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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TRICOLOR AUTO GROUP, LLC, Plaintiff and Respondent, v. 603 SAN FERNANDO ROAD, LLC, Defendant and Appellant.	2d Civil No. B284278 (Super. Ct. No. BC575588) (Los Angeles County)

Appellant 603 San Fernando Road, LLC (San Fernando) leased commercial property (the Premises) to respondent Tricolor Auto Group, LLC (Tricolor). Sometime after Tricolor took possession, the Premises were vandalized. After the damage was repaired, Tricolor sued San Fernando for abatement of rents due during the period the Premises were in a damaged condition. The court entered judgment in favor of Tricolor and ordered San Fernando to abate rent.

San Fernando appeals the judgment. It contends the trial court erred when it interpreted the lease to require San Fernando to pay rent abatement. We affirm.

FACTS AND PROCEDURAL HISTORY

In August 2013, San Fernando and Tricolor entered into a commercial lease agreement. Tricolor planned to operate an auto dealership on the leased Premises. Tricolor did not immediately occupy the Premises but commenced improvements.

On April 5, 2014, while the Premises were being improved, one of San Fernando's employees discovered the Premises had been vandalized. The Premises had been stripped of fixtures, pipes, and wiring, and there was "a lot of trash" and graffiti on the walls. It appeared that someone "had been there a while." Because of the extent of the damage, the Premises could not be occupied.

San Fernando made two claims to its insurance carrier: one for the repairs and one for rent abatement. In November 2014, the insurance carrier approved the repairs claim, but it denied the rent abatement claim. The repairs took three and a half months and were completed in March 2015. Meanwhile, Tricolor continued to pay rent.

After the repairs were completed, Tricolor sought rent abatement for the period of time during which the Premises could not be occupied due to the damage and repairs. San Fernando refused to pay.

Tricolor sued San Fernando. It alleged that under section 9 of the lease, San Fernando was required to repair the damage to the Premises and to abate rent.

Section 9 of the lease discusses damage to or destruction of the Premises. The relevant provisions read as follows:

> [9.1](a) 'Premises Partial Damage' shall mean damage or destruction to the improvements on the Premises . . . which can reasonably be repaired in 6 months or less from the date of the damage or destruction. . . .
>
> [¶] . . . [¶]
>
> (c) 'Insured Loss' shall mean damage or destruction to improvements on the Premises, . . . which was caused by an event required to be covered by the insurance described in Paragraph 8.3(a), irrespective of any deductible amounts or coverage limits involved.
>
> [¶] . . . [¶]
>
> 9.2 Partial Damage - Insured Loss. If a Premises Partial Damage that is an Insured Loss occurs, the Lessor shall, at [the] Lessor's expense, repair such damage . . . as soon as reasonably possible. . . .
>
> 9.3 Partial Damage - Uninsured Loss. If a Premises Partial Damage that is not an Insured Loss occurs, unless caused by a negligent or willful act of Lessee (in which event Lessee shall make the repairs at

Lessee's expense), Lessor may either: (i) repair such damage as soon as reasonably possible at Lessor's expense . . . or (ii) terminate this Lease . . . .

9.4 Total Destruction. . . . If a Premises Total Destruction occurs, this Lease shall terminate . . . . If the damage or destruction was caused by the gross negligence or willful misconduct of Lessee, Lessor shall have the right to recover Lessor's damage from Lessee . . . .

[¶] . . . [¶]

9.6 Abatement of Rent; Lessee's Remedies.

(a) Abatement. In the event of Premises Partial Damage, or Premises Total Destruction or a Hazardous Substance Condition for which Lessee is not responsible under [the] Lease, the Rent payable by Lessee for the period required for the repair, remediation or restoration of such damages shall be abated in proportion to the degree to which Lessee's use of the Premises is impaired, but not to exceed the proceeds received from the Rental Value Insurance. All other obligations of Lessee hereunder shall be performed by Lessee, and Lessor shall have no liability for any such damage, destruction, remediation, repair or restoration except as provided herein.

Subsection 8.3 provides in relevant part:

> (a) Building and Improvements. The [insurance carrier] shall obtain and keep in force a policy or policies in the name of Lessor, with loss payable to Lessor . . . . If the coverage is available and commercially appropriate, such policy or policies shall [i]nsure against all risks of direct physical loss or damage . . . .
>
> (b) Rental Value. The [insurance carrier] shall obtain and keep in force a policy or policies in the name of Lessor with loss payable to Lessor . . . insuring the loss of the full Rent for one year . . . .

Following a court trial, the court found in favor of Tricolor on the rent abatement cause of action and awarded $307,571.63 for the 11-month period the Premises could not be occupied.

DISCUSSION

San Fernando contends the trial court erred when it interpreted subsection 9.6 of the lease to require rent abatement. It interprets the phrase, "for which Lessee is not responsible under [the] Lease," to mean that it was required to abate rent for only those damages Tricolor did not cause. Under this interpretation, San Fernando argues it was not required to abate rent because Tricolor caused the damage when it failed to secure the Premises. We disagree.

The parties disagree on the applicable standard of review. Tricolor contends the standard of review is substantial

evidence, while San Fernando contends the standard of review is de novo. We review the trial court's interpretation of the contract's lease terms de novo. (*Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, 181 (*Eucasia Schools Worldwide*).) Where there are disputed facts, we review the trial court's factual findings for substantial evidence. (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511.)

When interpreting a lease agreement, we apply the general rules governing contract interpretation. (*Eucasia Schools Worldwide*, *supra*, 218 Cal.App.4th at p. 181.) A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of the contract. When possible, the parties' mutual intention is to be determined from the language of the contract. (*Ibid.*) "'"The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' . . . controls judicial interpretation." [Citation.]' [Citation.]" (*Ibid.*)

The language in the contract must be construed in the context of that instrument as a whole and in the circumstances of the case. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) Interpretation of the lease must be fair and reasonable and cannot lead to absurd conclusions. (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143 (*California National Bank*).)

We construe subsection 9.6's phrase "for which Lessee is not responsible under [the] Lease" in the context of section 9 and the lease as a whole. The preceding subsections in section 9 discuss various types of damage, and subsections 9.2 through 9.5 specify the circumstances under which responsibility for the cost of repairs is assigned to either San Fernando or Tricolor. Subsections 9.2 and 9.3 specify instances where San

Fernando is responsible for the cost of repairs, that is, when the partial damage is an insured loss (subsection 9.2) and when it is an uninsured loss that is not "caused by a negligent or willful act of" Tricolor (subsection 9.3). Subsection 9.4 specifies that Tricolor is responsible for the cost of repairs for the total destruction of property only when the "damage or destruction was caused by the gross negligence or willful misconduct of Lessee." Subsection 6.2 regarding "Hazardous Substances," which is also mentioned in subsection 9.6's abatement provision, specifies that Tricolor would be responsible for any expenses if the hazardous substance condition was caused by Tricolor.

In light of these subsections, a "fair and reasonable" interpretation of the phrase "for which Lessee is not responsible under [the] Lease" requires that the phrase be interpreted to refer to the parties' responsibility for paying for repairs. (*California National Bank*, *supra*, 164 Cal.App.4th at p. 143.) We therefore agree with the trial court that the "natural" and "best reading of the lease text is that when there is damage . . . for which [Tricolor] is not responsible [for the costs of repair] . . . , rent abatement occurs."

Here, there is no dispute that the damage constituted a "Premises Partial Damage" and an "Insured Loss." Under these circumstances, the parties agreed that San Fernando and its insurer would be responsible for the costs of repairs pursuant to subsection 9.2 of the lease. Indeed, San Fernando conducted the repairs and its insurer paid for those costs. The plain language of subsection 9.6 required that where San Fernando was "responsible" for such repairs "under [the] Lease," Tricolor's rent "shall be abated."

San Fernando contends that the phrase "for which Lessee is not responsible under [the] Lease" should be interpreted to refer to Lessee's responsibility for causing the damage. Under this interpretation, San Fernando argues that it was not required to abate rent because Tricolor allowed the damage to occur when it failed to protect the Premises—a responsibility Tricolor assumed under section 41 of the lease. But section 41 is inapplicable here. As the trial court properly reasoned, a "negligence determination is not at issue" under subsection 9.2. Other subsections in section 9 consider circumstances under which Tricolor is responsible for the cost of repairs, including when the damage is caused by Tricolor's "negligent or willful" acts or "gross negligence or willful misconduct." In those circumstances, a negligence determination is relevant only if the loss is a "Premises Partial Damage that is not an Insured Loss" (subsection 9.3), a "Total Destruction" (subsection 9.4), or a "Hazardous Substance Condition" (subsection 6.2); none of which apply here.

Even if we were to adopt San Fernando's interpretation of the contract, we would conclude no error occurred. Where, as here, an appellant does not request and obtain a statement of decision, we presume the judgment is correct and "all intendments and presumptions are indulged in the favor of correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) San Fernando argues there was evidence to prove Tricolor caused the damage to the Premises, but San Fernando did not request a statement of decision. Here, there was substantial evidence that Tricolor took reasonable measures to protect the Premises. For example, Tricolor's chief executive officer testified that Tricolor secured the property by locking the

doors and gates, and that San Fernando agreed to manage the Premises and "look after it on a daily basis." We therefore presume the evidence supports a finding that Tricolor did not cause the damage to the Premises.

San Fernando also argues that it was not required to abate rent because there were no proceeds from "Rental Value Insurance." It cites subsection 9.6, which limits Tricolor's rent abatement to "the proceeds received from the Rental Value Insurance." We disagree with this contention.

Under subsection 8.3(b), San Fernando was required to "obtain and keep in force a policy or policies in the name of Lessor . . . insuring the loss of the full Rent for one year." It did not do so, and its insurance carrier therefore rejected its claim for rent abatement. But as the trial court properly found, "[t]hat failure cannot moot the abatement." San Fernando cannot benefit from its own failure to obtain rent insurance, which it was contractually obligated to obtain. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277.)

Lastly, San Fernando contends Tricolor cannot receive rent abatement because it breached the lease by failing to (1) carry business interruption insurance as required under subsection 8.4(b) of the lease, and (2) obtain approval for major improvements to the Premises as required under subsection 7.3(b). But neither of these subsections are related to the issue of rent abatement. Nor would the breach of these sections excuse San Fernando's obligation under subsection 9.6 to abate rent in the event of Premises Partial Damage. (See *Kaupke v. Lemoore Canal & Irrigation Co.* (1937) 20 Cal.App.2d 554, 559 [if two covenants are independent, breach of one does not excuse performance of the other].)

We conclude the trial court properly interpreted the lease to require San Fernando to abate rent for the 11 months in which the property was damaged and undergoing repairs.[1]

DISPOSITION

The judgment is affirmed. Tricolor shall recover costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

[1] In light of our conclusion, we do not address Tricolor's other arguments regarding the lease addendums.

Michael J. Raphael, Judge

Superior Court County of Los Angeles

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