

RENDERED: MARCH 23, 2018; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-000414-MR

FOURSOME PROPERTIES, LLC;  
ROWAN RESTAURANTS, LLC;  
DOWNTOWN BP, LLC; ORVILLE  
JACK ROE; DIANA ROE; PHILLIP M.  
TACKETT; ROBERT L. MCGRATH,  
JR.; AND WILLIAM B. FOUCH

APPELLANTS

v.

APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 08-CI-90259

RITE AID OF KENTUCKY, INC.

APPELLEE

### OPINION AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: This is an appeal from a declaratory judgment action concerning the exclusivity of a provision in a lease agreement. The Rowan Circuit Court granted judgment in favor of Rite Aid. We affirm.

This matter has already been before this Court, and we repeat the factual and procedural history laid out therein:

Appellees [appellants herein] sought a declaration of rights regarding an exclusivity provision contained in a commercial lease between Foursome Properties and Rite Aid. Because we conclude the terms of the exclusivity provision are ambiguous, summary judgment was improper. We reverse and remand for additional proceedings.

Orville Jack Roe, Tackett, McGrath, and Fouch are the members of the three business entities named in this action: Foursome Properties, Rowan Restaurants, and Downtown BP. In October 1996, Foursome Properties executed a twenty-year commercial lease with Rite Aid, wherein Rite Aid would operate a pharmacy and retail store in Morehead, Kentucky. The lease named “Foursome Properties, LLC” as the landlord, and McGrath signed the lease on behalf of Foursome Properties. The lease contained the following exclusivity provision:

ARTICLE 9—Exclusive

In the Property and within three (3) miles of the Property, the Landlord shall not, either directly or indirectly, during the term of this Lease and any renewals thereof, lease to or otherwise authorize or permit the operation of any other health and/or beauty aids store or pharmacy or authorize or permit the sale of health and/or beauty aids or prescription drugs by any other parties or entities under the control of Landlord, either directly or indirectly, Landlord further represents to Tenant that it has not heretofore granted the above rights prior hereto nor will it permit the same in any operation within the above

area. Except as to the sale of prescription drugs, the provisions of the foregoing paragraph shall not be applicable to the operation of, and sales from, the BP Service Center/convenient type store premises located across U.S. 60/West Main Street from the Premises.

The provisions of the foregoing paragraph shall be a covenant which shall run with the land, and in the event of a breach thereof, Tenant shall be entitled, in addition to any other remedy available to it, to withhold rent, sue for damages, terminate the Lease and/or to obtain injunctive or other equitable relief.

In 2007, Rowan Restaurants negotiated the sale of commercial property it owned near Rite Aid to Rowan Pharmacists, LLC, which planned to open a pharmacy on the site. Also, Orville Jack Roe and his wife, Diana Roe, leased property they owned near Rite Aid to Hogan Development Company for the purpose of operating a Walgreens drug store. Rite Aid sent cease and desist letters to the Appellees, citing the exclusivity provision in the Foursome/Rite Aid lease.

In June 2008, Appellees filed a petition for declaration of rights to determine the parties' rights under Article 9 of the lease. Appellees argued the exclusivity provision applied solely to the actions of Foursome Properties, not its individual members and their related companies. In July 2009, Appellees moved for summary judgment, which the trial court denied. Appellees appealed the court's order denying summary judgment, and this Court dismissed the appeal as interlocutory in November 2009. Thereafter, Rite Aid moved for summary judgment. At a hearing on March 5, 2010, Rite Aid argued the Article 9 language "directly or indirectly" served to broaden the scope of the provision and include

Foursome's individual members and their related companies. Rite Aid also opined that the lease included a specific exclusion for one Foursome-related entity, Downtown BP, indicating intent to otherwise bind the members of Foursome and their related companies, except Downtown BP, under Article 9. In contrast, Appellees contended that, although they believed their interpretation of the provision was correct, the court should deny Rite Aid's motion because both parties had presented reasonable interpretations of Article 9, which indicated the terms of the lease were ambiguous. Appellees also argued that additional discovery was appropriate to discern the intent of the parties regarding the exclusivity provision.

On April 22, 2010, the court denied Rite Aid's motion and granted summary judgment in favor of Appellees. The trial court concluded that, because only Foursome Properties was specified in the lease, it was the only entity bound by Article 9. The court found the lease to be unambiguous and emphasized that Rite Aid, as the drafter of the lease, should have included more specific terms if it sought to bind the individual members and their related companies. This appeal followed.

“[T]he interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). “Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence.” *Id.* “A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *Id.* “Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.” *Id.*

“[O]nce a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact-finder.” *Id.*

Both parties advocate their respective interpretations of Article 9 as correct. Both parties also assert arguments in the alternative suggesting remand is appropriate because the terms of the exclusionary provision are ambiguous in light of the conflicting interpretations proposed by the parties. Because we conclude Article 9 contains ambiguities, we limit our review to that issue, as it resolves this appeal.

Rite Aid asserts the inclusion of the language “directly or indirectly” encompasses the indirect actions of Foursome Properties through its individual members and their related companies. Rite Aid further points to the inclusion of a specific provision exempting Downtown BP, which has the same four members as Foursome Properties, from the exclusivity provision. On the other hand, Appellees argue the lease applies only to Foursome Properties, pointing out that it is a distinct business entity from Downtown BP, Rowan Restaurants, and the individual members.

Essentially, the parties disagree as to the meaning of the term “indirectly” as it applies to the actions of Foursome Properties. Appellees, like the trial court, view Article 9 as applicable only to Foursome Properties; however, Rite Aid points out that such an interpretation focuses [on] only the direct actions of Foursome Properties and ignores the specific term “indirectly.” For instance, how does Foursome Properties indirectly lease, authorize, or permit the operation of a competing drug store; likewise, what “other parties or entities” are indirectly under the control of Foursome Properties? Appellees argue, because the agreement fails to specify any individuals or entities other than Foursome Properties, such omissions render Article 9 inapplicable

to the members and their related business entities. However, as Rite Aid opines, it is also reasonable to conclude the parties intended the members and their businesses to be bound by including the “directly or indirectly” language along with a specific exemption for Downtown BP.

It is well settled that “the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “The record must be viewed in a light most favorable to the party opposing the motion for a summary judgment and all doubts must be resolved in favor of that party.” *Commonwealth v. Whitworth*, 74 S.W.3d 695, 698 (Ky. 2002).

When viewing the record most favorably to Rite Aid, we must conclude a reasonable person could find the language of Article 9 capable of two inconsistent interpretations. The plain language of Article 9 does not indicate what parties or entities are indirectly related to Foursome Properties, and the conflicting reasonable interpretations offered by Rite Aid and Appellees indicate an ambiguity exists. Because the terms of Article 9 are ambiguous, issues of fact regarding the parties’ intent must be resolved by the fact-finder, *Cantrell Supply, Inc.*, 94 S.W.3d at 385; consequently, summary judgment was improper.

For the reasons stated herein, the judgment of the Rowan Circuit Court is reversed and remanded for additional proceedings consistent with this opinion.

*Rite Aid of Kentucky, Inc. v. Foursome Properties, LLC*, No. 2010-CA-001199-MR, 2011 WL 3516851 at \*1-3 (Ky. App. Aug. 12, 2011). Upon remand, the

circuit court entered an agreed scheduling order, and additional discovery was taken by the parties.

Meanwhile, on February 20, 2014, the Rite Aid property was sold by Foursome Properties (as stated above, owned by Orville Jack Roe, Tackett, McGrath, and Fouch) to 2 Rent Partnership (owned by Lisa Roe Anderson and Laura Roe, daughters of Orville Jack Roe and Diana Roe) for the sum of \$1,537,807.54. As part of the transaction, the lease between Foursome and Rite Aid was assigned to 2 Rent Partnership as lessor.

The Rowan Circuit Court “heard testimony [of four witnesses] and received exhibits and stipulations of fact on this matter at trial, on November 18, 2015,” and granted injunctive relief to Rite Aid of Kentucky, Inc., for “the term of the Lease Agreement, and any extensions of the Lease Agreement.”<sup>1</sup> The Lease by its own terms should have expired on October 24, 2016, although there were renewal options available to Rite Aid in Article 5 of the lease; there has been nothing mentioned on appeal by the parties regarding extensions.

In granting relief to Rite Aid, the circuit court made 14 pages of painstakingly detailed findings of fact. The question for this Court is whether

---

<sup>1</sup> Contrary to Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(vii) (“The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court.”), the appellants did not append the Rowan Circuit Court’s February 18, 2016, judgment. Counsel is cautioned to be aware of this Rule. See *Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010); and *Com. v. Crum*, 250 S.W.3d 347 (Ky. App. 2008).

those findings are supported by substantial evidence. *Cantrell*, 94 S.W.3d at 385. (“[A]reas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become[s] subject to resolution by the fact-finder.” (citations omitted)). “The trial court’s findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. On the other hand, the trial court’s application of the law to those facts is subject to *de novo* review.” *K.H. v. Cabinet for Health & Family Services*, 358 S.W.3d 29, 30-31 (Ky. App. 2011) (citation omitted).

Instead of granting injunctive relief to Rite Aid, the appellants insist, the circuit court should have granted summary judgment to them. The appellants first maintain that, because the Rite Aid property was sold – and the lease assigned – to 2 Rent Partnership, Foursome’s group and individual members were no longer affected by the radius restrictions in Article 9. The appellants contend that, not only was the sale and assignment made in good faith, but also the provisions of the lease run with the land and are thus binding on 2 Rent Partnership but not Foursome and its members.

An examination of the lease indicates otherwise: Article 34, entitled “Successors and Assigns,” specifically states that the lease “shall be binding upon and inure unto the benefit of the parties hereto **and** their respective legal



representatives, heirs, successors and assigns.” (Emphasis ours.) The appellants cannot defeat their obligations under the lease simply by assigning it to another entity. Moreover, “[i]n the present case [Rite Aid] has not acquiesced in the assignment made by [Foursome].” *Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380, 384 (1934). *See also Norcomo Corp. v. Franchi Const. Co.*, 587 S.W.2d 311, 319 (Mo. Ct. App. 1979). The appellants remain in privity of contract with Rite Aid and were subject to the provisions of the lease until its expiration. The circuit court correctly decided this issue. *Alexander, supra*.

The appellants secondly contend that the circuit court incorrectly construed the provisions contained in Article 9, specifically the meaning of the phrase “directly or indirectly” as it applied to the intent of the parties at the time the lease was executed. It is the appellants’ position that its members never anticipated that they would be individually bound by the radius restrictions. Orville Jack Roe testified that he never even saw the lease until after receiving the cease and desist letter from Rite Aid after the latter learned of the Roes’ plan to contract with Walgreens for a store within the three-mile restricted area. And Robert McGrath, Foursome’s member that signed as the group’s representative, testified that he was not aware of the restrictive nature of this provision as it applied to the group’s members. In fact, McGrath’s testimony was that he has no memory of Article 9.

“It is settled law that, absent fraud in the inducement, a written agreement duly executed by the party to be bound, who had an opportunity to read it, will be enforced according to its terms.” *United Servs. Auto. Ass’n v. ADT Sec. Servs., Inc.*, 241 S.W.3d 335, 339 (Ky. App. 2006) (citation omitted). Foursome was represented by counsel (and continues to be represented by that firm) throughout the negotiation process of this lease. It was Foursome’s counsel that added the Downtown BP, LLC, exception. Rite Aid’s attorney testified at length about his understanding of Article 9’s terms as well as his recollection of the discussions regarding the precise wording of that provision. The detailed findings of the circuit court are supported by substantial evidence, and the appellants have failed in their burden to convince us otherwise. CR 52.01; *Cantrell, supra*; *K.H., supra*.

The judgment of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Benjamin Shields  
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE:

Karen J. Greenwell  
Mickey T. Webster  
Sharon L. Gold  
Hamid H. Sheikh, Jr.  
Lexington, Kentucky