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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JV SOCCER CENTER LLC,

Plaintiff, Cross-defendant
and Respondent,

v.

ADMA ASSOCIATES L.P.,

Defendant, Cross-
complainant and Appellant.

B284919

(Los Angeles County
Super. Ct. No. YC071823)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed.

Perlman & Associates, Dana M. Perlman; Greines, Martin, Stein & Richland and Marc J. Poster for Defendant, Cross-complainant and Appellant.

Law Office of Martin L. Horwitz and Martin L. Horwitz for Plaintiff, Cross-defendant and Respondent.

Plaintiff and cross-defendant JV Soccer Center LLC (JVSC), sued defendant and cross-complainant ADMA Associates L.P. (ADMA), for declaratory relief, seeking a determination of whether JVSC could properly exercise an option to extend the term of a commercial lease. ADMA cross-complained for breach of contract. After a bench trial, the trial court ruled in favor of JVSC, declaring JVSC's right to exercise the option and finding that any breach of the lease had been immaterial or rectified. The trial court entered judgment in favor of JVSC and ADMA appealed. For the reasons set forth below, we affirm.

BACKGROUND

I. Statement of facts

ADMA is the owner and lessor of the commercial property in the City of Torrance (the property). The property is a single story, 73,000 square foot industrial building located on a 130,680 square foot lot. The property is zoned for heavy industrial manufacturing, however, in 2009, Torrance issued a conditional use permit for the operation of an indoor sports training facility.

In early June 2012, JVSC sought to lease the property and informed ADMA that it wanted to have a "Subway style tenant, pro shop, and/or educational activity on the Property." During negotiations, the parties exchanged numerous drafts of a modified form commercial lease. On June 29, 2012, the parties reached an agreement consisting of a modified form lease and an eight-page addendum (together, the lease). The lease had a five-year term from July 1, 2012 to June 30, 2017.

The lease also included two, five-year options to extend the term at the current rent. To exercise the option, JVSC had to be in "full possession" of the property. The lease does not define full

possession. Also, the option was unavailable if JVSC was in default or had committed a material nonmonetary breach.

Generally, the lease required JVSC to obtain ADMA's consent to sublease the property. However, JVSC reserved the right to sublease or license a portion of the property without ADMA's consent for the purpose of "a food concession, athletic activities, educational activities and/or a pro-shop, or to permit concessionaires," provided that the portion of the property allocated to any such activities was less than five percent of the square footage. With respect to these permissive subleases and licenses, ADMA had the right to approve their form. The lease authorized JVSC, subject to ADMA's consent, to place signs on the property, including signs on the front of the building.

The lease also included a rent sharing provision that entitled ADMA to 50 percent of any excess rent paid to JVSC, to be calculated on a square foot basis. Under this provision, ADMA was required to draw up a "separate agreement . . . evidencing the specific details of [the] shared [rent]" and retained the right "to audit the books, records and papers of [JVSC]."

On July 19, 2012, JVSC and Ambassador High School (AHS) entered into an agreement permitting AHS to use 2,400 square feet of the property (three offices, two multi-purpose rooms, and reception area) (the first AHS agreement). JVSC reserved the right to enter the area allocated to AHS at any time. In August 2012, JVSC obtained a modification to the conditional use permit to operate an indoor sports training facility to allow AHS to operate on the property from 7:30 a.m. to 4:00 p.m., Monday through Friday, for the 2013-2014 academic year.

Although it did not know the precise terms of the first AHS agreement, ADMA was aware of AHS's presence on the property,

and approved the form on which the first AHS agreement was based. ADMA had also approved several accommodations specifically for AHS, including the construction of additional exit doors and installation of an HVAC unit to service the classrooms.

As the term of the first AHS agreement expired, in July 2016, JVSC entered into another four-year agreement with AHS (the second AHS agreement), which was substantially similar to the form agreement previously approved by ADMA. It provided for the use of approximately 5,000 square feet of the property (three offices, two full time multi-purpose rooms, three part time multi-purpose rooms, conference area, learning area, and reception area), more than double the size under the first AHS agreement. At the time of trial, AHS had grown to 64 students.

On September 14, 2016, JVSC attempted to exercise the option under the lease. ADMA responded on October 17, 2016, taking the position that JVSC had no right to do so because it was not in full possession of the property because of the presence of AHS. Shortly thereafter, JVSC obtained an “Amended and Restated License Agreement” from AHS in November 2016 (the third AHS agreement). The third AHS agreement was not in the pre-approved form and JVSC did not submit it to ADMA for approval. However, AHS’s use of the property did not change between the second and third AHS agreements.

II. Procedural history

On January 25, 2017, JVSC sued ADMA, seeking a declaration of its right to exercise the option. ADMA cross-complained for breach of contract, alleging that JVSC had failed to (a) obtain ADMA’s consent to the form of the third AHS agreement; (b) pay ADMA 50 percent of the excess rent, and (c) obtain ADMA’s approval for any signs placed on the property. On

June 8, 2017, after a brief bench trial, the trial court ruled in favor of JVSC on the complaint and ADMA's cross-complaint. As trial took less than a day, the trial court delivered an oral statement of decision.

III. Trial court's ruling

The first issue the trial court addressed was whether AHS occupied more than five percent of the property, thus requiring ADMA's consent. The trial court had to resolve whether five percent referred to the square footage of the building or the combined square footage of the building and the lot. Concluding that the larger area applied, the trial court found that the space allocated to AHS was less than five percent of the property.

Next, the trial court addressed whether JVSC was in full possession of the property despite AHS's presence. The trial court concluded that it was. Before beginning its analysis, the trial court found that the term full possession "create[d] an ambiguity" and therefore extrinsic evidence was admissible to determine its meaning. While the trial court found it "troubling" that JVSC attempted to minimize the extent of AHS's use of the property, it nevertheless found that JVSC had not given up possession when it brought on AHS. The trial court considered a "whole course of conduct where [ADMA] welcomed [AHS]" and "participated in making sure that [AHS] was up and running." The trial court also found that JVSC continued to pay the taxes and insurance premiums on the entire property and used it "for many other purposes besides the utilization of a small school that is growing but still remains small."

After determining that JVSC remained in full possession and that AHS did not occupy more than five percent of the property, the trial court considered ADMA's remaining theories

that JVSC had breached the lease. The trial court first considered whether JVSC breached by failing to share 50 percent of the rent it collected from AHS pursuant to the rent sharing provision. The trial court found that there was nothing about the relationship between JVSC and ADMA that would trigger the rent-sharing requirement, noting that ADMA had never requested anything from JVSC or prepared a separate agreement as required by the lease.

The trial court then addressed whether the presence of three AHS signs on the property was a nonmonetary material breach and found that ADMA never complained of the conspicuous signage despite being on the property many times since the signs were up. As such, the presence of the signs could not constitute a material breach.

Lastly, the trial court considered whether the expiration of the modification of the conditional use permit was a material breach. While the trial court acknowledged that the lapse was indeed a breach, it also found that this was an “oops moment” on the part of JVSC that had been rectified very shortly after JVSC was put on notice of the lapse.

The trial court concluded that JVSC had complied with the lease in “all manners that are material and relevant” and entered judgment in favor of JVSC. This timely appeal followed.

DISCUSSION

We generally apply a de novo standard of review to conclusions of law regarding interpretation of a contract, or, in this case, a commercial lease. (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 999.) “The precise meaning of any contract, including a lease, depends upon the parties’ expressed intent,

using an objective standard.” (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 21.) If there is any ambiguity in the contract’s terms, extrinsic evidence may be considered to the extent that it does not conflict with the express terms of the contract. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266–1267.) “An ambiguity arises when language is reasonably susceptible of more than one application to material facts.” (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 177 Cal.App.3d 855, 859, fn. 1.) “There cannot be an ambiguity per se, i.e.[,] an ambiguity unrelated to an application.” (*Ibid.*) In some circumstances, “if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.” (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

Extrinsic evidence is also reviewed de novo, unless the evidence is in conflict and requires the resolution of credibility, in which case we are guided by the substantial evidence test. (*Golden West Baseball Co. v. City of Anaheim, supra*, 25 Cal.App.4th at p. 22.)

I. JVSC remained in full possession of the property despite AHS’s presence

The parties’ primary dispute is whether JVSC remained in full possession of the property despite AHS’s presence. The lease does not define full possession. As the trial court noted, the term creates an ambiguity and the court resolved the ambiguity in JVSC’s favor. We agree.

Neither the terms of the lease or those of the agreements with AHS, nor the undisputed facts support ADMA’s contention

that JVSC was not in full possession of the property because JVSC subleased or licensed a small portion of the property to AHS. There are numerous terms in the lease that contemplate that JVSC is in the business of charging third parties for use of the property. The lease defines agreed use as an “[i]ndoor adult and children’s sports training and sports oriented entertainment facility, including associated retail sales.” The lease expressly permits JVSC to license and sublease for the operation of “food concession, athletic activities, educational activities and/or a pro-shop, or to permit concessionaires” to operate on the property. The lease also allows JVSC to sublease small portions of the property (less than five percent) without ADMA’s consent. In its agreements with AHS, JVSC reserved the right to enter the areas occupied by AHS at any time and AHS’s activities on the property were subject to the use of JVSC’s other clients. Finally, as a factual matter, JVSC maintained a high degree of control over AHS’s operations that went beyond those of a normal lessor/lessee relationship.

We conclude that JVSC was in full possession when it exercised the option.

II. JVSC did not commit a material breach

We now turn to whether JVSC was in default or had committed a material nonmonetary breach that would forfeit JVSC’s right to exercise the option.

ADMA contends that AHS leased more than five percent of the property and JVSC breached the lease’s requirement that JVSC obtain ADMA’s consent to lease to AHS. The parties dispute whether the five percent should be measured using the square footage of the building or the building and land combined. ADMA submitted testimony from its attorneys that the five

percent limit was arrived at by rounding up from 3,500 square feet that was discussed on a call with JVSC's representatives during negotiations (3,500 is approximately 4.8 percent of 73,000). ADMA also introduced an estoppel certificate executed by JVSC and drafted by ADMA that the property consisted only of the 73,000 square feet of the building.

We fail to see the ambiguity in the lease's description of the property that would require considering extrinsic evidence on this point. Parole evidence should only be admitted if a lease is silent as to the quantity—of land to which the lessee is entitled. (*Guttman v. Berry* (1948) 83 Cal.App.2d 507, 510–511.) The lease defines the property as a “single story industrial building containing approximately 73,000 square feet situated on approximately 130,680 square feet of land.” The five percent provision applies expressly to the property as defined in the lease. We agree with the trial court that the larger area controls and that the 5,000 square feet allocated to AHS was less than five percent of the total square footage of the property (five percent of 130,680 is 6,534).

ADMA's next contention centers around AHS's operations on the property while the modification to the conditional use permit to operate a high school had expired. The modification expired at the end of the 2013-2014 academic school year while AHS continued to operate on the property. Notably, ADMA does not assert that the expiration of the modification is the breach. Rather, ADMA contends that the breach occurred when JVSC failed to provide it with “‘written evidence of compliance’” within 10 days after being issued a notice of default. ADMA learned of the lapse after this litigation was underway and issued a notice of default on March 10, 2017. That same day, JVSC's counsel

emailed ADMA's attorney, giving notice that JVSC had commenced steps to cure the default, i.e., to obtain an extension to the modification of the conditional use permit. JVSC moved quickly and obtained the necessary modification only 20 days after being issued a notice of default. The modification was renewed on March 30, 2017.

ADMA's next argument is that JVSC breached when it did not submit the form for the third AHS agreement to ADMA for approval. JVSC does not dispute that this occurred. The trial court did not address this issue in its oral ruling.

Pursuant to the lease, ADMA retained the right to approve the form of sublease, license or concession to ensure compliance with the requirements of the lease. The provision does not impose an affirmative duty on JVSC to present forms of subleases, assignments, or licenses for ADMA's approval and approval cannot be unreasonably withheld. ADMA was fully aware of AHS's operations on the property, which commenced as early as August 2012, a little over a month after JVSC executed the lease. In that time, ADMA did not find AHS's presence unwelcome and presumably knew that there was some agreement between AHS and JVSC that governed AHS's use of the property. Throughout, ADMA retained the right "to audit the books, records and papers of [JVSC]" related to any assignment or sublease, but it never did so. Therefore, JVSC's failure to seek approval of the third AHS agreement was not a material breach.

ADMA argues that JVSC breached the lease by allowing AHS to add signage without ADMA's approval. Again, just as ADMA was aware of AHS's presence, it was also aware of the signs, the first of which was put up in June 2015. Only when JVSC filed the declaratory relief action did ADMA take issue

with the signs. As such, we agree with the trial court that this breach was immaterial and cannot serve as the basis to deny the option.

ADMA argues that JVSC committed a material breach when it did not share 50 percent of the excess rent it was receiving from AHS. But, as the trial court noted, ADMA never asked for excess rent from JVSC, even though it knew AHS was operating on the property. Further, ADMA never prepared or attempted to prepare a separate agreement evidencing the shared rent, as was required under the lease. A party must demonstrate its performance or excuse for nonperformance under the terms of an agreement in order to prevail on a breach of contract claim. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Without such a showing, JVSC's failure to share excess rent cannot support ADMA's theory of a material breach.

DISPOSITION

The judgment is affirmed. JV Soccer Center LLC is awarded its costs on appeal.

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DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.