[Cite as *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 2017-Ohio-7090.]

[Please see vacated opinion at 2017-Ohio-2983.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104559

BEVERAGE HOLDINGS, L.L.C.

PLAINTIFF-APPELLEE

vs.

5701 LOMBARDO, L.L.C., D.B.A. VALENTINO-VAL L.L.C.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-846163

BEFORE: Stewart, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 3, 2017

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ON RECONSIDERATION[1]

MELODY J. STEWART, J.:

{¶1} Defendant-appellant 5701 Lombardo, L.L.C., d.b.a. Valentino-Val L.L.C., agreed to sell real property and a business being operated on the property to plaintiff-appellee Beverage Holdings, L.L.C. under terms where Beverage Holdings would make monthly rental payments to Lombardo until Lombardo was in a position to close. The parties agreed that at closing, the purchase price would be adjusted by rents received by Lombardo and certain credits. Four years later, when the parties were ready to close (Lombardo had debt issues that delayed closing), the parties disputed the applicability of the rent proration clause to the purchase price: Lombardo claimed that only the first and last month rents were subject to proration; Beverage Holdings claimed that all rents paid during the lease term were subject to proration. In response to cross-motions for summary judgment filed on Beverage Holdings' complaint for declaratory judgment, the court held that the purchase agreement gave Beverage Holdings a credit for all rents paid from the date of the agreement until closing. In three assignments of error, Lombardo challenges the trial court's ruling.

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[1] The original announcement of decision, *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C., d.b.a. Valentino-Val, L.L.C.,* 8th Dist. Cuyahoga No. 104559, 2017-Ohio-2983, released May 25, 2017, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

{¶2} In filing cross-motions for summary judgment on the contract claim, the parties agree that there are no issues of material fact and that judgment should issue as a matter of law. *See* Civ.R. 56; *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus.

{¶3} Lombardo and Beverage Holdings agreed on a purchase price of $1,726,000. Section 3 of the purchase agreement contained certain "adjustments to purchase price," among them being "Rents received by Seller from the tenant of the Premises, prorated to the date of closing." The "rents" were defined in a separate lease agreement in which the parties would enter into a 126-month lease with Beverage Holdings paying $12,500 per month and continuing to operate the existing business.

{¶4} The lease agreement was prompted by prepayment penalties Lombardo faced from its lender should it pay off its mortgages early. The parties memorialized their understanding that it was "not practical" for Lombardo to close the transaction immediately and that "this transaction may not close for several years."

{¶5} Nearly four years after entering into the real estate purchase agreement, Beverage Holdings gave Lombardo notice of its intent to complete the sale of the property. The notice contained adjustments to the purchase price, including a "rent credit" of $462,500 that reduced the total purchase price to $1,202,110.09. Lombardo rejected the offer to close and revoked the agreement, maintaining that the manner in which Beverage Holdings claimed the rent credit had not been contemplated by the parties.

{¶6} Beverage Holdings filed this action, seeking an interpretation of the rent credit clause. It maintained that all rents that it paid from the date of the lease agreement were

subject to credit; Lombardo argued that the rent credit applied only to a prorated amount of the first month and the last month's rent prior to the date of closing. The court held that the rent credit clause was unambiguous and did not limit the credit to a prorated amount of a single month's rent payment. The court applied the rent credit clause to all rents received by Lombardo, subject to proration only for the final month of rent credit according to the date of closing.

{¶7} We agree with the court that, standing alone, the plain language of the clause stating that the purchase price of the property would be decreased by "[r]ents received by Seller from the tenant of the Premises, prorated to date of closing" appears to apply to all rents received from the tenant, not just the rent paid during the closing period. Nevertheless, we should not give words used in a contract their ordinary meaning if doing so would lead to a manifestly absurd result. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, ¶ 34. When such a situation exists, the court should engage in fact-finding to give the contract the most sensible and reasonable interpretation. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987).

{¶8} A manifestly absurd result occurs if we read this contract clause in isolation from two other provisions in the contract: one dealing with the reduction of the purchase price by a credit for the amount of principal paid, and the second with regard to closing. The real estate purchase agreement states that Lombardo's financing at the time made it impractical to currently close the transaction and, in fact, that the sale might not close for "several years." In consideration of this fact, the parties agreed that Lombardo would reduce the purchase price to Beverage Holdings "by the amount of principal payments

made by Seller to Seller's lender for the mortgage notes currently on the property" and that, at closing, Beverage Holdings would "receive a credit equal to the reduction in principal for the mortgage notes from the date of the execution of this agreement until the closing date."

{¶9} Given that the parties understood that Lombardo had issues with its current financing prior to entering into the real estate purchase agreement, it would be absurd to conclude that Lombardo intended to deduct from the purchase price both the principal payments and all rents received during what could be a lengthy lease term. The parties contemplated a potential lease term of 20 and one-half years: one ten and one-half-year term and two optional five-year terms. The court's interpretation of the rent credit clause is such that if the lease term lasted for the entire duration, the buyer, Beverage Holdings, would not only acquire the property but would also be owed money at closing — all the while enjoying the profits from operating the business.

{¶10} The closing clause also indicates that the rent proration reduction was meant to apply only to rent paid after Beverage Holdings gave notice of intent to close. The parties anticipated a closing time between 120-180 days. Given this amount of time, it was reasonable for the parties to state that any rents, which were payable in advance, be prorated to closing.

{¶11} Admittedly, the real estate purchase agreement is not a model of clarity. But the trial court's interpretation of the rent proration clause in isolation would permit Beverage Holdings to take advantage of errors in drafting that go beyond the hard consequences of mere imprecision and lapse into absurdity. We conclude that questions

of fact exist as to what the parties truly intended with the agreement. The assigned errors are sustained.

{¶12} Judgment reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY EILEEN KILBANE, P.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, P.J., DISSENTING:

{¶13} The majority agrees that the plain language of the clause stating that the purchase price of the property would be decreased by "[r]ents received by Seller from the tenant of the Premises, prorated to date of closing" applies to all rents received from the tenant, not just the rent paid during the closing period, but concludes that giving these words their plain meaning would lead to a "manifestly absurd result." I respectfully disagree.

{¶14} Giving these terms their ordinary meaning, the agreement provides for all rent paid by Beverage Holdings to be deducted from the initial purchase price. Lombardo's attorney drafted this section of the agreement himself, despite the parties' knowledge that there was a significant delay of up to five years before the closing of the sale.

{¶15} Lombardo's lenders conditioned permission for the lease upon the payoff by Lombardo within five years. This is evident by the agreement providing Beverage Holdings with a credit to the purchase price for all rents paid. If closing had occurred within the customary few weeks, then the lease would have been unnecessary. In addition, the rent is prorated because it is prepaid. As a result, Beverage Holdings would not receive a credit for rent amounts that were not yet due. The phrase "prorated to closing" conveys this concept.

{¶16} I agree with the trial court's finding that the language at issue is unambiguous and supportive of Beverage Holding's interpretation applying the credit to all rents received by Lombardo. The court found "the language [in the agreement] does not support [Lombardo's] interpretation limiting the credit to a prorated amount of a single month's rent payment. No such limit exists in the actual language used by the parties. The Agreement clearly provides [Beverage Holding's] a credit for rents received by [Lombardo], and allows for the final month's rent credit to be prorated according to the date of closing."

{¶17} Thus, I would find the trial court properly granted partial summary judgment in Beverage Holding's favor.