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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RACCOON VALLEY INVESTMENT CO.,)

Plaintiff-Appellee/Cross-Appellant,) Filed August 26, 1980

vs.)

J.S.B. AMUSEMENT CORPORATION,) 0-147
2-62120

Defendant-Appellant/Cross-Appellee.)

Appeal from Polk District Court - James P. Denato, Judge.

Tenant appeals and landlord cross-appeals from the declaratory judgment of the parties' respective rights under a commercial lease. - AFFIRMED.

Robert E. Dreher, of Dreher, Wilson, Adams & Jensen, Des Moines, for defendant-appellant.

David S. Wiggins & David P. Jennett, of Williams, Hart & LaMarca, West Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J.,and Donielson, Snell, Carter and Johnson, JJ.

Lessee, J.S.B. Amusement Corporation, appeals and lessor, Raccoon Valley Investment Co., cross-appeals from a declaratory judgment concerning rights under a commercial lease. We affirm.

From early 1969 until mid-1970, the parties were negotiating a lease agreement for the construction and operation of a multiple theater building on lessor's property. A Memorandum of Agreement was executed in May, 1969, followed by the formal Lease Agreement in June, 1970.

Among other things, the lease provided for a term of twenty years, advance of lessor's investment in construction costs and subsequent mortgage of this investment to reimburse lessee's advancement. Lessee agreed to pay a fixed rent, real estate taxes, insurance and other operating expenses, plus an additional rent computed by excess of a percentage of show and concession gross over fixed rent and certain expenses paid by lessee.

The construction was completed and the operation of the theaters began and continues, but disputes arose between the parties in regards to 1) computation and payment of the additional rent, 2) assignability of the mortgage, and 3) rate of interest to be applied to unpaid rent. The lessor filed a petition in equity seeking a declaration of rights under the lease and reformation on the grounds of mutual mistake. The lessee counterclaimed seeking lessor's execution of an unrestricted mortgage. The trial court filed its findings and conclusions and asked the parties to make necessary calculations according to those findings and conclusions and to draft an appropriate decree. The final decree was filed eighteen months later. Both parties appeal that ruling. Being in equity, our review is de novo. Iowa R. App. P. 4.

Most of the issues on appeal concern the calculation and payment of the additional rent. The lessor alleges 1) the show and concession gross includes sales tax amount; 2) deductible real estate taxes are limited to proportion of lessor's investment; 3) deductible real estate taxes are amount paid during lease year, not levied; 4) additional rent payments should be made quarterly, not annually; and 5) independent audit of lessee's records at lessee's expense should be provided to lessor. Lessor claims that sales tax inclusion and limitations on real estate tax deductions were intended and reflected in the lease agreement and asks the court to so interpret the agreement.

Lessor contends the audit and payment schedule provisions were inadvertently omitted from the lease and asks the court to reform the agreement to reflect this intent.

The trial court received into evidence the Memorandum of Agreement and initial drafts of final lease and found 1) the memorandum was merged into the lease and 2) prior documents could be considered to resolve ambiguities or reformation of the Lease Agreement. We agree. Commercial leases are to be construed or interpreted as other contractual agreements.

The cardinal principle is to find the intent of the parties by the instrument or by application of rules of construction. Iowa R. App. P. 14(f)(14). Contracts should be read and interpreted as a whole to give effect to purposes and intents for which it was written. Eastern Iowa Light and Power Coop. v. McKenzie, 296 F.2d 295 (8th Cir. 1961). The issues concerning additional rent should be considered in light of the overall purpose of this type of rental provisions. Percentage rent in addition to a fixed annual rent provides a return to land owner for income produced on his property as well as compensation for the use of his property.

I. Sales Tax.

The trial court found the three percent sales tax amount was never the property of the lessee and should not be included as part of "gross" by which the percentage of additional rent is computed. We agree. The lease provision omitted the word receipts[1] but section 422.43, The Code 1971, acknowledges that total admission prices are the gross receipts upon which the sales tax percentage is imposed. This conclusion is in keeping with the purpose of additional rent. Sales tax does not add to the income or economic worth of the lessee and should not be considered when calculating the lessor's share.

II. Proration of real estate taxes.

The trial court found the effect of a comma in the following provision raised an ambiguity:

> . . . Tenant may add to the minimum guaranteed annual rental all real estate taxes, and premiums on fire and extended coverage insurance upon the portion of the building representing the Landlord's investment. . .

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[1] The provision reads:

> Ten percent (10%) on road shows gross, twelve percent (12%) of regular shows gross, and twelve percent (12%) of all concessions gross. . .

The trial court also found punctuation is not generally considered a reliable basis for interpretation because its usage varies greatly and its use here was not correctby rules of punctuation. The Supreme Court of Iowa has addressed the errant comma in Randolph v. Fireman's Fund Ins. Co., 255 Iowa 943, 124 N.W.2d 528 (1963), where they stated punctuation will not of itself create an ambiguity. As the comma is improperly used in this case, the punctuation is mere surplussage and will be disregarded. Reading the provision we find the leasee may add (or deduct) all real estate taxes and insurance premiums proportional to the lessor's investment. Such an interpretation is consistent with the purpose of the lease to provide a clear limitation of the lessor's investment towards cost of the building and construction. The major responsibility is on the lessee for all else including maintenance and risk throughout the lease term.

III. Taxes when paid or levied.

The trial court determined that the real estate tax amount to be credited to lessee would be the amount paid, not levied during each lease year because Iowa realty tax system is "one year behind." In our review of the lease and purposes and intents thereof, we find lessee only liable for payment of taxes payable, not assessed during the term of the lease; and, therefore, limited to deduction for taxes paid in year. See Miller Hotel Co. v. Gorman, 194 Iowa 751, 190 N.W. 524 (1922). This finding is compatible with purpose of additional rent as a share of economic success as it entails actual expenditures balanced with receipts.

IV. Payment schedule and independent audit.

Lessor asks that the contract be reformed to show quarterly payments and lessee's obligation to provide an independent audit. Reformation does not alter a contract, it merely sets down what was originally intended. Akkerman v. Gersema, 260 Iowa 432, 149 N.W.2d 856 (1967). The party seeking reformation must show by clear, satisfactory and convincing evidence that the "reformed" provision was originally intended. Iowa R. App. P. 14(f)(11). In this case, there was conflicting and less than clear evidence introduced by way of the memorandum and lessee's contention that those provisions were negotiated out of lease. The trial court found the evidence inconclusive to sustain an order for reformation. We agree with that finding.[2]

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[2] The trial court found it would be reasonable for lessee to submit the necessary records to lessor for an annual audit. The trial court also determined the additional rent to be payable within thirty days of the end of the lease year. We find these suggestions reasonable and in keeping with ordinary lease arrangements. See 49 Am. Jur. 2d Landlord & Tenant, §§ 519, 556.

V. Mortgage assignability.

Lessee in his counterclaim asked that lessor be required to execute and deliver a freely assignable note and mortgage. The lease required the lessor to secure a mortgage on the portion which represented the lessor's investment and advancement of construction costs. The lessee at its option could provide this permanent financing. The specifics of mortgage terms revealed in lease were 1) minimum 20 years, 2) no prepayment penalty after five years, 3) amortization over term, and, 4) contemplation of eight and one-quarter percent interest rate. The lease did not address assignability of the mortgage. The lessor contends the personal nature of the relationship of the parties necessitates a restriction on assignability.

A similar issue was presented in Merriam v. Leeper, 192 Iowa 587, 185 N.W. 134 (1921). See also Marx v. King, 193 Iowa 29, 186 N.W. 680 (1922). The court in Merriam decided that usual and ordinary terms would be implied in the mortgage and note unless set out differently in contract. In this case, assignability of financial instruments is a usual and customary term and is not negated by the lease terms concerning the mortgage. The personal relationship alleged by lessor is applicable to the lease, not the mortgage. We affirm trial court order to lessor to execute an unencumbered mortgage and note.

VI. Interest rate on unpaid rent.

Finally, lessor claims any unpaid rents are subject to a nine percent interest rate. The lease provides this rate of interest to apply to reimbursements of lessee's obligations incurred by lessor. The trial court did not consider unpaid rent as an obligation incurred by lessor and imposed the statutory rate of interest of five percent. See § 535.2(1)(a), The Code 1977. We reach the same conclusion.

AFFIRMED.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (concurring in part, dissenting in part)

I dissent from Division I of the majority's decision, wherein the majority holds the term "gross" as used in Article IV of the June 5, 1970, lease agreement does not include the sales tax collected on each sale. In my view, this holding ignores the ordinary and plain meaning of the term "gross". Moreover, the majority's reliance on the statutory definition of "gross receipts," found in section 422.42(6), The Code 1979, is misplaced since there is no evidence the parties intended to incorporate this definition into their agreement.

Gross is defined as: Whole; total; entire; or with no deductions. Black's Law Dictionary 832 (rev. 4th ed. 1968); Webster's New World Dictionary 617 (2d col. ed. 1976). In relation to its use here, the term "gross" would mean then the total money received with no deductions, not even for collected sales taxes. See Brissinden v. Babcock, 100 Ill. App. 2d 207, 210-11, 241 N.E.2d 209, 211-12 (1968). The majority's holding seemingly ignores the common definition of the term "gross."

The use of the statutory definition is unsatisfactory for two reasons. First, it is reasonable to assume the parties, represented by sophisticated business people who engaged in extensive negotiations, would specify such a definition in the contract. Yet nowhere in the contract is there a reference to the statutory definition of gross receipts. This can reasonably be viewed as evidence of the parties' intent not to use this definition. Second, the statutory definition must be evaluated within the context in which it is intended to be used. It would be nonsensical to define "gross receipts" in any other way for sales tax purposes than by excluding from the taxable amount the collected sales tax since gross receipts is the amount used to calculate the sales tax. § 422.43, The Code 1979. For sales tax purposes, the term "gross receipts" would of necessity always exclude the collected sales taxes. However, the term "gross" for other non-tax purposes could logically and reasonably include collected sales taxes.

The majority's affirmance thus approves a rewriting of the contract, that in my own opinion is not justified or supported by evidence in the record.