

2011 IL App (1st) 101844-U

No. 1-10-1844

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SIXTH DIVISION
December 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHAKER MANAGEMENT COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 M4 1796
)	
J.L.B. CORPORATION d/b/a Barbara's Bookstore,)	Honorable
)	Cheryl D. Ingram,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted summary judgment in favor of plaintiff because a fair and reasonable interpretation of the lease and amendments to the lease established that defendant was required to continue to pay additional rent for real estate taxes.

¶ 2 Defendant J.L.B. Corporation, d/b/a Barbara's Bookstore, appeals the circuit court's order granting summary judgment in favor of plaintiff Shaker Management Company. J.L.B. argues

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the terms of its amended lease did not obligate it to pay real estate taxes in addition to base rent.

J.L.B. also argues the circuit court miscalculated the damages and use and occupancy it awarded to plaintiff.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 This dispute arose when plaintiff Shaker Management initiated eviction proceedings in 2009 against defendant J.L.B., alleging defendant had failed to pay the rent due on a leased commercial space in accordance with the terms of the original lease and several amendments made to the lease over the years. Defendant, however, claimed that it had overpaid its rent and was entitled to a credit because the fifth and final amendment to the lease had eliminated defendant's obligation to reimburse plaintiff separately for real estate taxes.

¶ 6 Defendant had been operating a bookstore in a space in a multi-unit building pursuant to a lease that was originally executed in 1989. The president and owner of defendant was an attorney. Under the terms of the original lease, defendant paid base rent in a certain amount, which would increase periodically, and additional rent, which consisted of all real estate and other taxes in an amount equal to defendant's proportionate share of taxes in excess of the tax base of \$1.50 per square foot, based on the square footage of the leased space. The additional rent was paid in two ways: (1) monthly based on an estimate of the taxes to be owed for the current year, and (2) a later lump sum payment of any additional amount owed based on the amount of the actual tax bill.

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¶ 7 The original lessor and defendant entered into a series of four amendments to the original lease over the years. Each amendment, however, continued the same basic rent scheme, including the base rent, which increased as time went by, and additional rent for real estate tax reimbursement. Throughout that time, defendant, without objection, paid the original lessor the real estate tax reimbursements as part of its rental obligation. In addition, the fourth amendment added defendant's obligation to pay a monthly scavenger/trash fee.

¶ 8 In 2004, the current owner of the property purchased it, and plaintiff became the authorized management company and leasing agent. Plaintiff and defendant corresponded regarding the terms of a potential renewal of defendant's lease of the premises. In February 2005, plaintiff and defendant entered into the fifth amendment of the lease. The first paragraph of the fifth amendment provided that the fifth amendment was made part of the lease. If any terms and provisions of the fifth amendment were inconsistent with those of the lease, then the terms and provisions of the fifth amendment prevailed. Except as amended by the fifth amendment, the lease remained in full force and effect.

¶ 9 The second paragraph provided that the fifth amendment was not intended to modify or affect the lease in any way except as expressly provided for in the fifth amendment. The lease, as amended by the fifth amendment, was in full force and effect.

¶ 10 The fourth paragraph, entitled "Rents," provided that the "Base, Additional and Adjustment Rents during the March to July 2005 lease term would remain as currently set forth in the lease.

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¶ 11 The seventh paragraph, entitled "Lease Option," discussed defendant's option to renew the lease for a five year period upon certain terms. Subparagraph (a) listed the amounts by which the monthly base rents would increase over the next five years. Subparagraph (b), which is at issue in this dispute, contained lengthy, detailed provisions regarding defendant's new obligation to pay plaintiff "as Additional Rent for Operating Expense an amount equal to [defendant's] Proportionate Share of the Operating Expenses ***." Subparagraph (b) then explained how the amount would be determined.

¶ 12 Subparagraph (b) also provided that defendant "shall not be obligated to pay a monthly escrow toward its obligation under this section provided rent payments are made in a timely manner." Otherwise, plaintiff would establish a monthly escrow based upon plaintiff's "reasonable estimate of the expected costs of operating the Property for the calendar year."

¶ 13 Subparagraph (b) then gave a lengthy explanation of the expenses included in the term "operating expenses." After a lengthy list of the included expenses, subparagraph (b) expressly stated, "Operating expenses shall not include cost or other items included within the meaning of the term taxes ***."

¶ 14 Paragraph 11 of the fifth amendment, entitled "Miscellaneous," provided that the document set forth the entire agreement between the parties and any prior writing or conversation was merged therein and extinguished.

¶ 15 In May 2005, defendant exercised the option to extend the lease for the term from August 2005 through July 2010. Defendant continued to pay plaintiff the real estate tax reimbursements and the additional rent for operating expenses through August of 2009. During that time,

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plaintiff sent monthly statements to defendant that expressly referred to and itemized amounts for "RE Tax" and "Real Estate Reimbursement," as well as base rent and additional rent for operating expenses. At the end of each year, plaintiff provided defendant with a recap, which showed how much was paid for real estate taxes and how much was still owed.

¶ 16 In February 2009, defendant asked plaintiff to defer a portion of its rent obligation to avoid eviction for nonpayment. Ultimately, the parties agreed to defer a portion of defendant's rent until August 31, 2009. In June 2009, at plaintiff's request, defendant executed a tenant estoppel certificate, in which defendant confirmed to plaintiff's lender that defendant had not prepaid any rent and had no claim or defense against plaintiff which could be used as a set-off or credit against future rent.

¶ 17 In September 2009, defendant defaulted on its rent payments, and plaintiff initiated eviction proceedings. Plaintiff filed suit for possession of the leased premises, plus a judgment for unpaid rent and sums due and owing through the date of ordered possession, and court costs and attorney's fees as provided in the lease. In response, defendant claimed that it had overpaid its rent and was entitled to a credit because the fifth amendment to the lease had eliminated defendant's obligation to pay additional rent to reimburse plaintiff for real estate taxes. To support its claim, defendant cited the provision in the fifth amendment that excluded taxes from the additional rent for operating expenses.

¶ 18 The parties filed cross-motions for summary judgment. After briefing and oral argument, the circuit court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment. Defendant appealed.

¶ 19

II. ANALYSIS

¶ 20 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions and any affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). This court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that ground. *Id.* We review the entry of summary judgment *de novo*. *Id.*

¶ 21 In interpreting the terms of a lease, courts are guided by general principles of contract construction. *Fox v. Commercial Coin Laundry Systems*, 325 Ill. App. 3d 473, 475 (2001). The contract "should be given a fair and reasonable interpretation based on consideration of all its language and provisions." *Shelton v. Andres*, 106 Ill. 2d 153, 159 (1985). "[B]ecause words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). "The intent of the parties is not to be gathered from detached portions of the contract or from any clause or provision standing by itself." *Id.*

¶ 22 When seeking to determine the intent of the parties to a contract when its terms are in any respect doubtful or uncertain, courts look to the acts and conduct of the parties in carrying out the provisions of the contract. *Olympic Restaurant Corp. v. Bank of Wheaton*, 251 Ill. App. 3d 594, 602 (1993); *Chicago and Northwest Railway Co. v. Peoria & Pekin Union Railway Co.*, 46 Ill. App. 3d 95, 101 (1977); *Pocius v. Halvorsen*, 30 Ill. 2d 73, 81-82 (1963). If a contract is

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susceptible to two constructions, the construction that makes the contract fair, customary and one likely to be entered into by reasonable men is preferred over the construction that renders the contract inequitable, unusual or unreasonable. *Fox*, 325 Ill. App. 3d at 476.

¶ 23 On appeal, defendant argues that paragraph 7(b) of the fifth amendment to the lease removed defendant's obligation to make separate real estate tax reimbursements to plaintiff in addition to defendant's base rent payment. We do not agree.

¶ 24 Under the applicable principles of contract construction, we find that the fifth amendment of the lease did not remove defendant's longstanding obligation under the lease to pay real estate taxes but, rather, simply added defendant's new obligation to pay additional rent for operating expenses. The contract language was clear and unambiguous. Paragraph 7(b) of the fifth amendment was careful to state that defendant's new obligation to pay for operating expenses included, *inter alia*, the costs to the landlord for such expenses as electricity, steam, water, gas, fuel, heating, lighting, air conditioning, window cleaning, insurance, supplies, sundries, and the cost of wages and salaries of all persons engaged in the operation of the building. Paragraph 7(b) also explained that the operating expenses would not include cost or other items included within the meaning of the term taxes, costs of alterations of the premises, depreciation charges, interest and principal payments on mortgages, ground rental payments, and real estate brokerage and leasing commissions.

¶ 25 No reasonable construction of paragraph 7, which addressed defendant's option to renew the lease for five more years, supports defendant's contention that the new obligation to pay additional rent for operating expenses, which amount would not include, among other things,

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taxes, somehow eliminated defendant's ongoing obligation since the inception of the lease to also pay additional rent to reimburse the landlord for real estate taxes. Paragraph 4 of the fifth amendment specifically stated that the base, additional and adjustment rents during the 2005 lease term remained as currently set forth in the lease. Because defendant exercised his option to renew the lease for five more years, the increased base rents listed in paragraph 7(a) took effect. Defendant would like this court to conclude that the absence in paragraph 7 of any reiteration of defendant's longstanding obligation under the lease to pay additional rent for real estate taxes meant that the obligation was either removed or somehow included in the higher base rent amount. The contract, however, cannot be construed to support such a conclusion, particularly where paragraphs 1 and 2 of the fifth amendment clearly provided that the amendment was incorporated into the lease and was "not intended to modify or affect the Lease in any way whatsoever except as expressly provided for in this document."

¶ 26 Even assuming, *arguendo*, that the terms of the fifth amendment somehow rendered defendant's longstanding obligation to pay additional rent for real estate taxes doubtful or uncertain, the parties' acts and conduct in carrying out the provisions of the contract after the fifth amendment was executed establish that defendant understood it had a continuing obligation to pay additional rent for real estate taxes. Specifically, after the parties executed the fifth amendment in 2005 and defendant renewed the lease for five more years, defendant continued to pay plaintiff base rent and additional rent for both the real estate tax reimbursements and the operating expenses through August of 2009. During that time, defendant received monthly statements from plaintiff that separately itemized the charges for the base rent, real estate tax

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reimbursement and operating expenses. In addition, at the end of the each year, defendant received a recap detailing how much it had paid for real estate taxes and how much it still owed. Given these facts, defendant cannot credibly claim that the intent of the parties when they executed the fifth amendment was to eliminate defendant's obligation to pay additional rent for real estate tax reimbursement.

¶ 27 We find, therefore, that the circuit court properly entered summary judgment in favor of plaintiff. Because we have concluded that defendant was required to continue to pay additional rent for real estate taxes, defendant's remaining arguments on appeal regarding a set-off for the overpayment of rent and an alleged miscalculation of damages by the circuit court are redundant and rendered moot.

¶ 28 Accordingly, we affirm the judgment of the circuit court.

¶ 29 Affirmed.