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Little Caesar Enterprises v. Bell Canyon Shopping Center L.C. : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LITTLE CAESAR ENTERPRISES, INC., a	:	
Michigan corporation,	:	Case No. 990827-CA
	:	
Plaintiff/Appellee,	:	
	:	Priority No. 15
vs.	:	
	:	
BELL CANYON SHOPPING CENTER,	:	
L.C., a Utah limited liability company,	:	
	:	
Defendant/Appellant.	:	
	:	

REPLY BRIEF OF APPELLANT

Appeal from a Final Order of the Third Judicial District Court of
Salt Lake County, Judge Homer F. Wilkinson

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INTRODUCTORY STATEMENT

This case is governed by the plain language of the lease renewal option. That provision requires the option rent to be “at a market rate mutually agreed upon” by the parties. (Addendum to Brief of Appellant, hereafter “Add.,” at 29.) Little Caesar concedes the absence of any agreement, but argues that the district court properly set the rent at the maximum “Minimum Rent.” However, “Minimum Rent” is only one component of the total “market rate” for the option period. Because the parties never agreed on the “market rate,” the option is void and unenforceable.

ARGUMENT

POINT I: THE OPTION PROVISION DOES NOT SPECIFY A RENTAL RATE WITH SUFFICIENT CERTAINTY AND DEFINITENESS TO BE ENFORCED.

In its opening brief, Bell Canyon applied long-established Utah law to demonstrate that the option provision is void and unenforceable because it left the rental rate to future agreement of the parties, and the parties reached no agreement. (Br. of App. 7-15.) Little Caesar does not dispute the law, but argues that the terms of the option are sufficiently certain for enforcement without agreement of the parties. (Br. of App. 8-16.) However, that argument ignores the plain language of the option provision requiring agreement on a “market rate.”

A. Language of Option Provision.

The rental terms of the option provision, quoted verbatim below, plainly require mutual agreement on a “market rate” for the option period:

The Minimum Rent for the first option period shall be at a market rate mutually agreed upon by Tenant and Landlord. In the first option period, the Minimum Rent shall not be higher than \$11.00 per square foot. Rent in the second option period shall also be at market rates. Market rates shall be at the then prevailing market rates for similar space in similar shopping centers within 5 miles of the Shopping Center. Landlord and Tenant shall mutually agree on the market rate within 30 days of Tenant's notification to Landlord that Tenant wishes to exercise an option period. [Add. 29, ¶ 4, emp. added.]

The term "market rate" in a commercial lease contemplates two separate components, one for "Minimum Rent" based on square footage, and a second for percentage rent based on sales. That explains the two separate, plural references to "market rates," one for minimum rent and one for percentage rent. As a protection to the tenant, the first component, "Minimum Rent," was set at a maximum of \$11 per square foot for the first option period. However, that figure plainly was not intended as the total option rent, or the remaining references to future agreement on a "market rate," as well as the definition of "market rates," would be rendered superfluous.

Little Caesar's entire argument is based on its strained interpretation of the term "Minimum Rent" in the option provision. (Br. of Aplee. 8-9.) Little Caesar reasons that because paragraph 3 of the Lease Addendum reduced "minimum rent" to \$1,190 "for the remainder of the existing Lease term," and the original Lease also set "Basic Monthly Rent" at \$1,190, the terms "minimum rent" and "Basic Monthly Rent" must mean the same thing. However, even if accepted, that argument proves nothing because both terms refer to the basic component of rent to which a percentage component may be added.

(See Lease definitions: “Percentage Rent” is calculated separate from, and in addition to, “Basic Monthly Rent.”) Therefore, even if the term “Minimum Rent” in the option provision referred to “Basic Monthly Rent,” it would still allow for addition of a percentage component to reach a mutually agreed “market rate” for the option period.

Moreover, as indicated, the language cited by Little Caesar in paragraph 3 of the Lease Addendum refers to the rental rate during the existing Lease term, while paragraph 4 contains the rental provisions for the future option terms. While the original Lease specifically provides for “zero” percentage rent during the initial term, the option provision contains no such limitation, thus allowing for percentage rent in addition to “Minimum Rent” during the option period.

Little Caesar cites *Cummings v. Rytting*, 207 P.2d 804 (Utah 1949), for the proposition that nonapplication of percentage rent in the original Lease precluded any percentage rent during the option period. (Br. of Aplee. 13.) However, that case, which has never been cited by a court, stands for no such thing. *Cummings* dealt with an option provision that said only, “With a five year option,” with no mention of option terms and no contemplation of any required future agreement or lease document. *Id.* at 805-06. Accordingly, the court enforced the lease option on the same terms as the original lease. *Id.* By contrast, in the present case, the option provision specifically requires the rental rate for the option period to be renegotiated and set “at a market rate mutually agreed

upon by” the parties. Therefore, the option rental rate is neither fixed nor limited by the terms of the original lease.

Little Caesar quotes language from the option provision out of context to support its faulty interpretation, as follows: “Monthly rent during the first option period ‘shall be at a market rate mutually agreed upon by Tenant and Landlord,’ but ‘shall not be higher than \$11.00 per square foot.’” (Br. of Aplee. 10.) Nowhere does the option provision state that monthly rent for the option period shall not be higher than \$11 per square foot. Rather, it states that “the Minimum Rent shall not be higher than \$11.00 per square foot.” (Emp. added.) The option provision expressly requires “mutual agreement” on two separate “market rates”: First, the “market rate” for the “Minimum Rent,” for which the option contains the \$11-maximum; and second, the “market rate” for the total rent, which was to be determined within 30 days after notice of exercise of the option. (Minimum rent + percentage rent = total rent.) Accordingly, the \$11-rate cited in the option is not the maximum total rent for the option period, but the maximum “Minimum Rent,” or base rent, for the period. The parties, and the court, are bound by the actual language of the option, not by Little Caesar's selective (and deceptive) misquotations of the language.

Little Caesar argues that a percentage rent component cannot apply during the option term because the percentage rent provisions in the initial Lease were deleted. (Br. of Aplee. 11-13.) However, the percentage rent section of the Lease (section 4.3) was marked “deleted” during the initial term only because “Percentage Rent” was set at

“zero” for the initial term. (See definition of “Percentage Rent,” Lease p. 1.) Section 4.3 was not literally removed from the Lease, and the “Percentage Rent” definition, which was not marked “deleted,” also remained part of the Lease for possible application during the renewal periods. “Zero” percentage rent is common during the initial term of a commercial lease because the parties have no record of what actual sales will be. With a record of sales established during the initial term, the parties can accurately set a percentage rent for subsequent terms. Accordingly, the fact that percentage rent was not applied during the initial term of the Lease does not preclude its application during the renewal periods. Little Caesar refers to no language in either the Lease or the option provision stating that rent during the option period will be the same as during the initial period, or that nonapplication of percentage rent for the initial term would necessarily carry over into the option period. Rather, the option rental is governed exclusively by the option provision, which clearly states that “Minimum Rent” and total rent will be set at “market rates” “mutually agreed upon” by the parties. Those “market rates” clearly contemplate, or at least permit, an agreed component for percentage rent.

B. Utah Case Law.

Little Caesar disputes the application of governing case law, which holds that a lease renewal option is unenforceable in the absence of an agreed rental, or other terms to fix the rental with “certainty and definiteness.” *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976). Little Caesar attempts to distinguish *Pingree* on

the basis that the tenant there refused to pay the \$900 “maximum total monthly rental,” *id.* at 1320, while Little Caesar here “has agreed to pay the maximum amount that Bell Canyon could require,” referring to the \$11-maximum “Minimum Rent.” (Br. of Aplee. 16.) However, as demonstrated above by the language of the option provision, the \$11 rate is only the maximum “Minimum Rent,” not the maximum total rent. Accordingly, *Pingree* is exactly on point and controlling here. Because the parties failed to agree on the “market rate” for total option rent, the option is void and unenforceable.

Little Caesar also attempts to distinguish *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357 (Utah App. 1998), which held a lease renewal option unenforceable because it required future agreement of the parties on the percentage rent component of total rent, and the parties never agreed. *Id.* at 362-64. Little Caesar asserts that the option in the present case is sufficiently definite without agreement because it provides for “Minimum Rent . . . at a market rate . . . [that] shall not be higher than \$11 per square foot.” (Br. of Aplee. 15.) However, again, Little Caesar is erroneously equating “Minimum Rent” with total rent. The stated cap of \$11 applies only to the “Minimum Rent,” which, by definition and common usage, allows for the additional component of percentage rent to obtain total rent. Both “Minimum Rent” and total rent were to be set at “market rates” “mutually agreed” to by the parties. In the absence of such agreement or more definite terms, the option is “too vague and indefinite for specific performance.” *Brown's Shoe Fit, supra*, at 365.

In summary, the plain language of the option requires mutual agreement on rental at market rates. No agreement was reached, and the option contains no mechanism for a court to impose a rental rate. Therefore, the option is unenforceable. *Pingree and Brown's Shoe Fit, supra*; *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (court cannot impose lease agreement when parties have “explicitly disagreed as to the essential terms thereof”).

POINT II: THE DISTRICT COURT ERRED IN RELYING ON THE WHITTLE AFFIDAVIT TO INTERPRET THE UNAMBIGUOUS OPTION PROVISION.

Little Caesar argues that the Whittle Affidavit was properly considered “to the extent that Bell Canyon’s arguments created any ambiguity” in the option provision. (Br. of Aplee. 17.) In other words, Little Caesar concedes that the affidavit is admissible only to resolve ambiguity. However, ambiguity cannot be “created” by the arguments of a party; rather, ambiguity must be determined as a matter of law from the four corners of the document. *See, e.g., Interwest Constr. v. Palmer*, 923 P.2d 1350, 1359 (Utah 1996). Here, Little Caesar has never argued that the option provision is ambiguous, and the district court made no determination of ambiguity. Therefore, any consideration of the Whittle Affidavit was improper. Moreover, Little Caesar’s argument that consideration of the affidavit is justified by ambiguity in the option provision amounts to a concession that the option lacks the “certainty and definiteness” to be enforced. The option cannot be both clear and ambiguous.

Little Caesar cites *In re General Determination of Rights*, 1999 UT 39, 982 P.2d 65, for the proposition that the district court has “broad discretion” in the admission of affidavits. (Br. of Aplee. 17.) However, that case did not deal with the parol evidence rule, but with challenges based on general rules of evidence. The parol evidence rule is not merely an exclusionary rule of evidence, but a substantive rule of law. *E.g.*, *Payne v. Buechler*, 628 P.2d 646, 649 (Mont. 1981); *Lower Kuskokwim Sch. Dist. v. Alaska Diversified Contr.*, 734 P.2d 62, 63 n.1 (Alas. 1987); *Gulotta v. Triano*, 608 P.2d 81, 82 (Ariz. App. 1980). Therefore, the district court has no discretion to disregard the parol evidence rule in making a legal interpretation of a written contract. *See Interwest Constr. v. Palmer*, *supra*, at 1358-59 (question of ambiguity and legal interpretation are reviewed for correctness); *Dixon v. Pro Image Inc.*, 1999 UT 89, ¶¶ 13-14, 987 P.2d 48, 52.

Finally, Little Caesar argues that extrinsic evidence is admissible to determine whether a contract is ambiguous, citing *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264 (Utah 1995). In that case, Justice Durham proposed a new framework for contract analysis that would significantly narrow the parol evidence rule by permitting consideration of extrinsic evidence in determining whether ambiguity exists. *Id.* at 268. Justices Russon and Zimmerman noted the clear departure from established law in their dissenting opinions. *Id.* at 269 (Russon, J., dissenting); *id.* at 271 (Zimmerman, J., dissenting). However, in its very next parol evidence case, *Interwest Constr. v. Palmer*, *supra*, the Supreme Court “clarified” and returned to its long-established parol evidence

standards, requiring ambiguity to be determined only from the “four corners of the contract,” with extrinsic evidence admissible only *after* a legal determination that ambiguity exists. 923 P.2d 1358-59. The *Palmer* decision was unanimous, with Justice Durham concurring. *Id.* at 1360. The Supreme Court has never again cited or relied on the standard proposed in *Ward*. Rather, the Court continues to follow the traditional, correct standard “clarified” in *Palmer*. See, e.g., *Dixon v. Pro Image Inc.*, *supra*, 987 P.2d at 52. Accordingly, the proposed *Ward* standard is an aberration in the case law that this Court should disregard.¹

In summary, the district court erred by admitting, and refusing to strike, the Whittle Affidavit. If the option provision is ambiguous, it necessarily lacks the requisite “certainty and definiteness” for specific enforcement. Accordingly, if the provision is deemed ambiguous, the correct decision is not to consider extrinsic evidence, but to hold the option void and unenforceable as a matter of law. See *Pingree and Brown’s Shoe Fit*, *supra*.

¹ Alternatively, *Ward* is distinguishable on the grounds that the affidavit presented there did not contradict the parties’ written agreement. 907 P.2d at 269. By contrast, the Whittle Affidavit does contradict the written option provision by asserting that the maximum total option rent was to be \$11 per square foot, with no application of percentage rent. (¶ 11.) Accordingly, the Whittle Affidavit is inadmissible even under the proposed *Ward* standard.

CONCLUSION

Based on the foregoing, this Court should reverse the order of summary judgment for Little Caesar and enter judgment for Bell Canyon on the grounds that the option provision is void and unenforceable. In addition, the Court should reverse the award of attorney fees to Little Caesar and award attorney fees for both trial and appeal to Bell Canyon as the prevailing party under the attorney fee provision of the Lease.

Respectfully submitted this 29th day of June, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Reply Brief of Appellant** to be mailed through United States mail, postage prepaid, this 29th day of June, 2000, to the following:

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