2017 IL App (5th) 160095-U

NO. 5-16-0095

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SHER-JO, INC., an Illinois Corporation,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 13-CH-138
	)	
TOWN AND COUNTRY CENTER, INC.,	)	
a New York Corporation,	)	Honorable
	)	Phillip G. Palmer, Sr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in granting summary judgment in favor of tenant when tenant failed to give proper written notice to landlord of its intent to extend the term of the parties' commercial lease agreement.

¶ 2 Defendant, Town and Country Center, Inc. (Town and Country), a New York corporation, appeals the denial of its motion for summary judgment, as well as the denial of its motion to reconsider, as entered by the circuit court of Williamson County. We reverse and remand with directions.

¶ 3 Town and Country is the owner of property located at 1135 Carbon Street, Marion, Illinois. Town and Country had a written lease agreement with Rax of Marion,

Inc. (Rax), an Illinois corporation, dated August 23, 1983, wherein Rax, as tenant, leased the Carbon Street property from Town and Country. On December 1, 1993, Rax assigned all rights, title, and interest, as tenant, under the lease to plaintiff, Sher-Jo, Inc. (Sher-Jo), an Illinois corporation.

¶ 4 On July 26, 1994, Town and Country and Sher-Jo executed a written amendment to the 1983 lease agreement (hereinafter master lease). Section 56 of the master lease required the tenant to give irrevocable notice to Town and Country in order to exercise the option to extend the term of the lease not less than 180 days prior to the expiration of the then-current term. Section 42 of the master lease further required that all notices, demands, or other writings in the lease which may be given or made or sent by either party to the other were not deemed given or made or sent unless in writing and deposited in the U.S. mail, registered and postage prepaid, to the addresses listed in the lease for Town and Country and for Rax. Pursuant to paragraph one of the parties' amendment to the lease, the term of the master lease was amended such that a new 20-year term began on January 1, 1994, and ended on December 31, 2013. Under the amendment, the tenant, if not in default, had the right to extend the term of the lease for an additional 5 years, provided such option was exercised not less than 180 days prior to the expiration of the then current term. In other words, the lease agreement ended on December 31, 2013, and irrevocable notice to exercise the option to extend the term of the lease agreement had to be given 180 days before December 31, 2013, or by July 4, 2013. All other terms and conditions of the lease remained as originally set forth in the master lease.

¶ 5 On September 1, 1994, Sher-Jo executed a written sublease agreement with Fazoli's Restaurants, LLC, f/k/a Fazoli's Restaurants, Inc. (Fazoli's), a Delaware limited liability company. Per the terms of the sublease agreement, Fazoli's agreed to a 10-year original term with three 5-year option renewal terms. While the terms and conditions of the sublease were approved by Town and Country, Town and Country was not and never has been a party to this sublease.

¶ 6 On May 31, 2013, Fazoli's sent correspondence to Sher-Jo stating that Fazoli's was exercising its option to renew the sublease. The communication between Fazoli's and Sher-Jo specifically noted that Sher-Jo should confirm to Fazoli's whether Sher-Jo exercised its respective option to extend the term of the lease with Town and Country. On June 4, 2013, Sher-Jo faxed a copy of Fazoli's correspondence to Town and Country. Sher-Jo then verbally confirmed that Town and Country received the fax and further advised Town and Country that Sher-Jo wished to exercise its option to extend the lease for an additional five years as well. According to Sher-Jo, Town and Country stated that would be "fine," whereupon Sher-Jo asked whether notice by fax would be acceptable. Town and Country confirmed that notice by fax would be acceptable. Sher-Jo faxed Fazoli's written notice to Town and Country once again.

¶ 7 Town and Country claimed that it informed Sher-Jo that Fazoli's correspondence was not sufficient notice pursuant to the master lease agreement. Sher-Jo denied this claim. Other than Fazoli's correspondence, no other writing was sent, via facsimile, electronic, traditional, registered, or certified mail, by Sher-Jo to Town and Country prior to July 4, 2013. On July 18, 2013, Sher-Jo forwarded a written document to Town and

Country via e-mail and certified mail stating Sher-Jo's intention to renew the lease agreement between Sher-Jo and Town and Country. Town and Country, believing Sher-Jo failed to provide proper irrevocable written notice of its option to extend the commercial lease agreement, declined to accept the late notice and entered into a new lease agreement with Fazoli's directly. In response, Sher-Jo filed a complaint against Town and Country for specific performance of the amendment to the lease. Sher-Jo further requested a temporary restraining order and preliminary injunction enjoining Town and Country from leasing the property to anyone other than Sher-Jo or otherwise interfering with Sher-Jo's interest in the property.

¶ 8 In February of 2015, Town and Country filed a motion for summary judgment claiming that there was no manner in which liability could be imposed upon Town and Country given the relevant case law and the fact that Sher-Jo did not timely provide written notice of its intent to renew the master lease within the time specified. On February 24, 2015, Sher-Jo responded by filing a motion for partial summary judgment alleging that Sher-Jo properly exercised the option for an additional five-year term.

¶ 9 The court granted partial summary judgment in favor of Sher-Jo and denied Town and Country's motion for summary judgment after concluding that the only requirement was a timely written notice in some form which put Town and Country on notice of Sher-Jo's intent to exercise said option. The court concluded that the June 4 fax from Sher-Jo to Town and Country "(albeit originating from Fazoli's)" satisfied the notice requirement of the master lease as amended. The court subsequently awarded Sher-Jo damages in the amount of $97,638, and attorney fees and costs in the amount of $15,522.11.

¶ 10 Town and Country contends on appeal that Sher-Jo did not provide proper notice to Town and Country in order to exercise the option for an additional five-year term pursuant to the master lease agreement as amended. Sher-Jo counters that while the lease suggests written notice is required, neither the content nor specifics of that notice are spelled out. As amended, Sher-Jo argues the only requirement was timely written notice in some form which put Town and Country on notice of Sher-Jo's intent to exercise that option. Accordingly, Sher-Jo asserts, the June 4 fax satisfied the written notice requirement of the amended lease as a matter of law. We disagree.

¶ 11 It is clear that the disagreement arising between the parties relates only to the alleged sufficiency of the notice to extend the term of the lease. There is no dispute that the phone calls and fax were sent within the time frame required by the master lease and the amendment to the lease. Where the facts are not in dispute, the interpretation of a contract is a question of law which can be decided on a motion for summary judgment when the terms are plain and unambiguous. *Butler v. Economy Fire & Casualty Co.*, 199 Ill. App. 3d 1015, 1021, 557 N.E.2d 1281, 1285 (1990); *Madigan Brothers, Inc. v. Melrose Shopping Center Co.*, 123 Ill. App. 3d 851, 855, 463 N.E.2d 824, 828 (1984). We further note that contract language is not rendered ambiguous simply because the parties do not agree upon its meaning. *McCarthy v. Johnson*, 122 Ill. App. 3d 104, 109, 460 N.E.2d 762, 766 (1983). We review *de novo* the trial court's decision on a motion for summary judgment. *Thomson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill. App. 3d 621, 627, 850 N.E.2d 314, 319 (2006).

¶ 12 In Illinois, a lessee seeking to exercise an option to cancel or extend a commercial lease must strictly comply with the terms of that option. *Thomson Learning*, 365 Ill. App. 3d at 627, 850 N.E.2d at 320; *LaSalle National Bank v. Graham*, 119 Ill. App. 3d 85, 86-87, 456 N.E.2d 323, 324 (1983). Even though strict compliance might lead to harsh results, it promotes commercial certainty. *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 28, 623 N.E.2d 369, 376 (1993). Not only is the timeliness of notice to be strictly construed, but also the manner, the method and any other correlating conditions are to be strictly construed. Here, based upon the parties' lease and amendment, Sher-Jo was required by July 4, 2013, to provide irrevocable written notice to Town and Country of Sher-Jo's intention to exercise an additional five-year term. The fax sent to Town and Country references only an extension of the sublease agreement between Sher-Jo and Fazoli's. Although Town and Country was aware of and approved the sublease, Town and Country was not a party to the sublease agreement. Nowhere within Fazoli's letter was there anything expressly stating that Sher-Jo also intended to renew its lease agreement with Town and Country. In fact, the plain language of Sher-Jo's sublease agreement with Fazoli's required that Sher-Jo issue an additional notice to Town and Country. Sher-Jo argues Fazoli's was authorized to send that notice on behalf of Sher-Jo to Town and Country. Fazoli's, however, did not send any notice referencing Sher-Jo's intent to renew as well. Sher-Jo did not send written notice of its wish to exercise its option to extend the master lease as amended with Town and Country within the requisite time frame. Unfortunately for Sher-Jo, actual, oral notice does not excuse the failure to strictly comply with the terms of the renewal option and notice provision in the contract.

Thomson Learning, 365 Ill. App. 3d at 632, 850 N.E.2d at 323-24; *LaSalle National Bank*, 119 Ill. App. 3d at 87, 456 N.E.2d at 324. Again, in a commercial setting, strict compliance, not substantial compliance, is required. *MXL Industries*, 252 Ill. App. 3d at 28, 623 N.E.2d at 376.

¶ 13 Sher-Jo argues the amendment to the lease modified and replaced the notice requirements established within the master lease agreement. Sher-Jo points out that paragraph one of the amendment gives Sher-Jo the option to extend the term of the master lease for an additional five years and the time frame for which said option must be exercised. There is no language in the amendment as to how said option is to be exercised. As Town and Country asserts, all other provisions of the master lease remained unchanged after the amendment. Paragraph 4 of the amendment, by its express language, specifically illustrates the point that all other terms and conditions of the master lease remained as originally set forth in the master lease "except as expressly modified herein." It is true that nothing in the amendment dictated or directed Sher-Jo how to exercise the new option. Section 56 of the master lease, however, detailed how Sher-Jo was required to exercise its options to extend the term of the lease. Section 56 was not modified in any way, and therefore was not replaced by the amendment.

¶ 14 Sher-Jo also contends it understood the conversation with Town and Country to acknowledge that the faxed notice was sufficient and accepted even if the option was not exercised in accordance with the agreement of the parties. Sher-Jo asserts under the circumstances presented here equity should relieve it as a tenant from the consequences of failure to send proper notice given the just excuse for noncompliance. As Town and

Country points out, Sher-Jo cannot allege any undue hardship justifying equitable relief in this instance from not allowing the five-year extension of the master lease. Sher-Jo clearly has suffered lost profits from a good deal, but has shown no other hardship. While we may agree the result seems harsh under the circumstances, we cannot ignore that this is a commercial setting where strict compliance is required.

¶ 15 We conclude that Sher-Jo did not properly provide irrevocable written notice to Town and Country of Sher-Jo's election to exercise its option to extend the parties' master lease agreement as amended. Therefore, we must reverse the circuit court's decision and remand this cause with directions to deny the motion for partial summary judgment in favor of Sher-Jo and grant the motion for summary judgment in favor of Town and Country.

¶ 16 Reversed and remanded with directions.