

EXHIBIT 2



Analysis
As of: Oct 07, 2009

KKSIN, INC., a Delaware corporation, Plaintiff, v. WENDY BURDEN ROGERS, aka WENDY ROGERS ISHI, TERESA BURDEN KATZMAN, DOROTHY BURDEN, DAVID A. WHITE, the UNKNOWN HEIRS OF DON BURDEN, NORTHERN TRUST OF CALIFORNIA, a California corporation, as Trustee for the Estate of Don Burden, and KELLY D. BURDEN, Defendants.

Civil No. 92-1611-FR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

1993 U.S. Dist. LEXIS 7059

**May 25, 1993, Decided
May 26, 1993, Filed**

DISPOSITION: [*1] The motion of defendants for summary judgment (#7) is granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, lessors, unknown heirs of a lessee, and a trust established by the lessee's will, filed a motion for summary judgment in plaintiff sublessee's action for a declaration that, should it decide to purchase property leased to its predecessor pursuant to an option agreement, it would acquire title free from the prime lease and free from its obligations under a sublease.

OVERVIEW: The lessors leased real property to the lessee, who granted a sublease to the sublessee's predecessor. After the lessee's death, the lessors granted to a corporation an option to purchase that part of the property which had been subleased to the sublessee's predecessor for a term of 30 years. In his will, the lessee established the trust, which owned his former interest in the prime lease and in the sublease. The sublessee contended that the prime lease had terminated because the trust failed to give the lessors written notice of its election to renew the lease. The court first found that the sublessee had standing to bring an action to enforce the provision for written notice contained in the prime lease because the sublessee had rights under the option agreement that could be affected by an extension of the prime lease.

However, the court agreed with the lessors and the trust that no written notice was required to effect renewal of the prime lease and, if written notice was required, such requirement was waived. As the parties to the prime lease had attached a common meaning to that effect to their agreement, that meaning controlled interpretation of the agreement.

OUTCOME: The court granted defendants' motion for summary judgment, entering judgment in favor of defendants and against the sublessee.

CORE TERMS: lease, lessee, written notice, sublease, summary judgment, notice, lessors, renew, moving party, renewal, genuine, waived, option to purchase, rent, initial burden, issue of fact, common meaning, renewed, renewal option, year period, expiration date, declaration, election, expired

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview

[HN1]Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party.

Civil Procedure > Justiciability > Standing > General Overview

Civil Procedure > Justiciability > Standing > Personal Stake

[HN2]Standing is a threshold question to be resolved before proceeding to the merits. To establish standing, a plaintiff must demonstrate a sufficient personal stake in the outcome to justify invocation of the judicial process.

Contracts Law > Contract Interpretation > General Overview

[HN3]Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning. The primary search is for a common meaning of the parties, not a meaning imposed on them by the law.

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For Defendants: O. Meredith Wilson, Jr., Richard H. Williams, Lane Powell Spears Lubersky, 520 S. W. Yamhill Street, Suite 800, Portland, Oregon 97204-1383.

JUDGES: FRYE

OPINION BY: HELEN J. FRYE

OPINION

OPINION

FRYE, Judge:

Plaintiff, KKSIN, Inc., brings this action for declaratory relief against defendants, Wendy Burden Ishi, Teresa Burden Katzman, Dorothy Burden, David A. White, Kelly D. Burden, the unknown heirs of Don Burden, and the Northern Trust of California. The matter before the court is the motion of defendants for summary judgment (#7).

UNDISPUTED FACTS

On April 23, 1979, Wendy Burden Ishi, Teresa Burden Katzman, Patricia Burden, and Kelly D. Burden (the Burden children), as lessors, entered into an agreement to lease a certain parcel of real property (the Property), which they owned, to Don W. Burden. The initial term of the lease (the Prime Lease) expired on December 31, 1991; however, Don W. Burden, as lessee, had the right under the Prime Lease to extend the term of the lease upon certain conditions, [*2] as follows:

7. RENEWAL OPTIONS. The Lessor hereby grants and gives to the Lessee, at Lessee's option, the privilege of renewing this lease for one (1) ten year period, and a second option for one eight (8) year period, to be exercised by notice in writing at least ninety (90) days prior to the expiration of any extended lease period. All renewal lease periods shall be on the same terms and conditions as provided in this lease, including the payment of rents. Failure of Lessee to give such notice of intention to exercise the renewal option shall terminate Lessee's option to such renewal. Lessee shall not be liable for any additional rent beyond the expiration date of the original term of this lease, or beyond the expiration date of any extended period, in the event Lessee does not exercise his option to renew or extend.

On January 18, 1980, Don W. Burden, the lessee, granted a sublease (the Sublease) in a part of the Property to FVBC, Inc. for a term of thirty years.

Don W. Burden died prior to December 10, 1985. On December 10, 1985, the Burden children, then-owners of the Property, granted to Fort Vancouver Broadcasting Corporation an option to purchase that part of the Property [*3] which had been subleased to FVBC, Inc. by Don W. Burden for a term of thirty years. The option to purchase (the Option Agreement) expires on December 9, 1994. The Burden children are the present owners and lessors of the Property.

In his will, Don W. Burden established a trust which owns his former interest in the Prime Lease and in the Sublease. KKSIN, Inc. has succeeded FVBC, Inc. as the lessee in the Sublease and has obtained the option to purchase held by Fort Vancouver Broadcasting Corporation in the Option Agreement.

The trust established by Don W. Burden in his will, as lessee, failed to give prior written notice of its election

to extend the Prime Lease to the year 2002. However, the Burden children, as lessors, have waived the requirement that the trust provide notice. The trust has continued to pay rent to the Burden children on the Property. The Burden children have accepted the rental payments from the trust. The Burden children and the trust agree that the Prime Lease has been renewed and is binding upon them.

CONTENTIONS OF THE PARTIES

KKSN, Inc. contends that the Prime Lease terminated on December 31, 1991 because the trust failed to give the Burden children written [*4] notice of its election to renew the lease. KKSN, Inc. seeks a declaration that, should it decide to purchase that part of the Property which was leased to FVBC, Inc. pursuant to the Option Agreement, KKSN, Inc. will acquire title free from the Prime Lease and free from its obligations under the Sublease.

Defendants contend that because KKSN, Inc. is not a party to the Prime Lease, it does not have standing to enforce the provision for written notice contained in the Prime Lease; that written notice was not required to renew the Prime Lease; and that if written notice was required, the Burden children have expressly waived such requirement.

APPLICABLE STANDARD

[HN1] Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). [*5] On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. [Hector v. Wiens](#), 533 F.2d 429, 432 (9th Cir. 1976).

ANALYSIS AND RULING

1. Standing

The first issue for the court to decide is whether KKSN, Inc. has standing to enforce the provision for written notice contained in the Prime Lease. See [Los Angeles County Bar Ass'n v. Eu](#), 979 F.2d 697, 700 (9th Cir. 1992) (noting that [HN2]standing is a threshold question to be resolved before proceeding to the merits). "To establish standing, a plaintiff must demonstrate a sufficient personal stake in the outcome to justify invocation of the judicial process." *Id.*

While defendants contend that KKSN, Inc. lacks standing to enforce the provision of the contract requiring notice to renew because it is not a party to the Prime Lease, the relief being sought by KKSN, Inc. is a judicial declaration as to whether the Prime Lease expired on December 31, 1991. Since KKSN, Inc. has rights under the Option Agreement which may be affected by an extension of the Prime Lease, KKSN, Inc. has standing [*6] to bring this action.

2. Status of the Prime Lease

The parties to the Prime Lease, the Burden children and the trust, contend that no written notice was required to effect renewal of the Prime Lease, and, if written notice was required, that this requirement was waived. [HN3]"Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning. The primary search is for a common meaning of the parties, not a meaning imposed on them by the law." [Springfield v. Washington Pub. Power Supply Sys.](#), 752 F.2d 1423, 1427 (9th Cir. 1985) (internal quotations, citation, and brackets omitted) (quoting [Restatement \(Second\) of Contracts § 201\(1\) & comment c](#) (1981)), *cert. denied sub nom. DeFazio v. Springfield*, 474 U.S. 1055 (1986). Since the parties to the Prime Lease have attached a common meaning to their agreement, that meaning controls. The Prime Lease was renewed and remains in effect.

CONCLUSION

The motion of defendants for summary judgment (#7) is granted.

DATED this 25 day of May, 1993.

HELEN J. FRYE

United States District Judge

ORDER - May 26, 1993, [*7] Filed

IT IS HEREBY ORDERED that defendants' motion for summary judgment (#7) is GRANTED.

DATED this 26 day of May, 1993.

HELEN J. FRYE

United States District Judge

JUDGMENT - May 26, 1993, Filed

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against plaintiff.

DATED this 26 day of May, 1993.

HELEN J. FRYE