[Cite as *EAC Properties, L.L.C. v. Brightwell,* 2011-Ohio-2373.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

EAC Properties, LLC,	:	
Plaintiff-Appellant,	:	
		No. 10AP-853
v.	:	(C.P.C. No. 08CVH-17284)
Robert R. Brightwell, D.O.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 17, 2011

Murray Murphy Moul & Basil LLP, Brian K. Murphy and *Robert H. Miller,* for appellant.

Innis & Barker Co., L.P.A., and *Larry D. Barker,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, EAC Properties, LLC, appeals from a judgment of the Franklin County Court of Common Pleas concluding plaintiff waived the provisions of its lease agreement with defendant-appellee, Robert R. Brightwell, D.O., that increased rental payments during the holdover period of the lease when plaintiff accepted lesser rental payments from defendant. Because the trial court did not err in concluding plaintiff

waived the right to collect the increased rental payment during the holdover period, we affirm.

I. Facts and Procedural History

{¶2} The facts underlying plaintiff's appeal largely are undisputed. Plaintiff owned the medical building located at 72 W. Third Avenue in Columbus, Ohio. On August 15, 2003, plaintiff entered into a lease agreement with defendant, and another doctor not a party to this action, for the second floor of plaintiff's building. Defendant and the other doctor both signed the lease, which collectively referred to them as "Tenant." Although the other doctor ultimately chose to leave the building, defendant continued to occupy the second floor.

{¶3} Plaintiff's lease with "Tenant" was for a term of one year, ending August 31, 2004. The rent was $37,766.40 per year, payable in equal monthly installments of $3,147.20. "Tenant" provided a security deposit of $3,147.20 and shared equally with plaintiff the utilities not separately metered. For the term of the lease ending August 31, 2004, defendant paid $1,523.60 every month.

{¶4} Among the lease provisions pertinent to this appeal were Paragraphs 24, 25, and 34. Paragraph 25 of the lease, concerning holdovers, specifies any holdover beyond the expiration of the term of the lease "shall be construed to be a tenancy from month to month" at 125 percent of the monthly rental rate paid during the last month of the lease term. Paragraphs 24 and 34 respectively address waiver and lease modification.

{¶5} On August 9, 2004, defendant sent a letter to Dr. Elena A. Christofides, plaintiff's principal owner, notifying plaintiff he intended to vacate the building effective

September 30, 2004. Defendant nonetheless remained in the building and continued to make rental payments. From September 2004 to December 2004, defendant paid $1,904.50 each month; from January 2005 to September 2005, defendant monthly paid $1,523.60.

{¶6} In a letter dated September 7, 2005, Dr. Christofides informed defendant the "lease extension" expired as of August 31, 2005 and defendant would need to sign another lease agreement. The letter further noted that since defendant and the other doctor both signed the lease agreement, both "were (separately) responsible for the entire amount of the rent during this last year even though [the other doctor] vacated the space late 2004." The letter acknowledged Dr. Christofides had "not charged [defendant] the full rent as a physician to physician courtesy" since she thought defendant would "be moving out soon." It, however, also expressed Dr. Christofides' concern that defendant apparently "realized that [he] can enjoy the full use of the space with only half the rent payment. This was not the intention of letting [defendant] split up the payment last year."

{¶7} Dr. Christofides concluded her letter by advising defendant she "would be happy to waive this back payment if [defendant] sign[ed] a new 5 year lease agreement which is included in this letter." Noting defendant at the time was "on a month-by month [sic] lease agreement which carries a 125% increase in rent," Dr. Christofides informed defendant that rental payments would "be calculated on the original lease, so the new rent for September is $3934.00." In response, defendant wrote a letter to Dr. Christofides indicating he vacated the premises effective October 1, 2005. Defendant also wrote that plaintiff's "[c]ontinued acceptance of [his] rent checks for the past year without comment appears to indicate tacit approval of this arrangement."

{¶8} On December 4, 2008, plaintiff filed a complaint asserting defendant breached the lease agreement. The complaint sought the difference between defendant's rental payments and the amount specified in the lease, as well as defendant's share of the utilities and other related charges. The trial court referred the matter to a magistrate who conducted a bench trial on June 3, 2010. In addition to the undisputed facts, Dr. Christofides testified she told defendant's office manager that defendant "owed additional monies" and needed to talk to her "about this month-by-month carryover." (Tr. 21.)

{¶9} The magistrate's decision, filed June 4, 2010, concluded the parties, through their course of conduct, modified the terms of the lease when plaintiff accepted defendant's lesser rental payments. The magistrate decided the parties' conduct amounted to a waiver of the lease terms regarding the amount of the rent, rendering plaintiff unable to collect the full amount of back rental payments specified in the lease for the holdover period. The magistrate nonetheless awarded plaintiff $556.67 for unpaid utilities.

{¶10} Plaintiff filed objections to the magistrate's decision. In a decision and entry filed August 9, 2010, the trial court overruled plaintiff's objections and adopted the magistrate's decision.

II. Assignments of Error

{¶11} Plaintiff appeals, assigning the following errors:

> 1. The trial court erred as a matter of law in finding that Plaintiff waived its right to full payment under the unambiguous terms of the Lease by cashing checks for less than the contractual rent amount despite Paragraph 24 of the Lease, which prohibits waiver.

> 2. The trial court erred as a matter of law in finding that the conduct of the parties during the holdover period modified the terms of the written Lease with a provision requiring that all modifications be in writing and signed.
>
> 3. The trial court erred as a matter of law in finding that Plaintiff waived the rent increase by accepting Defendant's rent without objection, while at the same time recognizing that Plaintiff told Defendant's employees that the rent payments were insufficient.

Plaintiff's assignments of error are interrelated, so we discuss them jointly. They together assert the trial court erred in interpreting the lease and construing plaintiff's conduct to waive defendant's failure to pay the full amount of the holdover rent.

III. Lease Provisions regarding Waiver and Modification

{¶12} Plaintiff's first assignment of error asserts the trial court erred in concluding plaintiff waived its right to collect the difference in the amount of rent defendant paid and the amount specified in the lease for the holdover period. Plaintiff's second assignment of error asserts the trial court erred in finding the parties' conduct modified the terms of the lease. Taken together, plaintiff's first two assignments of error dispute the trial court's construction of the lease.

{¶13} Leases are contracts and are subject to traditional rules of contract interpretation. *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, ¶29; *Bucher v. Schmidt*, 3d Dist. No. 5-01-48, 2002-Ohio-3933, ¶13. "Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus; *Shifrin v. Forest City Ent., Inc.,* 64 Ohio St.3d 635, 1992-Ohio-28. "Common words appearing in a written instrument will

be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus (superseded by statute on other grounds). The construction of a written contract is a matter of law for the court. Id. at paragraph one of the syllabus.

{¶14} In addressing plaintiff's objections to the magistrate's decision, the court noted "Dr. Christofides' Letter admits that as of the writing she was not Charging [sic] the full rate for the year prior." (Decision and Entry, 8.) With that premise, the court decided "[t]he main issue here is waiver" and agreed that "Plaintiff waived the lease provisions related [to] rent." (Decision and Entry, 8.) At the same time, the court noted Paragraph 24 of Lease, "which prohibits waiver" and concluded "the parties modified the contract. Although two parties enter into a contract, no limitation self-imposed can destroy their power to contract again." (Decision and Entry, 9.) "Here, the parties agreed through their conduct to a rent less than that called for in the Lease for the hold over period." (Decision and Entry, 9.)

{¶15} The trial court's decision appears to conflate the issues of modification and waiver. The lease, however, treats the two as distinct issues, separately addressing waiver in Paragraph 24 and amendments in Paragraph 34. Paragraph 24 of the lease, entitled WAIVER, states "[n]o waiver of any condition or covenant of this Lease by either party shall be deemed to imply or constitute a further waiver of the same or any other condition or covenant." Paragraph 24 does not preclude waiver, but rather, as the parties appear to agree, Paragraph 24 properly is interpreted to allow waiver of a lease provision without construing it to further waive the same or other lease provisions.

{¶16} Plaintiff argues that, even if the lease permits waiver of some lease provisions, the trial court erred in finding a waiver here because Paragraph 24 is subject to the requirement in Paragraph 34 that any amendment to the lease be executed in writing. Paragraph 34, entitled ENTIRE AGREEMENT, states "[t]his Lease contains the entire agreement between the parties and supersedes all prior understandings. No amendment to this Lease shall be valid unless in writing and executed by the party against whom enforcement of the amendment is sought."

{¶17} Plaintiff contends Paragraph 34 allows the parties to modify the lease, including the amount of rent, only if the modification is in writing and plaintiff signs it. Pointing out defendant produced no signed writing purporting to modify the amount of rent due under the lease, plaintiff asserts the trial court erred in concluding the parties' course of conduct modified the lease. See *Star Leasing Co. v. G&S Metal Consultants, Inc.*, 10th Dist. No. 08AP-713, 2009-Ohio-1269, ¶25, citing *Reckart v. Lyons* (Aug. 13, 1993), 11th Dist. No. 92-L-180 (concluding that whether a lease/option agreement was modified orally was immaterial where the lease/option agreement provided any modification was to be in writing).

{¶18} In resolving the waiver and modification issues, the trial court relied on the Twelfth District's decision in *Fields Excavating, Inc. v. McWane, Inc.*, 12th Dist. No. CA2008-12-114, 2009-Ohio-5925, to conclude the parties could agree, through their conduct, to modify the lease even when the lease contains a no-oral-modification clause. *Fields Excavating*, however, notes an anti-waiver provision and a no-oral-modification clause address different circumstances.

{¶19} The anti-waiver clause, as typically drafted, deals with the failure to exercise rights or remedies under the existing agreement, especially if one party to the agreement is not complying. *Fields Excavating* at ¶31; but see *Allonas v. Royer* (1990), 67 Ohio App.3d 293 (stating "waiver of any provisions herein contained shall not be binding upon * * * [the company]"). By contrast, the no-oral-modification provision can be waived, in some cases, where the parties agree to modify the terms of the agreement that, by its terms, requires the modification to be in writing. *Fields Excavating* at ¶19. Similarly here, Paragraph 34 addresses an agreement between the parties to change the terms of the lease. By contrast, Paragraph 24 deals with whether plaintiff waived its rights or remedies under the existing lease agreement. See *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.,* 168 Ohio App.3d 592, 2006-Ohio-4779, ¶22.

{¶20} Considering the contract terms at issue in *Fields Excavating*, the facts peculiar to the case, and provisions of R.C. Chapter 1302, the court in *Fields Excavating* concluded the parties agreed to waive the no-oral-modification clause through their subsequent oral agreement and course of conduct. Here, no evidence suggested the parties entered into any agreement, oral or written, to modify the lease by changing the amount of rent under the agreement. The trial court wrongly concluded the parties' conduct modified the lease and changed the amount of rent for the holdover period.

{¶21} Because the lease allows one party to waive an obligation without a written instrument commemorating the waiver, the issue on appeal resolves to whether plaintiff waived its right to collect the increased holdover rent. As applied to contracts, waiver is a voluntary relinquishment of a known right. *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435, 2000-Ohio-213. "Waiver assumes one has an opportunity to

choose between either relinquishing or enforcing of the right." *Chubb v. Ohio Bur. of Workers' Comp.* 81 Ohio St.3d 275, 279, 1998-Ohio-628. A party who has a duty to perform and who changes its position as a result of the waiver may enforce the waiver. Id. at 279, citing *Andrews v. State Teachers Retirement Sys.* (1980), 62 Ohio St.2d 202, 205. The party asserting waiver must prove the waiving party's clear, unequivocal, decisive act. *Automated Solutions Corp. v. Paragon Data Sys., Inc.,* 167 Ohio App.3d 685, 2006-Ohio-3492, ¶28.

{¶22} "[W]aiver of a contract provision may be express or implied." *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶29, quoting *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶24, citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751. " '[W]aiver by estoppel' exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it." (Emphasis omitted.) Id., quoting *Natl. City Bank* at ¶24, quoting *Mark-It Place Foods* at ¶57. "Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights." Id., quoting *Natl. City Bank* at ¶24.

{¶23} Whether a party's inconsistent conduct amounts to waiver involves a factual determination within the province of the trier of fact. Id. at ¶30, citing *Lamberjack v. Priesman* (Feb. 5, 1993), 6th Dist. No. 92-OT-006, fn. 5 and *Walker v. Holland* (1997), 117 Ohio App.3d 775, 791. Review of a trial court's factual determinations involves some degree of deference, and we will not disturb a trial court's findings of fact where the record

contains competent, credible evidence to support such findings. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 52.

{¶24} Here, the trial court found a waiver based on plaintiff's accepting lesser rent checks for 13 consecutive months without objection. The trial court also specifically noted the September 7, 2005 letter in which Dr. Christofides admitted she had "not charged [defendant] the full rent as a physician to physician courtesy in the assumption that [defendant was] going to be moving out soon." The September 7, 2005 letter accordingly indicates plaintiff was aware defendant continued to pay less than the contractual amount of the holdover rent, but plaintiff nonetheless continued to accept the lesser rental amount.

{¶25} A lessor can waive the right to collect late fees when it continues to accept a lessee's late rental payments without objection. See *Windham v. 450 Invests., Inc.*, 5th Dist. No. 2010-CA-00215, 2011-Ohio-1034, ¶32-33 (finding no error in trial court's conclusion that lessor "waived its right to late fees" where lessor continually accepted late payments); *Habegger v. Paul*, 6th Dist. No. WD-03-038, 2004-Ohio-2215, ¶19-20 (concluding the landlord "waived his right to collect the late fees upon eviction by continuing to accept [the tenant's] rent payments and not pursuing eviction until approximately 14 months after the first late payment"); *Finkbeiner v. Lutz* (1975), 44 Ohio App.2d 223 (holding the lessor's failure to timely object to the late payment of rent amounted to a waiver). Similarly, a lessor can waive its right to collect holdover rent when it continues to accept the original rental amount after expiration of the lease. See *Galaxy Dev. v. Quadax, Inc.* (Oct. 5, 2000), 8th Dist. No. 76769 (finding no error in the trial court's conclusion the landlord waived its right to collect holdover rent for the period of

November 1, 1996 to April 18, 1998 when landlord without objection accepted the original rental amount each month during that period).

{¶26} Because plaintiff accepted the lesser rent payment for 13 consecutive months without objecting and admitted in the September 7, 2005 letter it had not been charging the increased holdover rent, the record contains competent, credible evidence to allow the trial court to find a waiver. Plaintiff's third assignment of error nonetheless contends the trial court erred in finding a waiver because the trial court also found that, despite plaintiff's cashing the checks defendant tendered in the lesser amount, plaintiff continued to object to the deficiency in defendant's rental payments.

{¶27} Dr. Christofides testified that during several conversations with defendant's officer manager she indicated defendant's rental payments were deficient. In its findings of facts, the magistrate's decision notes Dr. Christofides "claimed that she had a number of conversations with the office manager or receptionist for the Defendant but she never talked with the Defendant concerning her issues." (Magistrate's Decision, 3.) The magistrate's stating plaintiff's principal claimed she verbally objected to defendant's deficient payments is different than the magistrate's actually finding plaintiff objected to the deficient payments when it received them. Indeed, the magistrate's decision noted plaintiff's September 7, 2005 letter did not "claim that the past payments had been contested or disputed." (Magistrate's Decision, 4.)

{¶28} In addressing plaintiff's objections to the magistrate's decision, the trial court expressly observed that although the magistrate's decision determined Dr. Christofides personally asked for rental checks on occasion, the magistrate did not find Dr. Christofides told defendant's employees the "rent was insufficient." (Decision and Entry,

7.) As a result, even though the magistrate stated Dr. Christofides testified she verbally objected to the amount of the rent received, neither the magistrate nor the trial court affirmatively so found, a finding that would contradict their respective conclusions that a waiver occurred. See, e.g., *D'Souza v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-97, 2009-Ohio-6901, ¶17 (noting that regardless of a witness' testimony, the trier of fact is free to believe "all, part or none of a witness's testimony"), citing *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶32; *Parsons v. Washington State Community College*, 10th Dist. No. 05AP-1138, 2006-Ohio-2196, ¶21. Similarly, despite plaintiff's testimony that she conveyed to defendant's office staff her disagreement with the amount of defendant's monthly rental payments during the holdover period, neither the magistrate nor the trial court so concluded.

{¶29} Because competent credible evidence supports the trial court's finding plaintiff waived the rental provisions of the lease regarding the amount of rent defendant was to pay during the holdover period, we overrule plaintiff's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
