Topol v. Safeway Stores

Court of Appeal of California, Third Appellate District
December 5, 2008, Filed
C056740

Reporter: 2008 Cal. App. Unpub. LEXIS 9765; 2008 WL 5115688

JUDITH TOPOL, Plaintiff and Appellant, v. SAFEWAY STORES, INC. et al., Defendants and Respondents.

Prior History: **[*1]** Superior Court of Placer County, No. TCV831.

Core Terms

lessee, lease, escrow, statute of limitations, right to purchase, trial court, option to purchase, optionor, parcel

Judges: BLEASE, Acting P. J.; NICHOLSON, J., CANTIL-SAKAUYE J. concurred.

Opinion by: BLEASE

Opinion

Plaintiff Judith Topol, operator of the Lighthouse Shopping Center in Tahoe City, California, is the lessee of an adjacent parcel owned by defendant Safeway Stores, Inc. (Safeway). The lease contains an option to purchase the ″undeveloped″ part of the parcel as an additional parking lot ″at any time″ during the term of the lease.

Topol exercised the option by letter to Safeway on November 18, 1998, and opened an escrow that required Safeway to deposit title to the property in the escrow. Safeway refused to do so on the ground the property was developed. Topol took no further action until 2003 when she again sought to exercise the option. When Safeway again declined Topol filed this action on September 25, 2003, seeking declaratory relief that the lease provided multiple opportunities to exercise the option and specific performance of its latest exercise.

The trial court ruled that the lease provision for the exercise of the option ″at any time″ did not provide multiple opportunities to do so. It held that the 1998 exercise of the option created a bilateral contract that **[*2]** extinguished the option and that Safeway's breach commenced the four-year statute of limitations (*Code Civ. Proc., § 337, subd. 1*), [1] which ran prior to the filing of this action. [2] The court entered judgment in favor of Safeway.

We agree with the reasoning of the court and will affirm the judgment.

FACTS

The facts are taken from the statement of decision of the trial court and the documents which it references.

The defendant Safeway is a Delaware corporation whose primary business is the operation of grocery stores. It owns the property in dispute, located at 950 North Lake Boulevard, Tahoe City, California, a single assessor's parcel, number 094-110-019 (the Safeway property). Notwithstanding, the legal description further divides the parcel in two parts, ″Parcel I″ and ″Parcel II.″ The plaintiff, Judith Topol, **[*3]** does business as Lighthouse Shopping Center, a retail shopping center, in Tahoe City, California, on the adjoining parcel number 094-110-018, at 850 North Lake Boulevard.

Topol is the successor in interest of a lease of the Safeway property, dated July 18, 1961, that, as extended, ex-

[1] A reference to an undesignated section is to the Code of Civil Procedure.

[2] The trial court also ruled inter alia that exercise of the option was precluded because the property had been developed and because the portion of the parcel which Topol sought to purchase was not a legal parcel capable of being transferred. We have no occasion to consider these rulings of the trial court.

pires in 2011. The dispute centers on the meaning of Article Eighteenth of the lease. The Article contains an option to purchase the undeveloped portion of the Safeway property, otherwise referred to as the ″Undeveloped Parcel″ or ″Parcel II,″ as follows:

″Lessor also agrees that if lessee *at any time* determines that it will not be necessary or desirable to improve and develop said Undeveloped Parcel as an additional customers' parking lot, then lessee shall have the right to purchase said Undeveloped Parcel, and further agrees that if lessee *at any time* determines that it will be necessary and desirable to improve and develop only a portion of said Undeveloped Parcel as an additional customers' parking lot, then lessee shall have the right to purchase that portion of said Undeveloped Parcel that it determines not to improve and develop as an additional customers' parking lot.″ (Italics added.)

The option **[*4]** provision further states how the purchase is to be handled in the event the option is exercised. ″In the event of a purchase by lessee . . ., the purchase shall be handled through an escrow and title shall be conveyed as provided in Article Fourteenth . . .″

Article Fourteenth provides that ″[L]essor shall within sixty (60) days after the date of lessee's notice to lessor . . . open or cause an escrow to be opened with a bank, trust company or title company . . . and shall deposit in said escrow a properly executed grant or warranty deed, and such other instruments and authorizations as may be necessary to convey to, and vest in lessee such title [to Parcel II] . . . . Lessor shall immediately notify lessee of the opening of the escrow and lessee shall, within ten (10) days after receipt of said notice and approval of lessor's title, deliver to said escrow holder, the purchase price . . . .″

Topol, by letter dated November 18, 1998, through her counsel, Louis Basile, wrote Safeway ″that pursuant to ARTICLE [EIGHTEENTH] [3] of the . . . lease, Ms. Topol is hereby notifying you that she is exercising her option to purchase the Undeveloped Parcel″ described in the article. The letter also **[*5]** set forth the purchase price.

On December 17, 1998, Topol's counsel sent a follow-up letter to Safeway, confirming that Mr. Basile and Chad Otten of Safeway had exchanged telephone messages about the November 18 letter. The trial court's statement of decision asserts that ″Mr. Otten testified at trial that in a conversation on or after December 18, 1998, he advised Plaintiff's counsel that Plaintiff did not have the right to purchase Parcel II because the property was developed″ and that ″Mr. Otten's testimony was credible and persuasive on this point, and it is supported by the reference to a telephone conversation between Mr. Otten and Mr. Basile in the December 18, 1998 letter.″

The statement of decision further asserts ″[a]ccording to the evidence at trial, Plaintiff did not take any further action to enforce her option right between 1998 and March 2003, despite regular communications between Plaintiff and Safeway during that time.″

Lastly, on March 31, 2003, plaintiff, through her counsel, sent a ″virtually identical″ letter to that of November 18, 1998, to Safeway through its property manager, a codefendant **[*6]** in this action, advising Safeway that plaintiff was exercising her option under Article Eighteenth to purchase Parcel II.

The trial court ruled that Topol had exercised her option to purchase Parcel II on November 18, 1998, that the four-year statute of limitations under *section 337, subdivision 1* commenced shortly thereafter upon the breach of the bilateral contract formed by exercise of the option, and had expired by the time of filing of the present action in 2003. Accordingly, the court denied Topol's claims for declaratory relief and specific performance of the purported exercise of the option in 2003.

DISCUSSION

I

The Option Could not be Exercised On More than One Occasion

The dispositive issue is the construction of the option provisions of Article Eighteenth of the lease. Topol argues that, because the Article provides that lessee has the right to purchase the Undeveloped Parcel if she ″at any time determines that it will not be necessary or desirable to improve and develop [it] as an additional customers' parking lot″, she may exercise multiple options during the term of the lease.

That is not the case. As the trial court found, the phrase ″at any time″ during the lease means that **[*7]** ″it is up to Plaintiff during the term of the Lease to decide when and if she will exercise the option.″ It does not create multiple options. The reason is that ″[t]he exercise of an option is the acceptance of an offer,″ creates a ″bilateral contract for the purchase and sale of the property″ and thereby ″extinguishes″ the option. ″From the point of view of the optionor's duty it is binding upon the making of the option contract. '[T]he optionor has irrevocably promised upon the exercise of the option to perform the contract . . . . The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the ir-

[3] The document states the article is the NINETEENTH, but that is a palpable mistake.

revocable offer of the optionor by the optionee. ″The contract has already been made, as far as the optionor is concerned . . . .″″ (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 503.)

Thus, ″[w]hen Plaintiff exercised her option to purchase Parcel II on November 18, 1998, the option was extinguished and replaced by a bilateral executory contract for the purchase and sale of Parcel II.″ Since the lease option was extinguished no option remained for Topol to exercise in 2003 and it **[*8]** would make no sense to conclude that more than one contract was created to purchase a single piece of property.

The remaining question is whether Safeway breached the executory contract created by Topol's exercise of the option in 1998 thus commencing the four-year statute of limitations for the breach of a contract. (*§ 337, subd. 1*.)

II

The Breach of the Option Agreement, If Any, Occurred in 1998

Topol argues that because Safeway failed to respond to her exercise of the option in 1998 its breach was only anticipatory and not a material breach of the executory contract created by the exercise of the option. We disagree.

″A repudiation at the time performance is due is not an anticipatory breach; it is an actual breach, and the statute of limitations begins to run at once.″ (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 861, p. 949.)

The issue turns on the trial court's findings of fact. The trial court found that Safeway did respond to the 1998 exercise of the option in a telephone conversation to Topol's counsel with Safeway's representative Chad Otten, on about December of 1998, informing him ″that Plaintiff did not have the right to purchase Parcel II because the property **[*9]** was developed.″ [4]

We are bound to agree. Our scope of review is limited by the substantial evidence test and the trial court found that Otten's testimony on the point was ″credible and persuasive . . . .″ Accordingly, the breach, if any, occurred no later than when Safeway denied Topol's right to purchase the property and failed to deposit the deed to the property in escrow.

III

The Statute of Limitations Ran from the Date of the Alleged Breach

Section 337, subdivision 1 establishes the statute of limitations for the breach of a contract as four years. Since Safeway's breach, if any, occurred on or about December of 1998, the statute of limitations ran in December of 2002, well before the filing of this action in September of 2003.

DISPOSITION

The judgment is affirmed. The defendants shall be awarded their costs on appeal.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.

[4] We have no occasion to consider whether Parcel II was developed.