



Oklahoma Supreme Court Cases

K & K Food Services, Inc. v. S & H, Inc.

2000 OK 31

3 P.3d 705

71 OBJ 965

Case Number: [93595](#)

Decided: 04/18/2000

Mandate Issued: 05/15/2000

Supreme Court of Oklahoma

Cite as: 2000 OK 31, 3 P.3d 705

K & K FOOD SERVICES, INC. d/b/a BURGER KING RESTAURANT AT 721 S. MERIDIAN AVENUE IN
OKLAHOMA CITY, OK, Appellant

v.

S & H, INC. d/b/a HILTON GARDEN INN AT 801 S. MERIDIAN AVENUE IN OKLAHOMA CITY, OK,

Appellee

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II**Honorable Carolyn R. Ricks, Trial Judge**

¶0 The appellant, Weschad, Inc. d/b/a Burger King, is located next door to the appellee, S & H, Inc. d/b/a Hilton. On April 16, 1999, the restaurant sought an injunction to prohibit the hotel from constructing a curb along a common property line between the two properties. The restaurant relied upon an indenture which required unobstructed passage for persons and vehicles over and across common property lines. The hotel moved to dismiss the cause and it filed a motion for summary judgment, arguing that the indenture did not preclude its construction of the curb. The restaurant also asked for summary judgment. The trial court, Honorable Carolyn R. Ricks, granted summary judgment to the hotel. The Court of Civil Appeals affirmed. We hold that material fact questions exist concerning: 1) whether the makers of the indenture intended to keep the entire length of the property lines unobstructed or whether it was intended that only a portion need be unobstructed to allow access; and 2) whether construction of the curb violates the terms of the indenture.

COURT OF CIVIL APPEALS OPINION VACATED;**TRIAL COURT REVERSED AND REMANDED.**

Robert E. Norman Oklahoma City, Oklahoma For Appellants
Chris Harper, Phillip Owens Oklahoma City, Oklahoma For Appellee.

¶ 1 KAUGER, J.:

¶2 The issue presented is whether the trial court prematurely entered summary judgment when it determined that a hotel could construct a curb along the common property line it shared with a restaurant notwithstanding an indenture which provided for unobstructed passage of persons and vehicles over and across common property lines. We hold that material fact questions exist concerning: 1) whether the makers of the indenture intended to keep the entire length of the property lines unobstructed or whether it was intended that only a portion need be unobstructed to allow access; and 2) whether the construction

of the curb violates the terms of the indenture.

FACTS

¶3 The appellant, Weschad, Inc. d/b/a Burger King (restaurant) is the owner and operator of a Burger King restaurant in Oklahoma City. The appellee, S & H, Inc. d/b/a Hilton (hotel) owns two tracts of land which share property lines along the south and west boundaries of the restaurant's property. On October 2, 1967, the previous owners of both properties entered into an indenture which provided for "the right of continuous, open and unobstructed passage for persons and vehicles over and across the property lines that are common." The indenture was recorded with the County Clerk on October 11, 1967.

¶4 In March of 1999, the restaurant discovered that the hotel was building a concrete curb running parallel to the restaurant's south boundary lines, and that the only access allowed was through an opening in the curb at the west end of the property. On April 16, 1999, the restaurant sought a restraining order, a temporary injunction, and a permanent injunction to prohibit the hotel from constructing the curb near the property line between the two properties. The restaurant alleged that: the hotel's construction of the curb violated the terms of the indenture; the restaurant, the hotel and their predecessors used the entire length of the common property line for more than 15 years as a drive to access one another's property; and the use of the property line as a drive resulted in an easement by prescription for ingress and egress to and from both properties.

¶5 On April 27, 1999, the hotel filed a combined motion for summary judgment and motion to dismiss. The restaurant filed a combined objection to the hotel's motion to dismiss and a cross-motion for summary judgment on May 18, 1999. Finding that the indenture only required passage at some point along the property lines, and that no easement by prescription existed, the trial court, Honorable Carolyn R. Ricks, granted summary judgment to the hotel and against the restaurant. The restaurant appealed, and the Court of Civil Appeals affirmed. We granted certiorari on February 22, 2000.

¶6 MATERIAL FACT QUESTIONS EXIST CONCERNING: 1) WHETHER THE MAKERS OF THE INDENTURE INTENDED TO KEEP THE ENTIRE LENGTH OF THE PROPERTY LINES UNOBSTRUCTED OR WHETHER IT WAS INTENDED THAT ONLY A PORTION NEED BE UNOBSTRUCTED TO ALLOW ACCESS; AND 2) WHETHER CONSTRUCTION OF THE CURB VIOLATES THE TERMS OF THE INDENTURE.

¶7 Generally, an indenture is a deed or writing containing a conveyance, bargain, contract, covenant or agreement between two or more parties, and in construing an indenture the usual rules for the interpretation of contractual writings apply. If the terms of a contract are unambiguous, clear and consistent, they are accepted in their plain and ordinary sense and the contract will be enforced to carry out the intention of the parties as it existed at the time it was negotiated. Regardless of how broad the terms of a contract may be, its terms extend only to those things concerning which it appears the parties intended to contract. The interpretation of a contract, and whether it is ambiguous is a matter of law for the Court to determine and resolve.

¶8 Unless some technical term is used in a manner meant to convey a specific technical concept, language in a contract is given its plain and ordinary meaning. A contract term is ambiguous only if it can be interpreted as having two different meanings. Uncertainties in a conveyance may be treated as ambiguities. These may be clarified by resort to the intention of the parties as gathered from the instrument itself; the circumstances attending and leading up to its execution; and the subject matter and situation of the parties as of that time.

¶9 The contested portion of the indenture provides in pertinent part:

". . . both parties do, by these presents, grant, bargain, sell and convey unto each other, their successors and assigns, the right of continuous, open and unobstructed passage for persons and vehicles over and across the property lines that are common to First and Second Party. . ."

¶10 On appeal, the restaurant argues that: 1) according to the plain language of the indenture it essentially provides an easement which provides for mutual, unfettered vehicular and pedestrian access over and across the entire length of the common property lines; 2) the hotel's construction of the curb does not allow access across the property lines; and 3) if the grant of a right of access is uncertain or

ambiguous in any way concerning its meaning or extent, the practical construction the parties have placed upon the covenant or easement has great, if not controlling weight. Consequently, the restaurant insists that the indenture mandates continuous, open, and unobstructed passage for persons and vehicles over and across the entire length of the common property lines as evidenced by its terms and by the parties' and their predecessors' conduct after its execution.

¶11 The hotel counters that: 1) the indenture is not an easement because it does not grant one party or the other the right to use the neighboring property owner's land for any purpose; and 2) the indenture is merely a restrictive covenant which allows a mutual, unobstructed passage across the property lines. It asserts that the indenture speaks for itself and clearly provides that a continuous, open, and unobstructed passage between the properties must be maintained only at some point along the property lines, rather than the entire length of the boundaries.

¶12 Apparently, neither the parties, the trial court, nor the Court of Civil Appeals have agreed as to what the indenture conveys. The hotel and the trial court construed it as a restrictive covenant. The restaurant construes it as an easement. The Court of Civil Appeals labeled it a deed without determining precisely what the parties granted or conveyed. Neither party directs our attention to a case in which this Court has previously construed the precise language of the indenture, nor does either party dispute that indentures are used to convey covenants or grant easements.

¶13 The indenture appears to restrict the use of both properties by requiring that the common property lines remain accessible. However, the language, taken as a whole, is more like an easement because it appears to create rights rather than mere opportunities to access the other's property. An easement is a liberty, privilege or advantage without profit which the owner of one parcel may have in the lands of another. It is the right to use another's land for some definite and limited purpose. Although typical easement creating language such as "right of way" or "ingress and egress," is noticeably absent, the language of the indenture is synonymous with those terms. Clearly the purpose of the indenture is to keep the property lines open for passage from one property to the other. Apparently, the parties were contracting to keep the property lines unobstructed and granting each other a mutual easement for the perpetual right of access or passage over and across the other's property line.

¶14 What is not apparent is whether the terms "unobstructed passage" and "property lines that are common" were intended to mean passage completely free of all obstacles along the entire length of the property lines, or merely that it must continuously remain possible to access the other's property at some point along the property lines. Also absent from the indenture is a description of the length or location of where the common property lines are to remain unobstructed, or the width or area of access on or around the property lines.

¶15 Obviously, the indenture is vague, uncertain and ambiguous. The intent of the original parties cannot be determined simply by examining the instrument. The ambiguity must be resolved by the trial court by considering parol and extrinsic evidence and other circumstances, including the parties' admissions and construction as evidenced by subsequent acts and conduct of the parties in connection therewith. Material to the question of intent are facts relating to the circumstances surrounding the indenture's execution, and the intent of the original parties and the construction they placed on the indenture. Whether a use of an appurtenant easement is reasonable is a question of fact. Even if the original parties to the indenture intended to require access only at some point along the property line, the parties dispute whether the hotel's curb obstructs the entire property line or if it does allow reasonable access at some point along the property line. The evidentiary materials presented by the parties are not dispositive of the material questions of fact concerning whether the makers of the indenture intended to keep the entire length of the property lines unobstructed or whether it was intended that only a portion need be unobstructed to allow access and whether the hotel's construction actually obstructs the property lines.

CONCLUSION

¶16 A motion for summary judgment should be sustained only when the pleadings, affidavits, depositions, admissions, or other evidentiary materials establish that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. All conclusions drawn from the evidentiary materials submitted to the trial court are viewed in the light most favorable to the party opposing the motion. Before a motion for summary judgment under Rule 13, 12 O.S. Supp. 1993, Ch. 2 App. Rules for the District Courts may properly be granted, the movant must show that there is no disputed issue of material fact. Here, both parties moved for summary judgment. However, the

evidentiary materials presented by the parties are not dispositive of the material questions of fact concerning whether the makers of the indenture intended to keep the entire length of the property lines unobstructed or whether it was intended that only a portion need be unobstructed to allow access, and whether the hotel's construction actually obstructs the property lines. Summary judgment was premature.

COURT OF CIVIL APPEALS OPINION VACATED;

TRIAL COURT REVERSED AND REMANDED.

¶17 Hodges, Kauger, Watt, Boudreau, Winchester, JJ., concur.

¶18 Opala, J., concurs in result.

¶19 Summers, C.J., concurs in part/dissents in part.

¶20 Hargrave, V.C.J., Lavender, J., dissent.

Citationizer[®] Summary of Documents Citing This Document

Oklahoma Supreme Court Cases

Cite	Name	Level
2001 OK 40, 28 P.3d 539, 72 OBJ 1783,	DEWEY v. STATE ex. rel. OKLAHOMA FIREFIGHTERS PENSION & RETIREMENT SYSTEM	Discussed
2001 OK 43, 72 OBJ 1504,	BEATTIE v. STATE ex. rel. GRAND RIVER DAM AUTHORITY	Discussed
2001 OK 76, 37 P.3d 783, 72 OBJ 2725,	STROUD v. ARTHUR ANDERSEN & CO.	Discussed
2001 OK 88, 37 P.3d 845, 72 OBJ 3061,	IN RE: KAUFMAN	Discussed
2001 OK 94, 40 P.3d 463, 72 OBJ 3283,	BARKER v. STATE INS. FUND	Discussed
2002 OK 3, 41 P.3d 377, 73 OBJ 137,	BEATTIE v. STATE ex. rel. GRAND RIVER DAM AUTHORITY	Discussed
2002 OK 93, 64 P.3d 1083,	SOUTHERN CORRECTIONS SYSTEMS, INC. v. UNION CITY PUBLIC SCHOOLS	Discussed
2003 OK 55, 70 P.3d 866,	GREEN v. HARRIS	Discussed
2003 OK 16, 70 P.3d 811,	JOHNSON v. HILLCREST HEALTH CENTER, INC.	Discussed

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None Found.