IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

DOERKEN PROPERTIES, INC., etc.,	Civil No. B062551
Plaintiff and Respondent,	Ventura County Superior Case No. 116054
vs.	
CHARLES BRESLER,	FILED JANUARY 26, 1993 NOT FOR PUBLICATION
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Ventura County. Burt Henson, Judge.[1] REVERSED.

Lagerlof, Senecal, Drescher & Swift, Bruce A. Young, and Robert M. Ostrove, for Defendant and Appellant.

Pircher, Nichols & Meeks, Howard B. Miller, and Daniel L. Goodkin, for Plaintiff and Respondent.

Here we hold that a lease provision obligating the lessee to pay for his pro rata share of common area maintenance does not obligate the lessee to pay for capital improvements to the common area. We reverse the judgment in favor of the lessor in an unlawful detainer action with instructions to enter judgment in favor of the lessee.

FACTS

On December 20, 1985, Charles Bresler leased commercial space in the Simi Valley Promenade Shopping Center from Simvent Properties for use as a restaurant known as the "U.S.S. Chuck Burger." The initial term of the lease was for five years commencing May 1, 1986. In addition, the lease granted Bresler four options to renew for five years each. The options to renew were conditioned on Bresler not being in default under the lease when the options were exercised.

On June 29, 1988, Doerken Properties, Inc., purchased the Promenade from Simvent and succeeded to Simvent's rights and liabilities under Bresler's lease. In September, 1989, Albertson's supermarket agreed to lease part of the Promenade. As a condition of that lease, Doerken was required to expand one of the two buildings that comprised the Promenade. Among the other conditions of the Albertson's lease were improvements to the shopping center common areas. In addition to the expansion of an existing building, Doerken planned to construct a third building to accommodate more retail stores.

Doerken obtained a permit for the entire project from the City of Simi Valley (the City). The permit contained numerous conditions requiring, among other things, that the parking lot be regraded to comply with new standards for storm drainage, that new landscaping be put in and utilities be relocated underground.

Doerken obtained a construction loan of $6.35 million, and the project went forward. By letter dated August 28, 1990, Doerken advised Bresler that "[m]uch of the construction being undertaken in the renovation of [the Promenade] is being done to bring the common area of the center into full conformance with the City of Simi Valley zoning and code requirements." The letter referred to paragraph 5.4 of the lease for the proposition that the tenants were required to pay their pro rata share of the common area maintenance. The letter stated that the total costs relating to the common area were approximately $1,148,102 of which Bresler's share was $79,219.

Attached to the letter was what purported to be a "schedule of costs required to comply with City of Simi Valley code and building ordinances. " Of the $1,148,102 total cost, $825,000 was attributed to the construction contract. Work performed under the contract was said to include demolition, grading, excavation, storm drains, sewer, water system, paving, fencing, concrete and landscaping. Other charges were $33,183 for fees paid to the City of Simi Valley, $72,545 for engineering, $17,374 for architectural fees and $200,000 for "clean-up of contaminated soil - estimate." Bresler refused to pay any of the charges.

By letter of December 28, 1990, Bresler notified Doerken he was exercising his option to extend the lease for another five years. Doerken replied that it considered the notification invalid because Bresler was in breach of the lease by refusing to pay his share of common area maintenance expenses as set forth in the letter of August 28.

On May 8, 1991, Doerken filed the instant unlawful detainer action. The complaint alleged that Bresler's lease had terminated and that Bresler's attempt to exercise his option to renew was invalid because Bresler was in breach of the lease. The only breach alleged was the failure to pay $79,219 as Bresler's share of the common area maintenance costs within 10 days of the delivery of the lessor's statement.

Richard Bybee was Doerken's senior vice-president during the period the Promenade was being improved. At trial he testified that when he began to work for Doerken in April, 1990, the parking lot was in very bad shape. It was cracked, parts were broken up and weeds were growing. The landscaping, sprinklers and parking lot lights were also in bad repair.

Bybee described the work that was charged to the common areas. The old asphalt was removed from the parking lot along with a good deal of the old base and soil underneath the asphalt. The entire site was regraded to meet new city requirements. Underground utilities such as storm drains, water lines, electric lines, and sanitary sewer lines were installed. A block wall was constructed along two sides of the premises. New landscaping and an irrigation system were added. A new parking lot was laid down, new driveway approaches, aprons, sidewalk construction "and on and on."

Bybee admitted, however, that the improvements were a condition imposed by the City on the whole project. When asked what provisions were being invoked by the City prior to the permit application process, he replied, "Well, in general, none of them."

Bybee also admitted that $200,000 charged to the tenants for cleaning up contaminated soil was not incurred by Doerken. Bybee explained that the contamination was from a former Standard Oil gasoline station, and Chevron agreed to pay the cost of cleanup. He stated, however, that there were other charges not on the schedule of costs that far exceeded the $200,000 charged for contamination cleanup.

Thomas Pierce, an associate planner for the City, was called to testify by Bresler. Pierce stated that he was not aware of any action being taken by the City against the Promenade at the time the development permit was approved. When asked whether the improvements required by the City would have been required whether or not the project went forward, or were they simply conditions of the project, Pierce replied they were simply conditions of the project.

Bresler testified on his own behalf that his average monthly payment for common area expenses was between $700 and $800 per month. He also said that at the time he

entered into the lease he never figured on getting a lump sum charge of almost $30,000.

The trial court found that Bresler's failure to pay his pro rata share of the "remodeling and rehabilitat[ion]" of the common area was a breach of the lease. The court also found that the breach prevented Bresler from exercising his option to renew the lease and that the lease had terminated. the court gave judgment of possession to Doerken. Bresler appeals.

DISCUSSION

Bresler contends that the $1,148, 102 allegedly spent by Doerken to renovate the common area of the Promenade was not "maintenance" under paragraph 5.4 of the lease.

Paragraph 5.4 of the lease provides: "Maintenance: Lessor shall pay and be responsible for maintaining all improvements on the common area in good and sanitary order, condition, and repair, including making replacements where necessary, and in compliance with all governmental requirements, including without limitation, (1) property management, (2) cleaning and removing rubbish and dirt, (3) labor, payroll taxes, materials, and supplies, (4) all utility services utilized in connection therewith, (5) maintaining, repairing, replacing and reserving for replacement, and re-marking paved and unpaved surfaces, curbs, directional and other signs, landscaping, lighting facilities, drainage, and other similar items, (6) all premiums on compensation, casualty, public liability, property damage, and other insurance on the common area, (7) rental cost or straight-line depreciation on tools, machinery, and equipment used in connection with the above, (8) all real property and personal property taxes and assessments levied or assessed against the common area, and (9) any regulatory fee or surcharge or similar imposition imposed by governmental requirements based upon or measured by the number of parking spaces or the areas devoted to parking in the common area."

Paragraph 5.6 provided in part: "Lessee's Contribution: Lessee shall pay to Lessor within ten (10) days after delivery of Lessor's statement, but not more often than monthly, Lessee's pro-rata share of the amount of all expenses, including reasonable property management fees, described in Paragraph 5.4 based either on (a) the amount of such expenses actually incurred during the billing period, or (b) equal periodic installments which have been estimated in advance by Lessor for a particular calendar year..."

Paragraph 5.7 provides in part: "Lessor shall, except as otherwise provided herein, operate and maintain the common area during the lease term. The manner in which the common area shall be operated and maintained and the expenditures therefor shall be in Lessor's sole discretion."

Where, as here, there is no extrinsic evidence to aid in the interpretation of the lease, we must make an independent determination of its meaning. (Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865-866.) In the absence of a clear expression of intent to the contrary, we must interpret the lease so as to make it reasonable and to avoid a harsh, unjust and inequitable result. (Civil Code §1643; *County of Marin v. Assessment Appeals Bd.* (1976) 64 Cal.App.3d 319, 328.)

The cardinal paragraph is 5.4, entitled "Maintenance." The paragraph provides that maintenance includes "making replacements where necessary" including "replacing ... paved and unpaved surfaces, curbs ... landscaping, lighting facilities, drainage, and other similar items ..." The paragraph limits the landlord to making replacements "where necessary"; that is, where necessary for "maintaining all improvements on the common area in good and sanitary order, condition, and repair ..."

Bybee testified that the common areas were in bad condition, and the trial court so found. But there was no evidence that any of the work for which Bresler was charged was necessary for maintaining the common area in good and sanitary repair. Instead, the evidence was that the work was done as a condition of a permit for extending one

building and adding another.

Nor is Doerken aided by the provision of paragraph 5.4 that requires the lessor to keep the common area in good and sanitary repair "in compliance with all governmental requirements ..." There was no evidence the City was requiring any of the work to be done simply to maintain the common areas. Instead, the evidence was that the City was requiring the work to be done as a condition of a permit to expand one building and add another.

Under Doerken's interpretation of the lease, the lessor has complete control over the type and cost of capital improvements to the common area, and the lessee has virtually unlimited liability. No reasonable lessee would enter into such an agreement, and no reasonable lessor would expect him to. The unreasonableness of Doerken's interpretation becomes even clearer when it is considered that paragraph 5.6 allows the lessor to demand payment in one lump sum within 10 days of the delivery of the statement to the lessee. Thus, under Doerken's interpretation, a lessee, who has no control over the timing or cost of the improvements, must be prepared to pay a large amount of money within a very short time of the lessor's demand.

Doerken asserts its interpretation of the lease is reasonable because Bresler would have the benefit of the improvements over the 20-year term of his lease. But whether a commercial lessee who must pay for an improvement actually benefits will depend on whether the increase in income derived from the improvement exceeds its cost. Thus, few tenants would consider themselves benefited by an improvement the cost of which makes their businesses less profitable. Fewer still would consider themselves benefited where the cost forces them to cease doing business entirely. Where, as here, the tenant has no control over the timing of construction, the type of improvement or its cost, it is highly speculative to say the tenant will benefit. Moreover, where the landlord has such total control, any benefit derived by the tenant will be incidental to the benefit which the landlord expects to obtain.

The most reasonable interpretation of paragraphs 5.4, 5.6, and 5.7 is that the lessor has the discretion to charge the lessee for expenses incurred only in the ordinary course of maintaining the common area. Nothing in the lease authorizes the lessor to charge the lessee for capital improvements, whether the capital improvements are to the common area or whether the capital improvements are mandated by governmental regulation.

The line dividing maintenance from capital improvements may not always be clear. But when the usual maintenance cost of approximately $800 jumps to a demand for a lump sum of almost $80,000, only one reasonable conclusion is possible--the demand has far exceeded the cost of maintenance.

Doerken complains that Bresler has to tender any payment. But under paragraph 5.6, delivery of a proper statement by the lessor is a condition precedent to payment. Here no proper statement for ordinary maintenance was delivered. Under these circumstances, Bresler was not obligated to make any payment. This is not to say, however, that Bresler is relieved from his obligation to pay maintenance as required by the lease. What that amount may be is not before us here. Bresler's obligation to pay will arise when he receives a proper statement for ordinary maintenance costs.

The only basis alleged by Doerken for rejecting Bresler's option to renew the lease was Bresler's failure to pay the statement of August 28. Because Bresler had no duty to pay the costs itemized in that statement, the trial court erred in finding Bresler failed to exercise his option.

The judgment is reversed with instructions to enter judgment for Bresler. Costs on appeal are awarded to Bresler.

NOT FOR PUBLICATION.

Gilbert, J.