2017 IL App (1st) 160346
No. 1-16-0346
Opinion filed May 9, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WWL DHOTEL INVESTORS, LLC, on behalf of CHICAGO TITLE LAND TRUST CO., as Successor Trustee under Trust Agreement dated January 15, 1979 and known as Trust No. 45839, Plaintiff and Counterclaim-Defendant/Appellee, v. BB & A VENTURE, on behalf of CHICAGO TITLE LAND TRUST CO., as Successor Trustee under Trust Agreement dated January 15, 1979 and known as Trust No., 100855, Defendant and Counterclaim-Plaintiff/Appellant.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 01079 The Honorable Kathleen G. Kennedy, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment reversed and case dismissed because contract provision raised in declaratory judgment complaint does not apply to facts presented.

¶ 2 This dispute involves a 60-year lease on the land underlying the historic Drake Hotel in Chicago. The land belongs to a trust directed by defendant, BB & A Venture, which leases it to WWL DHotel Investors, LLC, the owner and operator of the hotel on behalf of a land trust. The lease provides that if WWL operates the building as a hotel it must be a first class hotel. While the lease prohibits operation of the property as a condominium or cooperative, it would, for example, permit WWL, with BB & A's cooperation, to convert the building to luxury apartments. The lease also provides that if WWL operates the building as something other than a hotel and as a result, gross receipts decline from one lease year to the next, a "triggering event" has occurred, and BB & A may increase the rent retroactively and prospectively. At the conclusion of the lease term, the building reverts to BB & A.

¶ 3 In 2015, BB & A notified WWL it believed a triggering event occurred in the 2013-14 lease year, increasing rent retroactively by $22.8 million as well as going forward. WWL contended it owed BB & A only the amount that gross receipts declined that lease year, slightly less than $25,000. Soon WWL sought a declaration that the rent adjustment provision of the lease was an unenforceable penalty with no relationship to the damages BB & A sustained from the alleged triggering event. (Whether a triggering event occurred was reserved for arbitration, but the declaratory judgment asked the trial court to interpret the lease provision relating to a rent increase.) Both parties filed motions for summary judgment. The trial court granted WWL's motion and denied BB & A's motion, holding the lease provision constituted a liquidated damages clause and an unenforceable penalty as it was unreasonable in view of the damages BB & A incurred from the deficiency lease year.

¶ 4 BB & A contends the trial court erred in granting WWL's summary judgment and denying summary judgment to it because (i) the lease provision was not a liquidated damages

clause; (ii) even if it was a liquidated damages clause, it was not an unenforceable penalty; and (iii) the trial court did not adhere to proper summary judgment standards by making WWL prove that the lease provision is an unenforceable penalty and disregarding evidence BB & A submitted to defeat WWL's affirmative defense.

¶ 5 We dismiss the appeal. Inasmuch as WWL was using the building as a hotel, the rent adjustment provision does not apply; if BB & A can prove that WWL failed to operate a first class hotel, its remedy is termination of the lease. Consequently, we reverse the trial court's judgment and dismiss the case.

¶ 6 BACKGROUND

¶ 7 WWL owns the Drake Hotel in Chicago. BB & A owns the land the Drake Hotel sits on. In 1979, BB & A leased the land to WWL for 60 years. The land and the building revert to BB & A at the end of the lease and WWL retains the Drake name. Should the lease be terminated for breach, BB & A also acquires the Drake name.

¶ 8 WWL pays three different types of rent, Minimum Ground Rent (MGR), Additional Ground Rent (AGR), and Percentage Rent (PR). For the first 40 years, the lease calculates MGR at a fixed rate amount. For the last 20 years, the lease calculates MGR under a formula based on the estimated value of the land. AGR kicked in during the 21st year and is reset every five years under a formula based on land value. PR applies to all lease years and is calculated as the amount by which 1% of WWL's gross receipts exceeds $18 million for each lease year.

¶ 9 Section 6.4 of the lease delineates the permitted uses of the building that is currently operating as the Drake Hotel. Section 6.4(A) permits WWL to use the building as a hotel operation of the kind and quality being conducted by BB & A in and from the building at the outset of the lease. Alternatively, section 6.4(B) permits WWL to use the building for "all lawful

uses which are such as to not endanger the structure of the Building or the safety of its occupants." Because the building reverts to BB & A, it has a vested interest in preserving the building's physical and reputational quality. To that end, the lease incentivizes WWL to continue to operate a high quality hotel.

¶ 10 Section 6.5, titled "Hotel Operations," provides that WWL must "operate and maintain the hotel as a first-class hotel as heretofore operated by [BB & A]" and "shall not use or permit the use of the Building in such a manner as would adversely affect the value, character or reputation of the name "The Drake" or "The Drake Hotel or the Building or any part therof." Any dispute regarding whether WWL operates and maintains a first class hotel goes to arbitration. Section 21.1 defines "events of default" and provides in subsection (c) that the tenant is in default if it fails to "perform any of the other covenants, conditions, and agreements of the lease." Accordingly, WWL's failure to operate a first-class hotel would constitute an event of default.

¶ 11 Section 2.12, which is the subject of the parties' dispute, provides that if WWL "fails to use the Building for the purposes described in section 6.4(A)" and, as a result, a "deficiency lease year" occurs, *i.e.*, gross receipts are less than the previous year, BB & A may increase the MGR and AGR. The increase involves raising the percentage of land value used in the formula for each type of rent from 10% to 12.5%. If, however, WWL continues to use the building as described in section 6.4(A), the percentage used in computing MGR and AGR remains at 10%, even if gross receipts declined in any year. Section 2.12 provides that "this [section] shall not be operative during periods when the Building is used for the purposes described in Section 6.4(A)."

¶ 12 On July 24, 2014, WWL provided BB & A with an accountant's statement showing that gross receipts from the building operations were about $2.45 million less between May 2013 through April 2014 than the year earlier, resulting in a decrease of percentage rent WWL owed to BB & A of $24,567. On February 5, 2015, BB & A sent WWL a demand notice, stating that a deficiency lease year as defined in section 2.12 had occurred and that because the decrease in gross receipts was due to WWL's failure to operate the building for the purposes described in section 6.4(A), WWL must pay $22.8 million in recalculated AGR using a 12.5% rather than 10% land value retroactive to May 1999. The notice also stated (i) AGR would be calculated using 12.5% of land value beginning on March 1, 2015 and (ii) MGR would be similarly adjusted upward beginning May 2019 and extending through the end of the lease.

¶ 13 In its response, WWL acknowledged that a deficiency lease year occurred but disagreed that it constituted a triggering event. WWL stated the building had been used for the purposes described in section 6.4(A), and ascribed the decrease in gross receipts to a decline in travel to Chicago due to a polar vortex, among other factors. WWL further stated that even if a triggering event had occurred, BB & A was not entitled to $22.8 million in AGR as the recalculation provisions in section 2.12 do not apply retroactively or prospectively but only apply to the deficiency lease year.

¶ 14 WWL filed a complaint for declaratory judgment asking the trial court to interpret section 2.12. WWL argued that the rent increase under section 2.12 applies only to the deficiency lease year in which the triggering event occurred. BB & A filed its answer and affirmative defenses, and a counterclaim. In its affirmative defenses, BB & A asserted that WWL's complaint (i) failed to state claim on which relief could be granted, having asked the trial court to disregard the plain meaning of section 2.12; (ii) conflicted with the arbitration provision which

required, as an initial matter, a determination as to whether a triggering event had occurred; and (iii) contravened the provision that all questions of fact arising under section 2.12 be decided by arbitration. In is counterclaim, BB & A sought a declaratory judgment that when a triggering event occurs, section 2.12 permits it to increase MGR from 2019 to 2039 and to increase AGR from 1999 to 2039.

¶ 15 WWL asserted a single affirmative defense in answer to BB & A's counterclaim—that section 2.12 constitutes an unenforceable penalty if BB & A's rent increases can be applied retroactively and prospectively due to a single deficiency year. BB & A filed a motion to strike the affirmative defense. BB & A also asserted that failing to operate the building as a hotel under section 6.4(A) was not a breach because it was WWL's choice between two alternative uses of the building. Lastly, BB & A argued that WWL failed to allege sufficient facts regarding the potential loss to BB & A in the event that WWL failed to use the building in a manner in accord with section 6.4(A).

¶ 16 WWL moved for summary judgment. In addition to its single year argument, WWL maintained summary judgment would still be appropriate as the provision to increase the rent constituted an unenforceable penalty. BB & A also moved for summary judgment. Its motion was supported by the affidavit of the president of BB & A's general partner, who averred that WWL had reduced the value of the property as a hotel by, among other things, closing several food and beverage facilities, ceasing offering numerous personal services, and reducing the number of rooms. He estimated that returning the property to pre-lease condition would cost $100 million.

¶ 17 The trial court denied BB & A's motion to strike WWL's affirmative defense that section 2.12 was an unenforceable penalty. The trial court reasoned that WWL had a choice of operating

the building as either a hotel under section 6.4(A) or for some other lawful use and that the latter option could result in an increase in rent. The trial court acknowledged that a contract giving an option to one or both parties to either perform a specified act or make a payment will be enforced as long as it was intended to give a real option. (14 Williston on Contracts § 42.10 (4th ed.)). The trial court agreed that parties may in good faith contract for alternative performances. Nevertheless, citing the Restatement (Second) of Contracts § 356, comment c, the trial court found that the options given to WWL—to run the building as hotel under section 6.4(A) or to run it in another manner under section 6.4(B)—were "illusory" and an unenforceable penalty "designed to threaten [WWL] to run the hotel in accordance with section 6.4(A)" because if it opted not to and its revenues decreased by any amount, it could be liable in millions of dollars in additional rent.

¶ 18 Further, the trial court rejected BB & A's argument that WWL's affirmative defense failed to plead facts sufficient to establish BB & A's prospective losses in the event of a breach. The trial court stated that to survive a motion to strike, WWL must allege facts permitting the court to infer the amount of BB & A's loss. The trial court found that WWL had done so by alleging that BB & A lost $24,567 for the deficiency lease year as compared to the $22.8 million BB & A sought in increased retroactive and prospective MGR and AGR.

¶ 19 As to the cross-motion for summary judgment, the trial court rejected WWL's single year argument and accepted BB & A's multiyear argument. But, the trial court granted WWL's motion for summary judgment and denied BB & A's summary judgment motion based on its finding that section 2.12's rent formula increase was an unenforceable penalty, stating, "the amount of liquidated damages must be reasonable at the time of contracting" and "[r]easonableness requires that the damages bear some relation to the injury sustained by the

non-breaching party." The trial court concluded, "the damages provision at issue bears no relation to [BB & A's] potential injury." The trial court noted that BB & A may be injured if the hotel's reputation diminishes or if it receives a lesser-quality hotel at the end of the lease, but the scope of this injury could not have been determined at the time of contracting.

¶ 20 BB & A appeals the denial of its motion to strike, the grant of WWL's summary judgment motion, and the denial of its summary judgment motion.

¶ 21 ANALYSIS

¶ 22 Both parties asked the trial court to decide whether under section 2.12 of the lease, BB & A may increase WWL's rent for failing to use the building for the purposes described in section 6.4(A), which resulted in a decline in revenues. This presumes section 2.12 applies. But because WWL was operating the building as a hotel, section 6.5 applies and section 2.12 does not apply.

¶ 23 In interpreting the provisions of a lease, we look to commonly recognized rules of contract construction. See *Clarendon America Insurance Co. v. Prime Group Realty Services, Inc.*, 389 Ill. App. 3d 724, 729 (2009). In so doing, we seek to give effect to the parties' intent by reading each term in light of the others and as a whole without focusing on isolated portions of the document. *Thompson v. Gordon* 241 Ill. 2d 428, 441 (2011). It is presumed that each part of a contract was inserted deliberately and for a purpose consistent with the parties' intentions. *Bank of America National Trust & Savings Ass'n v. Schulson*, 305 Ill. App. 3d 941, 946 (1999). If possible, we must interpret a contract in a manner that gives effect to all its provisions. *Id*. Absent disputed facts, as here, interpretation of the lease poses a question of law that we review *de novo*. See *NutraSweet Co. v. American National Bank & Trust Co. of Chicago*, 262 Ill. App. 3d 688, 694 (1994). Where there is any doubt as to the meaning of a lease, it should be construed most strongly against the lessor and in favor of the lessee. *Id.* at 695.

¶ 24 As noted, section 6.4(B) of the lease permits WWL to use the building as something other than a hotel, so long as the use is lawful and does "not endanger the structure of the Building or the safety of its occupants." Under section 2.12, if WWL uses the building for something other than a first class hotel, as provided in section 6.4(A) and defined in section 6.5, say, for instance, as a luxury apartment building, and gross revenues decline, then WWL may be subject to retroactive and prospective rent increases provided for under section 2.12. Because the issue is not before us, we express no view as to whether, under circumstances where the building is operated under section 6.4(B), application of section 2.12's provisions in the event of a deficiency lease year would constitute an unenforceable penalty.

¶ 25 But here, WWL was using the building for the purpose described in section 6.4(A)—as a first class hotel. Whether the hotel met the standards of a first class hotel required by section 6.5 presents a question of fact for an arbitrator. If the arbitrator determines that WWL is not in compliance, that constitutes a default, and BB & A's sole remedy would be to seek termination of the lease under section 21.1(c). Section 6.5 does not permit BB & A to seek an increase in rent. This interpretation is bolstered by section 2.12's express language that it "shall not be operative during periods when the Building is used for the purposes described in Section 6.4(A)."

¶ 26 During oral argument, BB & A asserted that the lease gave it the option to either declare a breach of the lease and seek termination, or invoke section 2.12 to escalate the rent. No language in the lease empowers the landlord to elect remedies in the event of a default of the lessee's covenants under section 6.5. Rather, the lease provides different remedies depending on whether WWL is operating under section 6.4(A) or 6.4(B). So, if BB & A believes WWL has

violated section 6.5 of the lease by operating a hotel that is less than first-class, it may pursue terminating the lease, but it is not entitled to increase the rent.

¶ 27 In the trial court and before this court, the parties proceeded under the presumption that section 2.12 applied to the circumstances here where the property is, in fact, operated as a hotel, but, according to BB &A, not up to the standards of a "first class" hotel. We conclude that section 2.12 does not apply under those circumstances and so we need not reach whether, as the trial court found, it is an unenforceable penalty. Interpreting the lease in this way avoids both (i) invalidating significant provisions of a lease negotiated by sophisticated parties represented by equally significant counsel and (ii) reading into the lease alternative remedies not specifically provided for.

¶ 28 Reversed and dismissed.