

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ST. LOUIS UNION STATION HOLDINGS INC.,)
)
 Appellant,)
) Appeal No. ED92838
 v.)
)
 THE DISCOVERY CHANNEL STORE INC.,)
)
 Respondent.)

Appeal from the Twenty-Second Judicial Circuit
Division 2
Honorable David L. Dowd

REPLY BRIEF OF APPELLANT

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THE FACTS

St. Louis Union Station Holdings, Inc. (“StLUSH”) will not restate its Statement of Facts, but will comment upon inaccuracies in the THE FACTS of The Discovery Channel Stores, Inc. (“DCS”).

I. RESPONDENT’S Brief at page 1: “On August 21, 2007, Union Station declared the lease agreement terminated and issued a notice of termination to Discovery Channel.”

Correction: Both at pages 8 and 91 of the Legal File, it is the Relief Period that is terminated, not the lease agreement. The Fourth Amendment Of Lease [L.F. at pp. 88-90] granted rent relief to the tenant for a Relief Period from February 1, 2007 through January 31, 2008. During this Relief Period, paragraph 1 of this Fourth Amendment abated the monthly rent of \$10,269.00. However, paragraphs 2(a) & (b) of the Fourth Amendment provided that upon any default by Discovery Channel, StLUSH was entitled to terminate the Relief Period and collect all rent that would have been due but for this Fourth Amendment. This is the Relief Period that was terminated, not the lease agreement.

II. RESPONDENT’S Brief at page 3: “Mr. Davidson replied, ‘[y]our lease termination counter offer of \$220,000 ‘all inclusive and as is condition’ is accepted for Discovery Channel St. Louis Union Station.’”

Correction: Please note that Mr. Davidson’s entire reply also contained the following: “Kindly prepare the lease termination agreement and email it to me for processing and review by Discovery. Regards, Tom Davidson DJM Realty.”

III. RESPONDENT'S Brief at page 4: “Three weeks after filing its Answer, counsel for Discovery Channel gave Union Station’s counsel copies of the September 21, 2007 e-mail exchange in which the parties settled the lawsuit.”

Correction: The e-mail exchange is not about settling a lawsuit, but negotiating a lease termination agreement. From the e-mail exchange, it is obvious that neither Marshall nor Davidson were aware that the lawsuit had even been filed. Use of the terms “as is” and “all inclusive” indicate that there were also discussions about the condition that DCS would deliver the leased premises to StLUSH. This email exchange did not discuss only money.

IV. RESPONDENT'S Brief at page 4: “Union Station never denied this Request to Admit.”

Correction: Although StLUSH never denied the Request to Admit, it did timely object to it and therefore under Rule 59.01 Mo.R.Civ.P. StLUSH is not deemed to have admitted the Requests.

V. RESPONDENT'S Brief at page 4, footnote #22: “In the height of irony, Union Station is now arguing that Byron Marshall lacked authority to settle the lawsuit he filed.”

Correction: Please note that Byron Marshall works for Jones Lang LaSalle Americas, Inc. and in that capacity is the general manager for St. Louis Union Station. And StLUSH owns St. Louis Union Station. Mr. Marshall is authorized with the day-to-day running of the mall. There is nothing in the

record to imply that he has authority to sign leases, sign lease termination agreements, settle lawsuits or to file lawsuits. StLUSH filed this lawsuit, not Byron Marshall. Byron Marshall “verified” the petition since he was an individual with personal knowledge of matters verified. Mr. Marshall did not “authorize” the lawsuit. There is nothing in the legal file to support that statement.

VI. RESPONDENT’S Brief at page 6: “Judge Dowd also considered Union Station’s argument that Byron Marshall, Union Station’s ‘General Manager’ who filed the Verified Petition commencing the lawsuit, did not have the authority to settle the lawsuit. Judge Dowd did not buy Union Station’s argument.”

Correction: Let’s look at exactly what Judge Dowd said that he considered: “Plaintiff argues that there has been no settlement of the lawsuit because Byron Marshall did not have authority to bind Plaintiff. However, Plaintiff failed to deny or timely object to Defendant's Requests for Admission which included the following:

On September 21, 2007, Byron Marshall had authority to negotiate on behalf of the Plaintiff.

On September 21, 2007, Byron Marshall spoke with Plaintiff's "ownership" about making a settlement offer to Defendant regarding its St. Louis Union Station lease termination prior to conveying such offer.

On or before September 21, 2007, Plaintiff's "ownership" agreed to extend a counter-offer to Defendant of \$220,000 for its St. Louis Union Station lease termination.

On or before September 21, 2007, Plaintiff's "ownership" authorized Byron Marshall to extend a counter-offer to Defendant of \$220,000 for its St. Louis Union Station lease termination.

The Court finds that Defendant has shown that Byron Marshall had authority to bind Plaintiff.” [L.F. at pp. 172 & 173] However, the Plaintiff did timely object to these Defendant’s Requests for Admission.

SUMMARY OF ARGUMENT

Respondent’s simple proposition [that the person with authority to file a lawsuit can also settle the lawsuit] is too simple. First, there is nothing in the record that shows that Byron Marshall had the authority to file a lawsuit. StLUSH’s attorney, Michael Wolff had the authority to file the lawsuit and did so. Mr. Wolff signed the Petition. Mr. Wolff would have had authority to settle the lawsuit. Mr. Byron Marshall “verified” the petition, since he was an individual with personal knowledge of the alleged matters.

Mr. Marshall had authority to negotiate a lease termination agreement with Mr. Davidson, DCS’ agent. As Mr. Davidson recognized in his e-mail (“Kindly prepare the lease termination agreement and email it to me for processing and review by Discovery.”) Section 20.14 of the Lease and the Statute of Frauds, required the principals to execute these types of agreements.

There would have been a binding lease termination agreement only upon: i) StLUSH accepting the additional terms of “as is” and “all inclusive” that were added by Mr. Tom Davidson, and ii) execution of the lease termination agreement by the parties.

ARGUMENT

I. The circuit court erred in entering judgment enforcing a settlement because there was no enforceable agreement to terminate the subject lease in that there was no written agreement signed by an authorized representative of the parties to terminate the subject lease.

A. No addition reply to Respondent's Argument IA.

B. The Statute of Frauds does apply to the negotiation of a lease termination agreement.

First, the lawsuit may be only about monetary damages, but this only emphasizes that Byron Marshall and Tom Davidson were negotiating a lease termination agreement and not settling the litigation.

Both concepts involve money; however, a settlement of litigation provides for a dismissal of the lawsuit. A dismissal of the lawsuit was not mentioned in the subject e-mails. The record does not even show that the parties to the e-mails were aware that the lawsuit had been filed. A lease termination agreement provides for the payment of not only rent but also of attorney fees, interest, and late fees. These agreements also address the condition that the property will be turned over. It is for these reasons that the subject e-mails included terms such as "all inclusive" and "as is".

The e-mails were not at all about settling only the money terms of this lawsuit. And although Respondent claims that the lease was already terminated, only the Relief Period was terminated.

The cases cited by the Respondent are irrelevant to our facts and unique to special situations. McPherson Redevelopment Corporation v. Shelton, 770 S.W.2d 448, 452

(Mo.App.E.D.1989) states that it is unique to condemnation cases where the Condemnation Order had already issued and only monetary damages are in issue. DeWitt v. Lutes, 581 S.W.2d 941 (Mo.App.1979) is a case limited to boundary disputes. McDaniel v. Park Place Care Center, Inc., 918 S.W.2d 820 (Mo.App.W.D.1996) is a case involving an oral partnership agreement. None of these cases are applicable here - the e-mails themselves are discussing terms other than a settlement of a lawsuit for damages only.

C. The Respondent argues at page 19 of its Brief that “Even if the Statute of Frauds were to apply to the September Settlement, the agreement was ‘in writing’ and satisfied the Statute of Frauds.”

Plaintiff agrees that the e-mails are “writings”. However, first, the e-mails do not constitute an offer and acceptance (Mr. Davidson’s “acceptance” included additional terms). Second, even Respondent’s agent, in his return e-mail recognized that they needed a written lease termination agreement, signed by the parties (or a written agreement authorizing the agents to sign the written lease termination agreement).

Crestwood Shops, LLC v. Hilken, 197 S.W.3d 641 (Mo.App.W.D.2006) is cited by the Appellant for the proposition the subject lease termination agreement would be subject to the Statute of Frauds, not that e-mail correspondence does not constitute a writing.

II. The circuit court erred in entering judgment enforcing a settlement because there was no enforceable agreement to terminate the subject lease in that there was no offer and acceptance and no meeting of the minds in order to form an enforceable agreement.

In footnote 66 in Respondent's Brief, page 21, DCS maintains that the offer/acceptance/meeting of the minds issue was not raised before Judge Dowd. Please see page 192, Section iii in the Legal File.

Londoff v. Conrad, 749 S.W.2d 463 (Mo.App.E.D.1988) is on point, because the e-mails are about negotiation a lease termination agreement which involved issues other than money such as the condition of the premises and the costs and expenses included in the termination fee. The legal file does not tell whether the Plaintiff was agreeable with the leased premises being returned in "as is" condition. The records does not tell whether the Plaintiff was agreeable with the sum of money being "all inclusive".

The Rent Relief Period was terminated; however, now the parties were plainly discussing a lease termination agreement. The subject e-mails make no mention of a lawsuit.

III. The circuit court erred in entering judgment enforcing settlement because Discovery Channel failed to prove a settlement by clear and convincing evidence in that there was no hearing to determine the evidence.

It is clear from the legal file that there was no evidentiary hearing for this Motion to Enforce Settlement.

CONCLUSION

The circuit court erred in entering judgment enforcing the settlement agreement claimed by Discovery Channel because the properly-authorized representatives of the parties did not sign a writing agreeing to terminate the lease at Union Station and because Discovery Channel failed to prove a settlement by clear, convincing, and satisfactory

evidence. The Court must reverse the circuit court's judgment and remand this case for trial on the claims alleged in the Petition and Answer, with instructions that the September 21 email exchange does not constitute an enforceable lease termination agreement.

Respectfully submitted,

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CERTIFICATION REQUIRED BY RULE 84.06

The undersigned hereby certifies that this Reply Brief complies with the limitations in Rule 84.06(b), and that it contains 1,734 words and 170 lines (exclusive of the cover and appendix) as counted by Microsoft Office Word for Windows 2007.

The undersigned has filed herewith a diskette containing this Brief using Microsoft Office Word for Windows 2007 and certifies that the diskette has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on September 8, 2009, one printed copy and one electronic copy of this Brief were mailed to:

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