

04-04-0082-CV

Court of Appeals of Texas,
San Antonio.

James F. COTTER, Appellant
v.
Carl Payne TOBEY, Jr., Appellee.

Feb. 9, 2005.

Opinion by PHYLIS J. SPEEDLIN, Justice.

James Cotter appeals from the trial court's judgment ordering him to pay damages, pre- and post-judgment interest, and attorney's fees to Carl Tobey in Tobey's suit for return of the balance of a security deposit under a real property lease. We affirm the trial court's award of damages in favor of Tobey, and reverse and remand the case to the trial court for a re-calculation of pre-and post-judgment interest.

BACKGROUND

Tobey and Cotter entered into a real property lease agreement in 1998. Tobey leased a house from Cotter for a period of six months to be used as a temporary law office until Tobey's new office location was ready. The parties used a pre-printed residential lease form, with some hand-written modifications, to memorialize their agreement. One of the modifications agreed to by the parties was to allow the property to be used for a commercial purpose, a law office, so long as such use did not create a nuisance. As part of the agreement, Tobey paid a security deposit of \$4000 to Cotter's brokerage company. The section of the lease pertaining to refund of the security deposit provides, "Subchapter C of Chapter 92 of the Texas Property Code governs the obligations of the parties regarding the security deposit." The lease goes on to specify items for which the landlord may deduct reasonable charges from the security deposit.

Tobey vacated the premises at the end of the lease term on or about July 31, 1998. Cotter provided Tobey with a list of deductions for cleaning and repairs on or about September 24, 1998, more than thirty days after Tobey had vacated the premises. Cotter then sent a check for the balance of the security deposit in the amount of \$2076.84 on October 7, 1998.

Tobey brought suit seeking enforcement of the contractual terms of the lease and return of the remainder of his security deposit. The trial judge entered a judgment in favor of Tobey, ordering Cotter to refund the

remainder of the security deposit, pay court costs, attorney's fees and pre- and post-judgment interest. On appeal, Cotter asserts that the trial court erred in applying Chapter 92 of the Texas Property Code to this dispute because § 92.002 provides, "This chapter applies to the relationship between landlords and tenants of residential rental property." TEX. PROP.CODE ANN. § 92.002 (Vernon 1995). In a sub-issue, Cotter contends that the evidence is legally and factually insufficient to establish that the lease in question is a residential lease. Finally, Cotter asserts that, if Tobey is entitled to judgment in this case, the pre- and post-judgment interest rates applied by the trial court are incorrect and the judgment should therefore be reformed to reflect the appropriate rates in effect at the time the judgment was signed.

ANALYSIS

Applicability of Chapter 92 of the Texas Property Code

The interpretation of an unambiguous contract is a question of law, which we review de novo. *MCI Telecomm. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 650-51 (Tex.1999); see also *Wade and Sons, Inc. v. Am. Standard, Inc.*, 127 S.W.3d 814, 824 (Tex.App.-San Antonio 2003, pet. denied). The court's primary concern in construing a written contract is to ascertain the true intentions of the parties, as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). To identify the intentions of the parties, the court must consider the entire writing and make an effort to harmonize and give meaning to all provisions of the contract so that none will be rendered meaningless. *Id.*; see also *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951); *Potter v. GMP, L.L.C.*, 141 S.W.3d 698, 700 (Tex.App.-San Antonio 2004, pet. dismiss'd). We presume that the parties intend every clause of a contract to have some effect. See *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex.1996); *Birnbaum v. Swepi LP*, 48 S.W.3d 254, 257 (Tex.App.-San Antonio 2001, pet. denied). Terms are given their ordinary and generally accepted meaning, and an unambiguous contract is enforced as written. *Heritage Res.*, 939 S.W.2d at 121; *Birnbaum*, 48 S.W.3d at 257. If a contract is so worded that it can be given a certain or definite legal meaning, then it is not ambiguous. *Coker*, 650 S.W.2d at 393; *Potter*, 141 S.W.3d at 700.

It is undisputed that Tobey was required to pay a security deposit as part of the lease agreement. It is further undisputed that the agreement between Tobey and Cotter expressly provides, "Subchapter C of Chapter 92 of the Texas Property Code governs the obligations of the parties regarding the security deposit." Subchapter C of Chapter 92 provides guidelines governing how and when a deposit may be either withheld by

the landlord or returned to the tenant. Tobey argues that under the terms of their agreement the guidelines found in this subchapter of the Property Code govern the parties. In response, Cotter contends that, despite the express terms of the contract, the provisions contained in Subchapter C of Chapter 92 cannot apply because Chapter 92 expressly provides, “[t]his chapter applies only to the relationship between landlords and tenants of residential rental property.” TEX. PROP.CODE ANN. § 92.002 (emphasis added). Because the property was used for commercial, not residential, purposes, Cotter asserts Chapter 92 does not apply. We do not find Cotter's argument persuasive.

We construe the lease agreement to give effect to every clause and see no reason why the express provision at issue here should not be given its clear and natural effect. See *Heritage Res.*, 939 S.W.2d at 121; *Birnbaum*, 48 S.W.3d at 257. The section of the lease pertaining to the security deposit is conspicuous and the parties made hand-written alterations to that section indicating they were aware of the provision and intended for it to be included. “As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.” *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 129 (Tex.2004) (orig.proceeding). Cotter does not argue that the express inclusion of the provisions of Subchapter C as terms of the agreement render the contract at issue here unconscionable, illegal, or against public policy. The express terms of the contract clearly and unambiguously indicate the parties' intent to subject themselves to the rights and obligations contained in Chapter 92 of the Texas Property Code regarding the handling of security deposits. The fact that the parties agreed that Tobey could use the leased property for a commercial purpose does not affect the parties' ability to also agree to look to Subchapter C of Chapter 92 to provide the terms of their agreement governing the security deposit.

We cannot change the terms of a contract merely because one of the parties later comes to dislike its provisions. *Birnbaum*, 48 S.W.3d at 257; *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26-27 (Tex.App.-Amarillo 2000, no pet.); see also *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888-89 (Tex.1998). “Parties to a contract are ‘masters of their own choices and are entitled to select what terms and provisions to include in a contract.’ “ *Birnbaum*, 48 S.W.3d at 257 (quoting *Cross Timbers Oil Co.*, 22 S.W.3d at 27). “For a court to change an unambiguous agreement merely because ... one of the parties subsequently found it distasteful, would be to undermine not only the sanctity afforded the contract but also the expectations of those who created and relied upon it.” *Id.* at 257-58. We see no reason not to give effect to the express terms of the contract as written and agreed to by the parties. Therefore, the trial court did not err in enforcing the contract as written and applying Subchapter

C of Chapter 92 of the Texas Property Code to the resolution of this dispute. Cotter's first issue is overruled.¹

Pre- and Post-Judgment Interest Rates

In his second issue, Cotter contends that if Tobey is entitled to recover the remainder of his security deposit as ordered by the trial court, the trial court applied incorrect pre- and post-judgment interest rates. We agree.

We review a trial court's award of pre-judgment interest under an abuse of discretion standard. *J.C.Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 289 (Tex.App.-San Antonio 2000, pet. denied). "A trial court has no discretion in determining what the law is or applying the law to the facts." *Id.* (quoting *Walker v. Packer*, 927 S.W.2d 833, 840 (Tex.1992)).

The trial judge awarded pre-judgment interest at a rate of six percent accruing as of September 1, 1998, and awarded post-judgment interest at a rate of ten percent. Where the applicable interest rate has not been provided by contract, section 304.003 of the Texas Finance Code provides the post-judgment interest rate for money judgments including court costs and pre-judgment interest. Tex. Fin.Code Ann. § 304.003 (Vernon Supp.2004-05). Therefore, we hold section 304.003 applies in this case. As amended, section 304.003 provides that the post-judgment interest rate on a money judgment signed after September 1, 2003 is five percent. *Id.* In addition, Texas common law allows pre-judgment interest, computed as simple interest, to accrue at the same rate as post-judgment interest on damages awarded for breach of contract.² *Int'l Turbine Serv., Inc. v. VASP Brazilian Airlines*, 278 F.3d 494, 500 (5th Cir.2002); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex.1998). The final judgment was signed by the trial judge on November 18, 2003. Accordingly, the appropriate interest rate for both pre- and post-judgment interest is five percent.

Finally, the trial court's judgment awarded pre-judgment interest from the date on which Cotter was required to refund Tobey's security deposit

¹ Because we conclude that the characterization of the agreement as a residential lease or a commercial lease is immaterial to the court's ability to give effect to the express terms of the agreement, we do not address Cotter's sub-issue challenging the legal and factual sufficiency of the evidence to support a finding of a residential lease.

² In Texas, pre-judgment interest is available pursuant to two sources of authority—a statutory provision, or equitable common law principles. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530-32 (Tex.1998). Pre-judgment interest is provided by statute in four types of cases: wrongful death, personal injury, property damage, and condemnation cases. See TEX. FIN.CODE ANN. §§ 304.102, .201 (Vernon Supp.2004-05). Because pre-judgment interest in a breach of contract case is not provided for by statute, any award of pre-judgment interest in a breach of contract case is governed by common law principles. See *Johnson & Higgins, Inc.*, 962 S.W.2d at 530.

under the terms of the agreement-September 1, 1998. Under common law, pre-judgment interest begins to accrue on the earlier of (1) 180 days after the date defendant receives written notice of a claim, or (2) the date suit is filed. *Johnson & Higgins, Inc.*, 962 S.W.2d at 531. The record reflects that Tobey sent a demand letter to Cotter dated August 5, 1999. The record does not establish the date that Cotter actually received written notice of the claim. Based upon the date of the demand letter, the earliest possible accrual date for pre-judgment interest would be 180 days later, or February 1, 2000.³

We conclude that the trial court abused its discretion in awarding pre-judgment interest at a rate of six percent from September 1, 1998, and in awarding post-judgment interest at a rate of ten percent. We therefore remand the case to the trial court for a factual determination of the date Cotter received written notice of Tobey's claim and a re-calculation of the pre- and post-judgment interest to be awarded to Tobey in accordance with this opinion.

CONCLUSION

We conclude that the trial court did not err in enforcing the contract as written and applying Subchapter C of Chapter 92 of the Texas Property Code to the resolution of this dispute. However, the trial court did abuse its discretion in its award of pre- and post-judgment interest. Therefore, we affirm the trial court's award of damages in favor of Tobey, and reverse and remand the case to the trial court for a re-calculation of the pre- and post-judgment interest in accordance with this opinion.

³ Tobey filed suit on July 27, 2000.