


FULTON RESTORATION, LLC * IN THE
Appellant * CIRCUIT COURT
v. * FOR
JEFFREY A. KREW, LLC * HOWARD COUNTY
Appellee * Case No. 13-C-07-70939
* * * * *

ORDER

For the reasons set forth in a Memorandum Opinion filed concurrently herewith, it is this 28th day of July, 2008, by the Circuit Court for Howard County,

ORDERED, that the decision of the District Court of Maryland for Howard County rendered October 9, 2007 in Case No. 271001010339 is REVERSED and the matter is REMANDED to the District Court of Maryland for Howard County, for further proceedings consistent therewith.


Raymond J. Kane, Jr.
Judge

Copy to: Christopher S. Young, Esquire
Tora A. Mahoney, Esquire
Jeffrey A. Krew, Esquire

(Mailed: 7/29/08)

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* * * * *

MEMORANDUM OPINION

This is an appeal on the record by Fulton Restoration, LLC (hereinafter “Appellant” or “Fulton”) from an oral decision of the District Court of Maryland for Howard County rendered on October 9, 2007 in Case No. 271001010339. The Appellant filed a Complaint for Failure to Pay Rent against Jeffrey Krew, LLC (hereinafter “Appellee” or “Krew”), claiming \$5,362.76 in unpaid rent. From a judgment entered by the District Court (Honorable Sue-Ellen Hantman) in favor of Krew, Fulton noted this appeal.

Krew filed a Motion to Dismiss Appeal due to Fulton’s failure to file a transcript of the District Court proceedings with the Circuit Court. This Court denied the Motion to Dismiss, ruled that the instant appeal was an appeal on the record, and afforded Fulton an opportunity to file a transcript. Krew filed a Motion to Reconsider, which this Court also denied. Thereafter, a transcript was filed, both parties submitted memorandum, counsel were heard in argument on June 5, 2008 and the Court held the matter sub curia. For the reasons hereinafter set forth, the Court shall reverse.

FACTUAL AND PROCEDURAL BACKGROUND

At the outset of trial the District Court was advised that the underlying dispute between the parties concerned the issue of whether Krew was obligated to pay certain charges pursuant to the lease between the parties as amended August 31, 2006 (“Lease Amendment”). It is undisputed that Krew paid the basic rent set forth in the Lease Amendment. Fulton contended below, and contends here, that Krew was obligated to pay CPRA costs and increased real estate taxes for the property, whereas Krew asserts that he only was required to pay the fixed sum of \$173.30 per month for real estate taxes.

The parties entered in a lease of office space (hereinafter “Original Lease”) on August 12, 2003. The Lease Amendment extended the Original Lease for a period of three years commencing September 1, 2006 and expiring August 31, 2009. The Lease Amendment provided for the payment of a “Basic Rent” to be paid by the Tenant (Paragraph 3) and for the Tenant’s obligation to pay a condo fee (Paragraph 5).

Paragraph 6 of the Lease Amendment provided as follows:

6. Real Estate Taxes. Effective as of the Renewal Date and in lieu of the Operating Costs provided for in Section 7, the Tenant shall also be responsible for paying the Real Estate Taxes (hereinafter defined) attributable to the Premises. The annual real estate taxes are estimated to be Two Thousand Eighty Dollars (\$2,080.00) which will be paid by the Tenant on a monthly basis at the rate of One Hundred Seventy-Three 30/100 Dollars (\$173.30) per month. “Real Estate Taxes” shall mean all real estate taxes, assessments, CPRA, sewer rates, ad valorem charges, water rates, rents and charges, front foot benefit charges, and all other governmental impositions in the nature of any of the foregoing assessed against the Premises.

At trial, Douglas Thomas, Managing Member of Fulton, testified on behalf of the Plaintiff. For the most part his testimony as to what monies were owed by Krew was confusing and at times inconsistent. He stated that although he signed the Lease Amendment on behalf of Fulton he did not participate in any of the negotiations between the parties concerning the Lease Amendment. (T.87).

Jeffrey Krew testified that the amount of real estate taxes set forth in Paragraph 6 (\$173.30 per month) was based upon “the common understanding, that the tax bill had already been received and this was the amount” (T.100-101), and that “...this was a negotiated number, which everybody went into with their eyes open...” (T.108). He further stated that if the monthly rate of \$173.30 were merely an estimate of real estate taxes to be adjusted at a later date, as opposed to a fixed sum “...there would have been no deal.” (T.108).

Thomas further testified that although the real estate taxes applicable to Krew’s unit were in excess of \$173.30 per month, Krew only paid the sum of \$173.30.

At the conclusion of trial, Judge Hantman found that Krew did not owe any rent and entered judgment in favor of Krew.

SCOPE OF REVIEW

The scope of this Court’s review of the decision of the District Court is limited. Pursuant to Maryland Rule 7-113(f), this Court is directed to review the case on both the law and the evidence, and not to set aside the judgment of the District Court on the evidence unless “clearly erroneous.” Moreover, this Court is required to consider the

evidence produced at trial in a light most favorable to the prevailing party. Ryan v. Thurston, 276 Md. 390 (1975); see also Friendly Fin. Corp. v. Orbit Chrysler Plymouth Dodge Truck, 378 Md. 337, 343, n.5 (2003). Indeed, if substantial evidence were presented to support the District Court’s determination, this Court cannot disturb that determination. Ryan, 276 Md. at 392.

In contrast, the District Court’s determination of a question of law enjoys no such deference; the reviewing court simply must apply the law as it understands it. Rohrbaugh v. Estate of Stern, 305 Md. 443, 447 (1986). Furthermore, in reviewing a decision of the District Court, the Court “will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon” by the District Court. United Steelworkers of Amer. v. Bethlehem Steel Corp., 298 Md. 665, 679 (1984).

DISCUSSION

I.

Fulton initially complains about the manner in which evidence was presented at trial. It contends that the trial judge erred by admitting parol evidence even though the language in the Lease Amendment was unambiguous; by permitting Jeffrey Krew, as counsel for Jeffrey Krew LLC, to testify as a witness; and by refusing to admit exhibits offered by Fulton.

Fulton acknowledges that the trial judge’s rulings may have been influenced by a determination that she considered the case to be a small claim action. Maryland Rule 3-

701(f) directs that such trials shall be conducted in an informal manner, specifically exempt from the provisions of Title 5 - Evidence. The transcript of the District Court proceedings, however, does not disclose that the Court determined the case to be a small claim action.¹ Assuming, this were a small claim action, such rulings were not erroneous.

Fulton's allegation of error based upon the admission of parol evidence and upon Krew's testimony as a witness are simply not preserved for appellate review, no objection concerning same having been made at trial.² Maryland Rule 5-103.

Fulton also contends that the trial court erred by refusing to admit two of its exhibits, (Plaintiff's Exhibits 5 and 6). A fair reading of the transcript discloses confusion on the part of both parties and the trial court concerning those exhibits. In fact, Plaintiff's witness admitted that he "did make an error" with reference to those exhibits. Whereupon, Plaintiff's Exhibit Number 7 was offered to clarify the issue and received into evidence without objection. (T.33-35).

II

Both parties contend that the lease provision at issue in the instant case is clear and unambiguous, however, they differ as to its interpretation.³ Krew contends that he is only obligated to pay the fixed sum of \$173.30 per month, while Fulton contends that such sum is merely an estimate and Krew is obligated to pay his share of the actual real estate taxes and CPRA charges.

¹ The record does reflect Fulton's trial counsel's statement that he understood "this is a small claims case." (T.41). Moreover, it appears that at the conclusion of trial, exhibits were returned to the parties. (T.120).

² Fulton's appellate counsel did not represent Fulton at trial before the District Court.

³ Perhaps for that reason alone, the Court should be cautious of ruling that it is unambiguous.

It is unclear from the record whether the trial court's decision was based upon a construction of the lease or whether it was based upon consideration of evidence after a determination that the lease provision is ambiguous. However, when reviewing the trial court's construction or interpretation of the lease, this Court does so as a matter of law. Metropolitan Life Ins. Co. v. Promenade Towers Mut. Housing Corp., 84 Md. App. 702, 716-717, *aff'd*, 324 Md. 588. Thus, the determination of ambiguity is one of law, not fact, and that determination is subject to *de novo* review by this Court. Calomiris v. Woods, 353 Md. 425, 434.

The applicable rules of construction were stated by the Court of Appeals in General Motors Acceptance Corp. v. Daniels, 303 Md. 254:

It is well settled that Maryland follows the objective law of contracts. A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person.....meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.

The test for ambiguity is whether the language of the lease is reasonably susceptible of two or more meanings. The determination of whether the language is reasonably susceptible of two or more meanings includes a consideration of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." Pacific Indem. v. Interstate Fire & Cas., 302 Md. 383, 388.

There is no ambiguity in the provisions of the Lease Amendment. It provides that "the Tenant shall be responsible for paying the Real Estate Taxes (hereinafter defined)

attributable to the Premises.” It defines the term “Real Estate Taxes” to include all real estate taxes.....CPRA.....” It estimates the real estate taxes to be \$2,080.00, to be paid at the monthly rate of \$173.30. The Lease Amendment failed to amend or modify Addendum Seven of the Original Lease, and therefore that provision, which provided a mechanism to make adjustments based upon the relationship between the annual tax rent actually due and the monthly payments made by the tenant for the year, remained in effect.

If the parties intended that the Tenant pay the fixed sum of \$173.30 per month, they could have said so. They did not. They provided that the Tenant “shall be responsible for paying the Real Estate Taxes...”, which they estimated to be a certain amount. Furthermore, the term of the Lease Amendment is three years. It provides for an increase in the basic rent for each renewal term. (Paragraph 3). It provides the Tenant with the right to renew the lease for an additional two years at an escalated rental. (Paragraph 4). It provides for an adjustment in the condo fee. (Paragraph 5). It is unreasonable to conclude that the parties provided for those contingencies, but intended that the sum of \$173.30 per month remain fixed for three years plus any renewal term.

Krew, and to some extent the Trial Court, believe that Paragraph 6, should be construed in light of Paragraph 5, relating to “Condo Fee.” Paragraph 5 provides that the “Tenant will also be responsible for paying the monthly condo fee attributable to the Premises.” It provides that the Tenant’s share of the condo fee “based upon the Estimated First Year Budget” is \$214.32 per month, but also provides that “the amount is

subject to adjustment.” Krew contends that since Paragraph 5 provides for an “adjustment” pertaining to the monthly condo fee while there is no “adjustment” provision in Paragraph 6 pertaining to the monthly real estate taxes, the parties intended the payment of a fixed sum of \$173.30 per month. The emphasis on Paragraph 5 is misplaced.

As previously indicated the “adjustment” provisions of Addendum Seven apply to Paragraph 6 of the Lease Amendment, while they do not apply to Paragraph 5, thus the need for “adjustment” language in Paragraph 5. The Lease Amendment recites that on “September 21, 2005, the landlord converted the building containing the Premises to a commercial office condominium...” For obvious reasons there was no provision for a condo fee in the Original Lease, thereby necessitating “adjustment” provisions in Paragraph 5.

This Court finds that pursuant to the Lease Agreement Krew is required to pay the real estate taxes and CPRA taxes allocated to the leased premises, and if said sums differ from the monthly payments made by Krew, the adjustment provisions of Amendment Seven shall apply.

Krew contends that the parties actually intended that the tenant pay the fixed monthly sum of \$173.30 for real estate taxes. However, where as in the instant case this Court finds that the language of the lease is plain and unambiguous, this Court must presume that the parties meant what they expressed.

In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean. General Motors Acceptance, 303 Md. at 261, 492 A.2d at 1310.

III

The Appellant correctly observes that “the single issue before the trial court was whether or not rent was due and owing at the time of trial such as would allow the court to enter an order for possession of the premises”, and that based upon the testimony and exhibits presented the trial court had “sufficient evidence to make an accurate calculation of the amount owed, and should have done so.” The Appellant contends that the trial court’s failure to determine that rent was due was reversible error. This Court agrees.

Douglas Thomas testified on behalf of Fulton that the real estate taxes on the unit leased by Krew for the fiscal year July 1, 2006 to June 30, 2007 were \$3,024.93. (T.12). His testimony is corroborated by Plaintiff’s Exhibit 3 and Defendant’s Exhibit 1. He stated that Krew paid the basic rental under the lease, condo fees, and the sum of \$173.37 for real estate taxes, each month. (T.80-81). He presented conflicting information concerning the balance currently due under the terms of the lease.

Despite Judge Hantman’s urging that she needed “to know what you believe is owed, per month, what you believe has been paid, and what you believe

hasn't been paid..." (T.37), Mr. Thomas failed to establish the exact amount of the arrearage. He initially testified that there was rent due in the amount of \$1,739.43 (T.29), but thereafter submitted a document entitled "Customer Quick Report" (Plaintiff's Exhibit 7) apparently showing the payment history, but establishing a different sum due.⁴

Krew maintained throughout the trial that his obligation to pay real estate taxes was limited to \$173.30 per month.⁵ The record clearly establishes that he did so, notwithstanding the fact that for fiscal year July 1, 2006 to June 30, 2007, real estate taxes for his unit were increased to \$3,024.93, and that pursuant to the Lease Amendment, his monthly obligation increased accordingly.

In commenting upon Fulton's conflicting evidence concerning the exact amount due by Krew, Judge Hantman stated:

"The numbers don't match. The numbers -- I don't know where the numbers came from..... There's no way of figuring out what the accurate numbers are..... This Court is not convinced that Mr. Krew owes any rent. Not base rent, not condo fees and not tax rent." (T.118-119).

The evidence before the District Court was that Krew was obligated to pay \$252.08 per month for real estate taxes plus one-twelfth of the annual CPRA charges, however, he only paid \$173.30 per month.

⁴ The record forwarded by the District Court did not include any of the exhibits filed in the instant case. Counsel were asked to provide this Court with copies of those exhibits. To some extent they were able to do so. They were unable to provide the Court with copies of Plaintiff's Exhibit No. 4 or Plaintiff's Exhibit No. 7.

⁵ Based upon annual taxes of \$2,080.00.

The Original Lease required Krew to pay as additional rent “all monies due hereunder.” Although there may have been confusion concerning the exact amount of rental due as of the date of trial, the evidence supports a finding that there was, in fact, rent due⁶, thereby making it appropriate to enter an order for possession of the premises in favor of Fulton.

The District Court’s finding that there was no rent due was clearly erroneous, as was its failure to enter judgment for possession in favor of Fulton.

SUMMARY

For the reasons hereinbefore set forth the decision of the District Court of Maryland for Howard County rendered October 9, 2007 in Case No. 271001010339 is REVERSED, and the matter is REMANDED to the District Court of Maryland for Howard County, for further proceedings consistent herewith.

July 28, 2008
Date

Raymond J. Kane, Jr.
Raymond J. Kane, Jr.
Judge

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(Mailed: 7/29/08)

⁶This Court has determined that Krew was also obligated to pay as rent 1/12 of the CPRA lien. Mr. Thomas testified that the annual CPRA charges on Krew’s unit was \$777.44. (T.31).