[Cite as *GLIC Real Estate Holdings, L.L.C. v. Bicentennial Plaza Ltd.*, 2012-Ohio-2269.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

GLIC Real Estate Holdings, LLC et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 11AP-474 (C.P.C. No. 09CVH-08-13007)
Bicentennial Plaza Limited,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
Bicentennial Plaza Holding Company, Ltd.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 22, 2012

Blomgren & Bobka, Co. LPA, Gilbert E. Blomgren and *Jeffrey T. Kalniz*, for appellee GLIC Real Estate Holdings, LLC.

Onda, LaBuhn, Rankin & Boggs Co., LPA, Timothy S. Rankin and *Matthew A. LaBuhn*, for intervening-appellee Marc D. Smith, Receiver.

Zeiger, Tigges & Little, LLP, John W. Zeiger and *Bradley T. Ferrell*, for appellant Bicentennial Plaza Holding Company, Ltd.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This is an appeal from the May 16, 2011 journal entry of the Franklin County Court of Common Pleas granting motions for summary judgment in favor of plaintiff-

appellee GLIC Real Estate Holdings, LLC ("GLIC"), and Receiver Marc D. Smith ("Receiver"), and overruling a motion for summary judgment from defendant-appellant Bicentennial Plaza Holding Company, Ltd. ("Holding"). Holding also appeals from the May 16, 2011 entry entering judgment in favor of GLIC on its first, second and third declaratory judgment claims, and in favor of the Receiver on its complaint for declaratory judgment. For the reasons that follow, we affirm.

{¶2} This action revolves around a 50-year parking lease executed in May 1999. The parking spaces are adjacent to Bicentennial Plaza, a large office building on the riverfront in downtown Columbus, Ohio. It is generally understood that a large office building is more valuable if it has parking available for tenants and guests. Bicentennial Plaza is owned by Bicentennial Plaza Limited ("BP Limited"). Holding's principal asset is a large surface parking lot located on Civic Center Drive in downtown Columbus. Since 1996, Holding has leased a portion of its parking lot to BP Limited for use by BP Limited's tenants in Bicentennial Plaza.

{¶3} Holding, a passive entity holding property, and BP Limited are related entities sharing, among other things, business offices and general counsel. William J. Schottenstein serves as president of both entities. As such, Schottenstein signed the parking lease for both Holding and BP Limited. The same attorney represented both entities. Holding and BP Limited are said to observe all requisite legal formalities and, in that sense, operate independently of each other. The trial court found no evidence of constructive fraud or circumstances that would support piercing the corporate veil, but still concluded, "the close, continuing, and sometimes informal business interrelationship between Holding and Limited cannot be disregarded." Thus, "significant - but not complete - common ownership and control existed between Holding and [BP] Limited at the time the documents were executed in May 1999, and ever since." Apr. 25, 2011 Journal Entry, at 3, 4.

{¶4} On May 24, 1999, BP Limited refinanced the outstanding debt on Bicentennial Plaza. BP Limited executed a promissory note for $11,000,000 from GLIC's predecessor in interest, Genworth Life Insurance Company, f.k.a. General Electric Capital Assurance Company. Later, the note was assigned to GLIC. To secure payment of the note, BP Limited executed an Open End Mortgage, Assignment of Rents and Leases,

Security Agreement and Fixture Financing Statement (collectively the "Mortgage"). To facilitate refinancing, BP Limited also executed a new parking lease with Holding as Lessor and BP Limited as Lessee. On the same date, Holding also executed a document known as the "Lessor's Certificate," which, among other things, limited Holding's right to terminate the parking lease under specifically spelled-out circumstances.

{¶5} The entire indebtedness was due in ten years, on May 31, 2009, later extended to June 30, 2009. BP Limited defaulted on the note and did not cure the default with GLIC. GLIC sought appointment of a Receiver and, on September 16, 2009, GLIC filed an amended complaint seeking judgment and decree in foreclosure for the Bicentennial office building and the parking lease.

{¶6} Holding then notified GLIC that it intended to terminate the parking lease once GLIC completed the foreclosure sale of BP Limited's leasehold interest. The Receiver filed an intervening complaint for declaratory judgment arguing that Holding should not be allowed to terminate the parking lease. GLIC withdrew its foreclosure claim against BP Limited's leasehold interest and asserted a claim for declaratory judgment arguing that it did not need to foreclose on the leasehold interest because it already owned the leasehold interest by virtue of the assignment that BP Limited gave to GLIC's predecessor. These facts were not disputed; rather, the parties sought a judicial construction of the documents associated with the refinancing.

{¶7} On cross motions for summary judgment, the trial court entered judgment on May 16, 2011. The trial court stated:

> (a) that Bicentennial Plaza Limited's leasehold interest in the Parking Lease was perfectly, absolutely and irrevocably assigned to GLIC's predecessor upon the execution of the Assignment of Rents and Leases dated May 24, 1999 * * *. (b) that GLIC is an assignee of the interest of GLIC's predecessor under the Assignment, and (c) that GLIC as assignee * * * can assign its interest in the Parking Lease to any purchaser of the Bicentennial Plaza Office Building upon the foreclosure sale of that building.

Entry Granting Summary Judgment, at 2.

{¶8} BP Holding has appealed from that judgment and assigns the following as error:

> [I.] The trial court erred in ruling (i) that Bicentennial Plaza Limited's assignment of its leasehold interest in its parking lease with Appellant Bicentennial Plaza Holding Company, Ltd. conveyed absolute ownership of the leasehold rather than creating a mortgage interest in it; (ii) that Appellee GLIC Real Estate Holding, Ltd., as the successor to the rights under the assignment, is the present owner of Bicentennial Plaza Limited's leasehold; and (iii) that GLIC may re-assign Bicentennial Plaza Limited's leasehold free and clear of Bicentennial Plaza Limited's ownership rights without having to foreclose on the leasehold.
>
> [II.] The trial court erred in ruling that Appellant Bicentennial Plaza Holding Company, Ltd. is prohibited from terminating its parking lease with Bicentennial Plaza Limited in the event Limited's leasehold interest in the lease is sold through a foreclosure sale.

{¶9} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995). The construction of a written contract is a matter of law, and such construction is reviewed without deference to the trial court's determination. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. The goal of construing contract language is to effectuate the parties' intent. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. Additionally, when the parties' agreement is integrated into an unambiguous, written contract, courts should give effect to the plain meaning of the parties' expressed intentions. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989), syllabus. Intentions that are not expressed in the writing are "deemed to have no existence." *Id.* at 53, citing *Charles A. Burton, Inc. v. Durkee*, 158 Ohio St. 313 (1952), paragraph two of the syllabus.

{¶10} The rules of contract construction require us to apply the language as written if the contract is unambiguous. *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906, ¶ 31. We are also required to interpret a contract that may be susceptible to two constructions by using the interpretation which makes it a fair and reasonable agreement and which gives the contract meaning and purpose.

See generally, Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth., 78 Ohio St.3d 353 (1997), and *Doctors Hosp. West v. Family Med. Group, Inc.*, 10th Dist. No. 76AP-702 (Feb. 8, 1977).

{¶11} With these standards in mind, we must first address the issue of standing.

{¶12} GLIC argues that Holding lacks standing to contest the trial court's finding that the parking lease was perfectly, absolutely and irrevocably assigned to GLIC's predecessor because Holding was not a party to the assignment of rents and leases. We do not find this argument persuasive.

{¶13} With respect to standing, it is well-established in Ohio that an appeal lies only on behalf of a party aggrieved. Such party must be able to show that he has a present interest in the subject matter of the litigation and that he has been prejudiced by the judgment of the lower court. *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 161 (1942). The appealing party must have an "immediate and pecuniary" interest in the dispute. *Id.*

{¶14} Here, Holding and GLIC's predecessor entered into a separate contract, the Lessor's Certificate that cross-references the parking lease and the other mortgage documents. GLIC's second amended complaint, at paragraph 81, specified that "[a]n actual controversy exists between Plaintiff [GLIC] and Defendant BP Holding with respect to the meaning and application of the language contained in the Lessor's Certificate." We agree. It is disingenuous to aver the existence of an actual controversy in a complaint only to argue lack of standing on appeal. An understanding of the interrelationship of the documents is crucial to construing the contract language and its effect on Holding. We conclude that Holding has standing to appeal.

{¶15} Holding's primary argument on appeal is that the assignment of the leasehold was not an outright assignment of ownership, but instead created an equitable mortgage interest in the leasehold. Holding acknowledges that the plain language in the assignment grants an absolute assignment of ownership, but Holding asserts that this language is invalid given legal precedent that such a conveyance creates an equitable mortgage with its corresponding right of redemption. Holding then argues that if the assignment of BP Limited's leasehold interest is a mortgage interest and sold through a foreclosure sale, BP Limited will have defaulted on the lease, and Holding would then

have the right to terminate the lease. Section 11.01 of the parking lease states that an event of default occurs if any portion of BP Limited's interest in the lease is sold by legal process.

{¶16} In support of this argument, Holding directs the court to the case of *Wilson v. Giddings*, 28 Ohio St. 554 (1876). In *Wilson*, the court stated: "There is no principle in equity more firmly settled on authority than that every contract for the security of debt, by the conveyance of real estate, is a mortgage, and that all agreements of parties tending to alter, in any subsequent agreement, the original nature of the mortgage, is of no effect." *Id.* at 565. This serves to preserve the mortgagor's right of redemption. *Id.* at 567. In commenting on this principle, this court has stated: "In other words, a court will consider a deed to be an equitable mortgage if the parties intended the transfer of the property to serve as security for a loan, and not as an actual sale." *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶ 30.

{¶17} GLIC argues that *Wilson* has not been extended to cover leasehold interests. GLIC distinguishes *Wilson* and the other cases cited by Holding by virtue of the fact that in every case, including *Wilson*, the conveyance at issue was a deed absolute on its face.

{¶18} Holding argues that because a leasehold estate is property that can be made the subject of a mortgage, the rule in *Wilson* therefore extends to the parking lease at issue in this case. GLIC argues that the case cited by Holding does not extend the *Wilson* rule to leasehold estates. *Abraham v. Fioramonte,* 158 Ohio St. 213, 222-23 (1952). Instead, it merely stands for the proposition that a leasehold interest may be subject to a mortgage provided the mortgage is executed with all the formalities required with respect to a mortgage on real estate and that it is recorded as a mortgage. *Id.* at paragraph two of the syllabus.

{¶19} In this case, the intent of the parties is spelled out multiple times in the loan documents. There is no question that clear, unequivocal language in the assignment of rents and leases granted a perfected, absolute assignment to GLIC's predecessor. In particular, section 4.1 stated, in pertinent part, that "[t]his Assignment shall constitute a perfected, absolute and present assignment." It assigned "all leases

and agreements for the leasing, use or occupancy of the Property." *Id.* at section (D)(i). Property specifically included the parking lot at issue. *Id.* at Exhibit A. Nor is there any dispute that the assignment of the leasehold interest in the parking lot was intended as additional security for the loan. Section 3 of the Lessor's Certificate states: "Landlord [Holding] understands that Tenant's [BP Limited's] interest in the Lease has been assigned to Lender [GLIC's predecessor] as security in connection with the Loan." Section 2(e) of the Lessor's Certificate states:

> While the Mortgage remains in effect, or during the redemption period in the event of foreclosure of the Mortgage or any other loan security documents, the Lease will not be terminated by reason of any noncurable default (unless a new lease is entered into with Lender as referred to below or Lender does not agree to enter into such lease) and will not be amended or modified without the consent of Lender (except pursuant to the terms of the Lease) or its successors in interest[.]

{¶20} The language employed in the interrelated loan documents is unambiguous as to the intent of the parties. BP Limited assigned all of its interest in the parking lease to GLIC's predecessor. GLIC's predecessor sought to protect its interest in the Parking Lease in the event BP Limited defaulted. In executing the Lessor's Certificate, Holding understood that it was limiting its ability to terminate the lease in order to provide assurances that would allow GLIC's predecessor to make the loan. The Lessor's Certificate specifically states as follows:

> [GLIC's predecessor] needs assurances from [Holding] in order to make the Loan, and [Holding] is willing to give those assurances to [GLIC's predecessor]. [Holding] also understands that, in making the Loan, [GLIC's predecessor] will rely on the assurances and statements made in this agreement.

{¶21} The business circumstances of the loan also indicate the purpose of the loan documents was to protect the interest of the lender and to insure that the bargained-for security retained its value. It is not reasonable to believe that an entity lending $11,000,000 to refinance an office building with adjacent parking would sign a contract permitting the lessor of the parking lease to terminate the lease if the office building went into foreclosure. GLIC's predecessor and BP Limited, as well as Holding,

were sophisticated commercial entities negotiating at arms-length with respect to what was necessary to secure an $11,000,000 loan.

{¶22} Holding seeks to create an ambiguity where none exists. All the relevant documents were executed on the same day, and the only reasonable inference from the writings of the parties was that Holding was aware of and agreed to the absolute nature of the assignment of the leasehold. Holding has advanced its theory of an equitable mortgage in spite of section 2(e) of the Lessor's Certificate in which Holding affirmed that while the mortgage remained in effect, or during the redemption period in the event of foreclosure, the parking lease would not be modified, amended, or terminated without the consent of the lender, GLIC's predecessor. Holding urges us to focus on the parking lease and to ignore the Lessor's Certificate. Accepting Holding's interpretation of the mortgage documents requires wholesale revision of the negotiated language in the various documents. GLIC and the Receiver's reading of the documents allows enforcement of the terms as written.

{¶23} GLIC also relies on language in the Lessor's Certificate that states the "Lease will not be terminated by reason of any noncurable default." Lessor's Certificate, at section 2(e). Similarly, section 3, Assignment of Lease states, in pertinent part, that "[a]fter Lender becomes the Tenant of the Leasehold Estate in the Leasehold Property, * * * the Lease shall be freely assignable notwithstanding any terms of the Lease to the contrary."

{¶24} Even if the assignment created an equitable mortgage, BP Limited and Holding did not agree to clog title to the property. In *Pangouleas Interiors, Inc. v. Silent Partner Group, Inc.*, 2nd Dist. No. 18864 (Mar. 22, 2002), the court recognized that "Ohio law is consistent with the accepted rule that 'a mortgagor's equity of redemption cannot be clogged and that he cannot, as part of the original mortgage transaction, cut off or surrender his right to redeem.' " The anti-clogging rule that has been part of Ohio Jurisprudence for many years prohibits clogging title to real property. In this case, the only "clogging" that exists is not to the fee simple interest in the parking lot, which Holding continues to own, but rather the ability to terminate the remainder of the 50-year lease as part of the bargained-for security for the $11,000,000 loan. In *Shaw v. Walbridge*, 33 Ohio St. 1 (1877), the parties executed a deed in lieu of

foreclosure, and the transaction was held to be invalid. In doing so, the Ohio Supreme Court held that:

> There is no rule of law which prevents a mortgagor from disposing of his equity of redemption to a mortgagee by private arrangement, but courts of equity will not permit a mortgagee to take advantage of his position so as to wrest from the mortgagor his equity, by an unconscionable bargain. The transaction will be jealously scrutinized, but if the agreement is a fair one, under all the circumstances of the case, it will be upheld.

Id. at paragraph two of the syllabus.

{¶25} In *Wargo v. Henderson*, 7th Dist. No. 08-CO-21, 2009-Ohio-2443, ¶ 48, the court upheld the validity of an option agreement to purchase the property. In doing so, the court applied the following principle from *Pangouleas*:

> [A] mortgagor can contract away his equity of redemption as long as it is not part of an unconscionable bargain. Additionally, the court examining the bargain must scrutinize the agreement and uphold it if, under all the circumstances, the agreement is fair. The court must examine the circumstances to determine whether the mortgagee used its position as a creditor to oppress the mortgagor or to force the mortgagor into an unfair bargain.

{¶26} We find the position taken by GLIC to be the more persuasive. Holding has not produced a single Ohio case that extends the principle of *Wilson* to leasehold interests. We are loath to have this case be the first, particularly because the intention of the parties is so clearly stated in the loan documents. Fairness dictates that the contract language be enforced to carry out the intent of the business entities rather than extending the rule of *Wilson* in a case of first impression.

{¶27} The first assignment of error is overruled.

{¶28} Having overruled the first assignment of error, we turn to Holding's second assignment of error. Assuming that GLIC must foreclose on BP Limited's leasehold interest, Holding argues the foreclosure gives Holding the right to terminate the lease. In addition to being moot in light of our resolution of the first assignment of error, Holding's argument would nullify the Lessor's Certificate. The argument is not well-taken, and the second assignment of error is overruled.

{¶29} Based on the foregoing, the two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.
