IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PR FINANCING LIMITED PARTNERSHIP, : NO. 04-01,964
Successor by name change to CROWN :
AMERICAN FINANCING PARTNERSHIP, L.P., :
Plaintiff :
:
vs. :
: CIVIL ACTION - LAW
BULLERS ENTERPRISES, INC., :
Defendant : Petition to Open Confessed Judgment

OPINION AND ORDER

Before the Court is Defendant's Petition to Open Confessed Judgment, filed January 7, 2005.[1] After argument held August 26, 2005, a hearing was determined necessary and such was held September 15, 2005.

This matter arises from a lease agreement entered by the parties in late 2002 for space at the Lycoming Mall, in which Defendant intended to operate an H&R Block office. The lease provides for a termination date of April 30, 2005, but Defendant vacated the premises on or about April 30, 2004. Plaintiff deemed such an event of default and thereafter confessed judgment for the remaining rents due under the lease. Defendant's Petition to Open that judgment alleges the existence of a meritorious defense.

Opening of a Judgment by Confession is governed by Rule 2959 of the Rules of Civil Procedure, which provides, in pertinent part: "If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment." Pa.R.C.P. Rule 2959(e). At the hearing on September 15, 2005, Defendant[2] testified that the parties had reached an agreement outside of the written lease documents that he would be able to terminate the lease early, providing two months notice, in the event he was not financially successful in the mall, and that he had documented that agreement in a letter sent along with the lease to Plaintiff's representative. A copy of the letter was introduced into evidence as Petitioner's Exhibit No. 1. Defendant also introduced a copy of a letter purporting to be the

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[1] Defendant's Petition to Strike Confessed Judgment, filed with the Petition to Open, was denied by Order of August 26, 2005, after argument held that date.

[2] Although the only defendant in this matter is Bullers Enterprises, Inc., the Court will also refer to the corporation's president, Clay Bullers, as "Defendant" for ease of reference.

two months' notice required to terminate the lease early. Petitioner's Exhibit No. 2. Plaintiff argues that Exhibit No. 1 would be ineffective to modify the terms of the lease, and, further, even is such does effect a modification, Exhibit No. 2 does not provide the notice required by that modification.[3]

The defense offered in this case appears strikingly similar to that in Howell v. Wheelock, 176 A. 252 (Pa. Super. 1934). There, the parties negotiated a lease which contained a renewal provision. The defendant did not agree with such a provision, and so informed the plaintiff. The plaintiff was apparently unwilling to remove the provision from the lease and suggested the defendant send a letter with the lease stating that the lease would terminate at the end of the initial term. This the defendant did. In ruling such was admissible to show a modification of the form lease, the Court stated:

> If, as alleged, this defendant objected to the terms of the provision in the lease respecting the continuation thereof after the expiration of five years, and, at the suggestion of plaintiffs' agent, he sent along with the executed lease a writing stating that the lease was to terminate at the end of five years, and this written modification to the printed form used was received and accepted, it became an integral part of the lease and was just as binding and effective as if the writing had been physically attached to or embodied in the original instrument.

Id. at 603. The Court recognized appellate authority holding that all previous negotiations were, in the cases at bar, merged in the written agreement, but held such principle was not therein applicable in light of other authority holding that where it is conceded or proven that a writing does not properly or fully state the agreement between the parties on any given point, the written provisions in regard thereto may be explained or supplemented, and the true state of facts established by parol evidence. Id. (citing Bryant v. Bryant, 144 A. 904 (Pa. 1929)).

In the instant case, Defendant has offered proof that he sent to Plaintiff with the executed lease a letter purporting to set forth the parties' agreement that he would be able to terminate the lease early in the event he was financially unsuccessful. With respect to the issue of whether the letter was "received and accepted" the letter states: "Should you feel there will be a problem, with this, DO NOT EXECUTE the lease" and Defendant testified he received

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[3] At argument, Plaintiff also contended there was no credible evidence of Exhibit No. 1 ever having been sent by Defendant or received by Plaintiff, but the credibility of the evidence offered is not a matter before the Court at this time.

from Plaintiff a copy of the fully executed lease with the letter stapled on the back. The Court believes that these circumstances, if proven, would constitute receipt and acceptance. Therefore, Defendant may be able to show that the lease agreement, under the authority of which judgment was confessed, was not the entire agreement of the parties.

Plaintiff also argues that Exhibit No. 2 does not provide the notice required by the lease (as contained in Petitioner's No. 1), pointing out that nowhere in the letter does it say "I am leaving." Defendant does say, however, after advising Plaintiff that he cannot afford to remain in the mall under the terms then in effect, and requesting a rent adjustment, "Please advise if this adjustment is possible. Otherwise, I will have no choice but to move out right after April 15th. If you need the space before that, I could leave with a week's notice." The Court believes this language is sufficient to put Plaintiff (the party with the power to grant or deny Defendant's request for the rent adjustment) on notice of his intent to vacate the premises by the end of April 2004.

Accordingly, Defendant having produced such evidence which in a jury trial would require the issues to be submitted to the jury, the judgment must be opened.

ORDER

AND NOW, this 22nd day of September 2005, for the foregoing reasons, the Judgment by Confession entered in this matter on November 24, 2004, is hereby opened. The matter shall be submitted to arbitration and the parties shall attempt to agree upon a Scheduling Order in that regard. In the event no agreement is reached, Plaintiff may request the scheduling of a Case Flow Conference by filing an Initial Case Monitoring Notice.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Stephen Zubrow, Esq., 301 Grant Street, 35th floor, Pittsburgh, PA 15219
Gregory Stapp, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson