

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

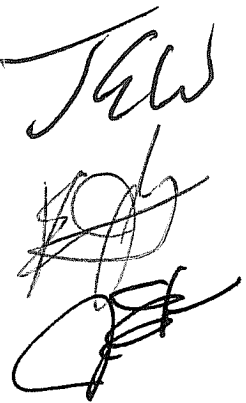
FIRST CIRCUIT

NUMBER 2006 CA 1714

JAZZ ENTERPRISES, INC.

VERSUS

LIVE MUSIC ESTABLISHMENT, LLC



Judgment Rendered: February 9, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 543,821

Honorable Timothy E. Kelley, Judge

* * * * *

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LLC

* * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

In this dispute over possession of subleased premises, the defendant/sublessee, Live Music Establishment, L.L.C. (“Live Music”), appeals a judgment rendered against it and in favor of the plaintiff/sublessor, Jazz Enterprises, Inc. (“Jazz”) awarding Jazz immediate possession of the premises. Also before us is a motion to dismiss Live Music’s suspensive appeal filed by Jazz. For reasons that follow, we grant the motion to dismiss the suspensive appeal, but maintain the appeal as a devolutive appeal, and we affirm the judgment of the trial court in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

FACTUAL AND PROCEDURAL HISTORY

On June 3, 2003, Jazz entered into a written sublease with Live Music. Of particular importance to this appeal, paragraph 4 of the sublease provided as follows:

Termination by Sublessor Without Cause. Notwithstanding anything to the contrary contained herein, the Sublessor shall have the right to terminate this Sublease without the consent of the Sublessee, even if the Sublessee is not in default of the Sublease, upon 30 days prior written notice to the Sublessee. (“Notice of Termination”) Such Notice of Termination shall provide not less than 30 days for the Sublessee to vacate and relinquish possession of the Premises, leaving the same in the condition as required under the terms of the Lease. In the event that Sublessor exercises its rights hereunder, it agrees to pay and Sublessee agrees to accept as full settlement and payment of any and all, claims, demands and causes of action for recovery of damages and losses the Sublessee may suffer as a result of such Notice of Termination, the following amounts:

- a. The unrecouped balance on the Sublessee’s capital investment and start up costs, which maximum amount of \$250,000 per paragraph 8 below; and
- b. The annualized EBITDA of the Sublessor from operations under the Sublease, multiplied by three (3). For purposes of this provision EBITDA shall be calculated for the twelve (12) full months preceding the Notice of Termination.

The initial term of the sublease commenced on June 1, 2004 and ended on May 15, 2005. Sixty days prior to the end of the initial term, Live Music exercised its right under the paragraph 3 of the sublease to extend the term of the sublease for

an additional one-year period through May 15, 2006.

On March 20, 2006, Live Music extended the term of the sublease for an additional one-year period through May 15, 2007. However, Jazz contended that the notice was not timely or in accordance with the terms of the sublease, and therefore, believed that the sublease would terminate by its own terms on May 15, 2006. However, in April 2006, Jazz also notified Live Music that it was exercising its right to terminate the sublease without cause pursuant to paragraph 4 of the sublease, and further requested that Live Music vacate the subleased premises on or before May 25, 2006. Since Live Music did not receive this notice of termination until April 28, 2005, Jazz sent a “follow-up” letter extending the date of termination and to vacate the premises from May 25, 2006 to May 31, 2006.

Live Music refused to vacate the premises, contending that Jazz was required to pay Live Music all amounts provided for in paragraph 4(a) and (b) of the sublease before the termination without cause could be enforced (*i.e.*, that payment of said sum was a “suspensive condition”). Therefore, on June 1, 2006, Jazz filed a rule to show cause for possession of the subleased premises seeking to evict Live Music. After a hearing on the rule for possession, as well as on the various exceptions filed in response to the rule, the trial court denied all of the exceptions, found that even though Live Music had properly renewed the sublease, Jazz had properly terminated the sublease without cause, and therefore, the trial court granted Jazz immediate possession of the subleased premises. A written judgment in conformity with the trial court’s ruling was signed on June 19, 2006, and it is from this judgment that Live Music now appeals.

MOTION TO DISMISS

On June 20, 2006, the trial court signed an order¹ granting Live Music a

¹ The order granting Live Music a suspensive appeal was captioned as a “Judgment on Bond Hearing.”

suspensive appeal in this matter. It also set the security for the suspensive appeal by requiring Live Music to pay the sum of \$3,370 per month in rent to Jazz for the duration of the appeal, to deposit the sum of \$1,620 per month on the first day of each month into the registry court, and to post a suspensive appeal bond in the amount of \$50,000 no later than June 20, 2006. On January 8, 2007, Jazz filed a motion to dismiss Live Music's appeal on the basis that Live Music had failed to pay the sum of \$3,370 in rent to Jazz for the month of January and had failed to deposit the sum of \$1,620 for the month of January into the registry of the court.²

When the appellant fails to timely furnish the security required for a suspensive appeal, the right vests in the appellee to obtain dismissal of the appeal and to secure the right to execute on the judgment. **Blue, Williams & Buckley v. Brian Investments, Ltd.**, 96-1451, p. 5 (La. App. 1st Cir. 6/20/97), 706 So.2d 999, 1002, writ denied, 97-2192 (La. 11/21/97), 703 So.2d 1311. However, the suspensive appeal is not invalid merely because the appellant does not furnish security until after the delay has elapsed. Rather, the appellant's tardiness in furnishing security merely constitutes an irregularity or defect imputable to the appellant that may form the basis for the appellee to move for dismissal of the suspensive appeal under La. C.C.P. art. 2161. *Id.*

However since the elimination of the requirement of security for devolutive appeals, the courts have consistently held that this defect is not jurisdictional. See Clement v. Graves, 2004-1831, p. 6 (La. App. 1st Cir. 9/28/05), 924 So.2d 196, 200; La. C.C.P. arts. 2124. Thus, where the appellant has failed to comply with the required security, the suspensive appeal should be converted to a devolutive

² A motion to dismiss an appeal because of any irregularity, error or defect which is imputable to the appellant must be filed within three days, exclusive of holidays, of the return day or the date on which the record is lodged in the appellate court, whichever is later. La. C.C.P. art. 2161. While we recognize that there may be a question as to the timeliness of Jazz's motion to dismiss, the unique nature of the security for the suspensive appeal in this case is such that Jazz was precluded from filing the motion to dismiss in accordance with the time limit provided in La. C.C.P. art. 2161. Accordingly, we will entertain the motion. See generally Schenker v. Watkins, 521 So.2d 686 (La. App. 1st Cir. 1988).

appeal, as long as the appellant has met those requirements. *Id.*; see also **Schmolke v. Clary**, 2003-2107, p. 5 (La. App. 1st Cir. 9/17/04), 884 So.2d 675, 677-78, writ denied, 2004-3089 (La. 2/18/05), 896 So.2d 41.

In this case, the judgment on the merits was signed on June 19, 2006. Live Music filed its motion for a suspensive appeal on June 16, 2006, and the motion for suspensive appeal was granted on June 19, 2006. At the oral argument of this matter on January 9, 2007, Live Music did not dispute that it had failed to pay the rent for the month of January and had failed to deposit the required sum of money into the registry of the court for the month of January. Thus, while Live Music failed to pay the security necessary to maintain its suspensive appeal, it has met the requirements for a devolutive appeal. Therefore, Jazz's motion to dismiss is granted insofar as it seeks the dismissal of the suspensive appeal; however, Live Music's appeal is maintained as devolutive. In accord **Clement**, 2004-1831 at p. 9; 924 So.2d at 202.

LAW AND DISCUSSION

On appeal, Live Music contends that the trial court erred in determining that the sublease did not require Jazz to pay all sums owed under paragraph 4(a) and (b) of the sublease before it could terminate the sublease without cause. Thus, the sole issue to be determined by this court is whether the payment of the sums provided in paragraph 4(a) and (b) of the sublease is a "suspensive condition" that must be fulfilled prior to Jazz enforcing its right to terminate the sublease without cause.

Louisiana Civil Codes article 1767 provides, in pertinent part, that "[a] conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive." The right to enforce the obligation does not arise until the fulfillment of the suspensive condition, and the obligation may not be enforced until the condition is met. **Hampton v. Hampton, Inc.**, 97-1779, p. 8 (La. App. 1st Cir. 6/29/98), 713

So.2d 1185, 1190. Courts do not construe stipulations in a contract as suspensive conditions unless the express contract language compels such construction. *Id.*

In its oral reasons for judgment, the trial court stated:

On its face, paragraph four is clear, unambiguous, and must be taken as written. There is nothing that states that that payment must be made before the termination is affective [*sic*]. Clearly, if that payment or if the effectiveness of paragraph four could be thwarted by an express disagreement by the sublessee as to the amount due and owing, there is no way for the sublessor to have a right of termination without cause. The sublessee could basically render that clause meaningless.

With regard to the time for payment, the time for payment, if no time is designated in the contract, Louisiana law is clear that such payment shall be made within a reasonable time. Certainly, a reasonable time does not need to be determined here, but there's nothing in the contract itself that says that payment must be paid in advance of the termination being affective [*sic*]; therefore I believe that paragraph four is affective [*sic*]. There is – they have exercised their right to terminate the sublease within a thirty[-]day period. The payment thereafter if not made within a ... reasonable time under Louisiana law, obviously will become the subject of another dispute, but certainly the right for the sublessor to gain access to its right of possession cannot be thwarted by a refusal to accept the payment calculation. The dispute over the payment calculation cannot render paragraph four meaningless, and it would otherwise.

... Therefore I find that you do have the right to terminate without cause, that your notice of termination was proper. ... You complied with the contract. So I'm going to enforce that portion of the contract.

Based upon our review of the sublease between Jazz and Live Music, we agree and find no error in the judgment of the trial court.³ There is no language—“express” or otherwise—in paragraph 4 of the sublease that compels us to construe it as requiring Jazz to pay the sums required by paragraph 4(a) and (b) *prior* to the sublessor terminating the sublease and taking possession of the premises. See Hampton, 97-1779 at p. 8; 713 So.2d at 1190. Accordingly, Jazz was entitled to

³ Whether a contract is ambiguous or not is a question of law. Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed unless manifest error is shown. However, when appellate review is not premised upon any factual findings made at the trial level, but is, instead, based upon an independent review and examination of the contract on its face, the manifest error rule does not apply. In such cases, appellate review of questions of law is simply whether the trial court was legally correct or legally incorrect. **Freeport-McMoran, Inc. v. Transcontinental Gas Pipeline Corp.**, 2004-0031, p. 8 (La. App. 1st Cir. 10/14/05), 924 So.2d 207, 213.

and properly did terminate the sublease without cause by providing written notice of not less than 30 days for Live Music to vacate and relinquish possession of the premises. Therefore, Jazz was entitled to immediate possession of the premises, and judgment of the trial court granting such relief is hereby affirmed.

CONCLUSION

For the above and foregoing reasons, Jazz's motion to dismiss appeal is hereby granted insofar as it seeks the dismissal of Live Music's suspensive appeal; however, Live Music's appeal is hereby maintained as devolutive; and, the June 19, 2006 judgment of the trial court is hereby affirmed in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

All costs of this appeal are assessed to the defendant/appellant, Live Music Establishment, L.L.C.

SUSPENSIVE APPEAL DISMISSED BUT APPEAL MAINTAINED AS DEVOLUTIVE; JUDGMENT AFFIRMED.