

Nos. A09-859 and A09-995

STATE OF MINNESOTA
IN COURT OF APPEALS

Starlite Limited Partnership,

Respondent,

v.

Landry's Restaurants, Inc.,

Appellant.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondent Starlite Limited Partnership (“Starlite”) cannot, and does not, deny that it executed an Offer to Lease – made by non-party Landry’s Seafood House Minnesota, Inc. (“Seafood House”) – five days after the express deadline for acceptance of the Offer to Lease. Under the clear, unambiguous terms of the Offer to Lease, it is “null, void, and of no force and effect,” and Appellant Landry’s Restaurants, Inc.’s (“Landry’s”) has no liability under the Guaranty at issue in this case. Starlite nonetheless argues, based on nothing more than conclusory statements in an affidavit, that Seafood House waived the time for acceptance of the Offer to Lease by occupying the premises. Starlite’s argument fails for two reasons. First, under Minnesota law, if an offer to lease has conditions for acceptance that must be met for it to be valid, and these conditions are not met, the lease is void. Starlite points to no authority to the contrary; rather, each case it cites deals with waiver in the context of an *existing* contract. Second, under Minnesota law, a party who occupies property under a void lease *does not* concede that the lease is valid but instead takes occupancy under a tenancy at will created by operation of law. Furthermore, irrespective of its ruling on the validity of the alleged lease, the district court erred in calculating damages. Despite Starlite’s heavy reliance on an inapposite, non-binding case from another jurisdiction, the Resident Statements provided by Starlite cannot serve as written demand necessary to determine Landry’s maximum liability under the Guaranty. Consequently, the district court should be reversed.

ARGUMENT

I. THE OFFER TO LEASE WAS NOT TIMELY ACCEPTED AND IS VOID.

Starlite does not dispute that it executed the Offer to Lease after the explicit deadline for acceptance. Under the terms of the Offer to Lease, the effect of Starlite's failure to accept before the deadline is clear:

If Landlord has not executed multiple copies of this Lease and returned at least one (1) fully executed copy to Tenant within six (6) days after the date of execution hereof by Tenant, *Tenant's offer to lease as provided for herein shall be deemed withdrawn, and this Lease shall be null, void, and of no force and effect.*

(A22, § 18.13 (emphasis added).)

Starlite calls this a "relatively technical" requirement and, in essence, asks the Court to ignore it. (Resp.'s Br. at 9-10.) But, as this Court previously wrote – in a case Starlite quotes in its brief – when an instrument "is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain and unambiguous terms are conclusive of that intent." Knudsen v. Transp. Leasing/Contract, Inc., 672 N.W.2d 221, 223 (Minn. Ct. App. 2003). For Starlite to suggest that this clear, unambiguous requirement for acceptance should be ignored as a mere "technicality" contradicts both this established principle of contract interpretation and the well-developed body of law regarding contract formation. And that body of law is clear: in this case, the Offer to Lease is indeed null, void, and of no force and effect. The Minnesota Supreme Court has held that "[i]f the time for acceptance of an offer is limited, as here, the limit is absolute and time is of the essence." Callender v. Kalscheuer, 184 N.W.2d 811, 812 (Minn. 1971). Starlite has not cited a single case that

holds otherwise. Instead, it relies on two wholly unrelated cases, Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 221 (Minn. 1962), and Markmann v. H.A. Bruntjen Co., 81 N.W.2d 858, 862 (Minn. 1957), to argue that an acceptance which substantially complies with an offer is objective evidence of the formation of a contract. But neither Cederstrand nor Markmann dealt with an offer that had an explicit, unambiguous time limitation for acceptance. The rule laid down in Callender is clear: when an offer has a time limit, the offeree must accept within that time limit, or the offer expires.

Starlite also relies on 1 Williston on Contracts § 5:5 (4th ed. 2007) to support its argument, quoting its statement that “[o]ften, an offeror who has imposed a time limit in its offer does not in fact insist upon it . . . [and a] manifestation of continued willingness on the part of the offeror will extend the time during which acceptance may occur, constituting in effect a new offer, which may be accepted and if so accepted will ripen into a contract.” (Resp.’s Br. at 7-8.) However, the language Starlite omitted from its quotation says that “by further negotiations, the offeror may indicate a continued willingness to stand by the terms of its offer.” 1 Williston § 5:5. There is, of course, no evidence whatsoever of any “further negotiations” that might indicate Seafood House’s willingness to stand by the Offer to Lease. Furthermore, as Williston makes quite clear earlier in § 5.5, if an offer has a specified time limit, “and if no acceptance is made within that time, *the power of acceptance necessarily expires.*” Id. (emphasis added). Because Starlite executed the Offer to Lease outside the explicit time limit, its power to accept expired, and the Offer to Lease is null, void, and of no force and effect.

II. AT MOST, SEAFOOD HOUSE'S OCCUPANCY OF THE PREMISES MERELY CREATED A MONTH-TO-MONTH LEASE.

As explained above, the Offer to Lease is void. Starlite tries to escape this conclusion by arguing that Seafood House waived the late acceptance by taking possession of the premises. But Seafood House's occupancy of the premises did not waive the deadline for acceptance; at most, it merely created a month-to-month tenancy by operation of law.¹

A. Waiver Cannot Cure Starlite's Failure To Timely Accept The Offer To Lease.

Starlite argues that Seafood House waived the deadline for *acceptance* of the Offer to Lease by occupancy of the premises. Starlite has not cited a single Minnesota case that found a waiver of the deadline for acceptance necessary for contract formation, instead providing a string cite to “[o]ther jurisdictions that have considered the question” and reached the result it desires. (Resp.’s Br. at 10 n.1.) But, as the court notes in Sabo v. Fasano, 154 Cal. App. 3d 502 (Cal. Ct. App. 1984), one of the cases Starlite cites,

¹ In its brief, Starlite makes a new argument, one not raised in the proceedings below (and only raised in a footnote before this Court): its late execution of the Offer to Lease was a counteroffer that Seafood House accepted by occupying the premises. Because Starlite raises this argument for the first time on appeal, this Court should refuse to consider it. See Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 67 n.2 (Minn. 1979) (“[T]his court is limited to deciding questions presented to and decided by the lower court, and to the trial court’s record. It is a well-settled principle that issues not presented at trial cannot be raised on appeal.”) (citations omitted). Even if this Court should consider Starlite’s counteroffer argument, there is no evidence on the record to support Seafood House’s acceptance of a counteroffer. There is no testimony from Starlite suggesting that it made a counteroffer, nor is there any testimony from Seafood House suggesting acceptance of a counteroffer, let alone an acceptance that would have complied with the statute of frauds.

“[T]here is an alternate view, held by respected legal scholars and courts of other jurisdictions, that ‘[u]nless the offeree exercises his power of acceptance before [the offer] expires, there is no contract, for there is no power to accept. Therefore, where the offer has terminated by lapse of time, an attempt to accept is ineffectual to create a contract. . . . Once terminated . . . the original offer to lease can never be revived.’” Id. at 506 (quoting Kurio v. United States, 429 F. Supp. 2d 42, 64-65 (S.D. Tex 1970) and citing numerous cases and secondary sources). The Minnesota cases Starlite cites in support of its waiver argument, as Landry’s discussed in its opening brief, are all inapposite: *every single one of them* deals with waiving the terms of a contract that *already exists*, not waiving the requirements for *formation* of a contract. None of the Minnesota cases discussed by Starlite holds that the conditions necessary to form a contract can be waived.

In its brief, Starlite argues that the validity of the underlying lease in TPI/CMS St. Paul Ltd. P’ship v. Expansion Enters., Inc., No. C5-94-1980, 1995 WL 296014 (Minn. Ct. App. May 16, 1995), was not at issue on appeal. (Resp.’s Br. at 11.) This misconstrues both what happened in TPI/CMS and Landry’s argument. The existence of the underlying lease was indeed not at issue in TPI/CMS, as the respondent landlord did not appeal the district court’s conclusion that the lease was void. 1995 WL at *1. But the primary relevance of TPI/CMS is not to demonstrate that the Offer to Lease in this case was void – the plain language of the document establishes that. Rather, TPI/CMS is important because it shows that Seafood House’s occupancy of the premises under a void lease does not constitute acquiescence or waiver. The landlord in TPI/CMS argued that

the appellant bank *waived* the lease's voidness by occupying the property and recognizing the lease. Id. This Court soundly rejected that argument, holding that under Minnesota law, "occupation under a void lease *does not constitute acquiescence to the lease*, but rather creates a tenancy at will." Id. at *2 (emphasis added).

Starlite also contrasts the facts of this case to those of Callender and Rooney v. Dayton-Hudson Corp., 246 N.W.2d 170 (Minn. 1976), arguing that Seafood House's behavior in this case shows waiver because, while the offerors in those cases "walked away" as soon as the deadlines for acceptance lapsed, Seafood House took occupancy of the premises. But both Callender and Rooney involved the sale of real property, not a lease. In a sale, the transaction either happens or it does not – there is no middle ground. In a lease transaction there is another possibility – a tenancy at will is created by application of law. As TPI/CMS and numerous other cases make clear, occupation under a void lease creates a tenancy at will by operation of law (see, e.g., TPI/CMS, 1995 WL at *2; Martin v. Smith, 7 N.W.2d 481, 483 (Minn. 1942); Hagen v. Bowers, 233 N.W. 822, 822-23 (Minn. 1930); Goodwin v. Clover, 98 N.W. 322, 323 (Minn. 1904)) – and Landry's Guaranty of "that certain Lease Agreement . . . dated April 30, 1998," (A26), does not cover such a tenancy.

B. Even If Waiver Could Cure Starlite's Untimely "Acceptance," Fact Issues Exist As To Waiver.

Starlite argues that two courses of conduct show waiver: first, that Seafood House fully complied with the terms of the Offer to Lease, and second, that Seafood House retained Cambridge Realty to sublet the premises. Even if waiver could cure Starlite's

untimely acceptance, these allegations would not be enough to support summary judgment for Starlite.

In its brief, Starlite repeatedly says that Seafood House fully performed under the Offer to Lease. However, there is no evidence on the record to indicate “full” performance. The conclusory affidavit of Robert Kueppers states that Landry’s paid rent, (A2), but there is there is no proof on the record that, e.g., Seafood House fulfilled the maintenance obligations of the Offer to Lease, (A12), carried insurance for the premises, (A13-14), or paid utility bills. (A14.) There is no evidence of any writing signed by each party altering or amending the Offer to Lease, as required for modification in Section 18.2 of the Offer to Lease. (A20.) And Landry’s states by affidavit that there were no modifications, written or otherwise, to the Offer to Lease. (A59.) On appeal from summary judgment, this Court must view the evidence in the light most favorable to Landry’s. See Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 847 (Minn. 1995). When the record shows only that Seafood House paid rent and taxes in a timely fashion, that record, viewed most favorably to Landry’s, is hardly enough to show that Seafood House fully complied with all terms of the Offer to Lease, thus waiving its voidness. At most, it shows exactly what TPI/CMS provides for: a tenancy at will created by operation of law.

Similarly, the fact that Seafood House retained Cambridge Realty to sublet the premises is hardly evidence that the Offer to Lease was accepted and a valid lease contract was created. There are many reasons why Seafood House might retain a realtor that have nothing to do with the validity of the lease. For example, as a month-to-month

tenant at will under these circumstances, Seafood House may have realized that, even with the law on its side, there was a potential for litigation. Subletting the premises to another party would provide a possible solution to a potential dispute without resorting to litigation. The fact that a reasonable business acted to avoid litigation is hardly dispositive of the validity of the Offer to Lease as a matter of law.

III. THE RESIDENT STATEMENTS ARE NOT SUFFICIENT TO CONSTITUTE WRITTEN DEMAND UNDER THE GUARANTY.

In its brief, Starlite invokes the plain language of the Guaranty, arguing that it shows Landry's is "absolutely liable" for Seafood House's default. (Resp.'s Br. at 12-14.) But even a cursory glance at the very language Starlite quotes shows that the Guaranty requires a formal demand by Starlite to trigger any liability: it provides that in the event of Seafood House's default, Landry's "shall, *on demand of [Starlite]*, fully and promptly, and well and truly, pay and perform the Guaranteed Obligations." (A26-27 (emphasis added).) Contrary to what Starlite claims, Landry's liability under the Guaranty is not "absolute upon Seafood House's default." (Resp.'s Br. at 14.) Rather, Landry's liability is triggered *only* if Starlite provides a demand for performance of the Guaranty. Furthermore, Landry's liability is limited to the period "beginning on the date on which [Starlite] makes written demand . . . upon [Landry's]." (A26.)

Despite Starlite's arguments to the contrary, the Resident Statements are not sufficient to serve as written demand under the Guaranty. If they were, Starlite would have had no reason to send Landry's a separate document that *Starlite's own authorized representative* calls a "Demand Notice." (See A2 at ¶ 8, A51-52.) Starlite's reliance on

Roshek Realty Co. v. Roshek Bros. Co., 87 N.W.2d 8 (Iowa 1957), is misplaced for several reasons. First, and most obviously, Roshek is an Iowa case. Starlite has not cited a single Minnesota case supporting its position. Second, the language Starlite relies upon explicitly “assume[s], without so holding,” that the rent statements at issue constituted written demand. Id. at 11. This is not merely dicta, this is dicta that says, as clearly as possible, that it is not a holding to be relied upon by other courts.

Finally, Starlite misinterprets what happened in Roshek. In Starlite’s view, “[o]nly because the lessor was unable to produce evidence that the defendant lessee actually received the monthly statement did the court ultimately hold that the lessor failed to prove there was an adequate written demand.” (Resp.’s Br. at 15-16.) The Roshek court found that that the lack of proof on this point was *sufficient* to decide in favor of the lessee, and because this was sufficient, there was no need to consider whether the statements were enough to serve as written demand. Indeed, in the paragraph immediately preceding the portions cited by Starlite, the Roshek court acknowledged that “[t]here is room for argument that the parties to the lease contemplated a written demand in addition to the routine statement sent defendant the first of each month.” Id. at 10-11. This is clearly what the parties contemplated here, as Starlite saw the need to send a separate demand notice. (See A51-52.)

Here, the Resident Statements do not mention the Guaranty, Landry’s liability under it, or clause 1(a) of the Guaranty – they merely refer to money owed *by Seafood House*. This is not enough to serve as a written demand under the Guaranty. See Parsons v. Restaurant Enters. Group, No. C3-95-2023, 1996 WL 146468 (Minn. Ct. App. Apr. 2,

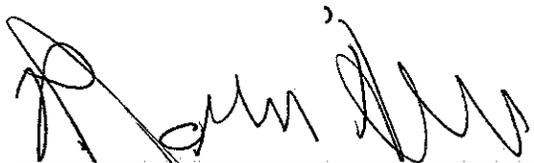
1996). To hold otherwise would eviscerate notice requirements in most commercial contexts where invoices are sent in the normal course of business.

CONCLUSION

For the reasons set forth above and in Landry's opening brief, this Court should reverse the district court's grant of summary judgment and direct judgment in favor of Landry's. At a minimum, the case should be remanded for recalculation of damages.

Dated: August 17, 2009

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