

No. 46071-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE
COURT OF APPEALS
DIVISION II
2014 JUL 12 10:10 AM
STATE OF WASHINGTON
BY *SW*

MICHAELS STORES, INC.,

Plaintiff/Respondent

vs.

RPAI LAKEWOOD, L.L.C. f/k/a INLAND WESTERN LAKEWOOD,
L.L.C.,

Defendant/Appellant

APPELLANT'S OPENING BRIEF (CORRECTED)

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR / ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR.....2

 A. Assignments of Error2

 B. Issues Pertaining to Assignments of Error.....2-3

III. STATEMENT OF THE CASE3

IV. ARGUMENT5

V. CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL AND OUT-OF-STATE CASES

Chase Manhattan Bank v. First Marion Bank,
437 F.2d 1040 (5th Cir. 1971)11

Superior Oil Co. v. Western Slope Gas Co.,
604 F.2d 1281 (10th Cir. 1979) 8

WASHINGTON CASES

Berg v. Hudesman,
115 Wn.2d 657, 801 P.2d 222 (1990)7, 8, 13

Byrne v. Ackerlund,
108 Wn.2d 445, 739 P.2d 1138 (1987)13

Hearst Communications, Inc. v. Seattle Times Co.,
154 Wn.2d 493, 115 P.3d 262 (2005)7

Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.,
123 Wn.2d 678, 871 P.2d 146 (1994)11

*Max L. Wells Trust by Horning v. Grant Cent. Sauna and Hot Tub Co. of
Seattle*,
62 Wn. App. 593, 815 P.2d 284 (1991)7

Scott Galvanizing, Inc. v. Northwest EnviroServices,
120 Wn.2d 573, 844 P.2d 428 (1993)7-8

Stender v. Twin City Foods, Inc.,
82 Wn.2d 250, 510 P.2d 221 (1973)8

Tanner Elec. Co-op v. Puget Sound Power & Light Co.,
128 Wn.2d 656, 911 P.2d 1301 (1996)5, 8

Trimble v. Washington State University,
140 Wn.2d 88, 993 P.2d 259 (2000)5

RULES

CR 56(c)5

I. INTRODUCTION

This is a contract interpretation case. The contract is a commercial Lease between RPAI Lakewood, L.L.C (“RPAI”) Landlord, and Michaels Stores, Inc. (“Michaels”), Tenant. [CP 9] The Lease provided the Tenant the right to pay Alternative Rent (reduced rent) in the event of 180 consecutive days of non-satisfaction of a co-tenancy clause (which required at least 70% of the leasable space be operated by defined Anchor Tenants). [CP 37] If the non-satisfaction continued for twelve (12) consecutive months from the initial failure, the Tenant had the right to terminate the Lease on 60 days notice and “...for so long as...” the non-satisfaction continued. [CP 38] The Lease also provided that the “Landlord shall likewise have a right to terminate the lease at the end of the 14th month...” which is twelve (12) months of continuous non-satisfaction, plus 60 days notice.¹ [CP 38] The Landlord contends that at any time after the non-satisfaction has been in effect for twelve (12) consecutive months, the parties rights are co-extensive and either may thereafter terminate the Lease by giving the requisite sixty (60) days notice. The Tenant contends that only it has the continuing right and that the Landlord’s right of termination is limited to a single day at the end of

¹ Although not expressly set forth, the earliest the termination can become effective for both parties falls on the same day--the end of the 14th month.

the fourteenth (14th) month of non-satisfaction. The issue is: Does the Lease language mean that the Landlord's right to terminate commences at the end of the 14th month (12 months, plus 60 days notice) and, like the Tenant's right, continues, or is the end of the 14th month the beginning *and the end* of its right to terminate? Did the trial court have a legal basis on summary judgment in holding that the only reasonable interpretation is that the *end of the 14th month* meant the Landlord can terminate the Lease on the last day of that month, and only that day?

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error

1. The trial court erred in granting Plaintiff's Motion for Summary Judgment.

B. Issues Pertaining To Assignments of Error

1. Facially, is the pertinent Lease language concerning Lease Termination by Landlord and Tenant contained in Paragraph 16.3 for failure of the Co-Tenancy percentage susceptible to more than one reasonable interpretation? Does a material fact exist concerning what the parties intended as it relates to the rights of the Landlord and Tenant to terminate the Lease for failure of the Co-Tenancy percentage, which could only be resolved at trial after the introduction of all the relevant facts and

circumstances? (Assignment of Error No. 1) The standard of review for this issue is de novo.

III. STATEMENT OF THE CASE

On August 10, 2001, Michaels executed a Lease with Defendant RPAI Lakewood, L.L.C. f/k/a Inland Western Lakewood, L.L.C.'s predecessor, MBK Northwest, for approximately 23,838 square feet in a shopping center located in Tacoma, Washington. [CP 9] The entire Lease is set forth at in the Clerk's Papers. [CP 9 – 141] Important to an analysis of the case is the fact that the leased premises consisted of a 23,000 square foot building that Landlord, at its cost, was to construct for the tenant. [CP 44 – 89] The initial term of the Lease was for ten (10) years and Tenant had three (3) five (5) year options to extend. [CP 9]

The Lease also contained a co-tenancy clause which provided remedies and rights to Landlord and Tenant in the event of its non-satisfaction, i.e., less than 70% of the leasable square feet of the entire shopping center was occupied by "Anchor Tenants" as that term was defined in the Lease. [CP 37] First, the Lease provided that the Minimum Rent "shall..." be reduced to Alternative Rent if the non-satisfaction continued for a period of one hundred and eighty (180) consecutive days. [CP 38] After twelve (12) months of consecutive non-satisfaction, and "...for so long as..." the non-satisfaction continued, the Tenant had the

right to terminate the Lease without penalty by providing sixty (60) days written notice. Correlatively, the Lease also provided the Landlord "...shall likewise have a right to terminate...at the end of the 14th month following consecutive non-satisfaction" by giving notice sixty (60) days *prior* written notice to Tenant. [CP 38] The relevant portion of paragraph 16.3 of the Lease provides:

In addition to the rights of the Tenant to pay "Alternative Rent", if [the non-satisfaction continues for a period of 12 months] "...and for so long as such non-satisfaction shall continue Tenant shall have the right to terminate this lease by sixty days written notice delivered to Landlord.....Landlord shall likewise have a right to terminate this lease at the end of the fourteenth (14th) month...by giving sixty (60) days prior written notice to Tenant...

[CP 37 – 38]

Upon receipt of the Landlord's notice of termination, the Tenant could trump Landlord's notice and render it *ineffective* by giving thirty (30) days' notice that it will resume the Minimum Rent payments. [CP 38]

On May 15, 2009, the on-going co-tenancy provision was triggered due to the vacation from the Center of a defined Anchor Tenant, Gottschalks. Beginning with the December, 2009 Rent Period, Tenant commenced paying the Alternate Rent but did not elect to terminate the Lease. [CP 183] The Landlord exercised its right to terminate on

December 14, 2012 by providing Tenant its sixty (60) day notice to terminate. [CP 143] The Tenant contends that the Landlord's notice was too late and the Landlord missed the window to terminate which, according to the Tenant, was a single day at the end of the 14th month. [CP 145] Tenant buttresses its argument by contending that there is no justification to resort to the context of the Lease transaction as a whole or the commercial realities attendant to Landlord/Tenant relationships. The Lease, however, does not say what Tenant would like it to say.

Summary Judgment was granted to the Tenant on January 10, 2014 and this appeal followed. [CP 404]

IV. ARGUMENT

The standard of review is that summary judgment is appropriate only where there are no genuine issues of material fact; reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law. All reasonable inferences must be considered in the light most favorable to the non-moving party. CR 56(c); *Tanner Elec. Co-op v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996). Appellate review is de novo. *Trimble v. Washington State University*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000).

The heart of this matter revolves around the extent of the Landlord's termination rights; the meaning to be attributed to the word

“...likewise...” when used in the context of describing the right of the Landlord to terminate the Lease and in the context of the entire Lease and commercial reality. Was the Lease language used meant to convey the intention that the Landlord’s right of termination existed to the same extent of that belonging to the Tenant or something radically different? The Tenant contends that since the sentence describing the Landlord’s right of termination does not contain the words “as long as...”, which is used in describing the Tenant’s right, the Landlord’s right therefore must, as a matter of law, be forever waived and extinguished after that single last day of the fourteenth (14th) month without any explanation or rationale, harsh as that may be. The Tenant does not provide any explanation for differentiating between the two rights other than those are the words chosen. Even if Tenant’s interpretation is reasonable at all, it is not the only reasonable interpretation of the language of the Lease and not a matter to be decided on a motion for summary judgment.

Landlord contends that the word “likewise”, although not a perfect use of the adjective, nonetheless, when given its common and customary meaning, is supportive of the Landlord’s interpretation. It could just as easily refer to the fact that, like the Tenant, it has the same rights which are already described in the preceding sentences rather than repeating them again, verbatim. The fact that the earliest the termination can

become effective for both parties is on the last day of the 14th month, indicates the Tenant's interpretation, which then separates and treats the rights differently, is strained. At a minimum, the issue is not ripe for a summary determination in favor of the Tenant as there is more than a single reasonable interpretation. RPAI should be given the right to introduce evidence concerning the meaning of the language of the Lease and that its rights are co-extensive with the Tenant's rights.

This court has adopted the "context rule" of contract interpretation first enunciated in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) recognizing the difficulties associated with interpreting contracts solely on the basis of the "plain meaning" of the words in the document.

Berg has since been refined to make clear that its purpose was not to grant a license to change "the deal" by the use of extrinsic evidence, but rather, the surrounding circumstances and other extrinsic evidence "...are to be used to determine the meaning of specific words and terms used..." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Discerning the intention of the parties remains the ultimate goal and the court retains the "objective manifestation" theory of contracts. *Max L. Wells Trust by Horning v. Grand Cent. Sauna and Hot Tub Co. of Seattle*, 62 Wn. App. 593, 815 P.2d 284 (1991). "[T]he touchstone of the interpretation of contracts is the intent of the parties."

See *Scott Galvanizing, Inc. v. Northwest EnviroServices*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993).

“In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement but also from ‘viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’” *Scott*, 120 Wn.2d at 580-81 (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). As the *Scott* Court noted, “Under *Berg*, interpretation of a contract provision is a question of law *only* when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Id.*, 120 Wn.2d at 582. In accord, *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). To determine the intent the Court must put itself in the position of the parties by considering the instrument itself, its purposes, and the circumstances of its execution and performance. *Tanner*, 128 Wn.2d at 679; *Superior Oil Co. v. Western Slope Gas Co.*, 604 F.2d 1281, 1288-89 (10th Cir. 1979).

Landlord's interpretation of the contract termination rights, when taken in the context of a commercial Landlord/Tenant relationship makes the most sense because there is no indication in the Lease that the parties intent was to impose a harsh and major disparity in rights. To the contrary, the language clearly evidences an intent to balance the playing field in the sense that the parties could choose to live with the non-satisfaction of the co-tenancy (resulting in payment and acceptance of lesser rent); but, at the same time, give both parties the right to opt out of the relationship altogether. Even Tenant admits that is the case. There is no reason provided by Tenant, however, why Landlord's right to opt out lasts only one (1) day in contrast to Tenant's never ending right to opt out. To contend that the Landlord is foreclosed after a single day (forever waived its right) does not reflect common sense; it is contrary to other Lease provisions where failure to act is expressly called out as a waiver [CP 26, ¶ 3.7] and is at odds with the balancing reflected in the Lease as whole. Importantly, the Tenant has the last word and can void the Landlord's termination by reinstating the Minimum Rent. Stepping back from the trees to see the forest, the Lease provisions clearly gives each party the opportunity to adjust to market conditions as they exist in the commercial world.

The Tenant's interpretation is punitive and a disconnect with commercial reality. The Tenant contends that in spite of the fact it has an unlimited time to terminate the Lease, i.e., "...as long as [the non-satisfaction continues]", the Landlord, on the other hand, has only a single day. It points to other instances in the Lease where the balancing is set forth in clearer terms as evidence the parties knew how to articulate rights and responsibilities. [CP 188, ln 8 – 15] Yet, Tenant offers no reasonable explanation for the unbalanced interpretation it gives to the termination rights. Tenant's view is that the court should look at the words the parties used in the Lease totally divorced from facts, circumstances and extrinsic evidence. In order to make its argument, Tenant inserts an unstated term in the Lease, i.e., there was a "one time right to terminate the Lease..." [CP 187, ln. 2] Landlord would agree that if the Lease did not contain the word "likewise" *and* contained the phrase "one time right...on the last day of the 14th month" or any other of the myriad ways available clearly indicating a waiver of Landlord's termination rights if not exercised on that last day Tenant's argument would have some force. But that is not the case; although the parties (as noted earlier), in fact, knew exactly how to express a waiver and extinguishment of rights and did so in Paragraph 3.7.

If Landlord fails to seek reimbursement...within thirty six (36) months after the last day of the calendar year...Landlord's right to recover such charge or expense shall be deemed to have been waived.

[CP 26]

The correct rule of contract interpretation is to "...impute to a person an intention corresponding to the reasonable meaning of his words and acts." *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Ambiguity is not a component of that analysis and is not a prerequisite to considering the context in which the Lease was executed. That the contract may not be ambiguous, does not prevent giving meaning to the words used. Since perception is conditioned by environment, it is proper to consider the contract's commercial setting even though the contract is not facially ambiguous. *Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040 (5th Cir. 1971).

To give this Lease the meaning Michaels attributes to it, is so out of the ordinary and punitive to one side, it necessarily requires a clear expression of intent to forfeit Landlord's right. The use of the word "likewise" is more apt to describe similarity or sameness, than the opposite. It is more reasonable to say it was used to avoid the necessity of repeating the phrase it references. Contrary to Tenant's contention, that is

why the Landlord having a continuing right like the Tenant does not modify or detract from the Tenant's termination rights and does not render any Lease Language superfluous. **[CP 188, ln. 1]** Tenant's right to terminate remains unabated. Tenant's right to pay a lesser rent, however, can be "called" by Landlord's correlative termination right. If such were to occur, then the Tenant is put to a choice. If it makes commercial sense after consideration of the economic factors, one of which is the actual impact, if any, of not having an Anchor Tenant, the Tenant may revert to paying the Minimum Rent. If it does not make sense, and the Tenant determines the lack of the Anchor Tenant is detrimental to its business, it can end the relationship. Instead, it exercised its option to extend the Lease for an additional five (5) years.

Landlord's interpretation is that both parties have the same quality of right of termination. Both parties are given the opportunity to gauge the impact of the non-satisfaction and adjust accordingly to fit their business and economic objective. Neither party is granted a windfall and the Lease terms are not given a punitive meaning. As it turned out, the Tenant did not experience an impact, at all, as its sales did not suffer but, in fact, continued to increase. Tenant's interpretation grants a windfall to Tenant by allowing the continuation of the payment of Alternative Rent in the absence of adverse consequences resulting from non-satisfaction of the

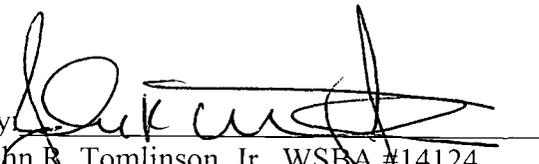
tenancy requirement. “Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail.” *Byrne v. Ackerlund*, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987). Similarly, the court will adopt the reasonable, prudent and just interpretation rather than one which makes it unreasonable and imprudent. *Berg*, 115 Wn.2d at 672.

V. CONCLUSION

Landlord contends that the trial court erred in granting summary judgment to Tenant. Even if the Tenant’s interpretation is reasonable, it is not the only reasonable interpretation, nor, in fact, the most reasonable given the parties circumstances. Further, Landlord’s interpretation confirms a level playing field and one that does not unduly favor one party over the other. Punitive interpretations and those that impose harsh results on one party and grant a potential windfall to the other party are disfavored in the law.

DATED AT Seattle, Washington this 10th day of June, 2014.

BAROKAS MARTIN & TOMLINSON

By 
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CERTIFICATE OF SERVICE

I am employed by the law firm of Barokas Martin & Tomlinson, over the age of 18, not a party to this action, and competent to be a witness herein.

On Thursday, June 12, 2014, I caused a true and correct copy of the foregoing document (Appellant's Opening Brief and Certificate of Service) to be delivered to the following via Washington Legal Messengers:

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I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

DATED this 12th day of June, 2014, in Seattle, Washington.

Signature: 
Lisa A. Earnest