

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-190

SEPTEMBER TERM, 2005

Howard A. Manosh	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
First Mountain Vermont, L.P.	}	DOCKET NO. 181-8-02 Lecv

Trial Judge: Howard E. VanBenthuyzen

In the above-entitled cause, the Clerk will enter:

Plaintiff Howard A. Manosh appeals the superior court’s order granting summary judgment to defendant First Mountain Vermont, L.P. (FMV) with respect to Manosh’s suit claiming that he owns development rights on certain lands that were the subject of a series of transactions executed in June 1995. We reverse the superior court’s order and remand the matter for further proceedings.

This case involves a convoluted fact pattern centering around at least six agreements signed on June 7, 1995. The agreements concern an eight-acre parcel consisting of four lots, one of which includes a building known as the Fairgrounds Plaza. Manosh and his corporation sold the parcel to the Grand Union Company, which assigned its rights under the sales contract to its lender, FMV. In an overlease agreement, FMV leased the parcel back to Grand Union, which, in turn, subleased portions of the property back to Manosh under an interim lease agreement.

The declared purpose of the interim lease was for Manosh to sublease the Fairgrounds Plaza building and its easements and rights of way, while Grand Union “obtain[ed] permits necessary to enter a permanent lease.” The interim lease provided at ¶ 2 that it would end “upon the execution by the parties of a permanent lease, pursuant to the terms of a Sales Contract between” Grand Union and Manosh. The interim lease provided further, at ¶ 3, that if the permanent lease was not executed within the year, the penalty would be that Manosh would pay rent of \$100 per year and

the permanent lease, referred to above, shall be executed and shall replace this Interim Lease except that the permanent lease will be modified by amending the description of the property to be leased thereunder to only include the Fairgrounds Plaza Building and the

buildings described in the said permanent lease, which buildings, along with the improvements described in the permanent lease, Landlord agrees to allow Tenant to construct, at Tenant's sole cost and expense. [emphasis added].

The "permanent lease, referred to above," as between Grand Union and Manosh, was "Exhibit D" incorporated by reference and attached to their sales contract. Paragraph 5.A of that lease provided that Manosh "may construct" a building on Lot C of the leased property as well as improvements on "Lease Back Lots" A and B.

On the same date, FMV and Manosh also signed an assumption-of-obligations agreement and a subordination agreement. The assumption-of-obligations agreement provides, in pertinent part, as follows:

[FMV] is not assuming any of GU's obligations under the Contract, including, without limitation, GU's obligations under the Contract to . . . (ii) execute any lease or sublease with [Manosh] except that [FMV] will execute such lease(s) that are required by the non-disturbance [subordination] agreements which [FMV] will be executing; (iii) obtain or amend permits or authorizations [emphasis added].

The subordination agreement provides at ¶ 2.a, in pertinent part:

If the current term of the Overlease [between FMV and Grand Union] . . . shall terminate before the expiration of the term of the [interim lease] . . . , the [interim lease] shall continue as a lease between [FMV], as landlord, and [Manosh], as tenant, with the same force and effect as if [FMV], as landlord, and [Manosh], as tenant, had entered into a lease as of the date of the termination of the Overlease, containing the same terms, covenants and conditions as those contained in the [interim lease] [emphasis added].

In December, 2001, a bankruptcy court terminated the overlease agreement between FMV and Grand Union, thereby triggering ¶ 2.a and substituting FMV for Grand Union as landlord in the interim lease with Manosh.

In August 2002, Manosh filed a complaint for declaratory relief, asking the Superior Court to find that he possessed development rights to the so-called lease-back lots A, B, and C within the subject property. The superior court eventually granted summary judgment to FMV upon concluding that FMV had no obligation to execute the permanent lease, and that the terms of the various agreements conveyed no lease-back lot development rights to Manosh. The court reasoned that the language in the assumption-of-obligations agreement excusing FMV from assuming any obligation of Grand Union to "execute any lease" with Manosh demonstrated that FMV "was under no obligation to execute the permanent lease, despite the assignment of the contract from Grand Union to [FMV]." The court read the modifying clause—"except that

[FMV] will execute such lease(s) that are required by the non-disturbance [subordination] agreements”— to refer only to the overlease and the substitution of FMV for Grand Union in the interim lease upon termination of the overlease. Thus, according to the court, the permanent lease containing Manosh’s development rights to lease-back lots A, B, and C did not come into play because it was never executed.

On appeal, Manosh argues that the trial court erred in determining that he did not retain development rights to the lease-back lots under the agreements. Manosh contends that, since the permanent lease was not executed within the year as required by the interim lease, then, by the penalty terms of the interim lease, the permanent lease “shall be executed and shall replace” the interim lease. Manosh argues that, because FMV is now obligated as substitute landlord on the interim lease under FMV’s subordination agreement, FMV is obligated to execute the permanent lease according to the terms of the interim lease. FMV responds that the assumption-of-obligations agreement expressly exempts FMV from any obligation to pursue permits necessary for the permanent lease, and further exempts FMV from any obligation concerning premises other than those described in the overlease and interim lease—i.e., the Fairgrounds Plaza building and all necessary easements and rights of way.

We agree with Manosh that FMV is subject to ¶ 3 of the interim agreement. The trial court correctly declined to rely on the terms of the unexecuted permanent lease, but nonetheless erred in determining that the parties’ subordination agreement was limited to the Fairgrounds Plaza building and accompanying easements. The parties’ assumption-of-obligations agreement expressly required FMV to assume the burdens of the subordination agreement. Although the court was correct that the actual leasehold premises described in the interim lease was limited to the Fairgrounds Plaza building and its easements and rights of way, the court did not address or reconcile FMV’s additional responsibilities to Manosh arising under ¶ 3 of the interim lease. The assumption-of-obligation agreement expressly required FMV to “execute such lease(s) that are required by the non-disturbance [subordination] agreements.” Paragraph 2.a of the subordination agreement, in turn, expressly required FMV to substitute for Grand Union on the interim lease and to assume “the same terms, covenants and conditions as those contained in the [interim] Lease.” Pursuant to ¶ 3 of the interim lease, in the event that the permanent lease was not signed within one year of the signing of the interim lease, the permanent lease was to be executed and modified to include not just the Fairgrounds Plaza building, but also “the buildings described in the said permanent lease, which buildings, along with the improvements described in the permanent lease, Landlord agrees to allow Tenant to construct, at Tenant’s sole cost and expense.”

FMV argues that it is not subject to ¶ 3 of the interim lease because the provision merely sets forth a penalty in the event Grand Union fails to fulfill its obligation under the sales contract to obtain the necessary permits. According to FMV, because the assumption-of-obligations agreement explicitly provides that FMV is not obligated to obtain permits, ¶ 3 cannot apply to it.

We disagree. Neither ¶ 3 of the interim lease nor the sales contract make obtaining permits a necessary condition for executing the permanent lease. Indeed, ¶ 4(a) of the sales contract provides for execution of the permanent lease exactly as in ¶ 3 of the interim lease in the event that permits are not obtained. Regardless of whether FMV had an obligation to obtain the

permits, the fact remains that the permanent lease was not executed within one year, and thus FMV, as the substituted landlord, is subject to ¶ 3 of the interim lease.

We review, de novo, a trial court's decision granting summary judgment and apply the same standard as that applied by the trial court. Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 9. "Generally, construction of a contract is a matter of law." Bergeron v. Boyle, 2003 VT 89, ¶ 14, 176 Vt. 78. Because we conclude that FMV is subject to ¶ 3 of the interim lease, we reverse the superior court's order granting summary judgment to FMV. Although we conclude that ¶ 3 of the interim lease is the provision of current applicability as between Manosh and FMV, we remand the matter for the superior court to determine in the first instance what rights Manosh has retained by virtue of that provision.

The superior court's April 12, 2005 order granting summary judgment to First Mountain Vermont, L.P. is reversed, and the matter is remanded for further proceedings consistent with this decision.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice