

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0835

MIE PROPERTIES-LA, L.L.C.

VERSUS

**VICTORY PHYSICAL THERAPY, LLC
AND AYODEJI O. FAMUYIDE**

Judgment Rendered: **DEC 21 2011**

On Appeal from the 23rd Judicial District Court
In and for the Parish of Ascension
Docket No. 93,565

The Honorable Jane Triche-Milazzo, Judge Presiding

Timothy E. Pujol
Barbara Lane Irwin
Gonzales, Louisiana

Counsel for Plaintiff/Appellee
MIE Properties-LA, L.L.C.

Dele A. Adebamiji
Felicia E. Adebamiji
Baton Rouge, Louisiana

Counsel for Defendants/Appellants
Victory Physical Therapy, LLC
and Ayodeji O. Famuyide

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a judgment awarding contractual damages for default under a commercial lease agreement. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 11, 2008 defendant Victory Physical Therapy, LLC (“Victory”) agreed, through its owner, Ayodeji Famuyide, to lease commercial space in a business/shopping center development located at 6473 Highway 44, in Gonzales, Louisiana, in order to open a physical therapy and rehabilitation facility. Mr. Famuyide signed a contract with plaintiff MIE Properties, Inc. (“MIE”) for that purpose. In the lease agreement, Victory agreed to pay rent in the amount of \$19,800.00 per year (\$1,680.00 per month), for a five-year term, beginning January 1, 2009 and ending December 31, 2013. The lease also provided that Victory would pay certain additional fees, which included a pro rata share of common area expenses and management fees in the amount of 5% of the annual rent. Victory further agreed that the annual rent would be increased by 3% every year of the lease term. A personal guaranty was signed by Mr. Famuyide. In the event of default under the lease, Victory agreed to pay, on the amount owed, a five percent late charge “of the monthly account balance” and ten percent attorney fees.

At the time the lease was signed, the interior of the 1,200 square foot office space had not been “built out” to a stage suitable for tenant occupancy. MIE agreed to bear the expense of installing the following: electric service; an acoustic drop ceiling; a one-hour rated firewall, with taped and sanded sheetrock “ready for [Victory’s] finishing;” a 5.0 ton HVAC unit; a handicapped equipped restroom; a “wet dumpster with drain;”

electric wall outlets every ten feet; fluorescent lighting; and a separate utility meter. Todd Pevey, MIE vice president and leasing agent, testified at the trial of this matter that MIE had agreed to turn over to Victory a “white box,” which meant that the leased space would have walls, ceiling, a restroom, electric service, and HVAC, but that Victory would finish the space by painting, putting in flooring, and installing other desired fixtures. There was additional testimony that some of the finishing work, which was agreed to be the financial responsibility of Victory, would be provided by MIE for an additional charge.¹

The lease further provided that Victory would be given possession of the premises as soon as it was ready for occupancy and would be allowed “base rent free” from October 31, 2008 through December 31, 2008. However, the lease stated that if possession could not be given to Victory “on or before the commencement date” of the lease, MIE agreed “to abate the rent proportionately until possession is given to [Victory],” and Victory agreed “to accept such prorated abatement as liquidated damages for the failure to obtain possession.”

Renovations to the office space were not complete by the time of the January 1, 2009 start date of the lease. Occupancy was later made available to Victory as of April 15, 2009, but Victory refused to take possession of the premises.

This suit was filed by MIE on August 21, 2009. Both Victory and Mr. Famuyide were named as defendants. MIE sought to recover all rents due under the lease agreement, along with common area expenses, management fees, and attorney fees. Victory and Mr. Famuyide reconvened for damages,

¹ Although estimate sheets were submitted into evidence at trial, there was no written contract between the parties detailing the specifics of this separate construction agreement.

asserting MIE breached its agreement to accord Victory exclusivity as physical therapists in the business development and failed to include the exclusivity agreement in the written lease. Further, the defendants raised the peremptory exception of no cause of action, asserting that MIE's suit was based on a lapsed lease.

Following an October 26, 2010 trial, MIE was awarded judgment against Victory and Mr. Famuyide in the amount of \$104,313.17 (representing unpaid rent and management fees²), a ten percent attorney fee of \$10,431.32, along with judicial interest, and all costs of the proceedings.³

Victory and Mr. Famuyide have appealed the trial court judgment, asserting the trial court erred: (1) in failing to find that the parties could not independently contract around LSA-C.C. art. 2684's requirement that the premises leased be delivered at the time agreed for the inception of the lease;⁴ (2) in failing to sustain Victory's exception of no cause of action; and (3) in failing to rule on Victory's reconventional demand for damages.

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

² Although management fees were awarded, the trial court denied MIE's claim for common area maintenance fees, stating that MIE failed to introduce evidence of the total common area expenses. Also, the trial court declined to award "build out" construction costs to MIE, because the lease agreement did not contain a specific provision that the tenant would assume those costs.

³ The trial court's failure to award damages to defendants on their reconventional demand, based on their allegation that MIE breached their contractual agreements, constituted a rejection of that claim; particularly in light of the trial court's ruling in MIE's favor, which was premised on the defendants' breach of contract rather than a breach by MIE. *See Alex v. Rayne Concrete Service*, 2005-1457, p. 13 n.9 (La. 1/26/07), 951 So.2d 138, 149 n.9; *VaSalle v. Wal-Mart Stores, Inc.*, 2001-0462, p. 8 (La. 11/28/01), 801 So.2d 331, 337.

⁴ Louisiana Civil Code Article 2684 provides, in pertinent part: "The lessor is bound to deliver the thing at the agreed time."

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 Title IX of the Civil Code ("Lease"), Articles 2668 et seq.; and in 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 that 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 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. **Carriere v. Bank of Louisiana**, 702 So.2d at 666. See also LSA-C.C. art. 1983.⁵

⁵ 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."

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, conduct of the parties before and after the formation of the contract, and other contracts of a 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, 2001-1295 (La. 6/15/01), 793 So.2d 1250, 1252.

In ruling in favor of MIE, the trial court found as follows, in pertinent part:

The evidence submitted at trial showed that the premises was available for occupancy on April 15, 2009. There was conflicting testimony regarding the cause of the delay, both parties testified that the delay was the result of the actions of the other. The Court finds that the cause of the delay is not dispositive. The Contract between the parties provided for the liquidated damages to be assessed in the event the premises was not available. Therefore, this Court finds that the lease was valid and enforceable and is the law between the parties.

It is clear that the trial court found the contract between the parties unambiguously allowed MIE to deliver the premises to Victory later than the date stated in the lease for the commencement of the lease and that a remedy for the delay was provided in the lease, i.e., abatement of the rent during the period of delay.

Nevertheless, the defendants, Victory and Mr. Famuyide, contend on appeal that the lease contract, in so doing, is against public policy, as violative of LSA-C.C. 2684, which requires the lessor to deliver "the thing" at "the agreed time." The defendants seemingly assert that the "the agreed time" was either October 31, 2008 or January 1, 2009, and that the failure of MIE to deliver the premises by these dates resulted in the lapse of the lease.

To the contrary, the lease specifically provided that the agreement of MIE to deliver the premises to the defendants on either October 31, 2008 or on January 1, 2009 was conditional, as follows:

Landlord does hereby lease unto said Tenant . . . the . . . premises . . . for the term of Five (5) years, beginning on the 1st day of January, 2009

* * *

Landlord covenants and agrees that possession of the Premises shall be given to Tenant as soon as the Premises are ready for occupancy. Landlord also agrees that the Tenant would be allowed base rent free from October 31st to December 31st of 2008. If possession cannot be given to Tenant on or before the commencement date of this Lease, Landlord agrees to abate the rent proportionately until possession is given to said Tenant and Tenant agrees to accept such prorated abatement as liquidated damages for the failure to obtain possession. [Original underscoring omitted; emphasis added.]

Thus, the parties agreed that possession would be delivered to the defendants as soon as the premises were ready, which was projected to be as early as October 31, 2008 or on January 1, 2009; however, due to construction delays, the premises could not be delivered to the defendants

until April 15, 2009. Nevertheless, the lease did not provide that the parties could terminate the lease on account of such a delay. Instead, the lease awarded an abatement of the rent during the delay period to the defendants, and the defendants agreed to accept the remedy provided in the lease. No evidence was presented at trial to suggest the delay in delivering possession of the premises to the defendants was unreasonable.⁶

In fact, Mr. Famuyide admitted at trial that despite the delay he still wanted to move forward with the lease. Mr. Famuyide's testimony at trial reflected that his primary reasons for refusing to accept possession of the leased premises were: (1) he was not given a final bill for his share of the construction costs; and (2) he wanted to have the lease amended to reflect the new commencement date and to insert an exclusivity provision for his physical therapy business.

Nor have the defendants presented any authority for their contention that a lease agreement that provides for a flexible commencement date, such as the one at issue herein, is *per se* contrary to Louisiana's lease laws or public policies.⁷ Rather, in instances where construction remains to be completed on the premises to be leased, some contractual allowance for delay would seem to be advisable. See Peter S. Title, 2 Louisiana Practice Series, "Louisiana Real Estate Transactions," § 18:124 (2d ed.) (which includes in its "shopping center lease" form a provision stating that the commencement date of the lease was to be the earlier of (i) sixty days after

⁶ A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time. LSA-C.C. art. 1778.

⁷ All things that are not forbidden by law may become the subject of or the motive for contracts. **Tassin v. Slidell Mini-Storage, Inc.**, 396 So.2d 1261, 1264 (La. 1981). The only specific prohibition in the Civil Code, with respect to the term of a lease, is that set forth in LSA-C.C. art. 2679, which provides in part: "The duration of a term may not exceed ninety-nine years." The lease at issue in this case does not run afoul of that provision.

delivery of possession, which would occur upon substantial completion of the landlord's construction, or (ii) the date the tenant opened its business; and a provision stating that if the landlord had not commenced the construction work within twelve months of the date of the lease or substantially completed work within twenty-four months of the date of the lease, then either the landlord or the tenant could elect to terminate the lease). The term of a lease may be indeterminate. See LSA-C.C. art. 2678.⁸

Inherent in the trial court's decision to uphold the lease in this case, was the court's rejection of the defendants' assertions that MIE had agreed to accord Victory exclusivity, in the business/shopping center development, as a physical therapy provider (as well as the conclusion that the defendants failed to prove that MIE did not honor "some other agreed upon conditions"), presumably since these alleged agreements were not included in the written lease. On these points we note, particularly, that Mr. Famuyide acknowledged at trial that he had not read the entire lease agreement prior to signing it. (He stated that when he read the agreement later, he discovered that certain terms under negotiation had been omitted.)

Having signed this agreement, Mr. Famuyide cannot seek to avoid its obligations by contending that he did not read or understand it. The law does not compel a person to read or to inform himself of the contents of instruments that he may choose to sign, but, save in certain exceptional cases, it holds him to the consequences, in the same manner and to the same extent as though he had exercised that right. See **Coleman v. Jim Walter**

⁸ Louisiana Civil Code Article 2678 provides:

The lease shall be for a term. Its duration may be agreed to by the parties or supplied by law.

The term may be fixed or indeterminate. It is fixed when the parties agree that the lease will terminate at a designated date or upon the occurrence of a designated event.

It is indeterminate in all other cases.

Homes, Inc., 2008-1221, pp. 7-8 (La. 3/17/09), 6 So.3d 179, 184 (citing **Ray v. McLain**, 106 La. 780, 790, 31 So. 315, 319 (1901)). It is incumbent upon the party signing such an obligation to examine it, before signing it in ignorance of its contents. See **Orillion v. Allstate Insurance Company**, 96-1131 (La. App. 1 Cir. 2/14/97), 690 So.2d 846, 849-50, writ denied, 97-0664 (La. 4/25/97), 692 So.2d 1092 (citing **Tweedel v. Brasseaux**, 433 So.2d 133, 137 (La. 1983), and **Boult v. Sarpy**, 30 La. Ann. 494, 1878 WL 8445 (1878)).

“Signatures to an obligation are not mere ornaments” as first stated in the case of **Watson v. Planters’ Bank of Tennessee**, 22 La. Ann. 14, 1870 WL 5240 (La. 1870), wherein a cotton investor signed a written agreement without first reading it, believing that the agreement contained terms he desired, only to discover some three years later that the terms varied materially from what he believed had been agreed upon. The significance of the **Watson** plaintiff’s failure to read the contract before signing it was discussed by the supreme court as follows:

The only error alleged is in signing a written contract without reading it, believing it to contain the terms of an agreement as he had understood them, which, in the absence of any charge or proof of fraud, force or improper influences upon the part of the other contracting party, is not an error from which the law will relieve him. . . . ***In this case the plaintiff has no one but himself to blame for signing an agreement different from the one which he says he agreed to make.*** [Emphasis added.]

Likewise, in the instant case, Mr. Famuyide signed the lease agreement without reading the document fully to ascertain that he understood and agreed with each and every provision it contained and also without verifying that certain provisions he wanted to be included were in fact included. Thus, he had no legal right to rely on his failure to read the

contract in order to defeat the rights and remedies provided therein to, and subsequently asserted by, MIE.

Accordingly, we find no merit in the defendants' contentions that the lease lapsed when occupancy was not delivered on October 31, 2008 or on January 1, 2009, or that the lease violated Louisiana's lease laws or public policies in anticipating and providing for MIE's failure to timely deliver occupancy. We therefore find no error in the trial court's award of damages under the terms of the lease or in the court's failure to grant relief to the defendants as requested in their exception of no cause of action and reconventional demand.

CONCLUSION

For the reasons assigned herein, the judgment of trial court is affirmed. All costs of this appeal are to be borne by the appellants, Victory Physical Therapy, LLC, and Ayodeji Famuyide.

AFFIRMED.