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(FILE NO. 2008-SC-0418-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001265-MR

STEVE MASTERSON — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 96-CI-00069

GLORIA GEORGE — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Steve Masterson appeals from the Marion Circuit Court's order granting Gloria George's motion for a directed verdict. Upon review, we find that the trial court erred by granting the motion and dismissing Masterson's complaint, which requested specific performance of an option to purchase contained within a lease

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

agreement between lessee Masterson and lessor Gloria.[2] We vacate and remand to the trial court for further proceedings.

In 1991, Masterson and Gloria entered into a two-year lease under which Masterson leased Gloria's farm. Although the lease term began January 1, 1991, neither party signed the lease until September 1992. Annual rent of $15,000 was payable in arrears on or before January 10 of both 1992 and 1993, and Masterson had the option to renew the lease on terms to be agreed upon by the parties. The lease required Masterson to carry liability insurance on the property, insuring both parties against claims, and to furnish Gloria with a copy of the policy. In the event of any failure to perform lease obligations, the non-defaulting party was required to give written notice of the default after which the defaulting party had thirty days to cure.

The lease provision which is central to this action is that which provided Masterson an option to purchase the property at any time during the continuance of the lease, as follows:

> 21. The right and option is hereby given to said Lessee to purchase the above described premises, at any time during the continuance of this Lease, for the sum of TWO HUNDRED SIXTY THOUSAND DOLLARS ($260,000.00), payable as follows:
>
> (1) $40,000.00 upon receipt of a General Warranty Deed;
>
> (2) $10,0000.00 [*sic*] payment toward the principal each year plus interest for nine (9) years with the balance due in the tenth (10) year;
>
> (3) That the interest rate due thereon shall be one-half (½) percent over the one (1) year certificate of deposit rate at the Kentucky National Bank of Marion County, Kentucky with a payment due on January 10th of each year.

[2] We refer to the appellee and several witnesses in this case by their first names for sake of clarity.

> Said right and option is granted provided all rents have been fully paid and all covenants of this Lease, on the part of the said Lessee to be performed, have been fully kept and performed; and said Lessor hereby agrees to furnish a Certificate of Title and to convey said premises to said Lessee by good and sufficient Deed of General Warranty upon payment of said sum; provided _____ days' notice of the exercise of this option shall be given by said Lessee to said Lessor.

By its terms, the lease expired December 31, 1992. However, Masterson continued to live and work on the land throughout the following three years, pursuant to the holdover provisions set out in KRS 383.160(1).

Masterson claims that in 1994 he decided to exercise his option to purchase, and that he gave oral notice to Gloria's son Kenneth in June 1994, and her son Charles on December 31, 1994. During 1995, Kenneth advised Masterson that the family had decided to auction the property, and that Masterson was welcome to bid. Masterson did not pay the 1995 rent for the property that was due in January 1996. In April 1996, Kenneth expressly refused to honor Masterson's previous requests to exercise his option. Therefore, Masterson filed a complaint alleging breach of contract and demanding specific performance of the terms of the option to purchase.

At a trial held in November 2005,[3] Masterson testified that he was concerned about the proper way to exercise the option because, while the terms of the lease prescribed that notice was to be given to Gloria as the lessor, he had consistently dealt with her sons, Kenneth and Charles, for all matters regarding the lease. He testified that following the execution of the lease, he addressed this concern with Elmer George,

[3] The trial which is the subject of this appeal was held some nine years after the filing of the complaint due to a number of procedural twists, including the recusal of three trial judges and the declaration of a mistrial declared during a previous trial held in April 2000.

Gloria's attorney and scrivener of the lease agreement, and Elmer advised him to "[j]ust tell me or Charles or Kenneth . . . hell, just tell one of us." He further testified that consistent with such instructions, he exercised his option to purchase the property several times, most notably in June 1994 and December 1994. Upon the conclusion of Masterson's evidentiary presentation, the trial court granted Gloria's motion for a directed verdict on the following four grounds: (1) Masterson failed to meet his burden of proof, (2) the lease and the option contained therein were separable, and although the lease was extended by holding over, the option was not, (3) even if the option was viable, Masterson did not exercise the option by giving notice to Kenneth that he wanted a deed in the future, and (4) Masterson committed a material breach by failing to name Gloria as a loss payee on the liability insurance policy. Masterson appeals.

The parties' contentions on appeal fall into two categories: first, whether the option to purchase was viable in 1994 or 1995 when Masterson attempted to exercise it, and second, whether Masterson effectively exercised the option. Since the interpretation of a contract is a matter of law for the court, our review of the former contention is *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998). Our review of the latter is essentially a review of the trial court's ruling on matters which were factually disputed. Our standard for reviewing a trial court's ruling on a motion for a directed verdict is set forth in *Gibbs v. Wickersham,* 133 S.W.3d 494, 495-96 (Ky.App. 2004), as follows:

> A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. *Bierman v. Klapheke,* Ky., 967 S.W.2d 16, 18 (1998). Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. *Id.* at 19. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made.

> *National Collegiate Athletic Association v. Hornung,* Ky., 754 S.W.2d 855, 860 (1988) *citing Kentucky Indiana Terminal R. Co. v. Cantrell,* 298 Ky. 743, 184 S.W.2d 111 (1944). Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. *National Collegiate Athletic Association v. Hornung,* Ky., 754 S.W.2d 855, 860 (1988) *citing Cochran v. Downing,* Ky., 247 S.W.2d 228 (1952). The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied. *National Collegiate Athletic Association v. Hornung,* Ky., 754 S.W.2d 855, 860 (1988) *citing Nugent v. Nugent's Ex'r.,* 281 Ky. 263, 135 S.W.2d 877 (1940).
>
> It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. *Harris v. Cozatt, Inc.,* Ky., 427 S.W.2d 574, 575 (1968). While it is the jury's province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture. *Wiser Oil Co. v. Conley,* Ky., 380 S.W.2d 217, 219 (1964) *citing Kentucky Transport Corp. v. Spurlock,* Ky., 354 S.W.2d 509 (1961); *Myers v. Walker,* Ky., 322 S.W.2d 109 (1959).

I. Viability of the Option.

The trial court ruled that the option to purchase was not in existence when Masterson attempted to exercise it. The court reached this conclusion on two grounds. First, the court found that the option to purchase was severable from the other terms of the lease and was not extended during the holdover terms. Second, the court found that Masterson materially breached the lease by failing to name Gloria as "loss payee" on a liability insurance policy.

As to the continuation of an option to purchase during a holdover term, KRS 383.160(1) allows for the terms of a lease to be extended for one year if the lessee maintains his tenancy and the lessor allows him to do so without any objection within ninety days of the original lease's termination. The rule has long been recognized that "[w]here the lease is thus renewed by holding over under this statute, it is presumed that the terms of the original lease are carried over into the extension[.]" *Cass v. Home Tobacco Warehouse, Co.*, 311 Ky. 95, 99, 223 S.W.2d 569, 571 (1949). In this case, Masterson held over from year to year and the parties did not alter the provisions of the agreement. No question exists that "the lease was extended by holding over[,]" as the trial court correctly adjudged in its order granting the directed verdict.

As to whether the option to purchase was a part of that renewal, in *Lexington Flying Serv., Inc. v. Anderson's Ex'r,* 239 S.W.2d 945, 949 (Ky. 1951), Kentucky's highest court stated:

> The general rule concerning whether an option to purchase may be exercised during an extended term is stated in 51 C.J.S., Landlord & Tenant, § 84, as follows: "Where the lease confers the right to purchase at any time during the term, it is generally held that it may be exercised during an extended or renewed term, acquired under an option in the lease for an extension or renewal on the terms and conditions of the original lease."

In the present case, Section 21 of the lease gave Masterson the right and option to purchase the property "at any time during the continuance of this Lease." The language is clear and unambiguous, and it can only be interpreted as granting the option not only at any time during the original term of the lease but also at any time during the continuance of the lease. *Carter v. Frakes,* 303 Ky. 244, 247, 197 S.W.2d 436, 438 (1946), does not compel a different result since the option to purchase set forth in that

lease contained a specific date by which the option was required to be exercised. The lease in the instant case, by contrast, contains no such expiration date. Thus, the court erred in failing to recognize that the option to purchase, along with the other terms of the lease, carried over to subsequent years during which Masterson leased the property pursuant to the holdover statute.

As to whether Masterson materially breached the lease by failing to name Gloria as an additional insured upon a liability insurance policy, the facts are undisputed that Masterson failed to name her as an additional insured and to deliver a copy of the policy to her, and that Gloria continued to accept rent. That continued acceptance of rent operated as a waiver of Gloria's ability, as landlord, to declare a default. *Bridges v. Jeffrey*, 437 S.W.2d 732, 733 (Ky. 1968). Gloria argues that since she was unaware of Masterson's failure to name her as an additional insured, she should not be held to the general rule. However, the fact that Masterson had not delivered a copy of the policy to her was within her knowledge. Thus, waiver still applies. *Cities Service Oil Co. v. Taylor*, 242 Ky. 157, 161-62, 45 S.W.2d 1039, 1041 (1932) (court holding that acceptance of rent with knowledge of a breach of the lease constitutes waiver of the breach); s*ee also Page Two, Inc. v. P. C. Management, Inc.*, 517 N.E.2d 103, 106 (Ind. App. 1987). The trial court therefore erred in ruling that the option could not be exercised because Masterson breached the lease in failing to name Gloria as an additional insured on the liability policy.

Gloria also appears to argue that the option was unenforceable as being unsupported by consideration. This argument, however, ignores the fact that the lease and the option were contained within a single written agreement. Kentucky cases have

long upheld the validity of leases with options to purchase which are contained within a single written agreement. *E.g., Simmerman v. Fort Hartford Coal Co.*, 310 Ky. 572, 583-84, 221 S.W.2d 442, 448-49 (1949).

II. Exercise of the Option.

Having concluded that the option to purchase was valid during the holdover period, we must next address whether Masterson presented sufficient evidence of having exercised the option to withstand Gloria's motion for a directed verdict. The terms of the option required Masterson, as lessee, to notify Gloria, as lessor, if he wished to exercise the option. The record discloses Gloria's concession that written or oral notice to either her or her agent would suffice. Masterson testified that Elmer, as Gloria's attorney and the scrivener of the lease, advised him that he could effectively exercise his option by notifying either Elmer himself, Kenneth, or Charles. The record further discloses that in 1982, Gloria executed a power of attorney designating Kenneth as her attorney in fact.

At trial, Masterson testified that he notified Kenneth in June 1994 that he wanted a deed at the end of the year, and he offered explanations concerning whatever discrepancies existed in the testimony he previously gave in his deposition or during the 2000 trial.[4] Gloria argues and the trial court ruled that Masterson did not effectively exercise the option by timely "giving notice he wanted a deed in the future." Although the parties' lease omitted the number of days' notice required for exercising the option, the parties' clear intent under Section 21 was that Masterson would give notice of the option's exercise and the parties would then close the transaction within a reasonable time. At that time, Masterson would tender the down payment of $40,000, and Gloria

[4] We recognize that Gloria maintained and Kenneth testified during the 2000 trial that the alleged June 1994 conversation between Masterson and Kenneth never occurred.

would tender a general warranty deed and a certificate of title. Since the purchase option provision did not specify a time for performance, it is presumed that a closing, *i.e.*, the simultaneous tender of deed and down payment, would occur within a reasonable time. *See Kirkpatrick v. Lebus*, 184 Ky. 139, 149, 211 S.W. 572, 576 (1919) (court holding that "in the absence of a specified time for the performance of a contract, it must be performed within a reasonable time after its execution or after the conditions arise when performance can be made"); *see also Restatement (Second) of Contracts* § 204, comment d (1981). Furthermore, as stated in *Kirkpatrick*, "[t]he rule is equally fundamental that what is a reasonable time is to be determined by the facts and circumstances of each case, and that, where the facts are undisputed, it is a question of law for the court." 184 Ky. at 149, 211 S.W. at 576.

Under the facts as testified to by Masterson, it was not unreasonable of him to give notice in June in anticipation of closing the purchase at the end of the year. Whether Masterson gave such notice to Kenneth is, however, a question of fact for resolution by the jury. A directed verdict therefore was not justified as to this issue. CR[5] 50.01.

As to Masterson's allegation that he gave notice to Charles, Gloria argues that in April 2000, during the first trial, the court ruled from the bench that Charles was not Gloria's agent for purposes of the lease, and that such ruling became final when Masterson did not appeal it at that time. We disagree. The ruling in question, as to which we have been unable to find any written order, appears to have been an interlocutory order made during the April 2000 trial which ended in a mistrial. Since the order was interlocutory, Masterson was not required to challenge it on appeal at that time.

[5] Kentucky Rules of Civil Procedure.

CR 54.02(1). Thus, the issues in this appeal may legitimately include whether Charles was Gloria's agent for the purpose of Masterson's attempt to exercise the option to purchase.

While some courts have stated that "[a]gency is a legal conclusion to be reached only after analyzing the relevant facts," *e. g., Thomas v. Hodge*, 897 F.Supp 980, 982 (W.D. Ky. 1995), if "the facts are in dispute and the evidence is contradictory or conflicting, the question of agency, like other questions of fact, is to be determined by a jury." *CSX Transp., Inc. v. First Nat'l Bank of Grayson*, 14 S.W.3d 563, 566 (Ky.App. 1999); *see also Hauck v. Lillick*, 254 Ky. 6, 70 S.W.2d 958 (1934) (court holding that evidence in question created jury issue as to authority of agent).

Masterson argues that Gloria's testimony in the April 2000 trial, which was read into evidence in the 2005 trial, constituted a judicial admission that both Charles and Kenneth were her agents regarding the lease. As this court has explained, a judicial admission

> "is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question." Whether a statement is a judicial admission is a question of law, which is reviewed *de novo*, "without deference to the interpretation afforded by the circuit court."
>
> While judicial admissions are not to be taken lightly, they "should be narrowly construed." In order for trial testimony to rise to the level of a judicial admission it must be "'deliberate and unequivocal and unexplained or uncontradicted.'" The conclusiveness of a judicial admission should be determined "'in the light of all the conditions and circumstances proven in the case.'" This is necessary in order to determine "the probability of error in the party's own testimony." The Court in *Elpers v. Kimbel* [366 S.W.2d 157, 163-64 (Ky. 1963)], stated as follows:

> "Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection[.] . . . The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself."

Reece v. Dixie Warehouse & Cartage Co., 188 S.W.3d 440, 448 (Ky.App. 2006) (internal citations and footnotes omitted).

Ultimately, whether Charles was Gloria's agent for purposes of the lease is an issue of fact to be determined by a jury. Certainly Gloria's and Elmer's statements are admissible to address Charles' authority to receive Masterson's notice of his exercise of the option.[6] Additionally, whether Masterson gave notice to Charles is to be determined by the jury, as set forth above.

The circuit court's order granting a directed verdict for Gloria was clearly erroneous. The option to purchase was valid throughout 1994,[7] and the testimony presented prior to Gloria's motion for a directed verdict was sufficient to withstand the motion.

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[6] Again, we recognize Gloria's position and Elmer's testimony, from the 2000 trial, that Elmer made no statements concerning Charles' agency.

[7] As previously noted, rent was due in arrears. Thus the rent payment for lease year 1994 was not due until January 10, 1995. While Gloria appears to allege that Masterson did not pay the rent which was due by January 10, 1995, two motions for summary judgment filed in 1998 and 1999 concede that Masterson did pay the rent for calendar year 1994, *i.e.*, that which was due January 10, 1995, and that Masterson's possession was improper only as of January 1996, after Masterson failed to pay the rent due January 10, 1996 and the property taxes for calendar year 1995. In addition, we note that the exhibits introduced at trial contain four rent checks in the amount of $15,000 each, dated December 18, 1991, January 15, 1993, January 16, 1994, and January 18, 1995. While the proof focused on Masterson's efforts to exercise the option during calendar year 1994, the renewal and holding over in 1995 would mean, of course, that Masterson had the ability to exercise the option during calendar year 1995 as well. On remand, the trial court should take proof on whether Masterson exercised the option during 1995.

The Marion Circuit Court's order granting a directed verdict in Gloria George's favor is hereby VACATED, and this matter is REMANDED to that court for further proceedings consistent with this opinion.

ALL CONCUR.

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