

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/06/2002

03/04/2002

CLERK OF THE COURT
FORM V000A

HON. EDWARD O. BURKE

M. MINKOW
Deputy

CV 2000-015119

FILED: _____

WESTFEST LLC

E JEFFREY WALSH

v.

WESTRIDGE PARK INVESTORS LIMITED MARTIN A ARONSON
PARTNE, et al.

MINUTE ENTRY

The Court, having had Plaintiff Westfest LLC's MOTION FOR PARTIAL SUMMARY JUDGMENT and Defendant Westridge Park Investors Limited Partnership's MOTION FOR SUMMARY JUDGMENT under advisement, and having studied the parties' statements of fact, the lease and the cases cited, rules as follows.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS DENIED.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

This case centers on the interpretation of Article 1 of the parties' August 1, 1989, lease which defines the term "leased premises" as:

"The real property, together with any and all improvements at any time and from time to time located thereon, are hereafter referred to as the "leased premises" or sometimes the "demised premises" or the "premises".

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The dispute arises because Article 3.3 of the lease provides for adjustment of the rent. Article 3.3 states in part:

"Both of the qualified appraisers so appointed ('original qualified appraisers') shall within thirty (30) days after the date on which each is appointed independently determine said current market value of the leased premises as of the date of the notice. For the purposes of the appraisal, each qualified appraiser shall determine said current market value of the leased premises taking into consideration the then existing usage of the leased premises."

Plaintiff contends that the definition of "leased premises" means only land while the Defendant asserts that the definition of "leased premises" includes the land and the improvements thereon.

In Taylor v. B. State Farm Mut. Auto. Ins. Co., 175 Ariz. 148, 153, 854 P.2d 1134 (1993), our Supreme Court set forth the standard for interpreting a written contract.

"... it is fundamental that a court attempt to ascertain and give effect to the intention of the parties at the time the contract was made if at all possible. . . If, for example, parties use language that is mutually intended to have a special meaning and that meaning is proved by credible evidence, a court is obligated to enforce the agreement according to the parties' intent, even if the language ordinarily might mean something different." 175 Ariz. 148, 153.

"The better rule is that the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation inserted by its proponent, the evidence is admissible to

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determine the meaning intended by the parties." 175 Ariz. 148, 154.

". . . the judge need not waste much time if the asserted interpretation is unreasonable or the offered evidence is not persuasive. A proffered interpretation that is highly improbable would necessarily require very convincing evidence. In such a case, the judge might quickly decide that the contract language is not reasonably susceptible to the asserted meaning, stop listening to the evidence supporting it, and rule that its admission would violate the parol evidence rule." 175 Ariz. 148, 155.

Based on all of the evidence presented by the parties, the Court does not believe that the contract language is reasonably susceptible to more than one interpretation. "Leased premises" are clearly defined as: "The real property together with any and all improvements at any time and from time to time located thereon."

The Court finds no ambiguity in this language or in the way the term "leased premises" is used in the appraisal provision of the lease.

If there were any doubt, Article 3.3 clarifies it by stating:

"For the purposes of the appraisal, each qualified appraiser shall determine said current market value of the leased premises taking into consideration the then existing usage of the leased premises."

Plaintiff's counsel conceded at argument that the land value of two identically zoned contiguous parcels of real estate would not vary based on their usage; i.e., the land value would be the same whether an office tower or a single family residence existed on the adjoining parcels. Therefore, the language "the

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then existing usage of the lease premises" can only refer to the improvements on the land.

In reviewing the 111-page lease, the Court finds no precision in the drafter's references to "leased premises", "demised premises" and "premises". The following references to "leased premises" make sense when read as "land and improvements":

3.8 ". . . in the event Trammell Crow of Dallas is a sole procuring cause of a national subtenant occupying space within the leased premises;"

3.10 Reference to Albertson's, Inc. as a sublessee of the premises;

6.1 "To inspect the premises in relation to the construction at all reasonable times as long as such inspection does not interfere with the construction;"

Article 8. "Mechanics liens being filed on and against the leased premises;"

Article 9. "Hold landlord harmless from any liability for all charges for water, gas, sewage, electricity, telephone, and other utility service on the leased premises;"

10.1 ". . . the occupancy or use of the leased premises or any part thereof by or under tenant;"

10.2 ". . . damage from the occupancy or use of the leased premises;"

10.4 ". . . the leasehold mortgage procured by tenant to provide interim and permanent financing with respect to the demised premises;"

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12. ". . . trade fixtures installed in or on the leased premises;"

14.2 ". . . the land area of the leased premises;"

14.3(e) ". . . decrease the value of the land of the leased premises;"

16.2(b) "Tenant appoints landlord as attorney in fact to lock-out and/or re-enter and resume possession of the premises;"

16.6 "All rents . . . from subtenants or occupants of space within the premises."

The use of "leased premises" in the above references means "land and improvements" because to hold otherwise would make these references nonsensical.

The following references to "leased premises" can only be interpreted to mean "land" only:

4.1 ". . . all . . . of the improvements previously constructed upon the premises;"

5.1 ". . . taxes imposed upon the leased premises and upon any improvements thereon;"

5.6 ". . . assessment attributable to the land comprising the premises;"

5.6 ". . . taxes allocable to the improvement on the premises;"

6.2(d) "The location of the improvement(s) to be constructed upon the leased premises;"

6.4 ". . . work performed or materials supplied with respect to the premises or improvements."

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7. ". . . maintain, repair, rebuild or replace any improvements on the leased premises;"

7. ". . . keep and maintain the leased premises, all improvements thereon;"

10.3(b) ". . . insuring all improvements located on the premises;"

10.4 ". . . restoring or rebuilding the improvements on the demised premises;"

11.1 "If the leased premises and/or improvement(s) located thereon;"

11.2 ". . . the improvements then existing on the leased premises;"

11.2(d) ". . . quitclaims all right, title and interest in the premises and improvements;"

11.3 "If the improvements located on the Leased Premises;"

11.3 ". . . thereafter raze the improvement which has been so damaged or destroyed from the demised premises;"

16.2(b) ". . . without compensation to tenant for any improvements placed upon the premises;"

21.1(a) ". . . make any repairs and reconstruction of the premises or Improvements; . . ."

24.1 ". . . tenant shall surrender to Landlord the possession of the premises and all improvements thereon.";

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26. ". . . right of first refusal to purchase the right, title and interest of the Tenant in and to all or any portion of the premises and/or in and to the improvements thereon;"

26.1 ". . . all or any portion of the premises, the improvements;"

33.4 ". . . in the ordinary course of constructing and maintaining the improvements on the premises;"

The above analysis indicates that over the three years it took to negotiate and draft the lease, the draftsman was not precise in the use of the defined terms. The fact that the defined terms were used imprecisely in the remainder of the lease does not make the clear language of article one and section 3.3 ambiguous.

The extrinsic evidence is clear that both the landlord and tenant intended that the reappraisals shall include both the land and the building at the time the lease was executed. Mr. Polachek, Ms. Korth, Mr. Porter and Craig Brown at Trammell Crow knew not only that the appraisal included land and improvements but that the definition made the transaction less appealing from an economic point of view. Trammell Crow's attorney, Victor Riches, was also aware the definition of "leased premises" included all improvements to be constructed on the land and warned his client about it. The landlord's representatives, Tom Tait and his attorney, Mr. Mohr, who drafted the language in question, agree.

Plaintiff submitted the supplemental affidavit of Richard C. Decker to contradict Mr. Polachek's deposition testimony. That affidavit, which relates conversations with Mr. Polachek in the fall of 1999 and in May of 2000, stating: "During both conversations, Mr. Polachek told me that the reappraisal provision could only mean a reappraisal of the land, not the land and improvements" is hearsay and not admissible to contradict Mr. Polachek's deposition testimony.

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Plaintiff's speculation that "all economic value in the leasehold will be transferred to Defendant no later than the 20th year" is just that, speculation. Further, it is not relevant to the resolution of this issue because the tenant was fully aware of the potential deleterious economic consequences and agreed to enter into the lease in spite of them.

Because all the parties and attorneys on each side at the time the lease was signed agreed that "leased premises" was intended and understood to mean land and improvements, the Court is compelled to grant Defendant's MOTION FOR SUMMARY JUDGMENT.

Defendant shall submit a form of judgment and application for attorneys' fees.