

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SAM KAZERY

APPELLANT

V.

CAUSE NO. 2009-CA-01391

GEORGE WILKINSON

APPELLEE

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS.....	i
II.	TABLE OF AUTHORITIES.....	ii
III.	INTRODUCTION.....	1
IV.	STATEMENT OF THE FACTS.....	1
V.	ARGUMENT.....	2
VI.	CONCLUSION.....	5
VII.	CERTIFICATE OF SERVICE.....	7

AUTHORITIES

CASES:	<u>Page Numbers</u>
<i>Dyer v. Ryder Student Transp. Services, Inc.</i> , 765 A.2d 858 (Rhode Island 2001).....	5
<i>Koch v. H & S Development Company</i> , 163 So.2d 710 (Miss. 1964).....	5
<i>Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc.</i> , 2001-CA-00970-COA (Miss. 2002).....	4

INTRODUCTION

Sam Kazery, Appellant herein, for the purposes of this Reply Brief adopts any and all matter presented in the Brief of the Appellant and restricts matter presented herein to facts and argument raised in the Brief of the Appellee.

STATEMENT OF THE FACTS

There is no dispute as to the legal position of the parties as Lessor (Kazery) and Lessee (Wilkinson) under the lease which is the subject of this law suit (Exhibit "1"). It is also undisputed that Arnold Kazery, the father of the Appellant Sam Kazery, has never owned the property subject to the lease nor has been a party to the lease itself. George Wilkinson testified at a trial of the matter that he was told by Howard Ross, the Conservator of Mary Kazery Eyd (Sam Kazery's mother), that Arnold Kazery had become the owner of the lease (Appellee Brief page 5). However, when questioned at trial, Wilkinson admitted that the only document that he had supporting that contention was a letter from his attorney to the conservator requesting confirmation as to where his rent checks were to be paid (Exhibit "5", R.V. 2, pg. 22-24).

George Wilkinson understood the legal requirements of the necessity of executing an assignment of the lease as evidenced by causing his own assignment of his interest in the lease to be recorded and properly executed (Exhibit "2"). Although George Wilkinson further testified that he made all monthly payments to Arnold Kazery, the record reflects that he in fact made payments to Sam Kazery and later redirected these payments to Arnold Kazery at Sam Kazery's instruction (R.V. 2, pg. 93; R.V. 3, pg. 142; R.V. 2, pg. 82-83).

Under the terms of the lease (Exhibit "1"), the Lessee was responsible for payment of all taxes. Wilkinson complied with the terms of the lease and paid the taxes as required. Wilkinson acknowledged receiving written correspondence from Sam Kazery beginning from at least 1986 and

continuing to the date of the trial (R.V. 2, pg. 30-31). In fact, Wilkinson requested that the tax receipts be sent directly to him in order that he might pay the same. These tax receipts were received by Wilkinson and reflected that from 1990 forward the record title holder to the property was in fact Sam Kazery.

Wilkinson noticed Sam Kazery by letter in 1997 of his renewal of the lease (Exhibit "14"). There was no attempt to notify Sam Kazery in a like manner in 2007 for the fourth renewal.

It is unnecessary to restate facts previously set forth in the Brief of the Appellant, but it is clear that the Appellant, Sam Kazery, is the owner of the property in question and a landlord of the Appellee, George Wilkinson. It is equally clear that George Wilkinson failed to provide the written notices required under the lease terms for the renewal due in March, 2007.

ARGUMENT

The Appellee devotes a large amount of his brief attempting to advance his theory of the facts based upon two major contentions. First, he alleges that the Appellee, George Wilkinson, believed that Arnold Kazery either owned the property or was an assignee of the Lessor in the subject lease. This, despite the fact that the overwhelming weight of the evidence indicated otherwise, including conflicting testimony by the Appellee himself. A careful reading of the Court's Opinion finds that the Trial Court rejected this argument, and found that the Appellee was on notice at least from 1990 that this supposition was incorrect. The second argument advanced by the Appellee rests upon his contention that letters he sent to Arnold Kazery (one of which Arnold Kazery denied receiving) constituted notice of his intention to renew upon Sam Kazery. Sam Kazery denies receiving either of these notices and Arnold Kazery testified that he never delivered these notices to Sam Kazery (R.V. 3, pg. 146-147). Therefore, the first time Sam Kazery could have been deemed to have been placed on notice of Wilkinson's intent to renew was on July 23, 2007 (Exhibit "26")

after the due date.

Therefore, the only ground upon which the Trial Court could find for the Appellee was under the doctrine of waiver, as evidenced by Sam Kazery's actions after July 23, 2007. The doctrine of waiver is fully set out in the Appellant's Brief but will be briefly addressed below.

The Appellee contends that George Wilkinson had reason to believe that Arnold Kazery was either the owner or assignee of the subject lease. This contention begs credibility when an examination of the facts reveals the extensive business relationship that existed between the parties. The relationship was begun by the predecessors to the parties and reflects business dealings between the parties from at least 1986 through the present date. Wilkinson's contention that he believed Arnold Kazery had some interest in this property is belied by the fact that he responded to Sam Kazery's demands and requests to pay the taxes and to provide him receipts (R.V. 2, pg. 25-30). Wilkinson did so, and in fact personally reviewed the tax bills which reflected Sam Kazery as the true and lawful owner of the property (R.V. 2, pg. 44-46). The Trial Court correctly recognized that Wilkinson had irrefutable constructive notice of the ownership status of the property by virtue of the requirement that he examine the tax receipts. The Court stated in its Opinion on page 6 as follows,

“So, in 1996 when Wilkinson gave notice of the third renewal, the notice was improper, since Wilkinson, at that time, had sufficient notice of who the true owner was.”

The Appellee spends considerable amount of time attempting to advance the argument that he had not given the required notice in 1997 to Sam Kazery but instead to Arnold Kazery, thereby placing Sam Kazery in the position of having waived the same. A careful reading of Exhibit 14, a letter to Sam Kazery in 1997, directly contradicts this contention. It is not disputed that this letter was received after the March 30, 1997 due date and enclosed a copy of a letter previously sent to Sam Kazery providing the required notification. The Appellee argues that these facts distinguish the

case at bar from those set forth in *Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc.*, 827 So.2d 726 (Miss. 2002). *Taranto* is in fact controlling on the issue of waiver as set forth in the Brief of the Appellant. There is a clear distinction between a waiver of a right to terminate the lease (which arguably Kazery elected in 1997) and a waiver of the notice requirements to exercise an option to renew. Kazery did nothing to waive his right to receive written notice from Wilkinson as required in the lease.

The Appellee further contends that Wilkinson continued to pay rent to Arnold Kazery from 1990 to present, but the record reflects that he was instructed to do so by Sam Kazery as a result of Sam Kazery's desire to help his father (R.V. 2, pg. 93; R.V. 3, pg. 142; R.V. 2, pg. 83).

It is important to recognize that the Trial Court, in order to advance the doctrine of waiver, must have found that Kazery took some action after receiving notice of Wilkinson's exercise of his option to renew in 2007 indicating a waiver of the lease requirements that such notice be delivered in writing prior to March 30, 2007. The Court's Opinion relies upon a letter dated July 23, 2007 from Wilkinson's attorney to Kazery, which included copies of letters purportedly sent to Arnold Kazery in 2004 and 2006. There is no evidence in the record, and the Court did not find that these letters were ever received by Sam Kazery. Therefore the first date that Sam Kazery received any notification was on July 23, 2007. The deadline for the exercise of the options to renew was March 30, 2007. Prior to receiving the July 23, 2007 letter, Kazery had written Wilkinson a letter (also after the renewal deadline of March 30, 2007) inviting Wilkinson to negotiate keeping the lease and participating in hiring joint counsel. Wilkinson did not respond to this letter and Kazery followed it up on July 12, 2007 (prior to receiving any notification of Wilkinson's intent to renew) and further clarified his position that the lease would expire on July 31, 2007. This letter invited Wilkinson to remain as a month-to-month tenant. None of these actions indicated any intent to waive the notice

requirements. Therefore any waiver would had to have occurred after July 23, 2007. The record reflects that Kazery has done nothing to indicate such a waiver, and in fact has refused to negotiate tendered rent payments and has not engaged in any conduct which would indicate a waiver. Kazery clearly indicated that the lease had terminated in his July 12, 2007 letter (Exhibit "18"), and even if he had not sent that letter, he was under no duty to inform Wilkinson that the lease had terminated. His silence after receiving defective notices implied rejection of such notice *Dyer v. Ryder Student Transp. Services, Inc.*, 765 A.2d 858 (Rhode Island 2001).

The Appellee argues that George Wilkinson's attorney's letter of July 23, 2007 was not notice of an intention to renew the lease, but simply a clarification of notice given on June 24, 2004 to Arnold Kazery. This fact further supports Kazery's contention that any purported notice to Arnold Kazery in 2004 is defective (Appellee Brief pg. 26). The Court correctly found that the notice to Sam Kazery was in fact improper since Wilkinson at that time had sufficient notice as to who the true owner was (Trial Court Opinion pg. 6).

The Appellee then attempts to argue with the finding by the Chancellor on page nine of her Opinion that Wilkinson and Kazery arguably could benefit identically from the use of the lease premises. A finding otherwise is necessary for the facts and circumstances to meet the test under *Koch v. H & S Development Company*, 163 So.2d 710 (Miss. 1964). Clearly the Chancellor found that the *Koch* test was not met, therefore equitable relief was unavailable.

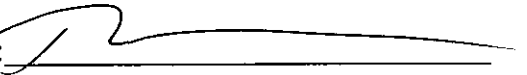
CONCLUSION

Therefore, the only possible route for relief for Wilkinson in the case at bar is through an application of facts which would constitute an intentional waiver by Kazery of lease requirements for renewal after he was placed on notice July 23, 2007. There is nothing in the record to support such a finding, therefore the Appellant urges a judgment of the Trial Court below be reversed and

the subject lease be deemed non renewed.

Respectfully Submitted,

Sam Kazery

By: 

Thomas M. Bryson
Attorney for Appellant


CERTIFICATE OF SERVICE

I, THOMAS M. BRYSON, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following counsel:

Honorable Patricia Wise
Chancery Court Judge
Hinds County Chancery Court
P.O. Box 686
Jackson, MS 39215-0686

Vernon H. Chadwick, Esq.
1640 Lelia Drive, Suite 210
Jackson, Mississippi 39216

THIS 10th day of May, 2010.



THOMAS M. BRYSON

THOMAS M. BRYSON MSB# [REDACTED]
KEYES, BRYSON & PIAZZA
Suite E, 5448 I-55 North
Post Office Box 12445
Jackson, Mississippi 39236-2445
Telephone: 601-956-2345
Facsimile: 601-956-2302