[Cite as *Cleveland Fin. Assoc., L.L.C. v. Prim Capital Corp.*, 2009-Ohio-2727.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92082

CLEVELAND FINANCIAL ASSOCIATES, LLC

PLAINTIFF-APPELLANT

vs.

PRIM CAPITAL CORPORATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-639075

BEFORE: Stewart, J., Gallagher, P.J., and Boyle, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Cleveland Financial Associates, LLC ("CFA"), appeals from an order granting judgment on the pleadings in favor of defendants-appellees, Prim Capital Corporation ("Prim Capital") and Joseph A. Lombardo ("Lombardo"), on CFA's claim for breach of a commercial lease. For the reasons that follow, we reverse.

{¶ 2} CFA is the current owner of the commercial property located at 200 Public Square, Cleveland, Ohio. The property was formerly owned by EOP-BP Tower, LLC ("EOP") until purchased by CFA in 2005.

{¶ 3} In June 1998, Prim Capital entered into a commercial lease agreement with EOP for the rental of a space known as Suite 2500 ("the premises"). Lombardo was one of the guarantors on the lease.

{¶ 4} In 2000, 2003, and 2004, Prim Capital and EOP executed the first, second, and third amendments to the lease. Lombardo was one of the guarantors under each amendment.

{¶ 5} In June 2005, CFA purchased the property and became the successor-in-interest to EOP and assignee of all lease agreements for the property. On January 1, 2006, CFA and Prim Capital entered into the fourth amendment to the lease. The fourth amendment was guaranteed by Lombardo and Anthony Delfre.[1]

[1] Delfre signed the lease as principal for Prim Capital and signed the guarantee of lease personally. CFA voluntarily dismissed its claims against Delfre pursuant to Civ.R. 41(A) and he is not a party to this appeal.

{¶ 6} Under the terms of the fourth amendment, Prim Capital continued its rental of the premises from January 1, 2006 through December 31, 2006 at an agreed rate. The fourth amendment included a renewal option clause under which Prim Capital was given the option to renew the lease for four successive 12-month terms at a stated renewal rate. The renewal clause as printed in the amendment states:

{¶ 7} "Renewal Options: Notwithstanding anything in the Fourth Amendment to the contrary *** Tenant shall have the option to renew Lease on Premises for four successive 12-month periods under the following Terms by providing 120 days prior written notice to Landlord at the Rent below: ***"

{¶ 8} The parties inserted the handwritten phrase, "**which notice Landlord may reject in its sole discretion whereby the Lease shall expire as if such notice were not given**" to the printed clause after the word "Landlord." (Emphasis added.) This addition was initialed by the parties.

{¶ 9} On September 8, 2006, Jim Koutrodimos, legal counsel for Prim Capital, sent an e-mail correspondence to CFA stating that Prim Capital, "would like to exercise the option for next year. Let me know if you need any other documentation."

{¶ 10} Prim Capital continued to occupy the premises and pay rent until June 2007 when it vacated the premises and ceased making rental payments.

{¶ 11} CFA brought suit against Prim Capital and Lombardo for breach of the terms of the lease. In its amended complaint, CFA alleged that Prim Capital

exercised the renewal option for the year 2007 and breached the lease agreement when it stopped making rent payments in June 2007. CFA sought damages for the rent due under the lease for the period of July 1, 2007 through December 31, 2007.

{¶ 12} On February 25, 2008, Prim Capital and Lombardo moved for judgment on the pleadings pursuant to Civ.R. 12(C). They argued that under the terms of the fourth amendment, in order to exercise the renewal option, they were required to send written notice to CFA by certified mail at least 120 days before December 31, 2006. They further argued that the September 8, 2006 e-mail was insufficient to trigger the renewal option and therefore, after December 31, 2006, Prim Capital was a "tenant at sufferance" and free to move out at any time.

{¶ 13} CFA opposed the motion for judgment on the pleadings, arguing that it had waived the formal notice requirement and accepted Prim Capital's e-mail as notice of renewal.

{¶ 14} On August 20, 2008, the trial court granted Prim Capital and Lombardo's joint motion for judgment on the pleadings. This appeal followed in which CFA raises five assignments of error for review. The first three assignments of error challenge the trial court's grant of judgment on the pleadings on the grounds that CFA waived the notice requirement and accepted the lease renewal for the year 2006. The fourth assignment of error asserts that the trial court's decision is inequitable because if the lease was not renewed, Prim Capital was a tenant at sufferance and therefore obligated to pay double rent, which it failed to do. The fifth

assignment asserts that the trial court erred in failing to consider CFA's motion for summary judgment.

{¶ 15} The first three assignments of error are related in fact and law, and will be considered together.

{¶ 16} Appellate review of the grant of a Civ.R. 12(C) motion for judgment on the pleadings is de novo. *Chromik v. Kaiser Permanente*, Cuyahoga App. No. 89088, 2007-Ohio-5856. Accordingly, we must independently review all legal issues without deference to the determination of the trial court. *Fontbank, Inc. v. CompuServe, Inc*. (2000), 138 Ohio App.3d 801.

{¶ 17} Determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the complaint. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161. "Under Civ. R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. Thus, the granting of a judgment on the pleadings is only appropriate where the plaintiff has failed to allege a set of facts which, if true, would establish the defendant's liability. *Chromik*, supra, citing *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677.

{¶ 18} In the amended complaint, CFA alleged that by virtue of the September 8, 2006 e-mail from Prim Capital's counsel, the lease was extended for another year, making the lease expiration date December 31, 2007.

{¶ 19} CFA acknowledges that the e-mail was received 114 days before the expiration of the lease rather than the 120 days stated in the lease terms, and that notice was received by e-mail rather than by certified mail as specified in the lease terms. However, CFA argues that since the 120-day requirement was for its benefit, it could waive the requirement and accept Prim Capital's late tender of notice.

{¶ 20} Prim Capital argues that the language in the renewal option clause is unambiguous and therefore the September 8, 2006 renewal notice sent by its legal counsel is invalid as a matter of law.

{¶ 21} Ohio courts have recognized the inherent contractual nature of lease agreements. In construing and interpreting lease provisions, courts apply traditional contract principles. *Guardian Tech., Inc. v. Chelm Props., Inc*., Cuyahoga App. No. 80166, 2002-Ohio-4893. The interpretation of a contract is a matter of law. *Saydell v. Geppetto's Pizza and Ribs Franchise Sys., Inc.* (1994), 100 Ohio App.3d 111, 118.

{¶ 22} "A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where

one is not bound to speak." Id. at 123, quoting *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 198.

{¶ 23} "The written notice requirement of a lease option is for the benefit of the lessor, not the lessee, and therefore the lessor may waive that requirement if he so chooses." *Joyce/Dayton Corp. v. Manchester Tank & Equip. Co.* (Dec. 6, 1996), Montgomery App. No. 15977; citing *Baxter Laundries, Inc. v. Lucas* (1932), 43 Ohio App. 518, 522.

{¶ 24} It is clear from the language of the fourth amendment that the notice requirement of the lease renewal clause was for the benefit of CFA. The lease renewal option was amended by the parties so that the lease could be renewed for subsequent terms only at the discretion of CFA. Even a timely and properly submitted request for renewal could be refused at CFA's discretion. Therefore, accepting the factual allegations in CFA's complaint as true, a reasonable inference could be drawn that CFA waived its right to the 120-day notice requirement and accepted the late tendered renewal as requested by Prim Capital in its e-mail.

{¶ 25} Prim Capital argues that CFA did not properly exercise its right to waive the 120-day notice requirement. It argues that CFA failed to demonstrate a clear, unequivocal, decisive act of waiver. However, under Civ.R. 12(C), a court may grant judgment on the pleadings only where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. *Lambert v. Hartmann*, 178 Ohio App.3d 403, 2008-Ohio-4905. Prim Capital's argument raises issues of material fact as to CFA's waiver. Whether CFA waived the 120-day notice

requirement and accepted the late notice of renewal remains to be determined by the fact-finder upon consideration of all of the evidence presented by the parties. Such an issue is not proper for determination by a Civ.R. 12(C) motion for judgment on the pleadings. See *Joyce/Dayton Corp.,* supra.

{¶ 26} Therefore, accepting as true all the material allegations of CFA's amended complaint, and construing all of the inferences drawn from those allegations in CFA's favor, we find there exists a set of facts which, if proven, would entitle CFA to recover on its claim against Prim Capital and Lombardo. Accordingly, the trial court erred in granting judgment on the pleadings against CFA. The remaining assignments of error are moot. See App.R. 12(A)(1)(c).

{¶ 27} The trial court's judgment is reversed and the matter remanded for further proceedings in accordance with this opinion.

It is therefore ordered that appellant recover of appellees its costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR