

FILED

MAY 31 1983

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

DELLA COMPIANO,

)

Plaintiff-Appellant,

)

vs.

)

COLE FURNITURE, INC., an Iowa corporation,

)

Defendant-Appellee.

)

Filed May 31, 1983

3-18
2-68693

Appeal from Polk District Court, Harry Perkins, Judge.

Plaintiff-landlord appeals from a judgment for defendant-tenant in an action instituted by the landlord to have the lease set aside as unconscionable or to have the lease interpreted in a way that would require an increased rent. **AFFIRMED.**

David S. Wiggins and Linda L. Haley of Williams & LaMarca, West Des Moines, for plaintiff-appellant.

Dennis W. Johnson and David W. Belin and Linda L. Kniep of Belin, Harris, Helmick & Heartney, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

SNELL, J.

Plaintiff-landlord appeals from a judgment for defendant-tenant in an action instituted by the landlord to have the lease set aside as unconscionable or to have the lease interpreted in a way that would require an increased rental. We affirm.

In 1957 plaintiff and her now-deceased husband entered into a lease with defendant corporation for land at Fleur Drive and Stanton in Des Moines. The defendant built a furniture store on the property. The lease was to run for a period of fifteen years, with an option to renew for an additional fifteen years. There was a provision for an adjustment in rent if the option was exercised.

In 1960 defendant loaned plaintiff's husband some money, in return for which defendant was given an option to purchase the property for \$40,000, less any indebtedness owed the defendant at the time of exercise; the 1960 agreement also modified the 1957 lease to eliminate the provision for an increase in rental in event of exercise of the option to renew. At the time plaintiff's husband and defendant entered into this agreement, plaintiff's husband was in tax difficulties with the IRS, and needed to pay a sum of money immediately; he also had other financial difficulties.

Plaintiff's husband never repaid any portion of the money loaned him by defendant; nevertheless, defendant did not exercise the option to buy and loaned plaintiff's husband more money. In June of 1964, plaintiff's husband was in debt to defendant for \$49,000, and in default on a substantial portion of it. The defendant did not exercise its option to buy the property, but rather entered into a new lease. Both parties were represented by counsel during negotiations for the terms of a new lease.

The new lease provided for an initial fifteen-year term and for four five-year renewal periods; the amount of the rent remained the same as it had been, and there was no provision for an increase in the amount of the rent at the time of exercise of the renewal options.

The terms of the new lease were substantially the same as the terms of a lease arrangement between defendant and Super Valu Realty, which had been entered into in 1957 and amended in 1966. Under the terms of the Super Value lease, in which defendant was the lessor, Super Valu was granted a lease and two successive options to renew without any provision for adjustment of the rent.

The plaintiff became dissatisfied with the amount of income she was receiving from the property, and instituted this action. In it, she initially asked for "an accounting to support payments made under the percentage of the gross" alternative rental provision in the lease. This claim was evidently settled, and the accounting count was dismissed; however, plaintiff amended her petition to claim that the provisions of the 1964 lease which required the rent to remain the same at the time of exercise of the options to renew was unconscionable, and a claim that computation of the percentage rental should be made in a manner different than that which had been followed for the first twenty-two years of the lease.

The case was tried to the court, which held that the rental payments made by defendant had been correct, and that the lease did not require the percentage rental payments to have added to them real estate taxes and insurance. The court also held that the 1964 lease was entered into fairly, and that it was not unconscionable.

On appeal plaintiff asserts that (1) the terms of the lease are unconscionable, and plaintiff's husband assented to them only because at the time he entered into the lease, he was heavily in debt to defendant; and (2) the explicit terms of the lease require that the rent, when calculated under an alternative based on a percentage of defendant's gross sales, be increased by the amount of the real estate taxes and insurance. Our scope of review in this case is de novo. Iowa R. App. P. 4.

I. Unconscionability

It is a general principle of contract law that if the court finds, as a matter of law, that a contract, or any clause therein, is unconscionable, it may refuse to enforce the contract or the offending clause. A contract is unconscionable as a matter of law if the bargain entered into is so blatantly unfair that "no man in his senses and not under delusion would make on the one hand, and [no] honest and fair man would accept on the other." Casey v. Lupkes, 286 N.W.2d 204, 207 (Iowa 1979).

In the present case, plaintiff argues that the lack of any provision for escalating the rent during the term of the lease (including the renewal periods) makes the lease unconscionable. We note at the outset that plaintiff's allegation is not entirely true. Under the terms of the lease, the rent is to be the greater of a fixed minimum rent or a fixed percentage of defendant's gross sales. As defendant's sales increase, the rent due to plaintiff increases commensurately. Thus the lease does provide for an escalation of the rent.

Even in the absence of such a provision, the lease would not be unconscionable. It is axiomatic that unconscionability is determined as of the time the lease was entered into, and that intervening factors (such as price increases) which were not within the contemplation of the contracting parties are irrelevant. See Casey v. Lupkes, at 208. The fact that in 1983 a reasonable lessor would not enter into a long-term lease at a fixed rental rate does not mean that a reasonable lessor would not have done so in 1964. Testimony at trial indicated that long-term commercial leases with renewal clauses and no provision for rent increases were common at the time the lease in question was entered into. Moreover, the fact that defendant lessee, during the same period, entered into a substantially similar commercial lease as a lessor belies plaintiff's claim that defendant imposed unreasonably unfavorable terms upon plaintiff when he entered into the disputed lease as a lessee.

Plaintiff has failed to show that the terms of the disputed lease were unfair. Additionally, competent testimony offered at trial supports the conclusion that the lease was not entered into as a result of any undue pressure brought to bear on the lessors by defendant. The trial court, therefore, did not err in holding that the 1964 lease was not unconscionable.

II. Calculation of Rent

The terms of the disputed lease provide that the rent due shall be the greater of either a fixed minimum rent or a fixed percentage of defendant's gross sales. The fixed minimum rent is to be computed as the sum of the following:

1. Principal and interest due on the real estate mortgage,
2. Real estate taxes due,
3. Insurance premiums for fire and casualty coverage, and
4. \$319 per month

Article III of the lease provides that the lessee is to pay "in addition to the rent reserved and as additional rent" all taxes which may be levied; "Except that the real estate taxes shall be included as part of the rental for purposes of determining the minimum rental as provided in Article II." Article XI provides that the lease is to be construed as a net lease (landlord is entitled to receive rent above and beyond all expenses).

Plaintiff argues that these provisions unambiguously require that the determination of rent due under the fixed percentage alternative include real estate taxes and insurance. (Thus, the determination of the amount of rent due would depend upon whether the sum of the fixed percentage of gross sales, real estate taxes and insurance premiums exceed the fixed minimum rent). Defendant argues that neither Article III nor Article XI suggests that real estate taxes or insurance premiums should be added to the computation of rent due under the fixed percentage alternative. Defendant argues that because the rent due under

either alternative guarantees to plaintiff a minimum of \$319 per month above and beyond all expenses, Article XI should not be read as requiring a double payment of real estate taxes and insurance premiums under the fixed percentage alternative.

In contract disputes such as this one, the court's primary objective is to ascertain the intent of the parties. See State v. Starzinger, 179 N.W.2d 761 (Iowa (Iowa 1970)). When a contract involves repeated occasions for performance, and the parties have opportunity to object to that performance, any course of performance accepted without objection is relevant in determining the meaning of the agreement. Cf. Ia Code § 554.2208(1).

When, as here, there is uncertainty about the terms of a contract, the practical construction placed on it by the parties themselves will usually be followed by the courts. This would seem to be a particularly salutary rule when one who has acted to the contrary later insists he was not a party to the agreement.

Ackerman v. Lauver, 242 N.W.2d 342, 347 (Iowa 1976).

In the present case the rents have been figured and paid in a manner consistent with defendant's position for over 20 years. Plaintiff had ample opportunity to object that defendant's performance was not in accord with the lease provisions. That issue was not raised until after the present dispute arose, however. "[T]he interpretation placed upon a contract by the parties themselves, before a dispute has arisen, is entitled to great weight." Treacle v. Pocahontas S.S. Co., 273 F. Sup. 609, (E.D. Virg. 1967).

The evidence does not support plaintiff's contention that the disputed lease was unconscionable. Moreover, the rental payments have been computed correctly based upon the construction of the lease provisions enforced by the parties themselves for over 20 years. Accordingly the judgment of the trial court is affirmed.

AFFIRMED.