2018 IL App (3d) 160623-U

Order filed January 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

MARY HUBERT LIMITED PARTNERSHIP,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Iroquois County, Illinois.
	)	
v.	)	Appeal No. 3-16-0623
	)	Circuit No. 11-CH-37
ROBIN HASSELBRING and KENTON HASSELBRING,	)	
	)	The Honorables
	)	James B. Kinzer and Ronald J. Gerts,
Defendants-Appellants.	)	Judges, presiding.
	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's determination that the lease agreement was void was not error.

¶ 2 Defendants Robin and Kenton Hasselbring entered into an agreement with the Mary Hubert Limited Partnership through its general partner Mary Hubert to lease farmland. Plaintiff Mary Hubert Limited Partnership filed a complaint against defendants, alleging that the lease agreement was invalid because Hubert was incompetent and certain provisions within the lease

were unconscionable. Defendants filed a motion for summary judgment, which the trial court denied. The trial court later determined that the lease was void because certain provisions were unconscionable. Defendant filed a posttrial motion and the trial court denied it. Defendant appeals from the trial court's decision on the motion for summary judgment and final judgment. We affirm.

¶ 3 FACTS

¶ 4 In 1986, defendants Robin and Kenton Hasselbring entered into a lease agreement with Mary Hubert in which defendants rented 208.55 acres of land (hereinafter the Mary Hubert farm) for the purpose of farming.

¶ 5 On July 22, 1998, Hubert created the Mary Hubert Limited Partnership and the Mary Hubert Revocable Trust. The limited partnership agreement listed Hubert as the sole general partner and Theresa Magruder and Gloria Jean Hull, Hubert's two nieces, as limited partners. The Mary Hubert Revocable Trust agreement listed Hubert and Magruder as co-trustees and assigned all of Hubert's rights, interest, and title in her property to the Mary Hubert Limited Partnership. Subsequently, a warranty deed was recorded in the Office of the Recorder of Deeds conveying the Mary Hubert farm to the limited partnership. On the same day, Hubert appointed Magruder as her power of attorney for property. The power of attorney granted Magruder the authority to handle, *inter alia*, Hubert's real estate transactions. The power of attorney also stated:

> "6. This power of attorney shall become effective as of the date and throughout the period I shall be considered incapacitated. As used herein, the term "incapacitated" shall mean (a) if and as long as I am adjudicated disabled because I am unable to manage

my financial matters or participate in medical treatment decisions, or (b) if a physician familiar with my physical and mental condition certifies in writing that I am unable to transact ordinary business or participate in medical treatment decisions, and until there is a like certification that such incapacity has ended."

¶ 6 In 2010, Magruder and Hull hired Wirth Ag Services Inc. to manage the farm. On July 22, Steven C. Wirth, the owner of Wirth Ag Services Inc., sent a letter to defendants terminating the 1986 lease effective at the end of 2010. The letter stated:

"Dear Robin and Kenton,

I was approached and hired by Theresa Magruder and Gloria Hull Follkie to manage property owned by the Mary Hubert Limited Partnership. Theresa and Gloria are partners, and Theresa has power of attorney for Mary Hubert, the general partner. The partnership owns the property you operate as the Mary Hubert Farm. The decision has been made by the partners to not cash rent the farm, but to operate it under either a share lease or custom farm agreement. Therefore, the rental agreement you currently operate under will be terminated.

You are hereby given notice of termination of the lease dated December 29, 1986, between Mary Hubert, and Walter Hasselbring, and any subsequent written or oral agreements that may apply to land owned by Mary Hubert and the Mary Hubert Limited Partnership, such land located in Sections 23 and 26,

Township 27 North, Range 23 West of the Second Principal Meridian, in Iroquois County, IL, consisting of 208.55 deeded acres. This termination in no way changes or alters obligations of the landlord or tenants under terms of the existing lease for the remainder of the 2010 crop year."

¶ 7 In December 2010, defendants prepared and Hubert, as general partner of the limited partnership, signed a lease agreement wherein defendants would rent the Mary Hubert farm between March 1, 2011, and February 28, 2016. The lease included the following terms:

"The annual cash rent shall be the sum of $27,580.00. This represents 197 tillable acres of cropland at $140.00 an acre, per year. It is understood that the Landlord will pay the cost of spreading limestone on the land every four years during the term of the tenancy beginning 2011.

* * *

Also, In the event of the Landlord & General Partner (Mary Hubert) passing away, Robin Hasselbring and Kenton Hasselbring, and/or heirs, will have the first opportunity to purchase the land involved at a fair market price determined by averaging three independent appraisals acquired by the Tenants. All appraisal expenses to be paid by Robin Hasselbring and Kenton Hasselbring and/or heirs."

¶ 8 In April 2011, plaintiff filed a complaint against defendants, seeking injunctive relief in count I and declaratory relief in count II. In the complaint, plaintiff alleged the 2010 lease

agreement was invalid because Hubert was incompetent and the cash rent clause in the lease was unconscionable. Consequently, plaintiff requested that the trial court enter an injunction against defendants to prohibit their farming operations and a declaratory finding that the lease was invalid and void. The complaint states that plaintiff learned about the lease when it received a copy of the lease and checks for 2011 cash rent from defendants. Subsequently, plaintiff filed a motion for preliminary injunction and the trial court granted it.

¶ 9 Defendants filed an interlocutory appeal. On appeal, this court reversed the trial court's decision, determining there was no evidence that plaintiff did not have any adequate remedy at law and that plaintiff suffered irreparable harm without the preliminary injunction. *Mary Hubert Ltd. Partnership v. Hasselbring*, 2011 IL App (3d) 110288-U.

¶ 10 In March 2012, plaintiff filed two first amended complaints. The first amended complaint added that the "opportunity to purchase" clause in the lease was unconscionable and the second amended complaint voluntarily dismissed count I (claim for injunctive relief). In 2013, Defendants filed a motion for summary judgment, arguing (1) Hubert, as general partner of the limited partnership, had authority to sign the lease; (2) Wirth AG Services did not have authority to terminate defendant's tenancy because the power of attorney was invalid; (3) Hubert was not properly disassociated as the general manager pursuant to the Uniform Limited Partnership Act (805 ILCS 215/603(7) (West 2012)); and (4) the terms of the lease were not unconscionable.

¶ 11 Defendants attached an affidavit from Robin to its motion. In Robin's affidavit, he asserted that he, Kenton, and Carol Schuldt, an insurance agent, went to Hubert's nursing home where they "went through each page of the lease individually with Mary Hubert and explained every part of the lease, including the cash rent and the opportunity to purchase." Afterward, Hubert, who at the time appeared "very relaxed, happy, and [in an] alert stage," signed the lease.

¶ 12 Plaintiff attached several affidavits to its response relevant to this appeal. Philip G. Hays, M.D., stated that he had been the treating physician for Hubert and that Hubert had been his patient since March 2004. Since 2005, Hubert had been diagnosed with dementia. Hays observed a gradual decline in her mental status since her diagnosis. In late 2010, Hays examined Hubert and observed she had not recognized Hays and was "essentially nonverbal." Hays opined that, in December 2010, Hubert was unable to make any decisions concerning her health or finances and that this inability existed for years prior to the time she signed the 2010 lease.

¶ 13 Magruder averred that she was informed that two men were in Hubert's room in December 2010 and that a nurse told the men that Hubert's power of attorney needed to be present before she signed anything. Magruder left work and went to the nursing home. When Magruder arrived, she asked Hubert "if she had any company that day and she said that some people were there. I asked her who was there and she didn't know." Magruder did not see a lease in the room and Hubert did not tell Magruder she signed a lease.

¶ 14 Steven Wirth attested that, in 2010, Magruder and Hull contacted him to assist the limited partnership with the management of the Mary Hubert farm. Magruder and Hull were concerned defendant's lease, which had contained the same terms since 1986, rented at a below market rate of $90 per acre. In July 2010, Wirth sent a notice to terminate the lease to defendants. Thereafter, Wirth and defendants discussed a possible new lease agreement but defendant's proposals did not meet the current rental value of the farm. Wirth opined that the cash rent for comparable farmland was $225 per acre and that custom farming returns were $378 per acre. Wirth believed that it was not sensible to cash rent the farm and that custom farming was a better business alternative for plaintiff. Wirth also opined that the cash rent of $140 per acre proposed in the 2010 lease was "substantially below" the current cash rental value of the Mary Hubert farm.

¶ 15 The trial court denied defendants' motion, determining that Hubert's incompetence and the unconscionability of the lease were genuine issues of material fact. In January 2016, the case proceeded to a jury trial. The record does not include transcripts of the trial proceeding, however, we assume the parties testified consistently with their affidavits. Before jury deliberations, the trial court ruled that the lease was void because it was unconscionable. Defendants appealed.

¶ 16 ANALYSIS

¶ 17 Defendants challenge the trial court's denial of their motion for summary judgment as well as the trial court's final decision. After a subsequent evidentiary trial, a previous order denying a motion for summary judgment is neither appealable nor reviewable on appeal because the decision on the motion is merged in the subsequent trial. *Costa v. Keystone Steel and Wire Co.*, 267 Ill. App. 3d 683, 688 (1994). Therefore, we decline to review defendant's claim on the issue of the motion for summary judgment and focus our analysis on the trial court's final judgment.

¶ 18 I. Hubert's Authority to Execute Lease Agreement

¶ 19 Defendants argue that Hubert, as general partner of the limited partnership, had authority to sign the lease because Hubert's actions bound the limited partnership pursuant to section 402 of the Uniform Limited Partnership Act (805 ILCS 215/402 (West 2016)) and that plaintiff never disassociated Hubert as general partner in accordance with section 603 of the Uniform Limited Partnership Act (805 ILCS 215/603 (West 2016)). As a result, defendants allege that the lease was valid. Plaintiff contends Hubert was not competent to manage her finances and, thus, had no authority to enter into the lease agreement.

¶ 20 "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Amcore Bank, N.A.*

v. Hahnaman-Albrecht, Inc., 326 Ill. App. 3d 126, 134 (2001). An agent's authority may be either actual or apparent. *Id.* The party alleging an agency relationship must prove it by a preponderance of the evidence. *Id.* The scope of the agent's authority is a question of fact and the trial court's decision will not be reversed unless its findings are against the manifest weight of the evidence. *Id.* In the instant case, the issue is Hubert's ability, as agent, to bind the limited partnership, as principal.

¶ 21 Section 402 of the Uniform Limited Partnership Act provides a basis for when a general partner does not have authority to act. In particular, section 402 states:

> "Each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner, including signing of a record in the partnership's name, for apparently carrying on the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under Section 103(d) that the general partner lacked authority." 805 ILCS 215/402 (West 2016).

¶ 22 There is no evidence that Hubert did not have authority to act as general partner for the limited partnership. First, Hubert was never disassociated as general partner in accordance with section 603(7)(C) of the Uniform Limited Partnership Act (805 ILCS 215/603(7)(C) (West 2016)). A general partner's dissociation from the partnership terminates the person's right to

participate in "the management and conduct of the partnership's activities." 805 ILCS 215/605(a)(1) (West 2016). Section 603(7)(C) states that a person is dissociated from the limited partnership as a general partner when there is "a judicial determination that the person has otherwise become incapable of performing the person's duties as a general partner under the partnership agreement." There is no evidence that any court had determined that Hubert was incapable of performing her duties as general partner.

¶ 23 Moreover, although defendants were notified, in the termination letter, that Magruder had power of attorney for Hubert, the transfer of authority to act was never actually triggered. The power of attorney states that it takes effect when Hubert is considered incapacitated, which happens when (1) she is *adjudicated* disabled or (2) a physician familiar with her condition *certifies in writing* that she is unable to transact ordinary business. There is no evidence that Hubert was adjudicated disabled or that a physician certified that Hubert was incapacitated before the 2010 lease was executed. Plaintiffs provide a physician's letter explaining Hubert's condition; however, the letter was created after execution of the 2010 lease. Therefore, we find that Hubert had authority as general partner to sign the lease on behalf of the limited partnership.

¶ 24 Defendants further contend that Hubert's alleged incompetence does not affect her authority as agent to sign the lease on behalf of the partnership. We believe that Mary Hubert lacked mental capacity at the time the parties executed the lease agreement. According to Hubert's long time treating physician, Philip Hays, he had diagnosed her with dementia in 2005 and had observed her steady mental decline over the ensuing years. Defendants did an end run around everyone and took a fully prepared lease agreement to the nursing home where Hubert was living. Once there, they ignored the caution from a nurse that Hubert was not to sign anything outside the presence of her power of attorney and secured her signature on the

challenged lease agreement. However, we need not reach a decision on whether her incompetence affected her authority as agent because we find that the terms of the agreement are unconscionable.

¶ 25 II. Unconscionability of Lease Agreement

¶ 26 Defendants claim that the cash rent amount of $140 listed in the 2010 lease was not unreasonable as the average cash rent for farmland in Iroquois County was $168 between 2010 and 2011. Also, defendants argue that the opportunity to purchase clause in the lease was not so outrageous and unfair that it shocks the conscience or offends the sensibilities of the court or is against public policy. Plaintiff alleges that the cash rent amount in the lease was far below the average cash rent for a similar farm and that the opportunity to purchase clause was self-serving. Citing *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), plaintiff also argues that the trial court's finding is presumed proper because defendants did not provide a sufficiently complete record on appeal.

¶ 27 "An unconscionable contract is usually improvident, wholly one sided or oppressive." *Dillman and Associates, Inc. v. Capital Leasing Co.*, 110 Ill. App. 3d 335, 341 (1982). There are two types of unconscionability: procedural or substantive unconscionability. *Kinkel v. Cingular Wireless LLC,* 223 Ill. 2d 1, 21 (2006). "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Razor v. Hyundai Motor America,* 222 Ill. 2d 75, 99 (2006). "Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor." *Id.* The determination of whether a contract or a portion of a contract is unconscionable is a question of law and is reviewed *de novo*. *Kinkel,* 223 Ill. 2d at 22.

¶ 28 Defendants contend that this court should reverse the trial court's ruling because the cash rent of $140 was not so grossly inadequate as to shock the conscience of the court when the average cash rent for farmland in Iroquois County was $168 and the opportunity-to-purchase clause was fair but failed to provide evidence that would explain why the provisions were not unconscionable. For example, the record is devoid of evidence that the $140 cash rent clause or the opportunity-to-purchase clause were a part of the course of performance between these parties or usage of trade and defendants do not cite any authority that supports its allegations that the provisions are not unconscionable.

¶ 29 Also, the opportunity to purchase clause is one-sided in defendant's favor. Specifically, the clause states that defendants get first opportunity to purchase the land at a fair market price determined by averaging three appraisals all acquired by defendants without giving plaintiff, which actually owns the property, any option to seek its own appraisal or set its own sale price. Moreover, there was an imbalance of bargaining power when the parties executed the cash rent amount because the evidence shows Hubert had exhibited significant signs of incompetence before and during the time she signed the lease. Hays' affidavit stated that, by late 2010, Hubert was "essentially nonverbal" and unable to make any decisions concerning her finances. Magruder testified that Hubert did not know or could not identify the individuals who came to visit her on the day she signed the lease. Although Robin's affidavit stated that Hubert was "very relaxed, happy, and [in an] alert stage" when she signed the lease, we do not believe this observation confirms Hubert's competence. Thus, we find the cash rent and opportunity to purchase clauses were substantively unconscionable. Accordingly, we hold that the contract as a whole is unenforceable given the one-sided basis on which the contract was executed and one-

sided nature of its terms. See *Neal v. Lacob*, 31 Ill. App. 3d 137, 142 (1975) ("Where a contract is found to be unconscionable, courts will refuse to give full effect to it as written.").

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of Iroquois County is affirmed.

¶ 32 Affirm.