted photocopy of which is attached hereto as Exhibit "N" and incorporated herein by reference, are incorporated into this Lease and made a part hereof.

Hill paid half of the brokerage commission at the execution of the lease and constructed an 80,000 square foot building to dekor's specifications. However, due to financial problems, dekor never opened for business and defaulted on the Lease without ever paying any rent to Hill. Staubach filed suit to recover their remaining portion of the brokerage commission, claiming that dekor did occupy the premises.

On April 17, 2002, Appellee filed a Motion for Summary Judgment. Appellant filed its response in opposition to the motion for summary judgment on June 28, 2002. In this response, Hill also moved for a summary judgment dismissal of Staubach's claim. The trial court granted Staubach's motion on August 2, 2002.

II.

Upon review of a grant of summary judgment, this Court must determine whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *See Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn. 1997). As this inquiry involves purely a question of law, our review is *de novo* without a presumption of correctness. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894 (Tenn. 1996). Summary judgments are appropriate only where there is no genuine issue of material fact relevant to the claim or defense contained in the motion and the moving party is entitled to a judgment as a matter of law on the

[1]The record is not clear how the change came about. Staubach's brief contends that the change was suggested by Hill's attorney, but the affidavit on which that contention is based never made it into the record. We, therefore, cannot conclude that Hill insisted on the change.

undisputed facts. See Tenn. R. Civ. P. 56.03; *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). Courts reviewing summary judgments must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Robinson*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In view of these standards, we turn now to the legal principles involved in this appeal.

The trial court's order granting Appellee's Motion for Summary Judgment stated the following findings:

> (1) pursuant to the Build-to-Suit Retail Lease ("Lease") and Exhibit N attached thereto, which are attached to the Complaint as Exhibit 1, Defendant - Counterplaintiff H. G. Hill Realty Company ("H. G. Hill") owes a brokerage commission to Staubach, payable one-half upon the execution of the Lease and one-half upon occupancy of the leased property by the tenant dekor, Inc. ("dekor");
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> (2) upon the execution of the Lease , H. G. Hill paid Staubach one-half of the commission it was due pursuant to Exhibit N to the Lease;
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> (3) the term "occupancy" is not defined in the Lease or Exhibit N and therefore the Court must consider the natural, ordinary and plain meaning of the term;
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> (4) the term "occupancy" means possession; and
>
> (5) the tenant dekor possessed and therefore had occupancy of the leased property as that term is used in Exhibit N to the Lease, making the second half of the brokerage commission payment due to Staubach from H. G. Hill.

On appeal, Hill argues that the trial court erred because it never agreed that the brokerage commission was to be paid upon occupancy. Appellant contends that when its representative saw payment was contingent upon occupancy, they refused to sign the brokerage agreement. Hill also argues that whether dekor occupied the premises is a question of fact and that the facts are in dispute on that issue.

III.
THE CONTRACT

As stated in trial court's findings, the Brokerage Agreement was attached to the Leasing Agreement as "Exhibit N." Exhibit "N" is not executed but the Lease as a whole was executed by dekor and Hill. Exhibit "N" was included in the list of exhibits in the Table of Contents of the Lease and was incorporated by reference in Article 44.

To rebut the promise made in Exhibit "N", Hill filed the affidavit of its executive vice-president in which he averred that he did not agree to pay the second installment upon occupancy of the building; that the only brokerage agreement he had ever seen prior to the closing provided for the second installment to be paid when dekor commenced paying rent; that when he discovered at

the closing that the attached Exhibit "N" provided for payment of the second installment upon occupancy of the building, he refused to sign it. He admits, however, that he executed the lease agreement with Exhibit "N" attached. With respect to what he thought the payment terms were, he said the following two things:

> 7. Because the proposed brokerage agreement submitted at Closing contained payment terms to which H. G. Hill did not agree, I refused to sign the brokerage agreement. I would not sign such an agreement because it required H. G. Hill to pay $500,000 in commission without receiving any consideration from the tenant. After the Closing, I considered the payment terms of the brokerage agreement to be the same as I had initially discussed with Mr. Caldwell – one half of the commission would be paid upon execution of the Lease Agreement and the other half would be payable after H. G. Hill received the first rental payment from dekor. H. G. Hill accordingly paid $250,000 to the brokers after the Lease Agreement was executed.
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> . . . .
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> 9. When I signed the Lease Agreement, I understood Article 44 to mean that H. G. Hill would pay a brokerage commission pursuant to the terms of an agreement it would later reach with Southeast Venture an [sic] Staubach, since the proposed brokerage agreement attached to the Lease Agreement had never been circulated and was unacceptable.

As can be seen, these two positions are inconsistent, but they only amount to two opinions of the witness. They are not competent evidence to be considered on the motion for summary judgment.

Hill's position amounts to what we would have called a plea of non est factum a generation or two ago. This special plea denied the execution of the instrument. *See Richardson v. McGee*, 246 S.W.2d 572 (Tenn. 1952). But Hill's affidavits specifically admit the execution of the lease with Exhibit "N" incorporated. We have consistently recognized that:

> It is not necessary that the contract be contained in a single document. Any number of papers may be taken together to make out the written expression of the contract of the parties, provided there is sufficient connection between the papers. "This connection may be established either by physical attachment of different papers at the time of the signature, or by reference."

Springfield Tobacco Redryers Corporation v. City of Springfield, 293 S.W.2d 189, 197 (Tenn. Ct. App. 1956)(citations omitted).

Therefore, the lease contains an unambiguous promise by H. G. Hill to pay the second installment of the brokerage fee upon occupancy of the building. It is not a defense to that obligation

that H. G. Hill did not execute the brokerage agreement separately. The lease incorporates by reference "an unexecuted photocopy" of the agreement. The execution of the lease has the same effect as an execution of the brokerage agreement. *Id.*

Similarly, Hill does not argue that the contract resulted from fraud, accident, or mistake. To the contrary, the affidavits admit that the person who executed the lease knew that Exhibit "N" contained a promise to pay the second installment of the rent upon occupancy of the building. Therefore, in the absence of fraud, accident, or mistake, the contract should be enforced according to its written terms. *See Richardson v. McGee*, 246 S.W.2d 572 (Tenn. 1952).

V.
OCCUPANCY

The term "occupancy" is not defined in the lease. But a cardinal rule of contract construction requires us to give the parties' words their usual, natural, and ordinary meaning. *Heyer-Jordan & Associates, Inc. v. Jordan*, 801 S.W.2d 814 (Tenn. Ct. App. 1990). *Black's Law Dictionary* (4th ed. 1957) says that "'possession' and 'occupancy', when applied to land, are nearly synonymous terms, and may exist through a tenancy." A later edition defines possession as: "(1) the fact of having or holding property in one's power; the exercise of dominion over property; (2) the right under which one may exercise control over something to the exclusion of all others." *Id.* (7th ed. 1999). In the context of the lease in this case, we think the term should be interpreted to mean a presence on the premises with the right to exercise some control over the use of the premises.

The undisputed facts show that the lease defined the "commencement date" as the date Hill substantially completed its work. The "rent commencement date" was defined as the earlier of the date dekor opened for business or ninety days after substantial completion. On or about April 5, 2001, Hill executed a certificate of substantial completion, and on April 18, 2001, the Metropolitan Government's Department of Codes Administration issued a temporary use and occupancy letter. Hill and dekor stipulated that the commencement date of the lease was April 19, 2001. dekor's agents had received keys to the building at an earlier date, although it is disputed who delivered the keys. At some point during the Spring of 2001 dekor changed the locks on the building. On May 10, 2001, dekor entered into a separate contract with J.E. Crain & Son, Inc. whereby Crain would add the fixtures to the building. The work continued through the month of May 2001, and dekor paid Crain approximately $30,000 for carpentry and electrical work. dekor also purchased and installed lighting, an audio system, and a security system. dekor had its representatives on the site getting the premises ready for opening. We are satisfied that the undisputed facts show that dekor occupied the building.

The judgment of the court below is affirmed and the cause is remanded to the Chancery Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to H. G. Hill and their surety.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.