Case No. 04-91482-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

THE BOOK OF ACTS CHURCH,

Plaintiff/Appellant

-vs-

DR. A.G. JONES dba MACEDONIA MISSIONARY BAPTIST CHURCH

Defendant/Appellee,

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Joseph Kisner
Judge of the District Court
District Court Case No. 01 L 25453

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I.
NATURE OF THE ACTION

This is a direct appeal to the Kansas Court of Appeals following the denial of the Plaintiff's request for eviction and damages against defendant and judgment in favor of Defendant's counterclaim. Said decision came from an action under Chapter 61 of the Kansas Statutes Annotated.

II.

ISSUES ON APPEAL

A. THE DISTRICT COURT ERRED BY FINDING THE TERMS OF THE LEASE AGREEMENT REGARDING FORFEITURE TO BE INVALID.

B. THE DISTRICT COURT ERRED BY FAILING TO FIND THE APPELLANT'S RELOCATED SO AS TO GIVE EFFECT TO THE FORFEITURE CLAUSE.

C. THE DEFENDANT, BY ITS ACTION THROUGH THE COURTS, WAS RESPONSIBLE FOR RENTS DUE AND OWING THROUGH THE END OF THE COURT PROCEEDINGS.

III.

FACTS OF THE CASE

On March 30, 1999, the Plaintiff, the Book of Acts Church, by and through Pastor Janice Martin, and the Defendant, Dr. A.G. Jones, signed an Agreement to Sell Real Estate (See Attachment1). The property to be sold was the building and land at 1144 S. Main, Wichita, KS 67213. The Agreement to Sell Real Estate included and incorporated an attachment. This attachment recited the terms and conditions of a lease agreement between the parties. As part of the sale, the Plaintiff agreed to lease a portion of the premises to the Defendant. The terms were such that the Plaintiff would deduct an amount of $900.00 per month as rent for five years from the $54,000.00 in equity held in the property by the Defendant. (R. I, 35).

The contract held that if the Defendant relocated prior to the end of the contract, all equity would be forfeited to the Plaintiff. Per the contract, the Defendant was also responsible for all repairs to the premises which the Defendant was using and occupying. Id.

Within a year, the furnaces in the south side of the building, which was being used by Defendant, was taken out of service as unusable. (R. V, 36-37). Defendant did not have the furnace fixed.

Over a two year period, no less than ten notices to fix were requested both verbally and in writing to the Defendant requesting that he fix the furnace. (R. V, 63). In

fact, in 2000, because of the neglect of the Defendant, the south side of the building was so cold that the pipes froze and burst. (R. V 41-42).

Despite the fact that Defendant on several occasions acknowledged his duty to repair and acknowledged that he would take care of the repairs, he did not do so. (R. V 38 and R. III, 139-142).

The Defendant testified that, because of the disrepair of the furnace, his space in the building was too cold to use in the winter and was too hot to use in the summer. He admitted that he would leave the premises during these times. He also testified that he had left the premises in November of 2001 because of the cold. (R. III, 46).

In November 2001, the Plaintiff had a sheriff's notice of eviction attached to the entryway of the Defendant to the building. The Defendant was allowed to access the building and remove his property. (R. III 147-148).

On December 11, 2001, the Plaintiff filed a Petition for Eviction. The Plaintiff requested full possession of the premises and $4,800.00 in damages based upon the costs to repair the furnaces and the cost to repair the burst pipes. (R. I, 18-20).

On December 21, 2001, the district court, based upon the failure of the Defendant to respond or appear on the matter, granted a default judgment in favor of the Plaintiff on the eviction petition. (R. I, 21-22).

On December 31, 2001, Defendant filed a Motion to Set Aside Journal Entry of Default Judgment. (R. I, 23-24). On January 4, 2002, the Defendant's motion was granted. (R. I, 27).

In its answer, the Defendant filed a counterclaim for damages based upon the equity lost by the Defendant based upon his removal from the premises. (R. I, 28-31).

Following a bench trial, the district court held that the doctrine of merger did not apply and that the transfer of deed in March 2001, did not relieve the Plaintiff of its obligations under the lease agreement. (R. II, 3).

The district court did find that the Defendant was responsible for the repair of the downstairs furnace and awarded damages for the cost of repair and for the cost of repair related to the burst pipes. Id. at 3-5.

The district court held that the Defendant did not relocate under the terms of the lease agreement, rather, that the defendant was evicted from the premises. The district court also held that the law abhors a forfeiture. As such, the court awarded the Defendant the balance of the equity remaining for the 28 months of the contract that remained after the Notice of Eviction in November 2001. The total amount of damages granted was $25,200.00. Id., 5-6. The court also ordered the return of personal property of the Defendant as such might still be contained on the premises. Id. 7-8.

The Plaintiff filed a timely Notice of Appeal and this brief follows.

A. THE DISTRICT COURT ERRED BY FINDING THE TERMS OF THE LEASE AGREEMENT REGARDING FORFEITURE TO BE INVALID.

1. Standard of Review

"Because Ho raises an issue regarding the interpretation of a written instrument, this court's review is unlimited. See Mark Twain Kansas City Bank v. Cates, 248 Kan. 700, 704, 810 P.2d 1154 (1991). When interpreting a written instrument, the primary rule is to ascertain the intent of the parties. Marquis v. State Farm Fire & Cas. Co., 265 Kan. 317, 324, 961 P.2d 1213 (1998). 'As a general rule, if the language of the written instrument is clear, there is no room for rules of construction.'" 265 Kan. at 324, 961

P.2d 1213. IPC Retail Properties, L.L.C. v. Oriental Gardens, Inc., 32 Kan.App.2d 554 (2004).

Thus, the standard of review by this court is unlimited. This Court must examine the document to determine the intent of the parties and to give it its proper meaning, value and interpretation.

2. The Terms of the Lease Agreement were plain and unambiguous.

The lease agreement stated in the relevant parts: "In the event that the Seller chooses to relocate before 5 years have expired, the remaining balance of the credit (on the $54,000) will be forfeited and no money will be owed to them." Later in the document, it states very plainly that the Seller will be responsible for all necessary repairs to areas that they are utilizing.

These terms and conditions were made a part of the agreement between the parties. Both parties had the opportunity to review the document. In testimony, Reverend Martin testified that she believed Dr. Jones was going to provide the documentation necessary for the sale and lease of the property. It was only when they met to take care of the sale that she learned that Dr. Jones had prepared no contract. Reverend Martin then went to Office Depot and purchased a lease agreement contract form and constructed the agreement as presented. Dr. Jones had the opportunity to create the document. He chose not to do so. Reverend Martin, a non-lawyer, used a form purchased at an office supply store and provided the contract. (R. V, 28-29). Dr. Jones had the opportunity to have the document reviewed by counsel if he wished. He chose not to.

There is no claim by the Defendant that he did not understand the terms of the

contract. There is no claim by the Defendant that the terms of the contract were ambiguous. There was no evidence presented that showed the terms of the agreement to be in controversy nor that there was any misunderstanding about the terms of the agreement.

Thus, it was error for the trial court to find that the language of the document was unclear and to rule in favor of the Defendant on that basis.

3. The district court erred by holding the terms of the contract to be read against the scrivener.

"Now, as to the counterclaim, the Court specifically looked again at page three of Exhibit 3, and in that item one, the latter part of that language, which talks about the respondent choosing to relocate, the language in that document, if it were unclear, or if the interpretation is unclear, is according to Kansas law read against the scrivener..." (R. II, 5-6).

> "It is a point of some importance that the written lease was prepared by appellees and not by an attorney. While the general rule is that written instruments are construed against the scrivener, it is not always the case where a layman drafts a multiple-page contract. 'Greater latitude is allowed in construing an instrument which is prepared by a draftsman who is a layman, or unskilled, than in a case in which the instrument is prepared by a skillful draftsman. [Citation omitted.]'" Springer v. Litsey, 185 Kan. 531, 535, 345 P.2d 669 (1959). T.R. Inc. of Ashland v. Brandon, 87 P.3d 331, 336 (Kan.App. 2004).

Here, the document used was purchased at an office supply store. Reverend Martin prepared the document only after Dr. Jones failed to provide any contract or paperwork. It was improper for the district court to automatically read the contract against the Book of Acts Church. The terms of the contract were clear. The parties were aware of what the consequences would be to the relocation of the Defendant. This was a

bargained for exchange in that Dr. Jones was utilizing his equity in the building to offset his rent and it was clear that he would forfeit said equity if he chose to move from the site.

"'Additionally, if a written instrument has clear language and can be carried out as written, the rules of construction are not necessary." Decatur County Feed Yard, Inc. v. Fahey, 266 Kan. 999, 1005, 974 P.2d 569 (1999). It was not necessary for the district court to interpret the contract against the Plaintiff. There were no ambiguous terms and the contract should have been given full effect.

"When a contract is not ambiguous, the court may not make another contract for the parties. Its function is to enforce the contract as made." Lauck Oil Co. v. Breitenbach, 20 Kan.App.2d 877, 879 (1995).

The actions of the district court discounted and excluded these terms as unfair and interpreted them against the scrivener. This altered the terms of a valid contract and was error.

4. The district court erred by finding that the terms of the contract were unfair.

The district court held: "The terms as set out in item one, page three of Exhibit 3, are severe, one-sided, and must be read strictly by the Court against the petitioner." (R. II, 6).

> "In private contracts, exculpatory clauses are upheld unless the agreement is contrary to public policy or is illegal. Corral v. Rollins Protective Services Co., 240 Kan. 678, 681, 732 P.2d 1260 (1987). Thus, in Corral, an exculpatory clause in a fire alarm installation/maintenance agreement was enforced in the absence of any indication the plaintiff could not understand the terms of the contract or was at a business disadvantage. 240 Kan. at 683-84, 732 P.2d 1260. Similarly, in Talley v. Skelly Oil Co., 199 Kan. 767, 433 P.2d 425 (1967), an exculpatory clause in a commercial lease was upheld where the clause neither violated a Kansas statute nor was contrary to public policy. Anderson v. Union Pacific R. Co., 14 Kan.App.2d 342, 345 (1990).

The terms of the contract were not unambiguous. The terms of the contract were negotiated between the parties. This was a private agreement. The court is not supposed to rewrite the contract. The terms of the contract relating to a forfeiture of equity if the Macedonia Church moved out was not contrary to Kansas law. The terms of the contract did not violate public policy. The district court made no such finding. There was no evidence presented that the contract was violative of public policy nor of Kansas law.

The district court's finding was improper and erroneous.

Long standing case law supports the fact that parties can contract for forfeiture as part of a lease agreement.

"Although the law abhors forfeitures, '[t]he law does not abhor the fulfilling of contracts where the parties have bound themselves to certain definite requirements or the loss of the lease in unambiguous terms.' Hinshaw v. Smith, 131 Kan. 351, 357, 291 P.

774 (1930)." City of Manhattan v. Galbraith, 24 Kan.App.2d 327, 333 (1997).

The instant case involves a valid contract with terms agreed upon by the parties. The forfeiture clause is plain and unambiguous. It is not unconscionable.

Although the district court did not make a specific finding of unconscionability of the terms of the contract, it seemed to be implied by the language of the ruling. However:

> "In Squires v. Woodbury, 5 Kan.App.2d 596, 621 P.2d 443, rev. denied 229 Kan. 671 (1981), this court was presented with a case which also concerned the reformation of the terms of a written lease. Although the issue of unconscionability was not specifically dealt with, this court did state:
> 'The general rule is that competent parties may make contracts on their own terms, provided such contracts are neither illegal nor contrary to public policy, and in the absence of fraud, mistake or duress, a party who has entered into such a contract is bound thereby.' Squires v. Woodbury, 5 Kan.App. at 598, 621 P.2d 443.
> We find that the general rule as stated in Squires is properly applicable to the present case, and therefore the trial court's decision is reversed. To find otherwise would allow the trial court to unjustifiedly rewrite the parties' lease." Link's Estate v. Wirts, 7 Kan.App.2d 186, 191, 33 UCC Rep.Serv. 833 (1982).

In the instant case, the district court placed itself in the position of invalidating the terms of the contract and then rewriting the terms of a valid contract which was entered into by both parties without fraud, mistake or duress. The district court did not make any findings that the terms of the contract were in violation of Kansas law or public policy. The district court erred by creating a different contract for the parties than the one they entered into with their eyes wide open.

Dr. Jones and Reverend Martin both testified that Dr. Jones had an opportunity to review the contract. As Reverend Martin testified: "When I showed up, I had the contract. He asked me if I had it. I showed it to him. He sat there, and he read it first.

Then he signed it. Well, he didn't sign it then. He sat there and read it first. Then he said he was ready to sign it but we did not sign it then." (R. V, 28-29). "We went to the bank before a notary and signed it (the lease agreement), and, you know, she looked and asked us both if we had read it and everything. And he said yes, and he looked at it again and he signed it, and I signed it and I gave him the cashier's check, $10,000." (R. V, 29).

Thus, Dr. Jones reviewed the contract two separate times before executing the document. He further admitted to the notary that he had reviewed the document. Dr. Jones knew the terms of the contract, the duties that were placed upon him by the contract and the potential penalty for failing to meet the terms of the contract.

> It has been held that one who signs a written instrument is bound by its terms, in the absence of fraud, undue influence or mutual mistake as to its contents, regardless of the person's failure to read and understand its terms. Washington v. Claassen, 218 Kan. 577, Syl. P 2, 545 P.2d 387 (1976). Our cases have recognized that a contracting party is under a duty to learn the contents of a written contract before signing it (Sutherland v. Sutherland, 187 Kan. 599, 610, 358 P.2d 776 (1961)), and if a person cannot read an instrument it is as much a duty to procure some reliable person to read and explain it before it is signed as it would be to read it before signing, if able to do so. Maltby v. Sumner, 169 Kan. 417, Syl. P 5, 219 P.2d 395 (1950). Squires v. Woodbury, 5 Kan.App.2d 596, 598-599 (1980).

The terms of the contract were plain and unambiguous. Dr. Jones knowingly entered into a contract that held him responsible for the repair of his side of his building and its contents and he knew full well that the forfeiture clause was included in the contract in the event he relocated.

The contract should have been enforced as valid by the district court and it was error to hold that the contract was unfair or unenforceable.

B. THE DISTRICT COURT ERRED BY FAILING TO FIND THE APPELLANT'S RELOCATED SO AS TO GIVE EFFECT TO THE FORFEITURE CLAUSE.

1. Standard of Review.

"Where the trial court has made findings of fact and conclusions of law, the function of this court on appeal is to determine whether the factual findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. 'Substantial evidence' is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. Tucker v. Hugoton Energy Corp., 253 Kan. 373, 377, 855 P.2d 929 (1993).

This Court must determine whether the findings of the district court were supported by substantial competent evidence.

2. Dr. Jones abandoned the property.

In trial and in deposition, Dr. Jones admitted that he stopped going to the building. He stated that because the furnace didn't work, it was too cold in the winter and too hot in the summer to hold services. (R. I, 37 and V, 36).

In fact, there was no evidence that services were even being held by the church at that building. There was substantial evidence that Dr. Jones stopped going to the premises completely.

This was a de facto abandonment of the property.

Further, Dr. Jones had the ability to maintain his space in this building. He was advised in writing no less than five times that he needed to fix the furnace that serviced the space he was utilizing. The terms of the contract are clear and unambiguous in that Dr. Jones, the Defendant, was responsible for all repairs to his area.

If the space was unusable, it was because Dr. Jones created the situation. Dr.

Jones, per the testimony of several witnesses, stated that he recognized his obligation and would repair the furnace. This never happened. Instead, Dr. Jones left the property in disrepair and caused even more damage because of the freezing pipes. Even then, Dr. Jones refused to make the necessary repairs.

Dr. Jones forced his own relocation by making his premises unusable.

The willfulness of Dr. Jones actions is further supported by the fact that he was the original owner of the building and knew about the condition of the building and its contents. Further, Dr. Jones testified that the furnace in question had long had a gas leak and he knew it was dangerous but he continued to use it at risk to the safety of all those in the building. (R. III, 62).

The district court made some contradictory findings related to this matter. First, the court found that Dr. Jones was responsible for the repair to the downstairs furnace and that he was responsible for the costs of the repair to the furnace and for the repairs that were caused by the broken water pipe which froze because of the broken furnace. (R. 4-5).

However, later, when discussing the counterclaim and the issue of forfeiture, the trial court stated: "The cases the Court looked at, the language included that the law abhors forfeitures, and the remedy claimed by the plaintiff that the respondent forfeit $25,200.00 in equity because he refused or failed to fulfill somewhat legally questionable obligation to have these furnaces repaired would not, in the Court's mind, be reasonable or equitable." (R. II, 6).

The district court just got done finding Dr. Jones liable for a $2,923.45 judgment against Dr. Jones because "[E]vidence supports the fact that the respondent was

responsible for repair of the heating unit on the ground level and the failure to make that timely repair caused the plumbing bill." (R. II, 5).

How was this previous finding, based upon the evidence, a "legally questionable obligation?" How was this not a material breach of the contract? Especially in light of the fact that numerous notices were given to the respondent about his duty and that he must fix the furnace or be removed.

Dr. Jones made a choice. He could fix the furnace and stay on the premises or he could ignore the harm and damage he was causing to the rest of the building, which he no longer owned, and cause his own forcible removal.

Dr. Martin testified that she would have allowed Dr. Jones to stay if he had just fulfilled his obligations. And Dr. Jones admitted it was his obligation. And Dr. Jones admitted he took no action to fix the furnace. And Dr. Jones admitted he had a duty to repair the furnace. And Dr. Jones was aware that if his church relocated, he would forfeit all of the remaining rent/equity as part of his contract.

And Dr. Jones chose to be relocated. And Dr. Jones did relocate. And Dr. Jones forfeited his equity as past rent due because of the choices he made.

C. THE DEFENDANT, BY ITS ACTION THROUGH THE COURTS, WAS RESPONSIBLE FOR RENTS DUE AND OWING THROUGH THE END OF THE COURT PROCEEDINGS.

The Defendant argued the Plaintiff had a duty to mitigate damages and, therefore, the Defendant had a right to receive all of the lost equity that had been taken under the forfeiture.

However, the facts of this case can be interpreted to show that the alleged eviction

of Defendant was invalid and that Defendant was, by his own actions, responsible for either occupying the premises and/or paying rent as per the original agreement.

On December 11, 2001, Plaintiff filed a Petition for Eviction. Ten days later, after no appearance nor answer by Defendant, a default judgment was entered by the court, granting the eviction and granting damages.

On December 31, 2001, Defendant filed a Motion to Set Aside Journal Entry of Default Judgment. On January 4, 2002, the Defendant's motion was granted.

As such, not only was the claim for damages reversed but the eviction was invalidated as well. This means that the terms and conditions of the lease agreement were still in effect. While the Defendant did not plead for a return to the premises, the practical effect of the action of the Defendant was to reinstate the terms and conditions of the lease agreement and would have, if he had chosen to, allowed him to occupy the premises once again.

Because of the actions of the Defendant, the Plaintiff was unable to rerent the space previously occupied by the Defendant. The Plaintiff was, by the actions of the Defendant, unable to take any action to mitigate damages. And it was thereby the fault of the Defendant that the premises lay fallow during and through the pendency of the action and the end of the lease agreement in March of 2004.

> "The rule in Kansas regarding a landlord's duty to mitigate was recently stated in Lindsley v. Forum Restaurants, Inc., 3 Kan.App.2d 489, Syl. P 3, 596 P.2d 1250, rev. denied 226 Kan. 792 (1979): "Where a tenant, under contract to pay rent on real property, abandons the property and notifies the landlord of that abandonment, it is the landlord's duty to make a reasonable effort to secure a new tenant and obtain rent before he can recover from the old tenant under the contract so as to lessen the injury. Following Gordon, Executor v. Consolidated Sun Ray, Inc., 195 Kan. 341, Syl. P 3, 404 P.2d 949 (1965)."

> Since the duty to mitigate does not begin until tenant abandons the property and notifies the landlord of that abandonment, the issue is whether there is any evidence before the October notification of the tenant's abandonment." Wichita Properties v. Lanternman, 6 Kan.App.2d 656, 658-659 (1981).

Therefore, no monies are due and owing to the Defendant because they took all actions necessary to retrieve and inhabit the premises again. In fact, the action of the Defendant specifically showed that there was no abandonment of the rights and interest in the lease and the premises.

The finding of the district court that the Defendant did not relocate but was evicted by the Plaintiff is in error. The eviction was attempted by the plaintiff and the action was overturned by the district court at the behest of the Defendant. The documents of the record clearly show that eviction was attempted then revoked by the Defendant.

Finally, evidence of a failure to mitigate lies upon the party who asserts it. "In this case, L.A.G. had the burden to prove that Plaza failed to exercise reasonable efforts to mitigate damages. See Kelty v. Best Cabs, Inc., 206 Kan. 654, 659 481 P.2d 980 (1971); Rockey v. Bacon, 205 Kan. 578, Syl. ¶ 6, 470 P.2d 804 (1970) ("Mitigation of damages is an affirmative defense and the burden of proving a failure to mitigate losses devolves upon the party who asserts it."); Lindsley, 3 Kan.App.2d at 492, 596 P.2d 1250." Leavenworth Plaza Associates, L.P. v. L.A.G. Enterprises, 28 Kan.App.2d 269, 272 (2000).

In the instant case, there was no evidence presented by the Defendant that there was a failure to mitigate damages. This is especially true in light of the fact that the

Defendant rebuffed the eviction and sued and won to have the eviction overturned.

The district court erred in finding there was no mitigation of damages by the Plaintiff as there was no evidence to support the finding. This matter should be overturned and remanded for further proceedings under the appropriate standards.

D. CONCLUSION.

The Defendant, by and through Dr. Jones, entered into a contract. A very plain and unambiguous contract. A contract that Dr. Jones was able to read and review before he signed it. He knew that if he left, he would lose his equity. He knew that he was responsible for the repairs to his space on the premises.

And with all of this knowledge, Dr. Jones chose to abandon the premises. He chose to consistently refuse repairs that caused damage and cost money to the Plaintiff. Then, after he left and abandoned the property, he chose to repudiate the eviction and chose to not reenter and occupy the premises.

The Defendant made knowing choices. And by those choices, he gave up his claim to the equity in the property and he gave up his right to claim any damages. And the district court erred in making findings in favor of the Defendant.

This matter should be reversed and remanded with instructions granting judgement in favor of the Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that five (5) true and correct copies of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

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this 13th of September, 2004.

_____
Michael P. Whalen