Michigan Law Review

Volume 43 | Issue 3

1944

LANDLORD AND TENANT-LEASES-OPTION IN TENANT TO CANCEL IN CASE OF GOVERNMENTAL INTERFERENCE WITH USE OF PREMISES

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LANDLORD AND TENANT—LEASES—OPTION IN TENANT TO CANCEL IN CASE OF GOVERNMENTAL INTERFERENCE WITH USE OF PREMISES—A lease of real property for an automobile service station contained a provision for termination of the leasehold at the option of the tenant in case "the use of the said premises for an oil and gasoline filling station be prevented, suspended or limited by any zoning statute or ordinance, or any other municipal or governmental action." *Held*, this clause applied to release the tenant when wartime rationing of gasoline and tires made it unprofitable for him to operate the filling station.

Mid-Continent Petroleum Corporation v. Barrett, (Ky. Ct. App. 1944) 181 S.W. (2d) 60.

"Generally speaking, the courts have declined to relieve tenants from the obligation of their commercial leases because of the fact that the volume of business transacted has been curtailed as a result of Federal rationing laws." [1] *Mid-Continent Petroleum Corporation v. Barrett* raises the question whether in the situation where the lease itself provides for termination by the tenant in case the use of the premises for the purposes designated in the lease shall be impaired or restricted by operation of law, the tenant is released if the volume of his business is reduced due to wartime rationing regulations. The answer hinges upon the interpretation to be given a clause in the lease contract such as that in the instant case. Paragraph 13 of the lease read: "If during the term of this lease, or any extension thereof, the use of the said premises for an oil and gasoline filling station be prevented, suspended or limited by any zoning statute, or ordinance, or any other municipal or governmental action or valid law, ordinance or regulation; or the use of said premises be affected or impaired by the widening, altering or improving of any streets fronting or adjoining said premises, then lessee may cancel this lease by giving thirty (30) days written notice to lessor." [2] If the intention of the parties when they entered into the contract is to control the construction to be given this provision it would seem that Mrs. Barrett and the Mid-Continent Petroleum Corporation, when they inserted that clause into their lease in 1926, had no thought of the possibility of war interfering with the business to be conducted upon the demised premises. The clause was probably meant to apply to laws or regulations affecting the local area or particular piece of property upon which the service station in question was situated. This argument was apparently advanced, but the Kentucky court rejected it saying, "Doubtless war, with all its tragic consequences, was far from the expectation of the parties, but the language used in expressing the conditions upon which the lessee's option to terminate the lease rests is sweeping in its reach, both with respect to cause and results. We cannot agree with the appellee that the language must be construed as applicable only to interference with the occupancy of the premises." [3] However, it would seem arguable that a more definite provision should be required to excuse the tenant. As pointed out in a recent New York case,[4] if the parties had intended the lease to cover such a situation "they could readily have provided for cancellation of the lease in the event of a regulation of the defendant's business by employing language to that effect. Were we to accept defendant's interpretation of the agreement, any rule, order, or regulation of public authority even of temporary duration which might affect defendant's business and restrict its profits would allow defendant to cancel the lease. . . . The federal regulations do not restrict the use of the land demised but they control the business of the defendant." [5] In *Robitzek Investing Co. v. Colonial Beacon Oil Co.* the lease read, "It is understood and agreed that if for reason of any law, ordinance, injunction or regulation of properly constituted authority,

[1] 147 A.L.R. 1273 at 1274 (1943).

[2] Principal case at 61. [3] Id. at 62.

[4] Robitzek Investing Co. v. Colonial Beacon Oil Co., 264 App. Div. 749, 40 N.Y.S. (2d) 819 (1943).

[5] Id. at 822.

Lessee is prevented from using all or any part of the property herein leased as a service station for the storage, handling, advertising or sale of gasoline or other petroleum products . . . or if the use of the premises herein demised shall be in any manner restricted for any of the purposes above stated . . . the Lessee may, at its option, surrender and cancel this lease." [6] Despite this provision, the court ruled "the clause has reference to a law or order regulating not the defendant's business, but the use of the premises as such; it refers to a real property restriction." [7] It is submitted that the interpretation given by the New York court is the better view. Nothing in the rationing regulations affected or restricted the physical use to which the property could be put. The lessee was still free to operate a filling station on the premises. It is difficult to see how the *use* of the property is affected by the wartime rationing regulations. There were no limitations upon the right to sell gas and oil on the premises in question. The governmental restrictions are upon the consumption of petroleum and rubber products. Such clauses in leases generally refer to zoning ordinances and laws which will affect the particular piece of property demised as a business site. Changes of law such as rationing regulations, higher taxes on gas and oil, apply alike to all engaged in the business. They do not affect any particular entrepreneur's competitive position in the market. These contingencies would seem to be part of the fluctuations of business and a risk which the lessee assumes. What he does not assume is that his position in relation to others operating in the same market will be changed. Hence he provides against it by contract.[8] In *First National Bank of New Rochelle v. Fairchester Oil Co.* the court declared, "The clause above quoted [a similarly worded tenant's option to cancel] must be held to relate to possible real estate restrictions which might limit the use of the premises, but does not relate to a regulation limiting the volume of business of the defendant." [9] The Kentucky court attempts to distinguish the Mid-Petroleum case from the Robitzek lease.[10] It adopts a broad view of the scope of the cancellation clause and rejects the restrictive interpretation of "use" con-

[6] Id at 821.

[7] Id. at 822.

[8] Buell v. Indian Refining Co., 62 Ohio App. 108, 23 N.E. (2d) 329 (1939) cited by the Kentucky court, was a case of the rerouting of a highway which cut off much of lessee's business. Under a clause in the lease that the tenant could terminate if the "use of said premises as an oil and gasoline filling station be prevented, suspended, or impaired . . . by the widening, altering, or improving of any street or highway fronting, or adjoining, said premises" the court held the tenant had a right to cancel. It would seem that the case is distinguishable from the Mid-Continent lease. In the Buell case governmental action affected that filling station alone and not service stations all over the nation.

[9] 267 App. Div. 281, 45 N.Y.S. (2d) 532 at 533 (1943).

[10] Referring to the New York decision, the court said at page 63, "The provision of that lease was not so broad as the one we have before us. . . . Only the words 'prevented' and 'restricted' were employed. They are usually used in speaking of property, while the words 'suspended or limited' have no such connotation." The argument was also advanced in the Kentucky case at page 64 that "where a grant is doubtful it will be construed in favor of the grantee," the court quoting from 32 AM. JUR. L. & T. at § 831, and therefore, applying this doctrine to leases, the cancellation clause should be construed in favor of the tenant and he should be released from his covenant.

tended for by the lessor. The cases may perhaps be distinguished on their faces, but in principle they would seem opposed to one another.

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