IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

477

VALLEY WEST DES MOINES SHOPPING CENTER, INC.,

Plaintiff-Appellant,

vs.

NATIONAL BANK OF DES MOINES,

Defendant-Appellee.

NATIONAL BANK OF DES MOINES,

Third-Party Plaintiff,

vs.

TANDY CORPORATION, RADIO SHACK DIVISION,

Third-Party Defendant-Appellee.

7-214
86-1068

Appeal from the Iowa District Court for Polk County (Polk County No. CE 20-11726), Jack D. Levin, Judge.

Landlord appeals the district court's judgment denying reformation of a commercial lease and refusal to find a modification of the lease. **AFFIRMED.**

Susan L. Ekstrom of Des Moines for plaintiff-appellant.

John Templer & Leo Finkelstein of Davis, Hockenberg, Wine, Brown, & Shores, Des Moines, for defendant-appellee.

Fred L. Dorr of Wasker, Sullivan & Ward, Des Moines, for third-party defendant-appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

The plaintiff, Valley West Des Moines Shopping Center, Inc. (Valley West), challenges the district court's judgment in favor of the defendant, National Bank of Des Moines (National Bank), in a contract action. Valley West asserts: (1) that the trial court erred in construing the initial written lease against Valley West and by holding there was no subsequent modification of the lease; (2) that the trial court erred in holding, if a modification did occur, Valley West was estopped by delay from asserting any modification; and (3) that the trial court erred in denying its motion to reopen the record. We affirm.

The case was brought at both at law and equity. It appears from the record, however, that the entire matter was tried as an equitable proceeding and, therefore, our scope of review is de novo. Iowa R. App. P. 4; Life Investors Ins. Co. of America v. Heline, 285 N.W.2d 31, 35 (Iowa 1979). We give weight to the findings of fact of the trial court especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

On May 16, 1973, the Valley West and National Bank entered into a lease whereby National Bank would occupy a free-standing location in the parking lot next to Valley West Mall. Pursuant to the lease agreement, National Bank would not be responsible for interior common area maintenance charges. J. C. Penney's expressed an interest in locating in the mall. As a part of the deal, J. C. Penney's required National Bank to relocate inside the mall so more parking space would be available.

National Bank agreed to relocate and a lease amendment was prepared. The amendment provided that National Bank would pay for interior common area maintenance charges. The charges were calculated on the proportionate basis National Bank's premises bore to the total rentable square footage. The amendment did not include what is known as an XYZ clause. An XYZ clause

is a complex clause signed by nondepartment store tenants and requires them to pay all the common area maintenance. The department stores are excluded from paying this charge to induce them to the mall.

Dan Bergeron who negotiated for Valley West testified he discussed the XYZ clause with National Bank's Perry Hansen and William Brenton. National Bank's negotiators both denied discussing the clause and stated they would not have relocated if such a clause were included. They testified they were told National Bank would pay on the same basis as before. National Bank's attorney also testified he found no mention of the XYZ clause in the file or lease and certainly would have brought the clause to National Bank's attention.

During the first two lease years, Valley West charged National Bank for maintenance charges based on the XYZ clause formula. Then, Valley West examined the lease and recalculated the charges using the original formula. Valley West refunded the overcharges and explained the error as being caused by the "unique wording" of National bank's lease. Subsequent charges were calculated on the "unique wording" formula of the lease.

In August of 1983, Valley West sent National Bank a letter stating the costs had been recalculated based on the XYZ formula and that National Bank now owed $28,316 in additional charges. This recalculation was based on a May 9, 1975 letter sent to National Bank. This letter stated that, during the relocation, the XYZ clause had been inadvertently omitted from the lease amendment. The letter requested an acknowledgment by National Bank. Bergeron testified he sent the letter and not a formal amendment because he felt they were documenting the prior agreement and not amending the lease. A follow-up letter was sent further explaining the May 9, 1975 letter. A bank employee, Robert Miller, without showing the letter to Perry Hansen or William Brenton, acknowledged the letter and returned it.

National Bank refused to pay the additional amount and this lawsuit ensued. Valley West requested the trial court to either reform the lease to include the XYZ clause or, in the alternative, to treat the May 9, 1975 letter as a correction of a mutual mistake by way of the further amendment. The trial court refused to reform the lease finding that Valley West had not shown by clear and convincing evidence the parties agreed to include the XYZ clause upon relocation. The court also found the contract had not been modified because there was not mutual assent to the modification, and also, even if a modification occurred, Valley West was estopped by delay from enforcing the modification. Valley West then brought this appeal.

Valley West argues the trial court erred in not finding that the letter corrected a mutual mistake and in not reforming the lease. Valley West argues the omission of the XYZ clause was a mutual mistake and National Bank knew it would be paying in accordance with the XYZ clause. National Bank argues the decision was correct because no prior agreement to include the XYZ clause was shown.

We will address the reformation claim first. The rules governing reformation of an instrument are clearly set forth in Kufer v. Carson, 230 N.W.2d 500 (Iowa 1975):

> The rules governing reformation of an instrument are well established. One who seeks reformation contending the instrument does not reflect the real agreement between the parties has the burden of establishing his contentions by clear, satisfactory and convincing proof. The term clear and convincing has been held to connote establishment of facts by more than a preponderance of evidence but something less than establishing a factual situation beyond a reasonable doubt. Reformation of course does not mean changing terms of an instrument but refers to a change in the instrument to reflect the real agreement of the parties. We have said the right to reform an instrument is not absolute but lies within the discretion of the equity court and depends upon whether the remedy is essential to the ends of justice. Facts and circumstances must be sufficiently compelling to constitute an effectual appeal to the conscience of the court and prompt it to interfere by reformation to mitigate the rigorous rules of law.

> Generally, a writing will be reformed only if the party seeking reformation clearly and convincingly establishes that it does not express the true agreement of the parties because of fraud or duress, mutual mistake of fact, mistake of law, mistake of one party and fraud or inequitable conduct on the part of the other. Ultimately equity will grant relief if an instrument as written fails to express the agreement as actually made, whether it is due to fraud, mistake in the use of language, or anything else which prevented the instrument from expressing the true intention of the parties.

Id. at 503-04 (citations omitted).

We agree that Valley West has not shown by clear and convincing evidence that the parties intended to include the XYZ clause in the lease amendment. During the relocation negotiations the XYZ clause was not discussed or explained to the National Bank negotiators. The Bank's attorney did not recall anything regarding the XYZ clause. Furthermore, an examination of the exhibits reveals that the XYZ clause was not considered in the preparation of the lease amendment. The letters sent by Valley West also show there was no prior agreement concerning the XYZ clause. In fact, one letter admits that "Unfortunately not all [the changes contemplated in the relocation] were considered and made." We conclude, therefore, in light of the evidence, that Valley West has not shown by clear and convincing evidence that reformation is justified, and we hold the trial court did not err in refusing to reform the lease.

Valley West also argues the letter from Valley West returned by National Bank modified the lease amendment and that National Bank has breached the lease. National Bank argues the mutual assent necessary to support modification is lacking.

Iowa law allows parties to modify a contract if the parties agree to the modification. Davenport Osteopathic Hosp. Ass'n v. Hospital Serv. Co., 261 Iowa 247, 253, 154 N.W.2d 153, 157 (1967). New consideration is also necessary to support a contract modification. Recker v. Gustafson, 279 N.W.2d 744, 754 (Iowa 1979).

We conclude the parties did not mutually consent to the modification. The May 9, 1975 letter does not set forth in any specificity Valley West's intentions and, consequently, National Bank was not fully apprised of the new terms. The letter does not explain the consequences of the XYZ clause. It includes no specific language as would be expected in the case of as complex a clause as this was. This letter was never presented to National Bank's counsel and Hansen testified he never told Valley West to negotiate with Miller. This lack of specificity in regard to a clause as important as the XYZ indicates that the parties, particularly National Bank, did not mutually consent to the modification. In addition, the fact that National Bank paid the overcharges does not support Valley West's position because Valley West supplied the figures based on projected estimates. These charges would then be readjusted at year's end to reflect actual costs. We hold there was no mutual consent to the lease modification.

Because we have found there was not a modification, we do not have to address the issue of whether the trial court properly applied the theory of estoppel. We now address Valley West's contention that the trial court erred in denying its motion to reopen the record.

The trial court enjoys wide discretion in reopening a case for reception of additional testimony. Salter v. Freight Sales Co., 357 N.W.2d 38, 42 (Iowa App. 1984). The party requesting a reopening must also show due diligence. Schipfer v. Stone, 206 Iowa 328, 331, 218 N.W. 568, 570 (1928). We cannot say the trial court abused its discretion in this case. Valley West did not show due diligence. National Bank responded to an interrogatory that they did not know of Miller's whereabouts. Miller also stated that he had not kept National Bank apprised of his whereabouts after leaving National Bank's employ. The record also reveals Valley West took no other steps than to request the information by interrogatory. We therefore hold the trial court did not abuse its discretion.

AFFIRMED.