IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01373 COA

ROBERT A. BENNETT AND WIFE, MARY ALICE BENNETT

APPELLANTS

v.

SAWYER REAL ESTATE, INC. OF MISSISSIPPI, LENWOOD S. SAWYER, JR., REAL ESTATE BROKER AND WAFFLE HOUSE, INC., A GEORGIA CORPORATION

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JASON H. FLOYD, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

MICHAEL T. DAWKINS

ATTORNEYS FOR APPELLEES:

VIRGIL B. GILLESPIE AND ROBERT P. MYERS, JR.

NATURE OF THE CASE: CIVIL: CONTRACT FOR THE LEASE OF LAND

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT ENTERED FAVORING WAFFLE HOUSE, INC. JUDGMENT FOR SAWYER IN THE AMOUNT OF $ 3,830.97

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Robert Bennett and Mary Alice Bennett appeal judgments entered in the Chancery Court of Harrison County. The judgments awarded Sawyer Real Estate, Inc. and Lenwood S. Sawyer, a six percent commission on all renewal rentals received by the Bennetts and granted summary judgment to Waffle House, Inc. We find that the trial court erred by granting Waffle House's motion for summary judgment and by awarding Sawyer damages. Therefore, we reverse the judgments.

FACTS

In 1974, the Bennetts and Waffle House, Inc. entered into a lease agreement. The lease provided that Waffle House, Inc. would lease from the Bennetts certain property in Biloxi Mississippi for the construction and operation of a standard Waffle House restaurant for a term of fifteen years. The lease could be renewed seven times for five-year periods at the option of Waffle House. Monthly rentals during the primary term of the lease were $550.00. After expiration of the primary term, monthly rentals during the renewal periods were to be determined by adding to the base monthly rental of $550.00 a cost of living adjustment, which was based upon increases in the Consumer Price Index. The Bennetts designated Sawyer as their agent for receipt of the rental payments. Because Lenwood Sawyer, Jr., broker and president of Sawyer Real Estate, Inc. was instrumental in procuring the lease agreement, Sawyer received a commission in the amount of

$33.00 each month from Waffle House.

In December of 1989, the primary lease expired, and Waffle House chose to exercise the first of the lease agreement's seven renewal options. Waffle House computed the monthly rental due according to the terms of the lease and forwarded to Sawyer a draft in the amount of $ 1,358.50 for the December rent. Prior to receipt of the December rental payment, the Bennetts had advised Sawyer not to accept any additional rental payments exclusive of the November rental. Purusant to the instructions received from the Bennetts, Sawyer returned the December rental payment to Waffle House. Waffle House refused to accept return of the draft and consequently, sent the draft back to Sawyer. Thereafter, Waffle House forwarded payment of the January rental to Sawyer.

After receipt of the January rental payment, Sawyer filed a complaint naming the Bennetts and Waffle House as defendants. The complaint requested that the court interplead the funds and determine the parties entitlements. In addition, Sawyer asked that the court declare his entitlement to a six percent real estate commission on all monthly rentals paid under the lease, including the renewal rentals.

The court granted Waffle House's motion for summary judgment. The court also determined that the rental due during the first renewal period was $ 1,358.50 per month and ordered disbursement of the interpled funds to the Bennetts. Because the court determined that an implied contract existed between the Bennetts and Sawyer, an order directing that six percent of the interpled funds be paid to Sawyer was entered. The order also directed the Bennetts to pay unto Sawyer six percent of all future rentals received.

ANALYSIS OF THE ISSUES AND LAW

I.

DID THE TRIAL COURT ERR IN

The Bennetts contend that the chancellor erred in granting Waffle House's motion for summary judgment because the lease agreement contained material ambiguities, which raise genuine issues of material fact regarding Waffle House's liability for violation of the lease agreement. When we are asked to review a lower court's grant of summary judgment, we employ a de novo standard of review. *Seymour v. Brunswick Corp.,* 655 So. 2d 892, 894 (Miss. 1995) (citing *Short v. Columbus Rubber & Gasket Co.,* 535 So. 2d 61, 63 (Miss. 1988)). In applying the standard, we review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. *Seymour Brunswick,* 655 So. 2d at 894. The evidence is viewed in the light most favorable to the the nonmoving parties, and they are given the benefit of every reasonable doubt. *Mississippi Ins. Guar. Ass'n v. Harkins & Co.,* 652 So. 2d 732, 735 (Miss. 1995). Summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Id.* To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule. *Baptiste v. Jitney Jungle Stores of Am.,* 651 So. 2d 1063, 1065 (Miss. 1995) (citing *Lyle v. Mladinich,* 584 So. 2d 397, 398 (Miss. 1991)).

In response to Waffle House's motion for summary judgment, Robert Bennett filed an affidavit which contained the following affirmations:

> (4) All of our negotiations prior to signing the Lease, was based on the premise that Waffle House was going to erect a "Standard Waffle House" with limited seating capacity (see Ex. "A" . . .).
>
> (5) During the term of the initial lease, Waffle House expanded the original building, and the expansion violated the lease and the set back requirements.
>
> (7)The lease granted Waffle House the use of a parcel of land 80' x 300' and the use of an additional 25' as a drive, but since the start of the lease Waffle House has used 145' x 300' without payment therefor.

Bennett's affidavit raised a genuine issue of material fact--whether Waffle House's expansion of the building and use of the premises violated the terms of the lease agreement. In granting Waffle House's motion for summary judgment, the court concluded that Waffle House's expansion of the building and use of the premises did not violate the terms of the lease agreement. A court may not try issues on a Rule 56 motion; it may only determine whether there are issues to be tried. *Seymour,* 655 So. 2d at 894. Because a factual dispute concerning Waffle House's violation of the lease agreement remains to be tried, we find that the trial court erred in awarding Waffle House's motion for summary judgment. Therefore, we reverse and remand the case for trial.

II.

DID THE TRIAL COURT ERR IN FINDING THAT SAWYER WAS ENTITLED TO A RENEWAL COMMISSION BASED ON IMPLIED CONTRACT PRINCIPLES?

The Bennetts contend that the chancellor was manifestly wrong in finding that Sawyer was entitled to a commission on the renewals because of an implied contract. We agree. In *Carmichael v. Agur Realty Co.*, the Mississippi Supreme Court determined that an implied contract lies between broker and principal when the broker provides "substantial services to his principal--be he seller or buyer--which services become a substantial causal predicate to a consummated sale." *Carmichael v. Agur Realty Co.,* 574 So. 2d 603, 609 (Miss. 1990). In the instant case, it is undisputed that Sawyer was instrumental in procuring the initial lease between Waffle House and the Bennetts. However, we find nothing in the record which suggests that Sawyer was instrumental in procuring the renewal of the lease. Although Sawyer procured the lease containing the renewal options, we are reluctant to find that Sawyer's procurement of the lease effectuated the renewal. The lease was automatically renewed when Waffle House failed to provide the Bennetts with notice of an intent not to exercise the option in accordance with the terms of the lease. Therefore, we find that the court was manifestly wrong in determining that the Bennetts were obligated to pay Sawyer a six percent commission on the renewal rentals. Accordingly, we reverse the judgment.

THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE APPELLEES.

BRIDGES, PJ., BARBER, COLEMAN AND DIAZ, JJ., CONCUR.

SOUTHWICK, J., DISSENTS WITH SEPARATE OPINION JOINED BY FRAISER, C.J., MCMILLIN, AND PAYNE, JJ.,

THOMAS, P.J., NOT PARTICIPATING.

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SOUTHWICK, J., dissenting

This is an appeal from two judgments of the Chancery Court of Harrison County. The first was entered in 1991 and was a grant of summary judgment to Waffle House, Inc., finding its lease to be in effect and properly renewed. The trial court dismissed Waffle House from the suit. Bennett moved to have the rent payments made to him instead of into the registry of the court, and this was ordered. *See Taylor v. Morris*, 609 So. 2d 405, 407-09 (Miss. 1992). The second judgment came after a bench trial in 1993. The realtor, Sawyer, was held entitled to a commission on all rental payments, and not just those from the original fifteen-year term of the lease. The notice of appeal was only from the 1993 judgment regarding Sawyer's claim. After Waffle House moved to dismiss the appeal as to them, the supreme court found substantial if not technical compliance with the appellate rules and refused to dismiss. We should affirm the lower court's judgment.

The Bennetts seek a declaratory judgment that the 1974 lease is now null and void due to breaches by Waffle House. The first alleged breach concerns Waffle House extending one wall out two feet in order to enclose space beneath the original roof line, thereby creating additional seating. This apparently occurred in 1976. The Bennetts characterized that addition as a breach when the lease came up for renewal in 1989. Between the statute of limitations for breach of contract, or the doctrine of laches, that question would appear moot by 1989. Laches, waiver, and estoppel were pled as affirmative defenses. The chancellor in 1991 found the addition to the Waffle House to have been permitted under the lease and did not rule on the affirmative defenses.

The record provides few details of the facts relating to the addition. The only reference to the addition's construction in 1976 appears in an affidavit filed in a collateral matter two years after Waffle House was dismissed from the suit. In a deposition taken after summary judgment for Waffle House but before judgment for Sawyer, there is a reference to litigation in the mid-1970's concerning the addition. The result of a trial that apparently occurred is not stated.

The record might not have been so barren if the requests for admissions, interrogatories, and requests for production of documents had been included. The chancellor said that he was partially relying upon them in order to grant Waffle House summary judgment. Waffle House attempted to

supplement the appellate record to include these matters, but the supreme court denied the motion. A review of Waffle House's appellate motion suggests the discovery was never answered, and if that is accurate, then there was not much benefit to having them in the record.

What we are then left with for reviewing the summary judgment for Waffle House is the lease itself, an affidavit from Michael Upton for Waffle House, and an affidavit from Robert Bennett for himself and his wife. There are actually two questions here. The first is whether the small addition was permitted under the lease, and the second is whether the remedy of lease cancellation is available if the addition is a breach. The lease stated that the lessee will "erect at Lessee's expense, a standard Waffle House. . . ." That is the only possible contractual limitation on the right of the company to enlarge the restaurant. The problem is that nothing in the lease indicates the meaning of "standard Waffle House."

We should initially be guided by general principles of lease interpretation. A lessee is permitted to use the leased property in any manner that does not violate the lease or law. *Ewing v. Adams,* 573 So. 2d 1364, 1368 (Miss. 1990). The result of that principle is that any alleged restriction on use is "construed narrowly against the landlord." *Ewing,* 573 So. 2d at 1368 (quoting *Forman v. United States,* 767 F.2d 875, 880 (D.C. Cir. 1985)).

The case law has sanctioned much more significant variations from the purpose language in leases than exist here: *e.g.*, a lease to the federal government of land "for postal purposes" did not prevent subleases for realtor, attorney, and secretarial service offices, *Forman v. United States,* 767 F. 2d 875, 880-81 (D.C. Cir. 1985), cited and quoted in *Ewing,* 573 So. 2d at 1368; restriction on use to pasturage did not prevent land from being cleared and used for farming, *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*, 281 So. 2d 683, 686-87 (Miss. 1973) (issue of waiver also present); lease for a drive-in theater did not prevent use for other similar purposes that did not injure the lessor's rights, *Ewing,* 573 So. 2d at 1368-69.

For the phrase "standard Waffle House" to operate as a meaningful restriction it would have had to be expressed in terms sufficient for it to be understood, and that it was meant as a restriction on use. Here, the phrase appears in the context of what the lessee was to construct, not as an express statement that this was the only use to which the property could be put. In the related area of restrictive covenants, the supreme court has required that a restriction be expressed in unambiguous terms. *Kinchen v. Layton,* 457 So. 2d 343, 345 (Miss. 1984). The same requirement operates here. An option agreement to lease a part of a building excepted "the west half thereof to be retained by [the lessor] as a grocery store." *Jolly v. Watkins,* 251 Miss. 598, 171 So. 2d 155, 155 (1965). The court held that the language in the option, not carried forward into the lease, could not constitute a restriction requiring use as a grocery. Moreover, even had the language been in the lease, it was not definite enough to be an enforceable restriction on use. *Jolly,* 171 So. 2d at 156.

This lease language is not clear as to what a "standard" restaurant was nor even that the provision was a use restriction. Without a "clear and specific indication that the landlord intended to limit the tenant's use of the property" in the way alleged here, I would hold as a matter of law that Waffle House's enclosure of a two foot wide overhang that was part of the original structure does not violate an enforceable use restriction. If a use restriction is not clear, it is not enforceable. This point was properly resolved on summary judgment and should be affirmed by this court.

However, even if the addition were a breach of the lease, cancellation is not an available remedy -- and that is the only remedy the Bennetts sought below and all they argue here. All violations of contracts do not lead to the right to terminate. Damages are often the sole remedy. For example, if Waffle House had put up a sign that was not permitted under the lease, are the Bennetts entitled to cancellation? I suggest they would instead be entitled to have the sign removed, or damages imposed.

The first place to turn in the analysis of available remedies is the lease itself. In the lease various grounds for cancellation are set out, but all deal with failure to pay rent. Since the lease does not provide for cancellation on the grounds asserted in this suit, we should next turn to general legal principles on remedies to determine the viability of the Bennett's claim.

One usually emphatic but not always accurate authority states:

> The general rule is that a breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages.

49 Am. Jur. 2d *Landlord & Tenant* § 1020 (1970). While I find no precedent whereby the supreme court applied this principle in the context of a lease agreement, it is consistent with Mississippi law concerning other types of contracts. Mississippi law disfavors forfeitures in contracts and requires prompt action by the party seeking forfeiture upon the occurrence of a breach. *See Christiansen v. Griffin*, 398 So. 2d 213, 215 (Miss. 1981) (citation omitted); *Denkmann Lumber Co. v. Morgan*, 219 Miss. 692, 709, 69 So. 2d 802, 810 (1954). Consequently, when a contract does not declare a certain kind of breach to be one that results in termination of the contract, this Court should refuse to write such a provision into the agreement. *Travelers Indem. Co. v. Chappell*, 246 So. 2d 498, 510 (Miss. 1971) (citation omitted); *see Roberts v. Grisham*, 487 So. 2d 836, 838 (Miss. 1986).

Unless the contract provides otherwise, rescission is permitted only when the breach is so material and substantial as to defeat the objects of the parties in making the contract. *Cenac v. Murry*, 609 So. 2d 1257, 1273-74 (Miss. 1992) (citations omitted). Even then, the aggrieved party must elect to sue for damages or to rescind the contract, but not both. *See Bryan Constr. Co. v. Thad Ryan Cadillac, Inc.*, 300 So. 2d 444, 446-47 (Miss. 1974) (citations omitted). However, in circumstances where the breach is not material and substantial, the sole remedy is a suit for damages. *See Cenac*, 609 So. 2d at 1274.

If the addition had been a violation of the lease, the Bennetts could have sued for damages or sought to have the offending addition removed. Seeking to make this alleged breach a basis for a rescission claim, the Bennetts argue that had they known a few more customers could be seated, they would have charged more rent. That is not a material breach leading to rescission, but at most would be the basis for a damage claim. The Bennetts do not seek damages.

I also disagree with the majority that there was any fact question on the use of property outside of a 80' by 300' strip. Mrs. Bennett's affidavit statement that the only property Waffle House could use was that one strip does not create a fact question if the lease clearly holds otherwise. Exhibit A to the lease describes a certain tract of land owned by the Bennetts. Following that description is the legal

description of a smaller tract, which was the 80' by 300' tract that the Bennetts leased to the Waffle House. This tract lay totally within the larger tract first described. The lease in Exhibit B then stated it was "the intent of the parties to have as the subject of this Lease a parcel of land 80 feet by 300 feet, for the exclusive use of Waffle House, together with the remaining property described above to be used for access and parking purposes." In Exhibit B, yet another strip of land, 5 feet by 300 hundred feet contiguous on the west to the property, was leased to Waffle House. The entire tract described on Exhibit A, plus the extra 5 foot strip, are basically 144 feet by 408 feet. Waffle House has every right under the lease to use that entire tract for "access and parking." I would find Bennett to have raised no question of material fact regarding an alleged breach by using a 145' by 300' strip.

Finally Bennett argues that the rent adjustment calculation at the time of the lease renewal could not be resolved because of factual disputes. The 1974 lease states that the adjustment in 1989 would be computed using the "'Consumer Price Index' -- U.S. City Average (1967 + 100)." A paragraph follows setting out a hypothetical calculation. The Waffle House prepared an adjustment and sent it to Bennett by letter dated December 13, 1989. The letter recounts the United States Department of Labor statistics used for the calculation. All that the Bennetts argue in their brief to create a factual dispute is that "a congressional office in Mississippi computed the renewal rate at $1,705.00" per month, instead of the $1,358.50 under Waffle House's calculation. His affidavit stated even less -- "The Cost of Living Index used to compute the rental on the renewal is in error." That hearsay, conclusory statement in the brief, and the conclusory statement in the affidavit, do not create a fact question. Where is there an ambiguity in the contract language or some other fact question? Here the Bennetts have relied simply on a denial of the accuracy of the computation. That is not enough to withstand summary judgment.

Reversing and remanding a summary judgment should require a dispute as to a material fact. There are none here. As to some issues such as the use of more acreage than allegedly permitted, or recalculating the rent, there are not even immaterial facts in dispute. We should affirm the 1991 judgment dismissing Waffle House.

I also believe the majority errs in reversing as to Sawyer. The majority holds that reversal is required because Sawyer did nothing to procure the renewal lease. The trial court made two determinations as to the implied contract between the Bennetts and Sawyer. The first is that Sawyer was the "procuring cause of the lease. . . ." The second conclusion was that this status entitled Sawyer to a six per cent commission for the life of the lease, whether during the original fifteen-year term or for any renewals.

In a supplemental opinion the chancellor also found that Sawyer was the "procuring cause for not only the original term of the lease but also was the procuring cause for the subsequent renewal thereof." It is this conclusion with which the majority disagrees, and because of which the majority reverses. I agree with the majority's statement that the record did not show "Sawyer was instrumental in procuring the renewal of the lease," but only if that statement is limited to actions physically taken in 1989. There is substantial testimony that Sawyer helped negotiate the original lease, including the provisions for increasing the rent if the lease were renewed. Sawyer remained the collecting agent for the lease payments throughout the first fifteen years, and it was to him that Waffle House sent the new rent payments that were rejected by the Bennetts. The Bennetts in their brief concede Sawyer was the procuring cause for the initial lease term, a concession I think removes any serious fact question about the renewals since the renewals are part of the original lease.

The lease language supports the conclusion reached by the chancellor regarding the commission. The lease provides for $583 monthly rent from Waffle House for 15 years. If the lease is renewed, the revised rent will be adjusted from the "base monthly land rental" of $550. This extra $33 is the commission earned by Sawyer, though the lease does not so state. The effect of this lease language is that the Bennetts pay the commission. Waffle House had to pay $583 "to the Lessor . . . as rental," of which the Bennetts retained only $550. So the $583 was the full amount of the rent, out of which sum the realtor got his 6%.

The fact that the rent adjustment after fifteen years is based on $550, not $583, does not change the fact that the lease establishes $583 as the monthly rent. The lease sets out what Waffle House pays and what "the Lessor" receives, both during the primary term ($583) and during a renewal term ($550 + CPI adjustment). Since the parties in 1974 agreed Sawyer would get his 6% out of what Waffle House was obligated under the lease to pay during the first fifteen years ($583), I think it a fair reading that the parties also contracted that Sawyer would receive his commission out of what Waffle House was to pay for the rest of the term of the lease ($550 + CPI adjustment). They may not have been thinking about the question, but it is a valid interpretation of the effect of the lease.

The Bennetts say Sawyer was never their agent because he was hired by Waffle House. However, the record also supports that Sawyer became the Bennett's agent. The lease says that payments are to be made to "Lessor [Bennett] at Lessor's agent: Lenwood S. Sawyer, Jr." Sawyer remained the Bennetts agent for fifteen years. Regardless of the person with whom the realtor originally works, that does not control his agency relationship at the end of the transaction. In real estate sales the buyer's agent not uncommonly becomes the seller's agent at the time of closing. The chancellor was not manifestly in error in failing to make controlling the fact of who made the initial contact with the realtor. Moreover, regardless of whose agent Sawyer was, the lease provided for Sawyer to receive his commission out of the rent payment, a practice I believe the chancellor was entitled to find was intended to continue after a rent adjustment.

The chancellor heard the evidence at trial. I would affirm his conclusion that Sawyer was the procuring cause of the entire lease. The method of renewing the lease and recalculating the rent are part of the contractual structure Sawyer helped prepare in 1974. A new lease document was not to be executed with each renewal, as in all respects the original document continued to set the rights and obligations of the parties. Sawyer provided services that procured the agreement, and the chancellor was not manifestly in error in holding him entitled to a normal commission. Accordingly, the majority should not substitute its judgment for the chancellor's.

Sawyer remains, at least within the discretion we must allow the chancellor, entitled to compensation.

FRAISER, C.J., MCMILLIN AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.