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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RONALD R. BARR, MARVIN T. FEIDLER, and CECIL C. KEARNEY,	)	
Plaintiffs-Appellants,	)	Filed March 31, 1987 22
vs	)	
REVCO DISCOUNT DRUG CENTERS, INC , a/k/a Revco Discount Drug Centers of Iowa, Inc., and a/k/a Revco D S., Inc., a Corporation,	)	6-526 86-42
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Wapello County (2405-0585) - Dan F Morrison, Judge.

Plaintiffs appeal from the trial court's dismissal of their application for forcible entry and detainer. **AFFIRMED.**

Victor V. Sprengelmeyer of Sprengelmeyer & Henkels, Dubuque, Iowa, for plaintiffs-appellants.

John R. Webber III and John N. Moreland of McKay & Moreland, Ottumwa, Iowa, for defendants-appellees.

Heard by Snell, P.J., Hayden, and Sackett, JJ.

HAYDEN, J

Plaintiffs appeal from the trial court's dismissal of their application for forcible entry and detainer, and from the court's denial of their posttrial motions to vacate, modify, and for new trial. This is a lease dispute brought by plaintiffs-landlords against the defendant, an alleged holdover tenant.

The property involved in this case is located at 202 East Main Street in Ottumwa, Iowa. In May of 1965 Mr. Schartz and Mr. Rosenman, the former owners of this property, agreed to lease the premises at 202 East Main Street to May's Drug Stores. Article III of the lease agreement set the term of the original tenancy at fifteen years and provided for lease extension options as follows

> A Original Term. Tenant shall have and hold the Demised Premises described in Article I hereof, together with all improvements thereon and all rights, privileges, easements and appurtenances thereunto attached and belonging, for and during the original term of Fifteen (15) Lease Years (as hereinafter defined) commencing upon the *date as hereinafter provided.*
>
> B Options to Extend. Tenant shall have the right and privilege, at Tenant's election, to extend the original term of this Lease for an additional period of five (5) Lease Years, commencing upon the expiration of the original term hereof, upon giving Landlord written notice of its election to so extend not less than six (6) months prior to the expiration of the original term. If Tenant so extends the term hereof, Tenant shall have the further right and privilege, at Tenant's election, to extend the original term hereof as previously extended, for one (1) additional period of five (5) Lease Years, commencing upon the expiration of the original term hereof as previously extended. All such extensions shall be upon all of the terms, covenants and agreements contained in this Indenture of Lease. No additional extension shall be permitted other than by the express written agreement of the parties hereto.

In April 1978 the original tenant, May's Drug Stores, exercised its option to renew which extended its tenancy through May 29, 1985.

By November 1980 the landlords, Schartz and Rosenman, had become an entity known as Schartz Realty Company, while the tenant had become an entity known as Lucky Stores, Inc. At that time, Lucky assigned its interests in the lease to the present defendant, Revco. Two new documents were then signed by the parties: an "assignment and assumption of lease" and a "consent to assignment and amendment of lease." The amendment, which purportedly gave Revco an option to extend the lease for an additional five years, provided in paragraph three as follows:

> 3. There shall be added to the Lease as a third paragraph to Article III the following:
>
> Lessee is hereby given the right to renew this Lease for one (1) additional period of five (5) years, upon the same terms and conditions except rent as provided in the original term of this Lease, upon the condition that Lessee notifies Lessor in writing of its intention to renew at least one hundred eighty (180) days prior to the date of commencement of such renewal term. When Lessee has notified Lessor of its intention to renew, minimum rent figure shall be negotiated by the parties, and agreement reached as to the minimum rent figure within thirty (30) days after the date of Lessee's notice of intention to renew. If not so determined within the time specified, the right to renew heretofore granted shall thereupon expire without further notice, and Lessee shall be free of any further obligation under this option.

On May 1, 1984, the Schartz Realty Company sold the property to the plaintiffs and assigned its interest in the lease to them. The sales contract specifically warranted that the lease with Revco would terminate on May 29, 1985, subject to the option to extend, found in the amendment. Revco was given notice of the sale, and commenced making rent payments to the plaintiffs in mid-1984. In October 1984 Revco notified the plaintiffs that it wished to exercise its option to renew the lease for an additional five years. Plaintiffs responded with a rental proposal for the extended term, in accordance with the "amendment" paragraph of Article III. Subsequent communications between

the parties were not productive, and in February of 1985, plaintiffs gave notice of their desire to have defendant vacate the premises at the end of the existing term. When Revco did not vacate the premises after May 29, 1985, the plaintiffs served a notice to quit. When defendant refused to vacate, the plaintiffs filed their application for forcible entry and detainer on June 24, 1985. In its answer defendant argued that the tenancy was not due to expire until May 29, 1990. Defendant has continued to pay the monthly rent at the rate fixed in 1965, although its June 1985 rent was late.

An evidentiary hearing was held before the trial court on September 7, 1985. At the conclusion of the plaintiffs' evidence, defendant moved for dismissal on the ground plaintiffs lacked standing to maintain an action for forcible entry and detainer. The trial court overruled the motion. In its ruling filed October 31, 1985, the trial court dismissed plaintiffs' petition after concluding Revco was entitled to a lease through May 1990. In a ruling filed December 4, 1985, the trial court denied plaintiffs' posttrial motions to vacate/modify and for new trial.

In an order filed February 21, 1986, the supreme court denied the defendant's motion to dismiss plaintiff's appeal. In an order filed on August 11, 1986, the supreme court denied plaintiff's motion for relief in which they sought court permission to cash rent checks received from defendant during pendency of the appeal.

Plaintiff contends the trial court's conclusion granting the defendant a five-year extension under the lease was not sustained by the evidence. Plaintiff also contends the trial court erred in its interpretation of the lease and its application of the rules of construction, including Iowa Code section 622.22 (1985).

This action was filed and tried to the court in equity. However, the deciding issue was the construction and interpretation of the contract (lease), which

is generally treated as an action at law. Atlantic Veneer Corp. v. Sears, 232 N W.2d 499, 502 (Iowa 1975). Another factor is the rule that review in an action of forcible entry and detainer under chapter 648, tried as an equitable action, is de novo. Roshek Realty Co. v. Roshek Brothers Co., 249 Iowa 349, 351, 87 N W.2d 8, 10 (1957). We are guided by the language from Grandon v. Ellingson, 259 Iowa 514, 518, 144 N.W.2d 898, 901 (1966):

> It is conceded the allegations of plaintiff's petition called for equitable jurisdiction. . . . once equity has obtained jurisdiction of a controversy, it will determine all questions material or necessary to accomplish full and complete justice between the parties, even though in doing so it may be required to pass upon some matters ordinarily cognizable at law.

Our review is de novo. While we are not bound by the findings of the trial court, we do give weight to them, especially where credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

In the interpretation of a contract, the parties made for themselves, the objective is to ascertain the meaning and intention of the parties as expressed in the language used. Mopper v. Circle Key Life Insurance, 172 N.W.2d 118, 124 (Iowa 1969). "It is the duty of the courts to give effect to the language of the contract in accordance with its plain and ordinary meaning, and not make a new contract for the parties." Id. The court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language. Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (1976). Where the language of the contract is clear and unambiguous, the intention expressed in the agreement prevails over the intent or interpretation of a party. Bidinger v. State, 341 N.W.2d 734, 737 (Iowa 1983). Finally, we note the rule that a contract should be reach and interpreted as an entirety rather than in order of clauses and the position of clauses in an instrument is not material or controlling. Allen, 239 N.W.2d at 139.

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Initially, we carefully consider and give effect to the language of the lease involved in the present case. The original lease, created in May of 1965, provided for: an original term from 1965 to 1980 and two five-year options to extend, from 1980 to 1985 and from 1985 to 1990. Both options commenced upon the expiration of the previous term and were to be exercised by giving the landlord six months' notice prior to the expiration of the term. The options extensions were granted upon all the terms, covenants and agreements of the original term. The original lease also provided that no extension shall be allowed other than by express agreement. After the assignment of the right to tenancy to defendant an amendment was added to the original lease. Through this amendment the lessee-tenant was given an additional right to renew the lease for an additional five-year period upon the same conditions of the original lease except rent. We find this additional five-year period option gave the tenant the privilege of extending the lease from 1990 to 1995. Plaintiff was assigned the lease through a real estate contract dated May 1, 1984.

Plaintiffs contend material omissions are found in the language of the original lease relating to the second option. They argue the 1980 amendment was drafted to correct these omissions and therefore we should substitute the language of the amendment for that found in the original lease.

Considering the entire language of the lease in accordance with its plain and ordinary meaning, we find plaintiff's argument strained and unreasonable. The original lease provided for tenancy from 1965 to 1980; the two original options provided for extensions from 1980 to 1985 and from 1985 to 1990; and the amendment provided for an additional extension from 1990 to 1995.

Plaintiffs argue the evidence presented at trial provided an independent basis of relief based upon defendant's failure to timely pay rent for June 1985 and because of this possibility of relief, the trial court erred in dismissing their

petition. The original notice to quit was served upon the defendant on June 3, 1985, stating the lease period had expired. Up until the first of June 1985 defendant had regularly made its payment of rent. In plaintiffs' petition they alleged defendant had failed to pay rent. Defendant paid the June rent on the last week of the month. Nonpayment of rent, when due, does not ipso facto operate as a forfeiture of the lessee's term absent a prior payment demand by the lessor. Village Development Company Ltd. v. Hubbard, 214 N.W.2d 178, 181-82 (Iowa 1974). Here defendant received no notice or demand of payment prior to the June 24, 1985, petition. Moreover, defendant sent plaintiffs the June 1985 rent and has continued to send rent. Since June 1985 plaintiffs have received each month's rent but has not cashed the checks. It is clear that plaintiffs have waived any breach of the lease by accepting defendant's late June payment and by continuing to receive and accept the monthly rent payments.

The trial court's decision was fully supported by the evidence presented at trial. The 1980 amendment provided an additional five-year option, to run from 1990 to 1995. On a careful reading of the contract as a whole, we find the lease to be unambiguous. Therefore, we do not consider plaintiff's argument the trial court erred in its application of the rules of construction. As already stated, we will not consider the rules of construction when the contract is unambiguous.

AFFIRMED.