FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT E. CIEMNOCZOLOWSKI,

Plaintiff-Appellant,

vs.

IVER O. SONDROL, EVELYN M. SONDROL, DOW PROUTY, and SUSAN E. PROUTY,

Defendants-Appellees.

Filed December 29, 1982

2-296
2-67313

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Appeal from Linn District Court - Robert Osmundson, Judge.

Plaintiff appeals from an adverse judgment in his action to recover damages from defendants as landlords for their alleged breach of the lease and interference with plaintiff's business relationships and from defendants' misrepresentation of the lease provisions in the sale, asserting 1) that defendants Sondrols breached the lease and interfered with his business relationships (a) by refusing to renew the lease after plaintiff notified them he was exercising his lease option to renew, and (b) by not offering plaintiff the same terms for the purchase of the building as they offered their son; and (2) that defendants Proutys fraudulently misrepresented the renewal provisions of the lease when they sold plaintiff their hardware business. AFFIRMED.

Daniel Den Beste, Cedar Rapids, Iowa, for plaintiff-appellant.

Stephen C. Nelson, Cedar Rapids, Iowa, for defendants-appellees Dow Prouty and Susan E. Prouty.

Edgar L. King, Cedar Rapids, Iowa, for defendants-appellees Ivor O. Sondrol and Evelyn M. Sondrol.

Heard en banc.

Plaintiff, Robert E. Ciemnoczolowski, appeals from an adverse judgment in his action to recover damages from defendants Iver and Evelyn Sondrol, as landlords for their alleged breach of the lease and interference with plaintiff's business relationships, and from defendants Dow and Susan Prouty for misrepresenting the lease provisions in the sale. On appeal, plaintiff asserts: (1) that defendants Sondrols breached the lease and interfered with his business relationships (a) by refusing to renew the lease after plaintiff notified them he was exercising his lease option to renew, and (b) by not offering plaintiff, pursuant to his lease right of first refusal, the same terms for the purchase of the building as they offered their son; and (2) that defendants Proutys fraudulently misrepresented the renewal provisions of the lease when they sold plaintiff their hardware business. We affirm.

Defendants Dow and Susan E. Prouty operated a hardware business in a building they had leased from defendants, Iver O. and Evelyn M. Sondrol, in 1973. The lease was to expire on December 31, 1978, but the tenant had the option to renew for an additional five-year term at a rent to be negotiated by the parties, provided the landlord had neither sold nor contracted to sell the building. The tenant also had the right of first refusal in a sale of the building. The lease was on file with the county recorder.

The Proutys listed their hardware business for sale with a realtor in 1975. Plaintiff made several offers to buy the business. While he and the Proutys were negotiating, the Proutys wrote a note for their realtor to show to prospective buyers clarifying what was for sale. The note stated in part: "Lease may be continued in one of three ways—(1) Continue as is for about 3 years at $500.00/mo. (2) Continue as is for about three years and extend for three years at $700.00/mo. (3) Rewrite lease for six years from now at $600.00/mo." The Proutys accepted plaintiff's fourth offer (which mentioned the lease and its recording) and assigned

their lease to him. The sale was completed in 1976. Plaintiff moved in and operated the business for about two years.

In June 1978, plaintiff and Iver Sondrol talked about the expiration of the lease at the end of the year. Sondrol indicated the rent on renewal would be $800 per month. Plaintiff indicated that he would be moving the business to a different location, so Sondrol began showing the building to prospective buyers. In July 1978, plaintiff contracted to sell his business, subject to his obtaining a five-year renewal of the lease. In September 1978, plaintiff's buyer moved in and plaintiff wrote Sondrol stating he was exercising his option to renew the lease for three years at $600 per month and for three years thereafter at $700 per month. Sondrol responded that his building was being sold and would not be for rent after the end of the year. Sometime in November 1978, plaintiff's buyer moved out of the building, in part because of plaintiff's failure to obtain a renewal of the lease; in any event, the sale fell through. Also in November 1978, the Sondrols wrote plaintiff stating their son had offered to buy the building and reminding plaintiff of his right of first refusal. When plaintiff responded that he still wanted to renew the lease, the Sondrols sent him a copy of their son's offer, which included a $25,000 cash down payment. Plaintiff did not respond, and the sale to the Sondrols' son was completed, with Iver Sondrol co-signing a note with his son for the cash down payment.

Plaintiff then brought this suit. The trial court entered judgment for defendants. Plaintiff appeals from this judgment.

**I. Scope of Review.** Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

**II. Right of First Refusal.** Plaintiff contends the trial court erred in failing to find that the defendant Sondrol did not offer the same terms to the plaintiff that the defendant offered to defendant's son for the sale of the building. The stated terms of the offer were identical. Plaintiff admits in his brief that he

never exercised his right of first refusal with respect to the offer communicated to plaintiff. He claims, however, that Sondrol's willingness to co-sign a note was never communicated to plaintiff, but had defendant offered to co-sign a note for him the bank would have loaned him the money and he would have bought the building. Our focus is a narrow one: whether defendant's co-signing a promissory note for his son was a condition of the offer of sale requiring communication of the condition to plaintiff. The burden of proving the exercise of the right of first refusal is on the party claiming the right was exercised. See generally Figge v. Clark, 174 N.W.2d 432, 434 (Iowa 1970).

> Further, . . . in a law action tried to the court its findings of fact having adequate evidentiary support shall not be set aside unless induced by an erroneous view of law.
>
> . . . we must construe the evidence in the light most favorable to the trial court's judgment, and this court will not weigh the evidence or pass on the credibility of witnesses.
>
> It is also true that findings of the trial court are to be broadly and liberally construed, rather than narrowly or technically. In case of doubt or ambiguity, findings will be construed to uphold, rather than defeat, the judgment. [citation omitted]

Frantz v. Knights of Columbus, 205 N.W.2d 705, 708 (Iowa 1973).

The trial court found that on November 25, 1978, defendants Sondrol advised plaintiff in writing "We have a bid on our building by Harold I. Sondrol. Per our lease agreement, you have first refusal of this bid. Please indicate on the enclosed form if you want the building and will meet the bid. Please return your reply in the enclosed stamped envelope within five days or not later than December 5, 1978." Plaintiff's attorney responded to this letter by reminding the Sondrols that plaintiff was exercising the option under the lease but made no response with regard to the sale of the building. On December 14, 1978, defendant Sondrol forwarded to plaintiff a copy of the real estate contract for the sale of

the premises to Sondrol's son and requested an acceptance on the terms expressed in the agreement before December 31, 1978. No response from plaintiff was forthcoming and Sondrol's son purchased the property. Sondrol co-signed a promissory note for a local bank in the amount of $25,000 for the down payment under the terms of the offer.

Even if we were to assume that co-signing a note was a condition that should have been offered to plaintiff, plaintiff's entire argument is premised upon the supposition that, had he known of Sondrol's willingness to co-sign a note, he would have purchased the building and that the bank would have loaned the money to him. Plaintiff offered no evidence that the bank would have given him the money even if Sondrol had co-signed a note for him. The trial court found plaintiff failed to establish his contentions by a preponderance of the evidence and we agree.

**III. Option to Extend Lease.** Plaintiff further claims the trial court erred in not finding that he had extended the lease for a period beyond the date of December 31, 1978, in accordance with the lease. In this regard, the trial court found that plaintiff did not exercise the option to rent the premises for an additional five years and that the parties had not agreed upon the amount of the rent for the additional five years.

The lease between defendants Sondrol and defendants Prouty provided: "On condition the landlord has neither sold nor contracted to sell the premises herein, the tenant is given the option to rent said premises for an additional term of five years on the same terms except as to the monthly rental which would be negotiable." In 1975, defendants Proutys listed the business for sale. Plaintiff made three offers to defendants Proutys which were rejected; the fourth was accepted. Between plaintiff's second and third offer, defendants Proutys prepared a handwritten memo for their real estate agent detailing the items for sale. This memo included the provision:

> Lease may be continued in one of three ways . . .
>
> (1) continue as is for about three years at $500/mo[;]
>
> (2) continue at $500/mo for about three years and extend for three years at $700/mo[;]
>
> (3) rewrite lease for six (6) years from now at $600/mo

Plaintiff's fourth offer was accepted by the Proutys, but was subject to approval by the Sondrols. Finally, in 1976, the Sondrols consented to the Proutys' assignment of the lease to plaintiff. The assignment provided that "all of [Prouty's] right, title, and interest in a five (5) year lease and right of refusal" was assigned to plaintiff.

In June 1978, plaintiff and defendant Sondrol had a conversation regarding the expiration of the lease on December 31 of that year. Plaintiff gave Sondrol the impression that plaintiff was expanding the business operation and needed more room and that he was going to construct a building of his own at a different location. Defendant Sondrol subsequently saw an advertisement in the yellow pages of the April, 1978, Cedar Rapids telephone directory listing plaintiff's business at a different location.

On July 31, 1978, plaintiff entered into a contract to sell the business. In the interim, plaintiff apparently assigned his interest in the premises to a corporation totally owned by him. One of the conditions of the contract for sale was that it was "subject to the seller extending lease with Iver Sondrol for five years." The purchaser took possession of the premises some time during September, 1978, but later abandoned the premises in November of 1978.

On September 5, 1978, plaintiff's attorney wrote defendant Sondrol advising him that the plaintiff:

> . . . is exercising his option under the lease to renew his lease agreement in accordance with the terms agreed upon by you in your lease for

> the above-described property with Donald and Susan Prouty. * * * The lease will be renewed according to its terms for a period of three years commencing January 1, 1979, at a monthly rental of $600 per month and that there still remains another three year option to renew the lease commencing January 1, 1982, at a monthly rental of $700.

On September 15, 1978, defendant Sondrol responded by stating "Our building is being sold and will not be for rent to your client. Possession is to be given January 1, 1979, or before." During the fall of 1978, defendant Sondrol nonetheless offered to rent the premises to plaintiff's purchaser but the amount of rental was not accepted by them.

On November 25, 1978, defendant Sondrol informed plaintiff of his son's offer to buy which is discussed in division II of this opinion. On December 2, 1978, plaintiff responded to defendant Sondrol stating that defendant's son could not take possession on January 2, 1979, since plaintiff had extended the lease "for a period of three years commencing January 1, 1979, at a monthly rate of $500.00 and for an additional three years at $700.00 per month."[1]

Plaintiff contends that the Proutys' handwritten memos were incorporated into the lease assigned to him by the Proutys. He further contends that he extended the lease pursuant to the memo. We find that the memo was not made a part of the lease so as to be effective against the defendant Sondrols and that plaintiff failed to extend the lease pursuant to the lease's terms.[2]

It has long been recognized that a tenant's assignee has no greater rights under a lease than the tenant. Egbert v. Duck, 239 Iowa 646, 651, 32 N.W.2d 404, 407 (1948). Here the terms of the lease provided that it could be extended for a

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[1] We note that plaintiff's letter of December 2, 1978 referred to plaintiff's letter of September 5, 1978. Plaintiff, however, changed the terms of renewal from$600 for three years and $700 for the optional three years to $500 for three years and $700 for the optional three years.

[2] We note that a parol evidence objection to the introduction of the memo may have been appropriate, however, defendants failed to preserve any assignment of error on this contention as defendants consented to its introduction. Appendix at

period of five years and that the rent could be negotiated between the landlord and the tenant. No specifics were expressly set forth in the lease regarding the amount of the rent. Thus, if the terms of the memo were enforceable against the landlord, then the terms must have been enforceable by the tenant as well as the assignee unless there was an amendment or modification of the lease for the benefit of the assignee.

A lease may generally be modified either by express statements or by the conduct of the parties. See Sisson v. Kaper, 105 Iowa 597, 75 N.W. 490 (1898); Roach v. Cameron, 97 Iowa 312, 66 N.W. 194 (1896). However, there must be mutual assent by the parties. See 51 C.J.S. § 229(2) at 576 (1968). See In re Estate of Farris, 159 N.W.2d 417, 420 (Iowa 1968). Irrespective of the fact that the tenant and the assignee may assent to a modification of the lease, it is not binding on the landlord unless the consent of the landlord is given. There can be no unilateral modification.

The trial court found no modification of the lease and we agree. Defendant Sondrol testified that he neither authorized nor endorsed any representations made in the memo. Additionally, defendant Prouty testified that defendant Sondrol did not expressly authorize him to make the representations contained in the memo, only that defendant Prouty and defendant Sondrol had discussed the assignment of the lease. Nor is there any evidence that defendant Sondrol acquiesced in the terms of the memo through his conduct. Defendant Sondrol consistently refused to extend the lease on the conditions stated in plaintiff's letters demonstrating an intent to renew. Thus, we conclude if plaintiff was to extend the lease he had to do so under the provisions of the lease, not the memo.

"[I] n an option contract or lease, time is of the essence and the burden is on the lessee to show it has properly exercised the option." White v. RCA Service Co., 234 N.W.2d 153, 154 (Iowa 1975). The lease provided for a renewal for five years yet in plaintiff's notices to defendant Sondrol of his intention to renew the lease plaintiff sought a six year period.

> In the exercise of the option, the lessee is confined strictly to the terms of the lease in respect of the scope of the privilege conferred; [tenant] cannot choose to take merely a part of it and neglect the rest, or require the lessor to do more than is called for by the stipulations thereof, and if [tenant] does so this is, in effect a rejection of the offer.

51 C.J.S. § 57 at 178 (1968). See also Hill and Redman's Law of Landlord and Tenant, § 81 (13th ed. 1960). Accordingly, we find that plaintiff's statement of intention to renew the lease for a six year period as opposed to the five year period as provided in the lease is nugatory and did not constitute an effective renewal.

**IV. Fraud.** Plaintiff contends the trial court erred in not finding that defendants Proutys fraudulently represented the means by which the lease could be extended. The trial court found that the Proutys made no misrepresentations to plaintiff regarding the terms of the lease.

We note at the outset that the memo prepared by defendant Proutys stated that the "lease may be continued in one of three ways." The burden is upon the plaintiff to prove each and every element of fraud by clear, satisfactory and convincing proof. Shear v. Swanson, 209 N.W.2d 53, 58 (Iowa 1973). A review of the record convinces us the trial court did not err in finding that plaintiff failed to sustain this burden. Accordingly, we affirm the trial court.

**V. Taxing of Printing Costs.** We have reviewed plaintiff's failure to comply with Iowa Rule of Appellate Procedure 15(b) and order that all costs of the appendix be assessed against plaintiff.

AFFIRMED.