Reversed and Remanded and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00798-CV

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TEXOIL, INC., Appellant

V.

1600 SMITH STREET VENTURE, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 98-47705

O P I N I O N

At issue in this case is the interpretation of an early cancellation provision in a commercial lease agreement and the propriety of the trial court's granting of the landlord's motion for summary judgment.

INTRODUCTION

The appellee/landlord, 1600 Smith Street Venture ("1600 Smith Street") sued the appellant/tenant, Texoil, Inc. ("Texoil") for breach of a commercial lease agreement. 1600 Smith Street alleged that by refusing to pay an early cancellation fee, Texoil breached the

lease. Both parties filed motions for summary judgment. The trial court initially denied the motions; the parties then filed a second round of summary judgment motions. The motions were mirror images of each other, except for Texoil's reservation of the determination of attorneys' fees. In support of its second motion for summary judgment and in response to Texoil's second motion for partial summary judgment, 1600 Smith Street attached an affidavit from Paul H. Layne, the president of Cullen Center, which is a joint venture with 1600 Smith Street. Texoil made several objections to the Layne affidavit. After ruling on these objections, the trial court granted 1600 Smith Street's second motion for summary judgment, disposing of all claims 1600 Smith Street filed against Texoil. On appeal, Texoil asserts that (1) the trial court erred in denying its motion for summary judgment and in granting 1600 Smith Street's motion for summary judgment because Texoil did not have a duty to pay an early cancellation fee if it cancelled the lease prior to November 1, and (2) the trial court erred in overruling its objections to 1600 Smith Street's summary judgment evidence. We reverse and remand.

FACTUAL BACKGROUND

In June 1995, 1600 Smith Street and Texoil entered into a commercial lease agreement involving 9,077 square feet of office space and encompassing an initial lease term beginning October 1, 1995, and running through September 30, 2000. The lease contained an early termination provision. By exercising this provision, Texoil, as tenant, could terminate the lease after three years instead of five, effective at any time from October 1, 1998 to January 1, 1999,

> provided however, (i) Tenant [Texoil] gives Landlord [1600 Smith Street] written notice of its election to terminate the Lease, which notice shall be given not less than four (4) months prior to the Cancellation Date, (ii) Tenant surrenders the Premises in accordance with the terms and condition of this Lease not later than the Cancellation Date, and (iii) at the time Tenant gives such notice of early cancellation, Tenant pays to Landlord an Early Cancellation Fee equal to $3.68 per square foot of Agreed Rentable Area if canceled on November 1, 1998 and reduced thereafter to the unamortized lease costs per square foot of Agreed Rentable Area upon the Cancellation Date.

Texoil took possession and operated its business in the leased space for approximately three years. On June 1, 1998, Texoil exercised its option to terminate the lease early by sending written notice to 1600 Smith Street. The termination was to be effective on October 1, 1998. Texoil surrendered the premises in accordance with the terms and conditions of the lease on that date. When Texoil did not pay a cancellation fee, 1600 Smith Street filed suit for breach of the lease, seeking to recover as damages $33,403.36.

STANDARD OF REVIEW

Generally, we review summary judgments in accordance with the following rules:

(1) The movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;

(2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and

(3) Every reasonable inference must be indulged in favor of the non-movant and any doubts will be resolved in favor of the non-movant.

See American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997) (citing *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). A plaintiff is entitled to summary judgment if it conclusively establishes the elements of its claim as a matter of law. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Ronin v. Lerner*, 7 S.W.3d 883, 885 (Tex. App.—Houston [1st Dist.] 1999, no pet.). A defendant "who conclusively establishes all of the elements of an affirmative defense" or "who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action" is entitled to summary judgment. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 630 (Tex. App.—Houston [14th Dist.] 1997, pet. denied), *cert. denied*, 525 U.S.1070 (1999).

ANALYSIS

In its first and second issues, Texoil asserts the trial court erred in denying its second

motion for partial summary judgment and in granting 1600 Smith Street's second motion for summary judgment because Texoil had no contractual duty to pay an early cancellation fee if it cancelled the lease before November 1, 1998. However, we do not reach the issue of whether the trial court erred in denying Texoil's second motion. When an appellant does not obtain a ruling on a cross-motion for partial summary judgment, the implied denial is not preserved for appeal. *See Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc.*, 956 S.W.2d 562, 572 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). Texoil did not obtain a ruling on its cross-motion for partial summary judgment; therefore, we address only Texoil's claim that the trial court erred in granting 1600 Smith Street's motion for summary judgment as to Texoil's obligation, if any, to pay an early cancellation fee.

In reviewing the trial court's judgment we interpret a commercial lease like any other contract, i.e., by performing a two-phase analysis. *See Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd). First, we decide if the contract is ambiguous. *See id.* (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). A contract is not ambiguous as a matter of law if it can be given a certain and definite meaning or interpretation. *See Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *Coker*, 650 S.W.2d at 393. However, if the contract can be given two or more reasonable interpretations, it is ambiguous. To determine ambiguity, we analyze the entire writing "in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *K3 Enterprises v. McDaniel*, 8 S.W.3d 455, 458 (Tex. App.–Waco 2000, pet. filed); *see also Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998). If we find the contract ambiguous, we move to the second phase of the contract analysis, in which the fact finder is generally free to consider the parties' interpretation and other extraneous evidence in interpreting the contract. *See National Union Fire Ins. Co. v. CBI*, 907 S.W.2d 517, 520 (Tex. 1995); *Quality Oilfield Products, Inc. v. Michigan Mut. Ins. Co.*, 971 S.W.2d 635, 639 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Ambiguous contracts raise questions of fact which cannot be disposed of by summary judgment. *See Cook*, 15 S.W.3d at 131 (citing

Calhoun v. Killian, 888 S.W.2d 51, 54 (Tex. App.—Tyler 1994, writ denied)). Therefore, in the summary judgment context, our review generally does not proceed beyond the first phase because if we find the contract ambiguous, we must also find that summary judgment is improper.

In the first phase of the contract analysis, determining ambiguity, our primary concern is to ascertain and give effect to the intentions of the parties *as expressed in the instrument*. *See Coker*, 650 S.W.2d at 393; *Preston Ridge Fin. Servs. Corp. v. Tyler*, 796 S.W.2d 772, 775 (Tex. App.—Dallas 1990, writ denied). To do so, we look only within the four corners of the agreement to see what is actually stated, and not what the parties allegedly meant by the words they chose. *See French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 796 (Tex. 1995); *Cook*, 15 S.W.3d at 131-32; *Chapman v. Hootman*, 999 S.W.2d 118, 123 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Esquivel v. Murray Guard, Inc.*, 992 S.W.2d 536, 544 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). We cannot consider the parties' interpretation or any other extraneous evidence as we do when we find the contract is ambiguous. *See National Union*, 907 S.W.2d at 520; *Terrill v. Tuckness*, 985 S.W.2d 97, 101 (Tex. App.—San Antonio 1998, no pet.); *Sears, Roebuck and Co. v. Commercial Union Ins. Corp.*, 982 S.W.2d 151, 154 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *Sidelnik v. American States Ins. Co.*, 914 S.W.2d 689, 692 (Tex. App.—Austin 1996, writ denied). In conducting our review, we consider all of the provisions with reference to the entire contract; no single provision will be controlling. *See Cook*, 15 S.W.3d at 132 (citing *Coker*, 650 S.W.2d at 393; *Esquivel*, 992 S.W.2d at 543). We must give the language used its plain grammatical meaning unless doing so would definitely defeat the clear intent of the parties. *See Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex. 1987) (citing *Fox v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1966)). "So long as the terms are free from ambiguity and do not conflict with the law, those terms establish the parties' rights under the contract." *Vest v. Pilot Point Nat. Bank*, 996 S.W.2d 9, 15 (Tex. App.—Fort Worth 1999, pet. denied) (citing *Citizens Nat'l Bank v. Texas & P. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1941)).

Neither party asserts that the lease is ambiguous. Therefore, we look solely to the lease

agreement to determine the parties' intent. Paragraph 2.06 of the lease provides that the tenant may cancel the lease early "on any date specified from October 1, 1998 until January 1, 1999." To cancel the lease early, the tenant (Texoil) must (i) give the landlord (1600 Smith Street) "written notice of its election to terminate the Lease, which notice shall be given not less than four (4) months prior to the Cancellation Date," (ii) surrender "the Premises in accordance with the terms and conditions of this Lease no later than the Cancellation Date," and (iii) pay "an Early Cancellation Fee equal to $3.68 per square foot of Agreed Rentable Area if canceled on November 1, 1998 and reduced thereafter to the unamortized lease costs per square foot of Agreed Rentable Area upon the Cancellation Date." The lease thus lays out three conditions precedent to the tenant's early cancellation. It is undisputed that Texoil complied with the first two, i.e., Texoil gave 1600 Smith Street written notice four months prior to the "Cancellation Date" and surrendered the leased premises before that date.

In evaluating the third condition precedent to an early cancellation (payment of the cancellation fee), we begin by noting that the word "if" usually indicates a condition to performance. *See Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). The use of this word in the third condition precedent expresses that the payment of the cancellation fee only applies "*if* [the Lease is] cancelled on November 1, 1998"or afterwards. Thus, the plain grammatical meaning of the sentence supports Texoil's contention that it owes an early cancellation fee only if the lease is cancelled on or after November 1, 1998. Although 1600 Smith Street argues that this reading makes the third condition meaningless, we find nothing in the parties' contract or in case law to suggest that a condition that applies only in certain circumstances is a meaningless one.

While it could be argued that it is not reasonable to put an early cancellation provision into a five-year lease that imposes a declining cancellation fee in the months of November and December while imposing no cancellation fee in the month of October, our role is not to evaluate the wisdom of the transaction or the soundness of the business decision but to

construe the meaning of the contract as written.[1] Both parties are business entities and were represented by counsel in the negotiation and execution of the lease. Although this early cancellation provision may not be typical for a commercial lease, and the reasons for it may not be apparent to the court, we must enforce an unambiguous, clear contract as written.

Even if we were to inquire into whether the plain meaning of the words leads to a reasonable reading of the contract and were to agree that the only reasonable way to interpret the lease is to find that Texoil owes an early cancellation fee for cancelling the lease on October 1, it is not possible for this court to determine from the lease how the parties intended the paragraph to read. Therefore, it is not possible to determine how to calculate the cancellation fee that would be charged for the month of October. If the intent of the parties was for the clause to read "if canceled on October 1, 1998" or "if canceled on or before November 1, 1998" instead of "if canceled on November 1, 1998," the formula is provided in the contract. However, the intent of the parties could very well have been for the clause to read "pays to Landlord an Early Cancellation Fee equal to $3.68 per square foot of Agreed Rentable Area if canceled on November 1, 1998 and reduced thereafter . . ." *and pays to Landlord an Early Cancellation Fee equal to _____ [an exact figure that is more than $3.68 would be given] per square foot of Agreed Rentable Area if canceled prior to November 1, 1998* or *between October 1, 1998 and October 31, 1998*. The number $3.68 is not mentioned anywhere else in the document. Therefore, we could not conclude that it is a magic number that represents the ceiling on what Texoil would have to pay per square foot. In sum, even if we were to view the lease in the manner 1600 Smith Street urges, it would not be possible to determine from the four corners of the document what amount the parties might have intended Texoil to pay if it cancelled the lease in October 1998.

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[1] Courts tend to inquire into the reasonable reading of a contract only when forfeiture of that contract is at stake, depending on the way the words are interpreted. *See Municipal Administrative Services, Inc. v. City of Beaumont*, 969 S.W.2d 31, 40 (Tex. App.–Texarkana 1998, no pet.); *Sturges v. System Parking, Inc.*, 834 S.W.2d 472, 474 (Tex. App.–Houston [14th Dist.] 1992, writ dism'd by agr.). However, in this case, the forfeiture of the contract is not at issue, but simply the interpretation of the cancellation clause. As such, it is inappropriate for the court to look into the reasonableness of the clause.

We will not rewrite an agreement to insert provisions the parties could have, but did not include, nor will we imply restraints for which the parties have not bargained. *See Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 646 (Tex. 1996) (citing *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 104 Tex. 199, 135 S.W. 1165, 1167 (1911); *Great Am. Ins. Co. v. Langdeau*, 379 S.W.2d 62, 65 (Tex. 1964)). Parties make their own contracts and it is not within the province of the court to vary the terms of the parties' agreement in order to protect them from the consequences of their own oversights and/or failures in not realizing the obligations assumed or the rights granted in the written document they signed.

The terms of the lease are free from ambiguity and do not conflict with the law; therefore, they establish the parties' rights under the contract. We find Texoil had no duty to pay an early cancellation fee because it cancelled the lease before November 1. Accordingly, we sustain Texoil's first and second issues on this ground and overrule them to the extent they were not preserved for review, i.e., the denial of Texoil's motion for partial summary judgment.[2]

CONCLUSION

Having found that the lease does not require Texoil to pay an early cancellation fee if it cancelled the lease prior to November 1, we must reverse the summary judgment the trial court entered in favor of 1600 Smith Street. The ordinary procedure when we reverse an order granting summary judgment is to remand the case for a new trial unless the trial court granted one motion seeking final relief and denied the other. *See Coastal Cement*, 956 S.W.2d at 572 (citing *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988); *Montgomery v. Blue Cross and Blue Shield of Texas, Inc.*, 923 S.W.2d 147, 152 (Tex. App.—Austin 1996, writ denied)). However, Texoil did not seek final judgment relief but filed only a motion for partial summary judgment, reserving the issue of attorneys' fees for determination at a later date. Furthermore,

[2] Having found the trial court erred in granting summary judgment as a matter of law, we do not reach Texoil's third issue, i.e., whether the trial court erred by overruling Texoil's objections to 1600 Smith Street's summary judgment evidence.

because our record does not contain an order by the trial court denying Texoil's partial motion for summary judgment, we cannot reverse and render judgment as Texoil requests. For the these reasons, we reverse and remand for further proceedings consistent with this opinion.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Justices Anderson, Fowler, and Frost.

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