I'm Affirmed and Majority and Concurring Opinions filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00474-CV

EDWARD A. SMITH, JR., Appellant

V.

OUTDOOR SYSTEMS, INC. and NATIONAL ADVERTISING CO., Appellees

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 98-13430

M A J O R I T Y O P I N I O N

In this billboard lease dispute, Edward A. Smith, Jr. appeals a judgment in favor of Outdoor Systems, Inc.[1] and National Advertising Co. ("National") on the grounds that: (1) the trial court erred in ruling that National, rather than Smith, owned the billboard in question because ownership of it vested in Smith when National failed to remove the billboard before

[1] Although Smith named Outdoor Systems as a party to this appeal, he has not sought a different judgment against it.

the date of termination of the lease; and (2) the trial court erred in refusing to submit a jury question concerning a default by National. We affirm.

Background

National entered into a lease (the "lease") of a lot owned by Smith on which to erect and maintain a billboard (the "billboard"). On April 11, 1997, Smith sent National a letter that gave notice of termination of the lease, enclosed a check for the $35,000 termination fee, and alleged that National had breached the lease by failing to pay him the amount due under the lease. This lawsuit subsequently ensued with each party seeking declaratory judgment that it owned the billboard.

At trial, the jury found, among other things, that National did not fail to remove the billboard within a reasonable time following termination of the lease. Pursuant to the jury verdict, the trial court entered a declaratory judgment that National owns the billboard and may remove it.

Forfeiture

The relevant paragraphs of the lease provide, in part:

> 8. Subject only to conditions imposed in this lease, . . . [National] shall remain the owner of all advertising signs, structures and improvements erected or made by [National], and that, notwithstanding the fact that the same constitute real estate fixtures, *[National] shall have the right to remove said signs, structures and improvements at any time during the term of the lease*.
>
> 18. *[Smith] . . . may terminate this lease on sixty (60) days written notice . . . and the payment . . . of thirty five thousand dollars ($35,000).*

(emphasis added).

Smith interprets the italicized portions of paragraphs 8 and 18 above to provide that: (1) National had a right to remove the billboard *only* during the term of the lease; (2) the lease terminated 60 days after Smith's April 11, 1997 notice of termination, or at least by January of 1998 (the last month in which he accepted a rent payment from National); (3) National failed to remove the billboard by either termination date (or thereafter); (4) after

such termination, National no longer had any right to remove the billboard; (5) the billboard was a fixture and thereby became part of the real property owned by Smith when National lost its right to remove it; and, therefore, (6) ownership of the billboard vested in Smith.

Based on this interpretation, Smith's first issue argues that this Court should reverse the trial court's judgment and render judgment that National take nothing on its claim of ownership because: (1) the relevant jury question asked whether National failed to remove the billboard "within a reasonable time following termination" rather than before termination, as provided in the lease; (2) there is no evidence to support a deemed finding[2] that National removed the billboard before the termination date; and, therefore, (3) National failed to obtain a jury finding necessary to support its declaratory judgment.[3] Smith's second and third issues further argue that, in addition to reversal, judgment should be rendered that Smith owns the billboard because: (1) the lease terminated on either June 10, 1997 (60 days after Smith's April 11th notice of termination) or January of 1998; and (2) National failed to remove the billboard before the termination date as required by the lease.

When interpreting an agreement, such as the lease, our primary concern is to ascertain and give effect to the parties' intentions as expressed in the lease. *See Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999). We must avoid a construction which is unreasonable, inequitable, and oppressive, and will therefore not declare a forfeiture unless it is compelled by language that can be construed in no other way. *See Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987).[4]

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2 *See* TEX. R. CIV. P. 279.

3 Thus, we do not interpret Smith's first point of error as asserting charge error, but rather as contending that National waived its claim for declaratory judgment by failing to obtain a jury verdict adequate to support it.

4 Forfeitures are not favored in the law because of their harshness. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). The law thus recognizes that forfeiture will not be read into a contract where the alleged forfeiting party is not on fair notice of its application.

In the instant case, the lease expressly provides for a forfeiture of the billboard only following an uncured default by National and written notification by Smith.[5] Smith's interpretation of paragraphs 8 and 18 as essentially providing a forfeiture upon any termination is not plainly set forth in the lease but must be deduced from provisions that facially do not even mention forfeiture or, in the case of paragraph 8, termination. We do not believe that parties who reasonably intend to effect such a result would do so in such a subtle manner, or that the law allows a forfeiture to be exacted from contractual language in which it has been so completely disguised, particularly where circumstances that do result in forfeiture have been clearly stated elsewhere in the lease.

Smith argues that interpreting the lease to provide no forfeiture upon termination would effectively negate the language of paragraph 8[6] stating that National has the right to remove the billboard "at any time during the term of the lease" because such language would be unnecessary if National continued to own the billboard after termination and could thereby remove it anytime, *i.e.*, during *or after* the term of the lease. However, this contention assumes that National's ownership of the billboard is necessarily accompanied by a right to go onto Smith's property to remove it. But, if it were (which we need not decide), then paragraph 8 is redundant in stating that National both owns the billboard *and* has a right to remove it, and the phrase, "during the lease term," (as well as the rest of the right to remove

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[5] Paragraph 11 of the lease provides:

> In the event of default, [National] shall remove the [billboard] within sixty (60) days of receipt of written notice of default . . . . In the event [National] shall fail to remove [its] sign within the stated sixty (60) day period, . . . ownership and title to the sign shall thereupon vest in [Smith].

Paragraph 7 further provides that "[Smith] may terminate this lease if [National] is in default . . . and fails to cure . . . within thirty (30) days after being given written notice thereof . . . ."

[6] *See, e.g.*, *MCI Telecomms. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999) (recognizing the rule of construction requiring the entire agreement to be examined to harmonize and give effect to all provisions so that none are rendered meaningless).

clause in paragraph 8) would be meaningless under Smith's interpretation as well.[7] Rather, as we read the lease, it simply fails to expressly address the ownership of, or right to remove, the billboard following a termination arising under the portion of paragraph 18 set forth above.

Because we therefore do not agree with Smith that the lease provides a forfeiture of the billboard if National failed to remove it before the termination date,[8] we overrule his contentions that the relevant jury question fails to support that element of National's declaratory judgment claim, and we need not address whether there is any evidence to support a deemed finding on that element.

Smith further contends that even if the jury's finding, that National did not fail to remove the billboard within a reasonable time of termination, could support the trial court's declaratory judgment, no evidence supported that finding because it is undisputed that National never removed the billboard, let alone within a reasonable time of termination.[9] However, Smith cites no lease provision or legal authority stating that a failure to remove the billboard within a reasonable time of termination would result in National's forfeiture of the billboard.[10] In the absence of any authority providing for such a forfeiture, a lack of evidence

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7 Smith's interpretation that the lease essentially effects a forfeiture upon any termination would also produce an anomalous result under paragraphs 7 and 11. *See supra* note 5. Although paragraph 11 purports to give National 60 days after notice of default to remove the billboard before a forfeiture can occur, paragraph 7 allows Smith to terminate the lease 30 days after such notice if the default is uncured. In that event, contrary to the apparent effect of paragraph 11, Smith's interpretation would allow him to terminate the lease and effect a forfeiture 30 days after notice of default, rather than 60 days thereafter, as set forth in paragraph 11.

8 Because Smith relies solely on the lease to provide for forfeiture, we do not address the possibility of forfeiture under statutory or case law.

9 It is undisputed that the lease terminated by January of 1998 and that the billboard was not removed by the time of trial.

10 Smith claims that National judicially admitted in its motion for entry of judgment that ownership of the billboard would transfer to Smith if National failed to remove the billboard within a reasonable time following termination. Although such a statement does appear in that motion, we find nothing in the lease to so provide. The only relevant case cited by the parties held, to the contrary, that

to support the jury's answer to that question would not warrant a reversal of the trial court's determination that National owned the billboard.

In any event, even assuming a termination in June of 1997, the jury's finding that National did not fail to remove the billboard within a reasonable time after termination could have been based on a conclusion that National's subsequent delay in removing it was reasonable in light of Smith's assertions of his claim to ownership of it. These claims of ownership were evidenced by: (1) Smith's letter to National in June of 1997 stating that the billboard belonged to him and that National should remove only the facings from the billboard; (2) Smith's letter to National in July of 1997 indicating that the billboard had become a fixture and any attempt by National to remove it would be considered a trespass and would be fought vigorously in the courts; and (3) copies of an interlocutory judgment[11] and final judgment[12] reflecting ongoing litigation since August of 1997 in which Smith claimed ownership of the billboard. Therefore, Smith's first three issues are overruled.

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where title to an improvement is expressly reserved in the lessee, and time for its removal is stipulated, the lessee's failure to remove it within that time period, in the absence of a forfeiture provision, subjects the lessee only to liability for damages for delay in removal, not to forfeiture (until the lessee loses the right to remove it by the running of limitations). *See Reader v. Christian*, 234 S.W. 155, 157-58 (Tex. Civ. App.—Beaumont 1921, writ ref'd). In addition, although the judicial admission of a *fact* in a pleading can bar the admitting party from disputing that *fact*, (*see, e.g., Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001)), Smith cites no authority that conclusions of law, such as the meaning of a lease, can likewise be judicially admitted. Smith sought no damages in the trial court for National's delay, if any, in removing the billboard.

[11] *See Smith v. National Adver. Co.*, No. 97-43577 (61st Dist. Ct., Harris County, Texas, Oct. 2, 1997) (interlocutory default judgment holding, among other things, that Smith owned the billboard as of June 10, 1997, *i.e.*, 60 days after the April 11, 1997 notice of termination).

[12] *Smith v. National Adver. Co.*, No. 97-43577 (61st Dist. Ct., Harris County, Texas, Oct. 24, 1997) (final default judgment awarding Smith actual damages, attorney's fees, and expenses), *rev'd*, *National Adver. Co. v. Smith*, Nos. 01-98-00121-CV, 01-98-01358-CV (Tex. App.—Houston [1st Dist.] Aug. 31, 1999, pet. denied) (not designated for publication), 1999 WL 681957. According to the briefs, a take-nothing summary judgment was entered against Smith in this case on remand and is currently on appeal in the First Court of Appeals. Neither party has asserted that the disposition of that lawsuit affects the issues in the instant case.

Charge Question on Default

Smith's fourth issue argues in the alternative that this Court should reverse the judgment and remand the case for a new trial because the trial court erred by refusing to ask the jury whether National was in default of the lease as of January of 1998 when National's rent checks from June, July, August, and September of 1997 (the "checks") were deposited by Smith but dishonored by National's bank.[13] For the reasons set forth in the two concurring opinions to this opinion,[14] Smith's fourth issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Majority and Concurring Opinions filed March 7, 2002.

Panel consists of Justices Yates, Edelman, and Guzman. (Yates and Edelman, JJ. concurring.)

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[13] The checks were dishonored because National had since changed banks and closed the accounts on which the checks were drawn. In December of 1999, Smith sent National a notice of default based on the dishonor of the checks in January of 1998. Smith contends that, pursuant to the lease, National's failure to cure the default after being notified of it caused ownership of the sign to vest in him. *See supra* note 5.

[14] The concurring opinion in which Justices Yates and Guzman join is the decision of the panel on this issue.

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C O N C U R R I N G O P I N I O N

We concur in the court's judgment and join the majority opinion with respect to its disposition of Smith's first three issues. This is the opinion of the court as to Smith's fourth issue.

In his fourth issue, Smith contends the trial court erred by refusing to ask the jury whether National was in default of the lease as of January 1998, when Smith attempted to deposit National's rent checks for the months of June through September, 1997. The parties

agree the lease had terminated no later than January 1998,[1] before the alleged act of default—the dishonoring of National's rent checks. Although certain types of contracts may include provisions that are expressly designed to govern the parties' relationship after termination of the underlying agreement, the lease in this case contains no such provisions. A tenant has no continuing obligation to pay rent after the lease has terminated.[2] Thus, as a matter of law, National could not have been in default of the lease in January 1998.

Even assuming that National could have been in default in January 1998, the trial court did not err in refusing to submit Smith's requested jury question because it is not a controlling issue in this case. *See Accent Builders Co. v. Southwest Concrete Sys., Inc.*, 679 S.W.2d 106, 111 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) ("It is not error to refuse to submit a special issue if, when answered, it would have no effect on the judgment."). Smith did not plead or otherwise present evidence that National's alleged default constituted a breach of the lease, causing damages to Smith. Smith instead argues that because National was in default, he was entitled to invoke the lease's forfeiture provision under paragraph 11. However, under paragraph 11, National was not obligated to remove the billboard until it received written notice of default. Smith concedes he did not send National written notice of National's alleged default based on dishonored rent checks until December 1999. Because the lease undeniably had been terminated before National received this notice, National was under no obligation to remove the billboard. Thus, whether National was in default in January 1998 is irrelevant in this case.

We do not find, however, that Smith's request for a jury question was fatally defective because he failed to present evidence that the account on which National's checks were drawn had insufficient funds when Smith received the checks, or because he cited no provision of the lease or the law requiring National to keep money in this account for some

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[1] In fact, Smith argues strenuously that the lease terminated on June 10, 1997.

[2] Of course, a party may bring suit for breach of contract after the agreement has terminated, provided the claim is based on conduct that occurred while the agreement was in effect.

minimum or reasonable time after delivering the checks to Smith. Smith's proposed jury question asks whether National was in default when its rent checks were dishonored. Evidence of a rent check being dishonored constitutes some evidence of failure to pay rent. A party seeking affirmative relief for such a failure should not also be required to show, for purposes of obtaining a jury question, that the check was not backed by sufficient funds when written or that the party drafting the check was obligated to maintain funds in the account. In this case, a fact finder could easily infer that Smith's delay in depositing the checks was unreasonable and, therefore, National did not default by closing the account before the checks were deposited. In reviewing the trial court's refusal to submit a jury question, however, we must view the evidence and inferences in the light most favorable to the party with the burden of securing the finding,[3] disregarding all evidence and inferences to the contrary. *Murphy v. Seabarge, Ltd.*, 868 S.W.2d 929, 933 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

For the foregoing reasons, we find the trial court properly refused to submit Smith's proposed jury question, and we overrule Smith's fourth issue.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Majority and Concurring Opinions filed March 7, 2002.
Panel consists of Justices Yates, Edelman, and Guzman.
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[3] Although it was National that initially requested a jury question to establish that it was not in default, Smith bears the burden of proof as the party asserting the affirmative of the issue. *Graff v. Whittle*, 947 S.W.2d 629, 634-35 (Tex. App.—Texarkana 1997, writ denied).

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C O N C U R R I N G O P I N I O N

I would overrule Smith's fourth point of error for the following reasons rather than those set forth in the companion concurring opinion. A trial court is required to submit jury questions, instructions, and definitions which are raised by the pleadings and evidence, requested by the parties, and proper to enable the jury to render a verdict. TEX. R. CIV. P. 277, 278. However, only disputed fact issues must be submitted to the jury. *See, e.g., T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992). Moreover, a party

does not preserve a complaint to a failure to submit a broad form jury charge by requesting questions without the necessary instructions.[1]

In this case, the evidence shows that the lease required monthly rent payments and that National timely delivered checks to Smith to pay the rent for the months in question. There is no evidence that funds sufficient to pay those checks were not in the account on which they were drawn when the checks were received by Smith or for some period afterward [2] or thus that National failed to *ever* pay the rent for those months.

Although it is Smith's burden as appellant to cite the authority necessary to sustain his challenge,[3] he cites no provision of the lease[4] or law indicating how long funds were required to be maintained in National's checking account to pay the rent checks after they were sent to Smith. To the extent that any such obligation exists only at law, *i.e.*, independent of the lease, Smith has also not shown that a failure to comply with that law would constitute a default *of the lease* such that it could trigger the forfeiture provisions.

If the law (which Smith has not cited) required National to keep money in the account to cover the rent checks until whatever time Smith elected to deposit them, and a failure to do so constituted a default of the lease, then there was no disputed fact issue to submit to the jury because it is undisputed that such funds were not in the account when Smith deposited the checks.

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1 *Keetch v. Kroger Co.*, 845 S.W.2d 262, 268 (Tex. 1992) (Hecht, J., concurring); *see* TEX. R. CIV. P. 278 (failure to submit a question in the charge is not a ground for reversal unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment); *Owens-Corning Fiberglas Corp. v. Keeton*, 922 S.W.2d 658, 662 (Tex. App.—Austin 1996, writ denied) (holding that complaint was not preserved on trial court's refusal to submit question on contributory negligence where requested question did not contain elements necessary to support a finding of contributory negligence and no instruction was submitted to supply those elements).

2 Smith cites no evidence showing at what point the account was closed or funds were no longer available to pay the checks during the period of months until he deposited them.

3 *See* TEX. R. APP. P. 38.1(h).

4 The lease does not specify how soon rent checks were to be deposited or how long money to cover rent payments was to be kept in the checking account after the rent checks were sent to Smith.

Conversely, if the law only required National to leave money in the account for a minimum or reasonable time,[5] and a failure to do so constituted a default of the lease, a question on default would have been required only if there was a factual dispute about when the funds were removed from the account or other aspects of whatever the applicable rule might be. In addition, the applicable rule would have needed to be set forth in the proposed jury question or an accompanying charge instruction or definition to enable the jury to properly render a verdict on it.[6] By failing to submitted such a question, instruction, or definition to the trial court, Smith preserved no complaint on the refusal to submit the question. Under these circumstances, Smith's fourth issue demonstrates no error by the trial court in refusing to ask the jury whether National was in default of the lease at the time its checks were dishonored.

The companion concurring opinion concludes that "[e]vidence of a rent check being dishonored constitutes some evidence of a failure to pay rent." Clearly, if there were insufficient funds in the account when the checks were delivered to Smith (which is not shown by the evidence in this case), that would be a failure to pay rent. However, if there were sufficient funds in the account to pay the checks when they were delivered to Smith and for some time after that, no conclusion can be reached as to whether a subsequent dishonor was any evidence of a failure to pay rent without knowing what legal obligation existed for keeping such funds in the account. Moreover, without that legal obligation being reflected in the lease or the jury charge, the jury would not have been authorized to find a breach of the lease based on a dishonor occurring months after the checks were delivered to Smith.

The companion concurring opinion also holds that the dishonor of the checks was not a controlling issue because the default did not occur, and/or the notice of default was not sent, until after the contract terminated. It further states that a party may bring a suit for

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5 Query whether, for example, circumstances could exist in which the law would allow a payor to reasonably infer that a long-outstanding check simply will not be accepted by the payee and to proceed accordingly.

6 *See* TEX. R. CIV. P. 277; *supra* note 1.

breach of a contract after an agreement has terminated only for conduct that occurred while the agreement was in effect. This would suggest hypothetically that, if, on the first day following termination of the lease, the checking account was closed and the rent check for the final month of the lease was deposited and dishonored, then the unpaid rent obligation could not be enforced, and the forfeiture provision pertaining to an uncured default could not be invoked. In the absence of a lease provision or legal authority so providing, why should a defaulting party be rewarded and a damaged party penalized merely because such a breach happens to occur after termination of the agreement rather than before?

/s/ Richard H. Edelman
Justice

Judgment rendered and Majority and Concurring Opinions filed March 7, 2002.
Panel consists of Justices Yates, Edelman, and Guzman.
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