

[Cite as *F & L Center Co., Ltd. v. H. Goodman, Inc.*, 2004-Ohio-5856.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83503

F & L CENTER COMPANY, LIMITED	:	
	:	ACCELERATED DOCKET
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
-vs-	:	
	:	AND
H. GOODMAN, INC.	:	
	:	OPINION
Defendant-Appellee	:	

Date of Announcement
of Decision: NOVEMBER 4, 2004

Character of Proceeding: Civil appeal from
Court of Common Pleas
Case No. CV-465611

Judgment: Affirmed

Date of Journalization:

Appearances:

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JAMES J. SWEENEY, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} Plaintiff-appellant F&L Center Company, Limited, (“F&L”) appeals from the judgment of the Cuyahoga County Common Pleas Court that granted summary judgment in favor of defendant-appellee H. Goodman, Inc. (“Goodman”). For the reasons that follow, we affirm.

{¶ 3} Goodman had leased retail space from F&L under a Lease dated July 1, 1966 (the “Goodman Lease”). A dispute arose between the parties when Goodman announced its intention to close its store and its desire to either assign the Lease or sublet to a third party, Michaels Stores, Inc. (“Michaels”). F&L was willing to terminate the Lease in consideration of the reletting to Michaels and on the terms contained in the “Termination of Lease and Settlement Agreement” entered between the parties on May 25, 1994 (the “Settlement Agreement”). Michaels paid more rent to F&L than Goodman had under the Lease. Pursuant to the Settlement Agreement, F&L paid Goodman a percentage share of the excess rent. Michaels did not renew its Lease with F&L. F&L was able to secure a new tenant but for a rental amount less than it would have received under the prematurely terminated Goodman Lease. F&L pursued Goodman for the rent differential. Goodman refused to pay F&L the difference because it asserts that such is contrary to the terms of the Settlement Agreement.

{¶ 4} F&L commenced this action on December 1, 2003 asserting the following claims against Goodman: breach of contract, unjust enrichment, and breach of covenant of good faith and fair dealing relating to the terms of the Settlement Agreement. The trial court granted summary judgment in favor of Goodman. On appeal, F&L presents a sole assignment of error for our review:

{¶ 5} “I. The trial court erred in granting defendant/appellee’s motion for summary judgment.”

{¶ 6} Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading the entire contract, or if the terms are reasonably susceptible to more than one interpretation. *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 55. Where the contract is clear and unambiguous, the intent of the parties must be determined from the contract itself. *Mattlin-Tiano v. Tiano* (Jan. 9, 2001), Franklin App. No. 99 AP-1266. Extrinsic evidence may be considered only when the language of the contract is unclear or ambiguous or when the circumstances surrounding the agreement invest the language of the contract with a special meaning. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635.

{¶ 7} F&L claims that Goodman’s rent obligations under the Goodman Lease were terminated only if F&L was able to obtain and retain a tenant whose annual rent obligations were equal to or greater than Goodman’s rent obligations under the Goodman Lease. Goodman claims that the Goodman Lease was terminated by the Settlement Agreement and that it has no obligation to pay F&L under the Settlement Agreement. The trial court found the terms of the Settlement Agreement clear and unambiguous and entered judgment in favor of Goodman.

{¶ 8} The primary objective in contract interpretation is to give effect to the intent of the parties as expressed in the language they chose to employ in their agreement. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53. The basic tenets of contract law require us to

give the common words that appear in the Agreement their ordinary meaning while construing the Agreement as a whole. *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph 2 of the syllabus; *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Authority* (1997), 78 Ohio St.3d 353.

{¶ 9} Courts cannot rewrite clear and unambiguous contracts to contain additional or different terms or make a better contract than the parties made for themselves merely because its operation happens to work a hardship on one of the parties.¹ *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55.

{¶ 10} F&L contends the trial court erred by granting summary judgment to Goodman on all of its claims, each of which we address separately for ease of discussion.

A. Breach of Contract

{¶ 11} F&L maintains that Goodman breached the intent of the Settlement Agreement. It is true that the Settlement Agreement states as follows: “[i]t is understood that the settlement hereunder is predicated upon the anticipated increase in rental to be received by Lessor under the Michaels’ Lease over the rental under the Lease, as set forth on Exhibit A attached hereto.” The Settlement Agreement sets forth conditions upon which F&L will pay Goodman a portion of the excess rental, as well as provisions in which such payments will either be reduced or eliminated.

{¶ 12} The Settlement Agreement refers to the possibility that Michaels would not exercise its renewal option. The Settlement Agreement contemplated a possible need to replace Michaels

¹The Settlement Agreement contains an integration clause which in clear and unambiguous terms provides that the Agreement “contains the entire agreement between the parties hereto with respect to the transactions contemplated herein and supersedes all previously written or oral negotiations, commitments and writings. This agreement may not be modified or amended except in writing, signed by the parties.”

whereby F&L agreed to “use reasonable efforts in good faith to secure another tenant to replace Michaels, if necessary, and to negotiate a Lease Agreement with any other subsequent tenant at commercially reasonable rentals and upon commercially reasonable terms and conditions in [F&L’s] reasonable judgment.” The Settlement Agreement does not require Goodman to pay F&L the difference in the event a tenant would pay less rental than Goodman was obligated to pay under the Goodman Lease. Absence of such a provision does not render the clear terms of the Settlement Agreement ambiguous.

{¶ 13} Michaels fulfilled its Lease at the higher rent for a period of time and both parties realized their percentage of profit. Michaels did not renew its Lease and ultimately a new Lease was entered into by a different tenant but at a lower rent than that negotiated in the terminated Goodman Lease. It would have been logical for F&L to include a provision in the Settlement Agreement that would make Goodman a guarantor to insure F&L’s receipt of at least the rental amount agreed upon in the Goodman Lease. But there is no such provision and we cannot insert this material term. Moreover, the Settlement Agreement unambiguously terminated the Goodman Lease and each party “release[d] and discharge[d] the other party from any and all claims and liabilities, known or unknown, now or hereafter arising under the Lease ***.”

{¶ 14} It is undisputed that the parties jointly drafted the Settlement Agreement and enjoyed equal bargaining power. The parties agreed that the Settlement Agreement was a fully integrated contract which bars our consideration of evidence outside the clear and unambiguous terms of the agreement itself. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27 (excepting fraud, mistake or the like, parties’ integrated writing cannot be varied or contradicted by evidence of prior or contemporaneous oral agreements or written agreements that the principal contract does not expressly authorize). Under the circumstances, the law prevents us from rewriting the Settlement Agreement to make a better

contract for F&L than it made for itself even though it arguably has worked a hardship upon them. *Aultman*, supra. The trial court did not err in granting summary judgment on F&L's breach of contract claim.

{¶ 15} B. Unjust Enrichment²

{¶ 16} F&L argues that failure of a condition precedent precluded the parties' obligations under the Settlement Agreement thereby rendering it a nullity and thus creating a viable claim for unjust enrichment. The condition precedent was "the anticipated increase in rental to be received by Lessor under the Michaels' Lease over the rental under the [Goodman] Lease." This rental increase was realized and the parties operated in accordance with the Settlement Agreement for years without dispute. Because there is a valid, enforceable contract in this case, the doctrine of unjust enrichment is not applicable. *University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002-Ohio-3748.

{¶ 17} C. Breach of Implied Covenant of Good Faith and Fair Dealing

{¶ 18} The basis of this claim is that Goodman took opportunistic advantage of F&L in a way that could not have been contemplated at the time the Settlement Agreement was drafted.³ We do not agree. At the time the Settlement Agreement was drafted, the parties were privy to the terms of the

²Unjust enrichment operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. Unjust enrichment cannot exist where there is a valid and enforceable written contract. *University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002-Ohio-3748.

³While F&L argues that Goodman owed it a fiduciary duty by virtue of an alleged de facto joint venture, Goodman had no obligations under the Settlement Agreement except to relinquish the premises and receive a share of the excess rent *under certain circumstances*. This was not an association of persons to carry out a business venture for joint profit as there was no combination of the parties' efforts, property, money, skill, or knowledge.

Michaels' Lease agreement, including the option to renew. The Settlement Agreement expressly contemplates a scenario that F&L would have to find a replacement tenant. It was not inconceivable that the replacement tenant might negotiate a lesser rental amount.

{¶ 19} We find it significant that the parties jointly drafted the Settlement Agreement and both were represented by counsel. F&L chose not to include or negotiate a term in the Settlement Agreement that in hindsight proved significant. The parties were free to include or negotiate whatever terms they wished in this Settlement Agreement. We cannot guess or speculate as to why this term was not included but it was not. The Settlement Agreement does not require Goodman to pay F&L any rental amount. The Settlement Agreement terminated the Goodman Lease and F&L released any claims it might have had against Goodman under that Lease. We find that there was no genuine issue of material fact concerning F&L's claim for breach of implied covenant of good faith and fair dealing and that the trial court properly entered summary judgment.

{¶ 20} Plaintiff's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Court of Common Pleas 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.

ANNE L. KILBANE, P.J., and

DIANE KARPINSKI, J., CONCUR.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).