NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0258

MIE PROPERTIES-LA, L.L.C.

VERSUS

KELLY HUFF AND KEVIN HUFF

Judgment Rendered: APR 0 9 2012

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On Appeal from the 23rd Judicial District Court
In and for the Parish of Ascension
Docket No. 89,838

Honorable Thomas J. Kliebert, Jr., Judge Presiding

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BEFORE: PARRO, GAIDRY, McDONALD, HUGHES AND WELCH, JJ.

EJP - Gaidry, J. - dissents
JMM - McDonald, J. dissents
Parro, J., concurs. RHP by

HUGHES, J.

This is an appeal from a judgment awarding rent in an action arising out of a commercial lease agreement. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 6, 2006 the defendant, Kelly Huff, agreed to lease commercial space in a shopping center in order to open a coffee shop, and on that date, she signed a contract with the plaintiff/lessor, MIE Properties-LA, L.L.C. ("MIE"), for that purpose. In the twenty-page lease agreement, Ms. Huff agreed to pay rent in the amount of $1,500.00 per month, for a five-year term, beginning September 1, 2006 and ending August 31, 2011. The lease also contained a personal guaranty, signed by both Ms. Huff and her husband, Kevin Huff.

At the time the lease was signed, the shopping center was under construction and had not reached a stage suitable for tenant occupancy. Nor had construction advanced to the occupancy stage by the time the September 1, 2006 start date arrived.[1] In order to push back the start date of the lease, Ms. Huff and MIE signed an amendment on February 20, 2007, entitled "2nd Amendment of Lease," agreeing that the five-year term would be changed to begin on March 1, 2007 and end on February 29, 2012.[2] Ms. Huff moved into the leased premises in March 2007 and opened for business.

[1] Todd Pevey, MIE vice president and leasing agent, testified that at the time the lease was negotiated, the shopping center was under construction, that the structural steel was up, and the parking lot was probably in place. Mr. Pevey further testified that MIE had agreed to turn over to Ms. Huff a "vanilla shell," which meant that the leased space would have walls, ceiling, a restroom, and HVAC, but that Ms. Huff would finish the space by painting, putting in flooring, and adding other desired fixtures. Ms. Huff would be given an initial rent-free period of time to finish the space.

[2] An earlier amendment, entitled "1st Amendment of Lease," had been signed by Ms. Huff and MIE, on July 28, 2006; this amendment changed the location of the coffee shop space within the shopping center. Kevin Huff did not sign either the first or second amendment.

Approximately two months later, road construction began on the highway adjacent to the shopping center, which required the closure of portions of the roadway and a nearby bridge. The bridge closure and other roadwork greatly reduced the number of customers frequenting the coffee shop, allegedly to the extent that revenue was insufficient to pay the rent. As a result, MIE agreed to a rent abatement for Ms. Huff and several other businesses that were similarly affected. It was agreed that, when the bridge reopened, payment of rent would resume. Mr. Pevey testified that in return for the abatement of rent, Ms. Huff agreed to sign a new five-year lease at the end of the abatement period. Although these arrangements were verbally agreed upon, the parties did not sign a written lease amendment.[3] Despite the reopening of the bridge at the end of 2007, Ms. Huff was unable to meet her rent obligations, and she declined to enter into a new lease. The coffee shop closed in March 2008.

MIE filed the instant suit seeking to recover rents, penalties, and attorney fees it claimed were due under the April 6, 2006 lease, naming as defendants: Kelly Huff, as lessee, and Kevin Huff, as guarantor. In response, Kelly Huff filed an answer denying the plaintiff's claims and asserting a reconventional demand for damages, alleging the plaintiff was aware of the upcoming road construction at the time the lease was signed, but failed to disclose that fact to her.

Following a May 28, 2010 trial, the trial court awarded judgment against Ms. Huff and in favor of MIE in the amount of $4,500.00

[3] Testimony was presented at trial that a written "confidentiality agreement" was prepared for signature by the parties, which memorialized, at least in part, the agreement of the parties; however, no copy of a signed document could be found by the parties. Although an unsigned exemplar was produced at trial, it was not introduced into evidence.

(representing rent owed for the months of January, February, and March 2008), along with judicial interest, and all costs of the proceedings, but dismissed the claims as to Mr. Huff. MIE appealed the trial court judgment, asserting the trial court erred: in finding the parties reached an oral agreement to terminate the written lease dated April 6, 2006; in determining that the proposition of a new and different lease was unnecessary had the original lease still been in effect; in finding that an oral lease existed; in determining that the guaranty of Kevin Huff was terminated; and in failing to award rental payments, attorney fees, and other related damages until the property was re-let in April 2010.

LAW AND ANALYSIS

Lease is a synallagmatic contract by which one party, the lessor, binds himself to give to the other party, the lessee, the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay. LSA-C.C. art. 2668. The obligations of the lessor and the lessee are thus reciprocal. See LSA-C.C. art. 2668, 2004 Revision Comment (b). A lease may be made orally or in writing. LSA-C.C. art. 2681. The consent of the parties as to the thing and the rent is essential for a contract of lease. See LSA-C.C. art. 2668.

The lessor's and lessee's duties *ex contractu* are set forth in the parties' contract of lease; in Book III, Title IX of the Civil Code ("Lease"), Articles 2668 et seq.; and in Book III, Title III of the Civil Code ("Obligations in General"), Articles 1756 et seq. The Civil Code, while defining and governing the relationship of the parties to a lease, still leaves the parties free to contractually agree to alter or deviate from all but the most fundamental provisions of the Civil Code, which govern their lease relationship. The codal articles and statutes defining the rights and

obligations of lessors and lessees are not prohibitory laws, which are unalterable by contractual agreement, but are simply intended to regulate the relationship between the lessor and lessee when there is no contractual stipulation imposed in the lease. **Carriere v. Bank of Louisiana**, 95-3058 (La. 12/13/96), 702 So.2d 648, 665-66 (La. 1996).

Our jurisprudence recognizes that the usual warranties and obligations imposed under the codal articles and statutes dealing with a lease may be waived or otherwise provided for by contractual agreement of the parties, as long as such waiver or renunciation does not affect the rights of others and is not contrary to the public good. In other words, the lease contract itself is the law between the parties; it defines their respective rights and obligations so long as the agreement does not affect the rights of others and is not contrary to the public good. **Carriere v. Bank of Louisiana**, 702 So.2d at 666. See also LSA-C.C. art. 1983.[4]

In defining the respective legal rights and obligations of the parties to a lease contract, the meaning and intent of the parties must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence, unless the contract is ambiguous. Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law. In cases in which the contract is ambiguous, the agreement shall be construed according to the intent of the parties. Intent is an issue of fact which is to be inferred from all of the surrounding circumstances. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and other contracts of a

[4] Louisiana Civil Code Article 1983 provides: "Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith."

like nature between the same parties. Whether a contract is ambiguous 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. Thus, a trial court's interpretation of a lease may, in some instances, be a mixed question of law and fact requiring the evaluation of the lease and the testimony of parties to the lease. See **Fleniken v. Entergy Corporation**, 99-3023, pp.14-15 (La. App. 1 Cir. 2/16/01), 790 So.2d 64, 73, writs denied, 2001-1269 and 2001-1295 (La. 6/15/01), 793 So.2d 1250 and 1252.

An obligation cannot exist without a lawful cause. LSA-C.C. art. 1966. Cause is the reason why a party obligates himself. LSA-C.C. art. 1967. There is implicit in a lease contract the presumption that one of the causes of the lease contract, if not the threshold cause, is that the lessee will be able to use the leased object for its intended purpose. See **ABL Management, Inc. v. Board of Supervisors of Southern University**, 2000-0798, p. 8 (La. 11/28/00), 773 So.2d 131, 136.

In the instant case, the trial court ruled that the lease agreement between the parties was terminated in 2007, when MIE ceased charging Ms. Huff rent (at the time of the road closure near the MIE shopping center), by mutual agreement of the parties. In support of the trial court decision, Ms. Huff asserts that the road closure was a fortuitous event that prevented her performance under the lease contract, citing LSA-C.C. arts. 1873,[5] 1875,[6]

[5] Louisiana Civil Code Article 1873 provides, in pertinent part: "An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible."

[6] Louisiana Civil Code Article 1875 provides: "A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen."

1876,[7] and 1877.[8]

On appeal, MIE argues, in essence, that any verbal agreement to terminate the written contract of lease was insufficient to accomplish such a result, as the contract expressly required that any modification to the agreement be done in writing. Specifically, Section 26 of the contract provides: "This lease contains the final and entire agreement between the parties hereto, and neither they nor their agents shall be bound by any terms, conditions or representations not herein written." MIE further contends that its prior failure to enforce the lease requirement as to payment of rent did not constitute a waiver of their right to future enforcement of the lease or evidence an intent on their part to terminate the lease. On this point, Section 24 of the lease provides: "It is agreed that the failure of [MIE] to insist in any one or more instances upon a strict performance of any covenant of this Lease or to exercise any right herein contained shall not be construed as a waiver or relinquishment for the future of such covenant or right, but the same shall remain in full force and effect, unless the contrary is expressed in writing by [MIE]."[9]

While this appellate court is not convinced that the parties *mutually agreed* to a dissolution of the April 2006 lease, we are unable to say the trial

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[7] Louisiana Civil Code Article 1876 provides, in pertinent part: "When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved."

[8] Louisiana Civil Code Article 1877 provides: "When a fortuitous event has made a party's performance impossible in part, the court may reduce the other party's counterperformance proportionally, or, according to the circumstances, may declare the contract dissolved."

[9] We note that, in some instances, a written lease can be modified either in writing or verbally even if the written lease provides that it can be modified only in writing. See Peter S. Title, 2 **Louisiana Practice Series**, Louisiana Real Estate Transactions, "Leases," § 18:16 (2d ed.); **Gravier Company v. Satellite Business Systems**, 519 So.2d 180 (La. App. 4 Cir. 1987), writ denied, 521 So.2d 1150 (La. 1988). Cf. **Shank-Jewella v. Diamond Gallery**, 535 So. 2d 1207 (La. App. 2 Cir. 1988); **Davis v. Avenue Plaza, LLC**, 2000-0226 (La. App. 4 Cir. 12/27/00), 778 So. 2d 613. See also **Bonvillain Builders, LLC v. Gentile**, 2008-1994, p. 10 (La. App. 1 Cir. 10/30/09), 29 So.3d 625, 631, writ denied, 2010-0059 (La. 3/26/10), 29 So.3d 1264.

court manifestly erred in its finding.[10] We conclude the trial court reached the correct result in this case, particularly in light of LSA-C.C. art. 2715, which provides:

> If, without the fault of the lessee, the thing is partially destroyed, lost, or expropriated, or its use is otherwise substantially impaired, the lessee may, according to the circumstances of both parties, obtain a diminution of the rent or dissolution of the lease, whichever is more appropriate under the circumstances. If the lessor was at fault, the lessee may also demand damages.
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> ***If the impairment of the use of the leased thing was caused by circumstances external to the leased thing, the lessee is entitled to a dissolution of the lease, but is not entitled to diminution of the rent***. [Emphasis added.]

It was established at the trial of this matter that an important cause, which had motivated Ms. Huff to lease space in MIE's shopping center for her coffee shop, was its location on a well-traveled highway. Ms. Huff anticipated that the busy highway would provide accessibility to and visibility for the coffee shop by potential customers. With the closure of the roadway for some six months, traffic decreased significantly and the coffee shop was deprived of the accessibility and visibility it needed to attract customers, thereby resulting in the impairment of the use of the leased premises caused by circumstances external to the leased premises. We conclude that the curtailment of the traffic flow amounted to the elimination of a cause for Ms. Huff's agreement to contract and resulted in the dissolution of the lease contract. See LSA-C.C. arts. 1873, 1875, 1876, 1877, 1949,[11] 1950,[12] and 2715. This court's decision in **Tauzin v.**

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[10] The issue to be resolved by the reviewing court is not whether the factfinder was right or wrong, but whether his conclusion was a reasonable one. **Stobart v. State, Through Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993).

[11] Louisiana Civil Code Article 1949 provides: "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

[12] Louisiana Civil Code Article 1950 provides: "Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation."

Claitor, 417 So.2d 1304 (La. App. 1 Cir.), writ denied, 422 So.2d 423 (La. 1982), is in accord.

In **Tauzin v. Claitor**, commercial tenants filed a suit for damages, in contract and tort, against the defendant/landlord because they did not have adequate parking after an adjoining commercial establishment fenced off its parking lot. The plaintiffs' complaint stemmed from the fact that, when they signed their respective leases, they had access to a much larger parking area, and after the fence was constructed they allegedly had insufficient parking available for their customers. The plaintiffs further contended that their lease agreements had purportedly given them the right to use common parking areas, which they assumed included the subsequently fenced-off lot. Citing former C.C. art. 2699 (amended and re-enacted by 2004 La. Acts, No. 821 as LSA-C.C. art. 2715), this court reasoned that "[t]here is ample evidence of record to show that the use of [the premises leased to plaintiffs] as a shopping center is much impeded by the restriction of access to and from [the adjacent parking lot] caused by the construction of the fence. We find the raising of a fence to obstruct access and limit the use of [the premises leased to plaintiffs] to be analogous to the raising of a wall by an adjoining landowner to intercept the light on a leased house." This court concluded: "The tenants are not entitled to damages but are entitled to obtain the annulment of their leases." See **Tauzin v. Claitor**, 417 So.2d at 1311.

After a thorough review of the record presented in the instant appeal and applicable law, we conclude that the impediment to Ms. Huff's customers accessing her new coffee shop premises, because of the extended period of time the road construction affected same, was a fortuitous event caused by factors external to the leased premises, which rendered Ms. Huff's

performance impossible and resulted in the dissolution of the contract of lease due to the partial failure of cause. Therefore, we find no error in the result reached by the trial court; i.e., in ruling that the April 2006 lease agreement was terminated, along with the accompanying personal guaranty, and in awarding rent to MIE against Ms. Huff, after the rent abatement period ended, in accordance with the Louisiana Civil Code's general lease provisions (LSA-C.C. arts. 2668 et seq.), for the months of January, February, and March 2008.[13]

CONCLUSION

For the reasons assigned herein, the judgment of the trial court is affirmed. All costs of this appeal are to be borne by the appellant, MIE Properties-LA, L.L.C.

AFFIRMED.

[13] Having disposed of this appeal on this basis, we find it unnecessary to address the remaining assignments of error.