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N.W.O. v. Kirby's Paint

N.W.O., INC., Plaintiff, v. KIRBY'S PAINT AND HARDWARE, INC.,

and JAMES W. KIRBY, Individually, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2001-266

Breach of Contract; Contracts; Damages; Lease Agreements

1. Parties to a lease agreement will be held to the specifics of their agreement, as with any other type of contract.

2. "Maintain and repair" provisions in lease agreements usually imply the preservation of the status quo, or a restoration approximately to the original condition, natural wear and tear excepted.

3. "All maintenance and repair ... shall be of the same quality, design and class so as to conform to the condition of the leased premises as of the date of this Lease Agreement" is the verbal equivalent of "the preservation of the status quo, or a restoration approximately to the original condition, natural wear and tear excepted."

4. The obligation to maintain and repair does not include the obligation to replace or rebuild, because if so, the contract would have explicitly stated that.

5. Where lease agreement terms are ambiguous, the lease provisions will be construed most strongly against the lessor and in favor of the lessee.

6. Where a parking lot has been exposed to extraordinary use over and above ordinary wear and tear by businesses other than the lessee, a lessee will not be held to the standard of restoring the asphalt parking lot to "new" condition.

7. Where the lessee feels that a repair is not his responsibility but the lease provisions provide to the contrary, the lease provisions will be enforced against the lessee.

Appearances:

Theodore Adler, Esq., *Counsel for Plaintiff*

Donald L. Kornfield, Esq., *Counsel for Defendants*

OPINION

Van Horn, J., October 15, 2002

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Procedural History

Plaintiff N.W.O., Inc. ("NWO") filed a complaint in this matter on January 25, 2001, to which Defendants Kirby's Paint and Hardware, Inc. ("Kirby's") and James W. Kirby ("Kirby"), who will be collectively referred to as "Defendants," replied with an "Answer With New Matter" on March 22, 2001. The president of NWO is Nickson W. Oyer ("Oyer"). In turn, on April 10, 2001, Plaintiff filed a "Plaintiff's Reply to New Matter." This matter was originally listed for a non-jury trial on October 5, 2001, but subsequently

postponed to May 28 and 29, 2002. Directly preceding trial, the trial judge and attorneys convened for an on-site viewing of the Defendant's former hardware store and surroundings.

Upon conclusion of the trial, attorneys were directed to submit post-trial memoranda on the central issues in this case. Plaintiff had already submitted a trial memorandum on or about May 28, 2002, and later submitted a supplemental memorandum on June 20, 2002. Defendants submitted their post-trial memorandum on June 24, 2002. The matter is now ripe for disposition.

Factual Background

Defendant Kirby commenced his tenancy in a building owned by Plaintiff on June 1, 1983, using it as a hardware and building supply store. The building in question is located at 11898 Buchanan Trail East, Waynesboro, Pennsylvania ("the premises"). Defendant occupied the premises for almost seventeen (17) years. The first lease, entered into on April 25, 1983 ("1983 Lease"), was for a term of ten (10) years, running from June 1, 1983, to May 31, 1993. The parties entered into a second and new lease agreement on June 6, 1988 ("1988 Lease"). On or about April 30, 1990 ("1990 Lease"), the parties entered into their last and most recent lease agreement. The term for this lease was for ten (10) years, ending on August 31, 2000. On August 1, 2000, the 1990 Lease was extended, by addendum, on August 1, 2000, commencing on September 1, 2000, and ending on September 30, 2000. During Kirby's occupancy of the premises, Plaintiff erected a second addition to the property in 1988, and in 1990, yet another addition. Also in 1990, storage bins were erected in the parking lot of the premises at the request of Kirby.

Contained within each lease agreement is a section dealing with repairs and maintenance of the premises. In the 1990 Lease, paragraph 9(a)-(j) sets forth Kirby's responsibilities related to the repair and maintenance of the premises. Plaintiff claims that Kirby breached this portion of the lease agreement by failing to maintain and repair the premises "so that the condition of the building remained consistent with the condition Defendant found it when he moved into the premises." (Plaintiff's Pre-Trial Memorandum, at 1.)

In Count I of the Complaint, Plaintiff lists numerous claims against Kirby for allegedly breaching the various lease covenants in paragraph 9(a)-(j). Plaintiff avers, among other things, that Kirby "failed to remove certain storage bins...failed to repair the asphalt paved area, failed to maintain and repair the heating and air conditioning system, [and] failed to repair or replace non-functioning lighting in the leased premises...." (Plaintiff's Pre-Trial Memorandum, at 1.) Paragraph 9(a)-(j) of the 1990 Lease, quoted here in its entirety, sets forth the tenant's specific responsibilities in maintaining and repairing the premises:

9. Repairs and Maintenance. During the term of this Lease Agreement and any renewal thereof, the parties hereto agree, if applicable, as follows:

> (a) All maintenance and repair provided for herein shall be of the same quality, design and class so as to conform to the condition of the leased premises as of the date of this Lease Agreement.
>
> (b) Except as otherwise herein provided, the repair, maintenance and painting of the interior and exterior of the leased premises shall be the responsibility of the Tenant.
>
> (c) The Tenant shall be responsible for the maintenance and repair of the asphalt paved area.
>
> (d) At least as often as once every four (4) months the heating and air-conditioning system shall be inspected by a qualified individual, firm or entity at the expense of the Tenant.
>
> (e) The Tenant shall be financially responsible for the maintenance and repair of the heating and the air-conditioning systems and agrees to periodically replace air filters in said system.
>
> (f) The maintenance and repair of the roof of the leased premises, as well as all gutter and downspouting, shall be the responsibility of the Landlord.
>
> (g) Should the replacement of the heating system or the air-conditioning system be deemed necessary by the Landlord, it shall be the responsibility of the Landlord to replace the same, provided, however, Tenant has complied with all of the provisions herein contained regarding said systems.
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> (h) In the event of a dispute between the Landlord and the Tenant regarding the necessity for repairs to or the replacement of the heating or the air-conditioning systems, and because of such dispute the Tenant refuses to make repairs deemed necessary by the Landlord in accordance with the provisions herein contained, the Landlord shall have the

right to make such repairs and, if said system operates satisfactorily for sixty (60) consecutive days thereafter without a malfunction, except for a malfunction due to an interruption of energy or fuel sources then in that event the Tenant shall reimburse the Landlord for the costs associated with such repairs to the heating or the air-conditioning systems.

1990 Lease, at 7, § 9(a)-(j).

Plaintiff requests relief in the form of monetary damages stemming from Defendants' alleged breach, demanding fair and reasonable costs of removing, repairing, replacing and otherwise correcting the damage resulting from Defendants' alleged actions and inactions.

Discussion

In order to determine whether Plaintiff is entitled to an award of damages to any of its claims, the Court must interpret the words "repair" and "maintenance," as used in paragraph 9 of the 1990 Lease. Parties to a lease agreement will be held to the specifics of their agreement, as with any other type of contract. Pennsylvania case law demonstrates that provisions in lease agreements where a party covenants to maintain and repair usually imply "the preservation of the status quo, or a restoration approximately to the original condition, natural wear and tear excepted." Hampers v. Darling, 166 A.2d 308, 310 (Pa. Super. 1960). However, the parties are certainly free to, and courts will uphold, contractual language that requires the tenant to have a more burdensome obligation to maintain and repair the premises, if the language in the contract so mandates.

Paragraph 9, in sub-provision (a), provides that "All maintenance and repair provided for herein shall be of the same quality, design and class so as to conform to the condition of the leased premises as of the date of this Lease Agreement." 1990 Lease, § 9(a). The language contained in paragraph 9(a) implies a requirement that the premises be returned to a condition approximating the original condition of the premises.

As pointed out by Plaintiff, the phrase "natural wear and tear excepted" is not found in paragraph 9; however, the phrase "All maintenance and repair...shall be of the same quality, design and class so as to conform to the condition of the leased premises as of the date of this Lease Agreement" is the verbal equivalent of "the preservation of the status quo, or a restoration approximately to the original condition, natural wear and tear excepted." Hampers v. Darling, 166 A.2d 308, 310 (Pa. Super. 1960).

Plaintiff argues that the phrase "natural wear and tear excepted" should not be considered to be implied in the lease agreement unless expressly stated. Plaintiff culls this notion from Platt v. City of Philadelphia, 133 A.2d 860 (Pa. Super. 1957): "Where the parties have by their express contract not limited their obligation, the law will not imply a limitation." Id. at 862-63 (citing Hoy v. Holt, 91 Pa. 88 (1879)).

However, the instant matter can be distinguished on several grounds. First, the lease in question in Platt was more explicit in detailing a more unconditional duty to repair by stating that the party must repair "at its sole cost and expense at all times while this lease is in effect." Platt, 133 A.2d at 862. Clearly, even from a cursory glance at the paragraph 9 lease provisions, Defendant Kirby in no way subjected himself to such unconditional repairing obligations.

Second, the Supreme Court of Pennsylvania has recognized that the principles in Hoy, a case from 1879, may no longer be quite as relevant in trying to resolve modern-day landlord-tenant issues: "too often courts have relied on outdated common law property principles and presumptions and have refused to consider the factors necessary for an equitable and just conclusion." Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758, 760 (Pa. 1977). Greenfield involved a rule also stated in Hoy that in the absence of a lease provision to the contrary, the lessee must continue to pay rent after the leased premises have been accidentally destroyed.

Third, Pennsylvania case law supports the proposition that the obligation to maintain and repair does not include the obligation to replace or rebuild, because if so, the contract would have explicitly stated that. See Ardesco Oil Co. v. Richardson, 63 Pa. 162 (1869); Pennsylvania Railroad Co. v. Pennsylvania Ohio Electric Co., 145 A. 686, 687 (Pa. 1929) (stating that "Each word is presumed to have some meaning, and 'to renew' naturally means to make new again, while to repair is to mend."); Hampers, 166 A.2d at 310 (concluding that the parties limited the obligation to maintain and keep in good repair, which did not include replacement, and "if the parties had so intended, they would have used the word "replace" and any ambiguity as to meaning would have been clear.").

If status quo is not preserved, taking into account natural wear and tear, then the Plaintiff is correct that Defendants will be liable for damages. However, Brockett v. Carnes, 416 A.2d 1075 (Pa. Super.

1979), correctly points out that "no Pennsylvania court has ever held that a lease obligation to 'maintain' the premises includes rebuilding them." Id. at 1078. Further, "where doubt arises out of the uncertainty as to the meaning of the language used in a lease, its provisions will be construed most strongly against the lessor and in favor of the lessee." Kline v. Marianne Germantown Corp., 263 A.2d 362, 364 (Pa. 1970).

The Court readily acknowledges that sub-provisions (b)-(h) specify Defendants' responsibilities concerning certain parts of the premises, in a more-detailed manner than with some other parts of the premises that Defendants are obligated to maintain, and Defendants will be duly held to the standard enumerated in these provisions. The Court will now look at the individual claims for damages made by Plaintiff, which will be evaluated in light of the foregoing analysis.

Itemization of Damages, in reference to Items #1-17 in Exhibit A of Plaintiff's Trial Memorandum

1. Removal of storage bins. Testimony was clear that the bins were not in place at the time of the initial lease in 1983 but instead were built by W.R. Oyer, Inc., another entity of Nickson W. Oyer. Kirby's unchallenged testimony was that not only were the storage bins built with the knowledge of Oyer but that Oyer required his company be the one to install them. Permission for their installation was presumably obtained by Kirby given the more permanent nature of their installment and their similarity to a capital improvement to the real estate. Therefore the Court will not hold the Defendant responsible for their removal.

2. Parking lot. Extensive testimony was received from the parties themselves as well as individual expert witnesses relative to the claim of NWO for what is identified in Exhibit "A" as repairs to asphalt parking area when in actuality the figure represents a removal of some materials on the parking lot, replacement with BCBC, application of a leveling course and an overlay of asphalt which was part of the continuous paving extended over an adjoining property. The evidence presented demonstrated that Defendants fulfilled their responsibilities under the terms of the lease in providing normal repair and maintenance including the application of a seal coat, the filling of pot holes with cold patch and the tamping down of those areas. Although no age to the parking lot was definitely established, the Court is satisfied that it was in existence for more than thirty years at the expiration of the lease and based on the testimony of NWO's expert, the expectancy for such a parking lot would be in the range of thirty to forty years. The picture was painted of this lot being used by neighboring businesses, being subject to new building construction and installation of utilities which would certainly constitute extraordinary use over and above ordinary wear and tear. Defendants will not be held to the standard of restoring the asphalt parking lot to "new" condition.

3. Purchase of duct heater. The Court concludes from the testimony of Kirby and other supporting witnesses including Ed Birely that the unit above the laundromat was not working either in 1983 or 1990. Defendants will not be held responsible for the purchase of a new duct heater.

4. Installation of duct heater. This claim is denied for the reasons stated in item #3 above.

5. Repair and replace electrical fixtures. While Defendant Kirby testified that many of the lighting fixtures were not working in 1983, it was undisputed that new strip fluorescent lighting was installed in the majority of the rented premises in 1990. Defendant Kirby acknowledged replacing lights and ballasts over the years which indicates to the Court his acceptance of responsibility for this maintenance of the rented premises. Defendants will be held responsible for this item.

6. Flooring. The portion of the floor that consisted of tiles was in place for years before Defendants entered into their original lease agreement. Carpeting was installed around the time of the renewal lease in 1990. No evidence whatsoever was presented regarding the ability to professionally clean the carpeting but rather the Court was presented with Plaintiff's claims for new carpeting. Given our determination that Plaintiff is not entitled to replacement, this claim will be denied.

7. Painting of interior walls. Paragraph 9(b) clearly places the responsibility for painting of the interior walls on Defendants. Defendant Kirby indicated in his testimony that he did not feel the painting of the walls was his responsibility. The lease provides to the contrary, therefore this claim will be permitted.

8. Removal of paint from plate glass. The Court concludes after a review of evidence presented regarding this matter that the paint was applied to the plate glass by Plaintiff's workers and by mutual agreement prior to 1990. Therefore the painted plate glass was in existence at the time of the renewal of the lease in 1990 and Defendants will not be responsible for its removal.

9. Paint exterior wood above windows. Again the Court turns to paragraph 9(b) of the 1990 lease to resolve this claim. Said subparagraph places responsibility for the painting of the exterior of the leased premises upon the Defendant and this claim will be permitted.

10. Paint storage room. The Court recognizes Defendants' position that this room was never painted, not in 1983 at the time of the original lease nor in 1990 at the time of the last lease. However the Court also takes into consideration Defendant Kirby's acknowledgment that after seventeen years the room possibly needed cleaning and painting and therefore responsibility for this item will be placed upon the Defendants.

11. Remove shelvings. This item clearly was not in place at the time of the initial lease but rather was acknowledged as existing due to its installation by the Defendants during the term of the lease. The shelving was capable of being removed with little effort given the claimed costs and Defendants will be responsible for this charge.

12. Removal of paneling and repair to walls. Again the Court notes that this claim results from the installation of paneling by the Defendants and for the same reasons articulated in #11 above, the Defendants will be responsible for this charge.

13. Replace concrete walk at the front door. The undisputed testimony revealed that the sidewalk entrance to the front of the leased premises was the same concrete walkway in existence at the time of entry into the original lease in 1983. Plaintiff chose to replace the concrete walk at the time new sidewalk was being installed for the leased premises and neighboring premises owned by Plaintiff as well. No evidence was presented to convince the Court that anything other than ordinary wear and tear occurred to the sidewalk during Defendants' occupancy of the premises and therefore Defendant will not be responsible for this charge.

14. Paint exterior wall at warehouse. For reasons previously articulated in items 7 and 9 above, the Court views paragraph 9(b) of the 1990 lease as controlling and Defendants will be responsible for this claim.

15. Replace rooftop air conditioning. The Court was not presented with evidence indicating that this unit was working at the time of the last lease renewal in 1990 and to the contrary finds the evidence presented by Defendant as to its non-working condition to be credible. At the time of hearing, the unit had not been replaced and Defendants will not be held responsible for the prospective replacement.

16. Lubrication of overhead garage doors. The evidence relating to this item indicated that Plaintiff discovered a malfunction with the garage doors that was resolved by lubrication. Defendant Kirby acknowledged in his testimony that he had tended to the doors during the term of the lease, thereby acknowledging responsibility for keeping the garage doors in working order. He will be held responsible for this claim as well.

17. Removal of rear building. The evidence presented leaves the Court to conclude that this structure was built with the permission of Plaintiff and was in existence at the time of the 1990 lease. This claim will be denied.

A summary of the claims for which Defendant is held responsible is as follows:

Repair and replace electrical fixtures	$4,500.00
Paint interior walls	$5,300.00
Paint exterior wood above windows	$630.00
Paint storage room	$600.00
Remove shelving installed by Defendant	$90.00
Remove paneling installed by Defendant	$90.00
Paint exterior warehouse wall	$3,055.01
Lubricate overhead garage doors	$80.00
Total:	$14,345.01

ORDER OF COURT

And bow this XX day of October, 2002, after reviewing all testimony presented and Memorandums submitted, it is hereby ordered that Defendants shall be responsible for the following claims of Plaintiff:

Repair and replace electrical fixtures	$4,500.00
Paint interior walls	$5,300.00
Paint exterior wood above windows	$630.00
Paint storage room	$600.00
Remove shelving installed by Defendant	$90.00
Remove paneling installed by Defendant	$90.00
Paint exterior warehouse wall	$3,055.01
Lubricate overhead garage doors	$80.00
Total:	$14,345.01

The total sum should be paid by Defendants to Plaintiff within sixty (60) days of the date of this Order. All other claims of Plaintiff are denied.