In The

Supreme Court of Virginia

RECORD NO. 170631

THE GAME PLACE, L.L.C. and ROBERT C. LIGHTBURN,

***Appellants*,**

v.

FREDERICKSBURG 35, LLC,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This action arises from the enforcement of a fifteen (15) year commercial lease and personal guaranty which was breached twelve (12) years after first occupancy. In the proceedings below, Appellants—tenant The Game Place, LLC ("The Game Place") and Robert C. Lightburn ("Lightburn"), the personal guarantor under the commercial lease—asserted that the lease was ineffective notwithstanding that Appellants had benefited from the right of occupancy for nearly the entire term of the lease, because the subject document was captioned "Lease" and not "Deed of Lease." Appellants directed the Trial Court to no distinction—neither factual nor legal—between a "Lease" or a "Deed of Lease" as it applied in this matter. No distinction is made in their Brief before this Court.

Having properly lost the "Deed of Lease" argument on demurrer, Appellants alleged at trial that the personal guaranty was somehow ineffective due to a purported lack of consideration—again, ignoring: the twelve (12) years of occupancy; correspondence between the parties; at least one estoppel certificate executed by The Game Place admitting a pending leasehold and tenancy; and, The Game Place's own right to enforce the lease prospectively. At trial, Appellants failed to proffer any evidence and rested their case without calling a single witness.

The Trial Court properly determined that the commercial lease was valid between these parties and that the personal guaranty was enforceable. As the Trial Court committed no error, the judgment of the Trial Court should be affirmed.

STATEMENT OF THE FACTS

On September 14, 2000, Amusement–Central Park Limited Partnership, as landlord, and NICOL, Inc., as tenant, executed an Agreement of Lease pursuant to which NICOL, Inc. leased retail premises for an initial term of fifteen (15) years (the "Lease"). (JA 199; JA 25; JA 18.) The Lease was amended on the same date, September 14, 2000. (JA 223.) Amusement–Central Park Limited Partnership is the predecessor in interest of Plaintiff/Appellee Fredericksburg 35, LLC ("Fredericksburg 35"). (JA 199; JA 25; JA 18.)

On November 15, 2002, NICOL, Inc., Defendant/Appellant The Game Place and Amusement–Central Park Limited Partnership executed an Assignment of Lease pursuant to which The Game Place assumed all obligations as tenant under the Lease, and which Lightburn expressly affixed his endorsement to become unconditional guarantor. (JA 224; JA 26; JA 19.) The Assignment of Lease provides, *inter alia*, "Landlord would not consent to this Assignment without the unconditional guaranty of Robert C. Lightburn." (JA 225.) The Assignment of Lease contains the signature of Defendant/Appellant Lightburn underneath the wording, "GUARANTOR: The unconditional guaranty of: Robert C. Lightburn."

(JA 225, emphasis in original.) Fredericksburg 35 accepted the Assignment of Lease, in which The Game Place became the tenant and Lightburn unconditionally guaranteed, in that "it accepted rents, billed charges, monitored the account, responded to tenant inquiries and needs. Fredericksburg 35 essentially treated this tenant as its own because it was." (JA 77.) On May 20, 2003, Fredericksburg 35 advised The Game Place of an increase in rents. (JA 250.) In response, The Game Place accepted the demand of increase in rents and began paying the rent increase. (JA 78.)

From the time of May 20, 2003 until May 10, 2014, periodic letters were sent on behalf of Fredericksburg 35 to The Game Place advising The Game Place of increases in its rent, common area maintenance, insurance, real estate taxes, and similar charges. (JA 79.) In response to those letters, Fredericksburg 35 would routinely receive rents from The Game Place in the new amount requested by Fredericksburg 35. (JA 79.)

On June 15, 2005, slightly more than one year after The Game Place's initial cured default, Fredericksburg 35 again notified The Game Place that action would be taken within 10 days if The Game Place's account was not again made current. (JA 243; JA 80.) Shortly thereafter, Lightburn conferred directly with Fredericksburg 35 regarding certain disputed charges. (JA 247.)

On October 26, 2006, The Game Place, by Lightburn as Member, executed a Tenant Estoppel Certificate[1] in which The Game Place certified that it was the tenant under the written lease with Fredericksburg 35 and stated,

> 1. Tenant [The Game Place] is the tenant under that certain lease dated **9/14/2000**, between Tenant and Fredericksburg 35, LLC, as landlord ("Landlord"), as amended, modified or supplemented by **Addendum to Agreement of Lease, dated 9/14/2000 and Assignment of Lease, dated 11/15/2002**…

(JA 251, emphasis in original.)

No evidence was proffered or received at trial suggesting that Lightburn challenged, in any way, the confirmation of the Assignment of Lease or the guaranty contained therein. Following another rent default, an unlawful detainer action was filed by Fredericksburg 35 against The Game Place in the General District Court for the City of Fredericksburg which resulted in possession of the premises being granted to Fredericksburg 35 on December 17, 2012. (JA 59-60; JA 71.) The Judgment for possession was not executed upon.

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[1] Estoppel certificates are routinely used by parties in commercial lease and other real estate transactions. Courts regularly enforce estoppel certificates and preclude claims and defenses inconsistent with their provisions due to third party reliance. *See HBR Properties Norfolk*, *L.L.C. v. JANAF HQ*, *L.L.C.*, 79 Va. Cir. 479 (Norfolk, 2009); *Chesapeake Bank of Md. v. Monro Muffler/Brake*, *Inc.*, 166 Md. App. 695, 891 A.2d. 384 (2006); *Urban Sites of Chicago*, *LLC v. Crown Castle USA*, *Inc.*, 365 Ill. Dec. 876, 886, 979 N.E.2d 480, 490 (Ill. App. 1 Dist., 2012) ("An estoppel certificate is a signed statement by a party, such as a landlord, certifying for another's benefit that certain facts pertaining to the tenancy are correct."); *Excelsior Garage Parking*, *Inc. v. 1250 North Dearborn Condominium Association*, 394 Ill. Dec. 700, 36 N.E.3d 991, 998 (Ill. App. 1 Dist., 2015).

Similar to how rent increase notices were sent previously, on April 10, 2014, Fredericksburg 35, advised The Game Place of an increase in rents. (JA 242; JA 78-79.) On May 29, 2014—after nearly twelve (12) years of continuous occupation of the premises by The Game Place—counsel for The Game Place confirmed that it had now vacated the premises. (JA 50.)

As of May 2014, monthly rent totaled $6,739.32 per month. (JA 226; JA 232.) No payments towards The Game Place's account have been received by Fredericksburg 35 since a May 7, 2014 payment of $6,739.32. (JA 226; JA 232.) As of trial, the amount claimed owed by The Game Place and Lightburn was $93,542.27. (JA 226; JA 232.)

The Trial Court determined that the premises had been removed from the rental market for a brief period of time following the default of The Game Place and that a credit towards the amounts owed was appropriate. (JA 160-162.) The Trial Court then awarded judgment in favor of Fredericksburg 35 against The Game Place and Lightburn in the amount of $68,610.44 together with attorneys fees of $17,152.61. (JA 253.)

STANDARD OF REVIEW

Appellee Fredericksburg 35 concurs with the standard of review proffered by Appellants.

ARGUMENT

I. The Lease is Enforceable, Even if Defective, Pursuant to the Savings Statute (Assignment of Error One)

At the demurrer stage, The Game Place and Lightburn alleged one defense: that the Lease, being for a term of more than five years, must be in the form of a sealed "Deed of Lease" and cited Va. Code § 55-2 for support for same. As relevant to this present action, Va. Code § 55-2 provides that, "[n]o estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed …" Va. Code § 55-2. However, this provision is silent as to the form of such deed so as to be effective. Chapter 4 of Title 55, entitled "Form and Effect of Deeds and Covenants; Liens" provides what may be contained within such a deed or deed of lease so as to be legally valid. Specifically, the permitted form of a deed is provided in Va. Code § 55-48 and the form of a permitted deed of lease is provided in Va. Code § 55-57. Importantly, both of these sections are set forth in Chapter 4 of Title 55. Also contained within Chapter 4 of Title 55 is Va. Code § 55-51, the Savings Statute, which provides,

> Any deed, or a part of a deed, which shall fail to take effect by virtue of this chapter shall, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted.

Va. Code § 55-51. Unquestionably, if the Lease was in compliance with Va. Code § 55-48 or Va. Code § 55-57, it would be enforceable as a matter of law. Similarly, the failure, if any, in the Lease is saved by virtue of Va. Code § 55-57.

The sole Virginia Supreme Court authority cited in the Trial Court by The Game Place and Lightburn, *Smith v. Payne*, merely held in regard to an *unwritten* lease that, "[i]n Virginia, by the statute of conveyances, [Va. Code § 55-2], leases for more than five years must be by deed, but there is no statutory provision in this State which in terms declares that other actual leases must be in writing." *Smith v. Payne*, 153 Va. 746, 756 (1930).

However, neither *Smith* nor any of the authority relied upon by Appellants in their current Brief, considers the effect of the Savings Statute, Va. Code § 55-51, on any requirement that the Lease be sealed. Indeed, Appellant provides no authority of any kind to support its reading of Va. Code § 55-51. Va. Code § 55-51 provides that, *inter alia*, even if a seal were required notwithstanding the plain language of Va. Code § 11-3 abrogating the purported common-law requirement of a seal, that failure to have a seal does not render the lease ineffective. Thus, to the extent that a sealed "deed of lease" and not a "lease" is required as alleged, the present Lease must be construed as "valid and effectual and as binding upon the parties thereto" notwithstanding any technical failure.

Whether the word "deed" is missing from the caption of the now-questioned document, Va. Code § 55-51 cures such defect, if it is a defect. "Neither statutory nor common law requires a grantor to employ words of art so long as 'the intention to grant is so manifest on the fact of the instrument that no other construction could be put upon it.'" *Corbett v. Ruben*, 223 Va. 468, 471 (1982).

While certainly not binding before this Court, it is apparent that the various circuits have applied the reasoning of the Savings Statute to save otherwise defective transfers. *Moorman v. Shin*, 49 Va. Cir. 140, * 3 (Fairfax, 1999) (holding that lease in violation of Va. Code § 55-2 was saved by Va. Code § 55-51 and remained an enforceable obligation as between the parties). A "failure to comply with the statutory form may not be fatal to an enforcement action between the parties to the deed." *Kasso LLC v. Geodigital Mapping*, *LLC*, 69 Va. Cir. 137, * 1 (Loudoun, 2005) (overruling demurrer predicated on Va. Code § 55-2).

Undeniably, "no magic language is required under Virginia law to create a deed" as between the Fredericksburg 35, The Game Place and Lightburn. *McCue & McCue*, *LLP v. Hamel Health Ventures*, *Inc.*, 17 Va. Cir. 331, * 1 (Fairfax, 1989) (Holding a "detailed 24-page agreement" represented "as clear an indication of a ten-year lease as a lessor could communicate" and was an enforceable lease.) "Courts are liberal in construing written contracts, including deeds, in order to give effect to the intention of the parties, where that is manifest, if not restrained by

some inexorable rule of law." *Albert v. Holt*, 137 Va. 5, 119 S.E. 120, 122 (1923) ("every deed must, if possible, be made operative, and that the law desires to sustain the validity of this class of instruments wherever it can.")

Appellee has located no case which has construed the Savings Statute and concluded that a lease is nevertheless defective due to the failure to contain a seal or style the heading "deed of lease". Presumably, as Appellants have identified no such authority, none exists.

Here, The Game Place and Lightburn, as parties to the Assignment of Lease, expressed a clear intent to accept the Lease as granting the right to occupy the premises and be bound by the personal guaranty. Indeed, The Game Place peacefully occupied the premises from November 15, 2002 until abandonment on May 27, 2014. For The Game Place to assert that there existed no right for it to do so—while paying rents during much of this period of occupation—is utterly without merit. Even if the Lease relied upon by The Game Place during its period of occupancy is flawed as between Fredericksburg 35 and some third-party, the saving statute of Va. Code § 55-51 compels the finding that the Lease and each of its terms, as well as the personal guaranty, remained enforceable.

The Lease is a binding agreement between The Game Place, Lightburn and Fredericksburg 35. The Trial Court committed no error and its decision should be affirmed.

II. The Guaranty is Supported by Adequate Consideration (Assignment of Error Two)

A guaranty is "an independent contract, by which the guarantor undertakes, in writing, upon a sufficient undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform." *McDonald v. National Enterprises*, *Inc.*, 262 Va. 184, 189 (2001) ("In an action to enforce an independent contract of guaranty, the obligee is proceeding on the guaranty, not on the underlying note."). To recover on a guaranty, a plaintiff must establish the terms of both the guaranty and the underlying primary obligation, that the primary obligor has defaulted on the primary obligation and that the guarantor has not paid the underlying debt. *McDonald*, 262 Va. at 189.

It is axiomatic that "when a contract is clear and unambiguous, it is the duty of the court, and not the jury, to decide its meaning." *Winn v. Aleda Construction Co.*, 227 Va. 304, 307 (1984). Additionally, "words used by the parties are normally given their usual, ordinary, and popular meaning." *Id*. In the present matter, The Game Place and Lightburn have admitted the Lease and Guaranty are the binding contract documents and do not claim any ambiguity in them.

Since Fredericksburg 35 acquired the subject property Fredericksburg 35, The Game Place and Lightburn treated Fredericksburg 35 as the landlord. Indeed, The Game Place and Lightburn responded to the May 20, 2003 increase in rents

(JA 250) by paying the demanded increased rent. (JA 78.) For the next eleven (11) years, similar rent increases were demanded and, save for the later-cured rent defaults in 2005 and 2012, The Game Place, through its agent, Lightburn, tendered such demanded rents directly to Fredericksburg 35.

Further, in addition to over a decade of rent payments directly to Fredericksburg 35, Lightburn, as the Member of The Game Place, executed an October 26, 2006 Tenant Estoppel Certificate in which he certified that The Game Place was a tenant of Fredericksburg 35 pursuant to the Lease and Assignment of Lease. That document reaffirmed the Assignment of Lease which contained the very Guaranty Lightburn now claims is unenforceable. To now argue that the Lease is unenforceable ignores the long history between these parties. *See Cardinal Development Co. v. Stanley Const. Co.*, *Inc.*, 255 Va. 300, 305, 497 S.E.2d 847, 851 (1998), *quoting*, *Stanley's Cafeteria*, *Inc. v. Abramson*, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983) (a "course of dealing by contracting parties, considered in light of all the circumstances, may evince mutual intent to modify the terms of a contract."). Still further, at the time of Lightburn's endorsement of the Assignment of Lease as guarantor, and his execution of the Tenant Estoppel Certificate, he had full opportunity to investigate all aspects of these transactions providing for the continuation of his business. He had actual and constructive knowledge as to all such matters and he acted voluntarily and continued to operate

his business in the Premises. The Trial Court, correctly, refused to allow Appellants to ignore their course of dealing with Fredericksburg 35.

It cannot be reasonably contended that the Lease and Assignment of Lease—which resulted in 12 years of occupancy—should now fail for lack of consideration. "Generally, a slight advantage to the party promising or a trifling inconvenience to the party to whom the promise is made is sufficient consideration for a promise. *R.K. Chevrolet*, *Inc. v. Hayden*, 253 Va. 50, 54, 480 S.E.2d 477, 480 (Va. 1997); *GSHH–Richmond*, *Inc. v. Imperial Associates*, 253 Va. 98, 99, 480 S.E.2d 482, 484 (1997) (this day decided); *Sager v. Basham*, 241 Va. 227, 229–30, 401 S.E.2d 676, 677 (1991); *Brewer v. First Nat. Bank of Danville*, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961).

The Guaranty at issue in this present appeal is contained within the Assignment of Lease. (JA 224.) The Assignment of Lease provides, *inter alia*, "Landlord would not consent to this Assignment without the unconditional guaranty of Robert C. Lightburn." (JA 225.)

Since Fredericksburg 35 acquired the subject property, Fredericksburg 35 has made the subject premises available to The Game Place. It is unquestioned that that The Game Place occupied the subject premises, paying rents—save for short periods of delinquency, all but the final delinquency being cured—and

enjoying the benefits of the property for the entire period of time from December 18, 2002 until it vacated the premises shortly prior to May 29, 2014.

For The Game Place to allege that their payment of rents directly to Fredericksburg 35 for more than a decade resulting in their ability to occupy the premises is somehow not adequate consideration is incorrect. Lightburn's contention that his signature on the Assignment of Lease, which contained the phrase "Landlord would not consent to this Assignment without the unconditional guaranty of Robert C. Lightburn," is unsupported by any consideration is similarly flawed.

Moreover, Appellants ignore that no proof was required that Fredericksburg 35 was the owner at the time of the Assignment of Lease was executed. The Virginia Code provides that proof of ownership, operation and/or control of "property or instrumentality" by one claiming such ownership, operation and/or control at trial is unnecessary unless the matter is properly put at issue by a defendant.

> When any pleading alleges that any person, partnership, corporation, or unincorporated association at a stated time, owned, operated, or controlled any property or instrumentality, no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue, denying specifically and with particularity that such property or instrumentality was, at the time alleged, so owned, operated, or controlled.

Va. Code § 8.01-279(B). In referencing the predecessor to Va. Code § 8.01-279, Va. Code § 6125, the Virginia Supreme Court held that "[t]he basis of these statutes is that the failure of the defendant to establish, set up, or assert his defense, in the manner prescribed by law, raises a presumption that the material facts alleged or pleaded are admitted to be true." *C.C. Bova v. Roanoke Oil Co.*, 180 Va. 332, 341-42; 23 S.E.2d 347, 352 (1942) (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)); *Hague v. Valentine*, 182 Va. 256, 28 S.E.2d 720 (1944) (interpreting Part B of Va. Code § 6125, predecessor of Va. Code § 8.01-279 and holding that failure to file affidavit disputing ownership results in having ownership stand "as a proven fact.").

The Amended Complaint averred that Amusement – Central Park Limited Partnership, the entity which executed the Assignment of Lease, was the "predecessor in interest" to Fredericksburg 35. (JA 25.) The Amended Complaint further averred that Fredericksburg 35 "has succeeded to the interest of the prior lessor," Amusement – Central Park Limited Partnership. (JA 26.) No affidavit denying either averment was filed with the Trial Court.

Appellants never, despite being required to do so, filed an affidavit with any pleading putting the ownership matter at issue and its current contention that Fredericksburg 35 "no longer owned the Property" is untimely. Brief of Appellant, Assignment of Error II, p. 14; See *WBM, LLC v. Wildwoods Holding Corp.*, 270

Va. 156, 160-61, 613 S.E.2d 402, 405 (2005) (error for a Trial Court to let the issue of a denial of a signature proceed to trial when it had not properly been put at issue in a sworn answer nor denied in an affidavit as required by Va. Code § 8.01-279 notwithstanding that unsworn answer raised issue.) Fredericksburg 35 properly pled that it was entitled to enforce the Assignment of Lease and neither The Game Place nor Lightburn properly denied such allegation. The facts regarding ownership have been proven as fact by such failure of The Game Place and Lightburn.

The Guaranty, as contained within the Assignment of Lease, is an effective and operable agreement supported by adequate consideration which may be enforced by Fredericksburg 35, as the owner of the Property. The Trial Court committed no error and its decision should be affirmed.

CONCLUSION

WHEREFORE, Fredericksburg 35, LLC prays this Court determine that the Trial Court committed no error and that the decision of the Trial Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE

I hereby certify that on this 27th day of December, 2017, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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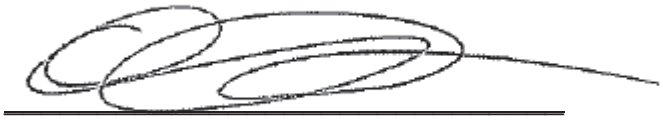

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