COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-SC-142-DG
2006-SC-624

LYKINS ENTERPRISES, INC.
FUEL STOP REAL ESTATE COMPANY
A/K/A FUEL STOPS REAL ESTATE COMPANT
DAVID O. LYKINS; FUEL STOPS, INC.
AND WIKKIAM L. ESHAM — APPELLANTS

v.

APPELLEE'S COMBINED BRIEF

MAXINE S. FELIX — APPELLEE AND CROSS-APPELLANT

*** *** ***

(Court of Appeals No. 2004-CA-001305-MR)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy hereof was mailed this 30th day of JANUARY, 2007, to Hon. Robert McGinnis, Special Judge, Mason Circuit Court, Court of Justice Building, 100 West 3rd Street, Maysville, KY 41056, Richard M. Sullivan, Jennifer Fust-Rutherford, Conliffe, Sandmann & Sullivan, 325 West Main Street, Suite 2000, Louisville, KY 40202, Counsel for Appellants Lykins Enterprises, Inc., Fuel Stop Real Estate Company, a/k/a Fuel Stops Real Estate Company; David O. Lykins, Fuel Stops, Inc., and William T. Esham, Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and that nine copies of same and one original were sent by United States Express Mail this 30th day of JANUARY, 2007 to Hon. Susan Stokely Clary, Clerk, Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601.

Edward S. Monohan IV

Edward S. Monohan IV (49320)
N. Jeffrey Blankenship (05795)

INTRODUCTION

This is an appeal from a decision by the Court of Appeals dismissing an Ohio real property case sua sponte on the grounds of *forum non conveniens*. The issue was raised at oral argument by the Chief Judge of the Court of Appeals and was briefed again in the Court of Appeals on Appellant's Petition for Re-Hearing. Appellee has never been permitted to try this case to a jury during its 10 years in litigation.

STATEMENT CONCERNING ORAL ARGUMENT

This case involves an interpretation of Ohio real estate law and Appellee believes that oral argument would assist the court in addressing the issues in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The salient facts in this case are simple and many of these facts are uncontested.[1]

The Appellants in this action first raised the issue of improper venue in the Mason Circuit Court in its Motion to Dismiss filed on December 17, 1997 (ROA 22-41). Additionally, Appellants filed an action involving the same subject matter in Brown County, Ohio, on or about December 4, 1997, approximately 3 days after this Kentucky action had been filed. In this case, Appellants have consistently argued that Ohio is the proper venue for this matter. (ROA 22-41, 52-73).

Additionally, the Court of Appeals at the outset of oral argument, announced that it was concerned about whether or not this case should remain in Kentucky or be remanded back to Ohio.[2]

On or about September 6, 1988,[3] H. Lee Felix and Maxine S. Felix, husband and wife, as Lessors, entered into a Lease Agreement with Lykins Enterprises, Inc., a Kentucky Corporation, as Lessee (ROA 397, ¶ 1). The leased premises contained approximately ten (10) acres in Aberdeen, Ohio, on which a truck stop was located (ROA 402, Exhibit "A" ¶ 1). The initial term of the lease was for a period to expire on August 31, 1989, but the Lessee had the

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[1] A stipulation of facts was entered into among the parties (ROA 397) which contains the following statement, "31. These stipulations are not intended to encompass all factual issues and each of the parties does, in fact, believe that certain inferences to be drawn from the stipulated facts are still in dispute."

[2] The videotaped transcription of the Court of Appeals oral argument is not available. Counsel for Appellee has attached, to this Brief, his Affidavit concerning these facts.

[3] The lease is dated May 1, 1988, but was executed by the Felixes on August 22, 1988, and by Lykins Enterprises, Inc., on September 6, 1988.

option to extend the initial term of the agreement for a period of eight (8) additional years or until August 31, 1997 (ROA 402, Exhibit "A" ¶ 2). The lease term was, in fact, extended until August 31, 1997 (ROA 402, Exhibit "B"). If the Lessee stayed beyond August 31, 1997, the lease continued on a month-to-month basis (ROA 402, see Exhibit "A" ¶ 2). The lease specifically provided that it could not be assigned by the Lessee without the prior consent of the Lessor except that Lessee was permitted to assign this lease to Fuel Stops, Inc., an Ohio Corporation (ROA 402, Exhibit "A" ¶13). In the event of an assignment, the original Lessee, Lykins Enterprises, Inc., remained primarily liable to Lessor for the performance of all the terms and conditions of the lease (ROA 402, Exhibit "A" ¶13). Lessee was further required to pay any attorneys' fees incurred by Lessor in the enforcement of the Lease Agreement (ROA 402, Exhibit "A" ¶ 15).

Lessee was granted an option at any time during the lease to purchase the property, provided that Lessee was not in material default under the terms of the Lease Agreement. Furthermore, the lease provided that, in order to effectively exercise that option, the Lessee first had to unequivocally provide Lessor with written notice of that intention no fewer than thirty (30) days prior to the expiration of the Lease Agreement's extended term on August 31, 1997 (ROA 402, Exhibit "A" ¶ 16). Thereafter, closing must occur on that option no later than expiration of the lease's then-current term.

All notices and other communications were required to be in writing. This requirement encompassed the buyer's option to purchase. The

lease stated that a communication was effective as to Lessor when sent by United States Mail, postage pre-paid, return receipt requested or personally delivered to Lessor at 9808 Royal Palm Drive, Bradenton, FL 34210 (ROA 402, Exhibit "A" ¶ 21). No modifications to any of the terms of the Lease Agreement were permitted unless the modification was in a writing signed by all surviving parties (ROA 402, Exhibit "A" ¶ 20).

During the negotiation of the original Lease Agreement, Lessors were represented by M. Susan Brammer, attorney, Maysville, Kentucky, and the law firm of Royce, Zwaggert, Kirk & Brammer ("RZK&B") (ROA 397, ¶ 10).

On or about November 20, 1996, M. Susan Brammer, attorney with RZK&B, was contacted by David Lykins ("Lykins) because Lykins was attempting to sell the leased property to a third party, Mid-Ohio Petroleum Company ("Mid-Ohio"). At that time, Lykins asked Brammer to prepare a deed from the Felixes to an Ohio Corporation identified as Fuel Stops Real Estate Company. Brammer also prepared, on November 20, 1996, an assignment for Lykins' signature, the purpose of which was to authorize the Felixes to execute the requested deed. Two (2) days later, Brammer received a copy of a letter from Lykins to Mid-Ohio stating that the proposed sale to Mid-Ohio was cancelled (ROA 397, ¶ 16 of the Parties' Stipulations).

Sometime in January of 1997, the Mid-Ohio sale was rescheduled for closing but that closing was also unilaterally canceled by Lykins (ROA 397, ¶ 21 of the Parties' Stipulations).

On August 8, 1997, Lykins sent a letter to Brammer indicating that he would "like to close" on the Felix property in Aberdeen, Ohio, no later than August 18. **At no time prior to the letter of August 8, 1997, did Lykins indicate to Brammer, in writing or otherwise, that he had exercised the option to purchase the real estate contained in the lease.** (ROA 397, ¶ 23(a)) The assignment was prepared by Brammer for the sole purpose of providing written authorization to the Felixes to direct their deed to Fuel Stops Real Estate Company, an Ohio Partnership, and not for the purpose of exercising the option contained in the lease to purchase the property (ROA 402, Affidavit, M. Susan Brammer, dated June 2, 1998, ROA 397 ¶ 16, 21, 22, 23(a) and 25 of the Parties' Stipulation).

Lykins did not communicate with any other person concerning the lease or concerning the option to purchase the property other than the attorney, M. Susan Brammer, and the Plaintiff's son-in-law, Terry L. Teegarden. (See ROA 58D, Deposition of Maxine Felix, Page 39, 41, 42; Deposition of Terry Teegarden, Page 23, 25, 26; Deposition of Rose Teegarden, Page 5,6; Paragraph 30 of the Parties' Stipulations.)

David Lykins never did affirmatively announce that he was exercising the option, either orally or in writing. (See Deposition of M. Susan Brammer, Attorney, Page 69, Line 6 to Page 71, Line 16.)

On or about August 11, 1997, well beyond the deadline for exercising the option, Terry Teegarden, Appellant's son-in-law, received a letter dated August 8, 1997 from David Lykins indicating that he would like to close on the

property (ROA 397, ¶ 25). This letter was rejected as untimely by counsel for Appellant (ROA 397, ¶ 26).

In the event the option to purchase had been properly exercised, Lessors would have been permitted to finance this purchase, requiring only $50,000.00 down payment by Lessee (Exhibit "A," Paragraph 16).

ARGUMENT

The Opinion of the Court of Appeals should not be altered for the reasons that the Court properly applied the doctrine of *forum non conveniens* and the Court of Appeals had the power and the duty to raise the issue on its own.

I. THE DOCTRINE OF *FORUM NON CONVENIENS* WAS PROPERLY APPLIED.

The doctrine of *forum non conveniens* originated in England and is part of our common law. *Logan v. Bank of Scotland,* [1906] 1 KB (Eng) 141, 6 BRC 320, 3 Ann Cas 1148. Both the courts of England and the courts of this country worked out techniques and criteria for applying the doctrine. *Collard v. Beach*, 93 App. Div. 339, 87 NYS 844. Generally, the discretion for the application of this doctrine is delegated to the courts. See: *Dainow, The Inappropriate Forum*, 29 Ill L Rev 867,889. The issue directly impacts the effective administration of the courts as well the rights of litigants. *Gulf Oil Corp v. Gilbert*, 330 U.S. 499 (1947).

The Supreme Court of the United States has said, "the principle of *forum non conveniens* is simply that a Court may resist imposition upon its

jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp., supra.*

The Restatement provides as follows:

§ 84 *Forum Non Conveniens*

A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff. See: Restatement, Conflicts, § 84.

A. The Supreme Court of the United States, in delineating the considerations to be applied, focuses on a number of factors.

In *Gulf Oil, supra,* the Supreme Court indicated that the following factors are to be considered in the application of the doctrine:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost to obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. See *Gulf Oil, supra* at Page 508.

With reference to the "ease of access to sources of proof", Appellees minimize and all but ignore that the subject property is located in **Aberdeen, Ohio**. Specifically, Appellees have expounded at length as to the enormous amounts of money that they allegedly spent on improvements to the property. The proof necessary to develop this argument is only available by inspection of the premises in Aberdeen, Ohio. There is no other reliable way to verify the nature and extent of these alleged expenditures.

The principal witness in this case, Terry Teegarden, is a resident of the state of Ohio. Similarly, the principal investor in this project, Appellee William T. Esham, is a resident of Ohio. The Courts of the State of Ohio have complete

control of the premises and title thereto. The Felixes were life-long residents of Ohio until their retirement to Florida; the entity, which claims the right to title to the property, Fuel Stops Real Estate Company, is an Ohio General Partnership. All of these facts are part of the record in this case. In short, a trial in Ohio, under Ohio law, can most expeditiously and fairly resolve all of these issues. Witnesses otherwise beyond subpoena power, could be compelled to attend. The presiding judge or jury could inspect or examine the property.

B. The record on appeal is ample for a determination of the issue of *forum non conveniens.*

The record on appeal is replete with discovery in this case (most of which took place in the Ohio action). Additionally, the parties entered into a limited agreement as to certain facts in this case which is part of the record. The argument of the Appellants that this Court somehow had to reach beyond the record in this case in order to render its decision, is easily refuted by a review of the record on appeal in this matter. In fact, this Court may note that, despite Appellants' general assertion, Appellants fail to identify a single fact, not found in the record, relied upon by the Court of Appeals.

C. The action in Ohio filed by the Appellees is a factor to be included in any analysis.

It is important to recognize that the Appellants filed the action in Ohio in which the greater part of the discovery has been developed.[4] Appellants have

[4] This action was dismissed on April 21, 2005, after the Mason Circuit Court **ordered** Appellant to dismiss that case. Appellee anticipates that the Common Pleas Court in Brown County, Ohio, will favorably entertain a motion under Civil Rule 60 to set aside that order for the reason that Appellee "agreed to" the Order in deference to the mandate of the Mason Circuit Court. If not, the record in that case would certainly be available if a new filing were to be required.

previously argued in this case that Ohio is the proper venue for this matter and they should not be allowed to now change that position. (Record on Appeal 22-41, 52-73).

The existence of an alternate forum has always been a factor to be considered in the application of the doctrine of *forum non conveniens* (see *Phillips Electronics, N.V. v. New Hampshire Insurance Co.*, 728 N.E.2d 656, 666 (Ill. App. 2000) ("Two or more forums having jurisdiction" is a prerequisite to the analysis.)

D. The Ohio action has been completely developed as a result of extensive discovery and is virtually prepared for trial.

The numerous depositions and other discovery matters filed in this case as part of the record on appeal from the Ohio action testifies volumes as to the enormous preparation that has been finished in the Ohio action. If one were to choose an action, which is "in its infancy," a comparison of court records would support the conclusion that only the Kentucky action meets that criteria. The Kentucky action was placed in abeyance shortly after it was filed by the Mason Circuit Court and actually all trial preparation was finished in the Ohio action. The record from the Mason Circuit Court will support Appellant's assertion. Much of the argument of Appellants in their Petition is premised on their erroneous assertion that the Ohio matter has somehow been dormant and the Kentucky action has been the focus of the litigation. Rather, however, the opposite conclusion is true.

II. THE COURT OF APPEALS HAD POWER TO ACT *SUA SPONTE* IN THIS MATTER.

The doctrine of *forum non conveniens* is closely related to venue issues. In fact, in Kentucky, any distinction between improper venue and *forum non conveniens* is "merely illusory." *Seymour Charter Bus Lines, Inc. v. Hopper*, Ky., 111 S.W.3d 387 (2003). It is further indisputable that a court has the inherent jurisdiction to transfer or dismiss a case, *sua sponte*, without a motion. See, e.g., *Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989). "A court has "the inherent power to dismiss *sua sponte* for want of jurisdiction. . . under some circumstances, a court may dismiss under the ancient doctrine of *forum non conveniens*." *Prevot v. Prevot*, No. 94-5854; 94-6440, U.S. Court of Appeals for the 6th Cir. (6th Cir. 1995); *15 Wright and Miller Federal Practice and Procedure Sections 3828* (2d Ed. 1986) "A court has the inherent power to manage its docket, subject of course to statutes requiring special treatment for specified types of cases." Id.[5] See also *Skil Corp. v. Millers Fall Co.*, et al, 541 F.2d 554 (1976); *accord, Chambers v. Nasco, Inc.* 501 U.S., 32, 45, (1991), stating that a court has, within its inherent authority to act *sua sponte* "to dismiss an action on grounds of *forum non conveniens* . . .;" similarly, an issue raised even in oral argument, *sua sponte* by the Court, does not preclude the Court from considering or addressing that issue. *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, Ky. 163 S.W.3d 408 (2005).

[5] See copy of Prevot attached hereto.

III. APPELLANTS' ARGUMENT THAT IS HAS BEEN DENIED "DUE PROCESS" IS WITHOUT ANY MERIT.

From the very first injection of this concept of "improper venue" or *forum non conveniens* into this case by the Appellants on December 17, 1997, in the Mason Circuit Court, Appellants had ample opportunity to have this matter fully argued and considered by both the Ohio and Kentucky court systems. Appellants simply want this court to ignore the fact that they have had every opportunity to explore this entire issue and have chosen to use this theory or not to use this theory, depending on whatever advantage it might have to their position. It is Appellee's position that Appellants have had "ample process" in this matter, particularly on this issue. The due process clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a "protectable property (liberty) interest be so comprehensive as to preclude any possibility of error." See *Mathews v. Eldrige*, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976). The decisions of the United States Supreme Court underscore the truism that "due process unlike some legal rules, is not a technical consumption with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L. Ed.2d 1230, 81 S.Ct. 1743 (1961). Due process is flexible and calls for such procedural protections as a particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, (1972).

IV. THE MASON CIRCUIT COURT SHOULD HAVE REFUSED TO RECONSIDER A MOTION FOR SUMMARY JUDGMENT BY THE APPELLANTS.

The Appellants raised and briefed the issue of summary judgment on the same fact situation in the Court of Common Pleas in Brown County, Ohio (ROA 454). The doctrine of collateral estoppel precludes the re-litigation of issues actually litigated and determined in a prior suit. See *Napier v. Jones, by and through Reynolds,* Ky App., 925 S.W.2d 193 (1996) and *City of Louisville v. Louisville Professional Fire Fighters Assoc.,* 813 S.W.2d 804, 807 (1991). The Courts of Ohio determined that this matter involved a factual determination and, therefore, a trier of fact had to make the decision necessary in order for either party in this case to obtain judgment. Appellants in this action should be estopped from questioning the ruling by the Common Pleas Judge in Brown County, Ohio under the authorities cited herein.

V. THE DATE OF THE FILING OF THE TWO ACTIONS IS NOT IMPORTANT.

The Appellants in this case are extrapolating on "dicta" contained in the opinion (and the dissent) by the Court of Appeals. There is no indication in that opinion that the date of the filing of this action or the date of the filing of the Ohio action were considered to be important matters by the Court of Appeals. There is no real discussion of this issue and its applicability in this case or any citation of authority on the issue. It simply appears to be a matter mentioned in passing by the Court of Appeals (and by the dissent) in the opinion. Appellants are trying to make much more of this issue than it deserves. Appellee asks this court to simply ignore this entire matter as being

an unimportant issue, which is of no consequence to the decision of the Kentucky Court of Appeals.

VI. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ENTERED SUMMARY JUDGMENT FOR THE DEFENDANT/APPELLANT AND FAILED TO ENTER SUMMARY JUDGMENT FOR PLAINTIFF/APPELLEE.

The lease which the parties voluntarily executed is specific as to the method to exercise the option to purchase contained in Paragraph 16:

a. Option to purchase may only be exercised by the Lessee, Fuel Stops, Inc., an Ohio Corporation;

b. The option to purchase must be exercised by the end of the day on August 1, 1997;

c. The option must be exercised in writing;

d. The closing must take place "prior to the expiration of the current agreement term, but not less than 30 days after notice given by Lessee unto Lessor of such closing date."

The facts of this case are clear that Lessee, Fuel Stops, Inc., failed to comply with any of the above lease terms. Indeed, it would have been impossible for the Lessee to comply with subsection "d," above, because there were not thirty (30) days left in the lease term after the receipt of the written letter of August 8, 1997, even if the terms of said letter were construed to be a proper exercise of the option.

VII. THE KENTUCKY CONFLICT OF LAWS RULE REQUIRES APPLICATION OF OHIO LAW TO ANALYSIS OF THIS LEASE/OPTION

The property which is the subject matter of this litigation is located in Ohio. Accordingly, Plaintiff urges that this Court adopt Ohio substantive law on the issue of the proper exercise of the option to purchase.

The Kentucky Courts have adopted the modern test in contract conflict of law situations, whereby the law, which controls the outcome, is that of the state which has the most significant relationship to the transaction and the parties. *Lewis v. American Family Insurance Group*, Ky., 555 S.W.2d 579 (1977). Thus, the law of the jurisdiction which, because of its relationship or contact with the occurrence or with the parties, has the greatest concern with specific issues raised in the litigation, is controlling. *Breeding v. Massachusetts Indemnity & Life Insurance Co.*, Ky., 633 S.W.2d 717 (1982). For that reason, as a general rule of law, the place of performance of the contract governs the rights of the parties absent a clear showing of contrary intent. *Ray Glover Construction Company, Inc.*, Ky., 49 B.R. 581 (1985).

The following significant relationships (contacts) within the State of Ohio existed in this case at the time of the alleged attempt to execute the option to purchase:

(a) The property is located in Aberdeen, Ohio;

(b) The truck stop business which is a part of this litigation is located on the Aberdeen, Ohio property;

(c) The lease was assigned to Fuel Stops, Inc., an Ohio Corporation;

(d) The proposed deed to the property was to run to Fuel Stops Real Estate Company, an Ohio partnership;

(e) The financing proposed by the Defendants was to come from an Ohio bank;

(f) Appellants have made a judicial admission that Ohio has the most significant connection to this case. See Appellants' Motion to Dismiss Complaint in this case (ROA 22-41, 52-73) wherein counsel for Appellants stated, "Brown County, Ohio is the proper forum for adjudication of this matter."

Thus, it is clear that Ohio has the most significant contacts herein, so Ohio law should govern construction of the subject lease option.

Ohio law requires strict adherence to exercise an option to purchase.

Ohio courts recognize the inherent contractual nature of lease agreements. See *Bevy S. Dry Cleaners & Shirt Laundry, Inc. v. Streble*, 2 Ohio St.2d 250 (1965); *Downtown Associates, Ltd. v. Burrows Bros. Co.*, 34 Ohio App.3d 296, 297 (1986). In identifying and interpreting the terms of a lease, courts shall apply traditional contract law principles. The court, in construing the provisions of any contract, has the task of determining the intent of the parties at the time the contract was made. *Stony's Trucking Co. v. Public Utilities Commission*, 32 Ohio St.2d 139, 142 (1972). The actual intent of the parties is presumed to reside in the language of the contract itself. See *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987).

There are two (2) recent Ohio cases whose fact situations are closely analogous to this case. Both of these cases involve leases with options to purchase, which required written notice to exercise the options. See *715 Spencer Corporation v. City Environmental Services, Inc., et al*, 80 F.Supp.2d 755 (N.D. Ohio, 1999) (Exhibit "C"); and *Anglin v. Burger Chef Systems, Inc.*, Unpublished decision (2-5-2001), Case No. CA2000-05-100, 12th District, Butler County (Exhibit "D").

In the *City Environment Services* case, the optionee sent a letter along with a purchase agreement stating "we look forward to consummating this transaction as soon as possible." The parties then met, shook hands and agreed that the sale was a "done deal." Later, the purchaser attempted to get out of the deal and the owner (Seller) filed suit for specific performance. The Plaintiff claimed that "(a) City Environmental waived the writing requirement and exercised the option orally by representing that the sale was a "done deal" and that a writing was not necessary; and (b) City Environmental exercised the option in writing in the letter stating that "we look forward to consummating this transaction as soon as possible." The District Court, in granting summary judgment to the Defendant holding that the option was <u>not</u> effectively exercised, stated that:

1. City Environmental never provided the Seller with an unequivocal written notice of its election to exercise the option to purchase;

2. There was no waiver of other writing requirements because, to constitute a waiver, a party must do so by "relinquishment of a known right by a clear, unequivocal decisive act." (Page 759).

The District Judge further opined, "Plaintiffs' tortured construction of Frank's statement to indicate waiver of an option that City Environmental clearly did not intend to exercise is not **a clear**, **unequivocal decisive** act sufficient to satisfy the requirements for waiver under Ohio Law." [Emphasis added]. (Page 761).

The Court continued to discuss the other ongoing factors involved in the transaction and concluded that none of these factors were sufficient to waive the writing requirement in the lease:

1. City Environmental ordered and obtained title work, surveys and an environmental study;
2. City Environmental exercised dominion and control over the real property by occupying portions of the real property that were not part of the lease premises;
3. City Environmental exercised dominion and control over prospective tenants;
4. City Environmental tendered $10,000.00 good faith money to Mr. Conley [Seller's agent];
5. City Environmental and Spencer resolved all environmental issues and represented while shaking hands that it was a "done deal";
6. City Environmental set a closing date.

The District Judge went on to say, "The writing requirement places the evidentiary burden squarely on the shoulders of the party seeking enforcement of the option: . . . the buyer/optionee as well as the seller/optionor . . ." (Page 762).

In rejecting the argument that the writing requirement was waived, the District Judge said,

> "Such a rule would effectively permit Plaintiffs to undermine writing requirements in every contract into which they had entered, thereby leading to the preposterous result that parties to contract would not be able to rely on writing requirements they had placed into such contracts. This Court will not countenance such a result." (Page 762).

The District Judge went on to discuss the statement in the letter from City Environmental that they were looking forward to completing the sale of the property in the future. The Judge stated, "It is merely an optimistic statement about the purchase of property which at that time all parties believed would be forthcoming." (Page 762).

In the *Burger Chef* case, attached, the lease also required that the option to purchase be exercised in writing. The last day to exercise the option was October 1, 1997. On September 30, 1997, Hardee's (the successor to Burger King) attempted to exercise the option in a written letter sent certified mail. However, the letter contained certain typographical errors concerning the length of the lease and the rental. Hardee's attempted to remedy what it characterized as simple mistakes with a phone call on October 2, 1997, and a follow-up letter on that date. Rejecting the argument that the court should

ignore the technical imperfections in Hardee's attempt to exercise the option, the Court stated, "if a contract is clear and unambiguous, the Court looks only to the plain language of the agreement to determine the parties' rights and obligations. The Court only gives effect to the agreement's express terms (citations omitted). A contract does not become ambiguous because its operation may work a hardship upon one party (citations omitted)" (Page 4).

In further rejecting Hardee's equitable argument that it would be required to forfeit its investment in the property, the Court simply stated that such an argument is frivolous in light of the written provisions of the lease which would be rendered meaningless by such an argument.

An option is an agreement to keep an offer open for a specified time; it limits the customary power of an offeror to revoke his offer prior to its acceptance. See *George Wiedemann Brewing Co. v. Maxwell*, 78 Ohio St. 54 (1908); Restatement of the Law 2d, Contracts (1981) 73-74, Section 25. In the ordinary real estate option contract, the seller offers to sell his real property upon fixed terms, and he and his prospective buyer agree that, in exchange for a consideration paid by the buyer, the seller will leave his offer open for a specified time. Within this context, the option contract is not a contract to buy and sell the property, but only a contract whereby the seller agrees to leave his offer to sell open for a time-certain. Confusion often arises since the option is combined with the main offer to sell and its attendant detailed terms. *Ritchie v. Conray*, 10 Ohio App.3d 213 (1983).

Acceptance of the main offer contained in an option contract is not operative until received by the offeror (here, the sellers) (Restatement of the Law 2d, Contracts [1981[, 151, Section 63[b]), and the general rule is that, where an offer prescribes the place, time or manner of acceptance, those terms must be strictly complied with by the offeree (see *Schirtzinger v. Albery* [May 25, 1971], Franklin App. No. 9984, unreported; Restatement of the Law 2d, Contracts [1981] 147, Section 60, *Ritchie, supra.*

Equity will not relieve a lessee of the consequences of his failure to give written notice of renewal of the lease within the time required by the provisions of the lease when the failure resulted from the negligence of the lessee unaccompanied by fraud, mistake, accident or surprise and unaffected by the conduct of the lessor. *Standard Brewing Co. v. Tomash,* 17 C.C.(N.S.) 93 (1910); *Keppler Brothers v. Heinrichsdorf,* 5 C.C.(N.S.) 112 (1904); 50 American Jurisprudence 2d 75, Landlord and Tenant, Section 1187; Annotation 44 A.L.R.2d 1359; cf. *Rounds v. Owensboro Ferry Co.*, 253 Ky. 301, 69 S.W.2d 350 (1934); *Berkow v. Hammer,* 189 Ca. 489, 53 S.W.2d 1 (1949); *Ahmed v. Scott,* 65 Ohio App.2d 271, 418 N.E.2d 406 (1979).

Herein, the lease agreement is clear that, to have effectively exercised the option, Appellant was required to do so in writing by delivery of that notice to the Appellee by U.S. mail, return receipt requested, no later than 30 days before the lease expired. Appellant has stipulated that he did not strictly adhere to the writing requirement of the lease. Therefore, Summary Judgment should have been entered for Appellee, not Appellants.

VIII. KENTUCKY ANALYSIS WOULD ALSO REQUIRE SUMMARY JUDGMENT IN FAVOR OF APPELLANT

While, unlike Ohio, Kentucky does not have case law which is directly on "all fours" with the facts in this case, Kentucky law is specific on certain issues. Exercise of an option must be an "unequivocal and unqualified expression of intent to exercise." *River City Development Corp. v. Slemmer*, Ky.App., 781 S.W.2d 525 (1989). An option has long been recognized not as a sale but merely the right to exercise a privilege. *Three Rivers Rock Co. v. Reed Crushed Stone Co.*, Ky.App., 530 S.W.2d 202 (1975). After the option expires, by its own terms, it may not then be exercised. *Clore v. Frederick*, Ky.App., 552 S.W.2d 239 (1977). None of the statements, including the written letter dated August 8, 1997, provides such an unequivocal expression of intent by David Lykins on behalf of any of the many entities included in this case. This is especially true in light of his unilateral cancellations of previous closing dates. This Court should not look outside the written terms of the option for extrinsic evidence unless the option provision is "ambiguous." *Central Bank & Trust Company v. Estate of Kincaid, Deceased, et al*, Ky.App., 617 S.W.2d 32 (1981).

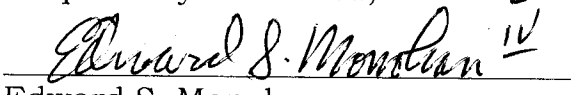
It would be difficult for a reasonable person to argue that the provisions of this option to purchase were anything less than clear and certain. There is no room for alleging the existence of an ambiguity and Appellant has not even attempted to do so . Accordingly, none of the confusing comments or statements by David Lykins should have any bearing on this matter and such evidence should not be considered in this case. The amenability and

willingness of the Appellee to cooperate with David Lykins, early in the performance of the lease's terms and prior to his cancellation of the first two closings, should not be strained to have somehow forged an ambiguity when it does not exist on the face of the lease.

CONCLUSION

For all of the reasons cited in this combined brief, Appellee asks that the decision of the Court of Appeals be affirmed and that this matter be permitted to return to the State of Ohio, where it will be tried before a jury under Ohio law in the Ohio system. In the alternative, Appellee asks that this matter be returned to the Mason Circuit Court with an Order that the summary judgment entered by that Court be set aside and that summary judgment be entered for Appellee.

Respectfully submitted,



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