IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NOS. 1D06-3999/1D06-5250

C. LEON BROOKS,

Appellant,

v. L.T. No.: 06-190-CA

JONATHAN M. GREENE,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT C. LEON BROOKS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER

STATEMENT OF THE CASE AND OF THE FACTS

I. Overview of the Case.

This appeal concerns a dispute about a long-term lease agreement ("Agreement") for premises at 640 East 15th Street in Panama City, Florida ("Premises"). (R1:56 (App. 1); Pl.'s Ex. 1.) The Agreement included an option for the Premises to be purchased for $175,000 by Appellant, C. Leon Brooks, the lessee ("Tenant") and sold by Appellee, Jonathan M. Greene, the lessor ("Landlord"). (R1:56, 59-60 (App. 1).)

The lease initially was for a ten-year term from March 1989 until February 1999. (R1:53, ¶ 4; R1:62, ¶ 4; R1:56, Article I (App. 1).) The Tenant properly renewed the lease for a second ten-year term from March 1999 until February 2009. (R1:53, ¶ 4; R1:62, ¶ 4; R1:58-59, Article XII (App. 1).) Before the second term expired, however, a fire on July 5, 2005 severely damaged the building on the Premises.[1] (R1:53, ¶ 7; R1:66, ¶14.) This fire eventually led to two lawsuits – one filed in the county court by the Landlord against the Tenant seeking to evict the Tenant and one filed in the circuit court by the Tenant against the Landlord seeking to enforce the option to purchase. (R1:1-2; R1:53-61.) The two separate suits were consolidated before the circuit court and resolved by that court's Final Judgment of July 24, 2006. (R1:50-52; R1:128-29.)

[1] The cause of the fire was not an issue below and is not disclosed in the record.

In the proceedings below, the Landlord argued, and the circuit court agreed, that the Tenant breached the Agreement by not designating the Landlord as a named insured for the fire insurance policy covering the Premises. (R1:1, 64-67, 112-13, 128-29.) Because of this breach, the circuit court: (1) declared that the Tenant could not exercise his option to purchase the Premises, (2) ordered the eviction of the Tenant and that possession of the Premises be transferred to the Landlord, and (3) awarded the Landlord $400,000 as compensation for the loss of the building damaged by the fire. (R1:128-29.)

II. For Over Seventeen Years, the Tenant Transformed the Dilapidated Premises to a Usable Office Space and Never Missed a Rent Payment.

The Premises' building, fixtures, and equipment were leased "as is." (R1:56.) At the commencement of the lease in 1989, the building on the Premises was "dilapidated" and in such disrepair that it could not be occupied. (R2:164:4-23; R2:177:8-22.) The roof was in "bad shape" and leaked "profusely," resulting in damage to the walls and floors and in two inches of standing water in the west wing. (R2:164:14-19; R2:170:9-11; R2:177:8-22.) The building was just "one big open space" that had to be substantially renovated into multiple offices and other facilities so that it could be suitable to be used by the sub-tenant, the Florida Department of Corrections. (R2:169-75.)

Under the Agreement, the Tenant agreed "to keep the [Premises] clean and to repair or replace all broken or damaged doors, windows, plumbing fixtures and

pipes, floors, stairways, railings, air conditioning or other portions of the [Premises.]" (R1:57-58, Article VI (App. 2).) Furthermore, the Tenant had the right to alter and repair the Premises "at his sole expense." (R1:58, Article VIII.) Over seventeen plus years, the Tenant – without any involvement by the Landlord – maintained the Premises and made in excess of $426,000 in improvements to the Premises, including installation of a new roof, a paved parking lot, and new landscaping. (R2:182-185, 202:2-6, 14-24.) The building on the Premises was transformed from a dilapidated one to a "nice[]", "immaculate" office. (R2:184:15-22.) During these same seventeen plus years, the Tenant never missed a rent or tax payment, paying $1000 per month for rent alone for a total of more than $200,000. (R2:202:7-8, 11-13; R2:202:25 to 204:13; R2:281:4-16; Pl.'s Ex. 2.)

III. The Tenant Had Fire Insurance to Cover the Premises, But the Landlord Was Not Listed as a Named Insured.

Article III of the Agreement contains the language concerning insurance. In the only available copy of the Agreement, Article III is incomplete as the beginning of the article apparently was cut off when copied, and no one knows what the missing language in Article III stated. (R2:214:21 to 215:4.) The available part of Article III states in full:

> . . . and maintain during the entire term of this Lease, the following insurance coverage:

> (1) public liability insurance in the minimum amount of $300,000 for loss from an accident resulting in bodily injury to, or death of, persons; and $50,000.00 for loss from an accident resulting in damage to, or destruction of, property.
>
> (2) fire and extended coerage [sic] insurance on [Tenant's] fixtures, goods, wares, and merchandise in or on the lease premises, with coverage in an amount of not less than $150,000.00.
>
> (3) **Fire and extended coverage in an amount not less than 100% of the value of the leased property and other improvements on the leased premises, provided that insurance in that percentage can be obtained and, if not, then to the highest percentage that can be obtained.**
>
> On securing the foregoing coverages, [Tenant] shall give to [Landlord] written notice thereof, together with a certified copy of the appropriate policies.
>
> If [Tenant], at any time during the term hereof, fail [sic] to secure or maintain the foregoing insurance, the [Landlord] shall be permitted to obtain such insurance and shall be compensated by the [Tenant] for the cost of the insurance premiums.

(R1:57 (bold emphasis added) (App. 1); Pl.'s Ex. 1.) Subsection three, emphasized above, is the particular provision upon which the Landlord relied in the proceedings below.

At the time of the July 5, 2005 fire, the Tenant did have fire insurance that insured the Premises, and the Landlord previously had received from the Tenant copies of fire insurance policies insuring the Premises. (Def. Ex. 1 (App. 5); R2:159:10-15, 287:7 to 288:3) Indeed, in his closing argument, the Landlord conceded that, at the time of the fire, the Tenant had fire insurance that covered the Tenant's interest in the Premises. (R1:112-113.) The policy provided $646,040 of coverage (with a $1000 deductible) as the replacement costs for a casualty to the

Premises. (Def.'s Ex. 1 (App. 5).) This coverage covered the value of the building damaged by the fire, which the circuit court determined to be $400,000 based on the Landlord's testimony, and it covered the $175,000 that the Tenant had to pay the Landlord to purchase the Premises pursuant to the option. (R1:59, 128; R2:272:24 to 273:8.) Moreover, the Tenant paid the premiums for the policy. (R2:202:9-10.)

Along with the fire insurance, the Tenant also had liability insurance for the Premises under the same policy. (Def. Ex. 1 (App. 5).) The policy named the Landlord as an additional insured for the liability coverage. (Def. Ex. 1 (App. 5); R1:113; R2:209-10.) However, the policy apparently omitted the Landlord as an additional insured for the fire coverage. (Def. Ex. 1 (App. 5).) When the Tenant purchased the fire insurance, his intent was to "protect" both himself and the Landlord. (R2:216:19 to 217:1.) The insurance company was given a copy of the Agreement, and the Tenant told the insurance company that, "if anything happened to the building, [the Landlord was] to get 175,000 dollars", which was the price that Tenant could purchase the Premises from the Landlord under the Agreement's option clause. (R1:59 (App. 2); R2:210:7-9.)

IV. After a Fire Destroyed the Building on the Premises, the Landlord Claimed the Tenant was in Default, Sued to Evict Him, and Refused to Allow the Tenant to Exercise his Option to the Purchase the Premises.

A little more than a month after the July 5, 2005 fire that severely damaged the building on the Premises, the Landlord's counsel sent a letter to the Tenant claiming that the Tenant was in default under the Agreement for: (1) committing waste and failing to maintain the Premises in violation of Article V; (2) failing to repair the Premises in violation of Article VI; and (3) failing to maintain fire insurance on the Premises in violation of Article III. (Def.'s Ex. 2; R2:212:1-4.) Shortly after sending this letter, the Landlord initiated an action in the county court to evict the Tenant. (R1:1-2.)

The county court denied the Landlord's request for an eviction because it concluded that the Tenant was not in default as the Landlord had claimed. (R1:27-29.) In addition, the county court opined that the Tenant had to restore the Premises without regard to the insurance proceeds over which the parties had been fighting. (R1:29.) (Previously, the Landlord had filed his own claim with the insurance company seeking the proceeds from the fire insurance policy. (R2:273:21-23, 275:11-20.)) But, the county court opined, because the Agreement did not specify when the Premises had to be restored, the law implied a "reasonable time" to complete the restoration. (R1:29.)

Two days after the county court denied the eviction, the Landlord sent another default letter to the Tenant, claiming the exact same three "defaults" that already had been rejected by the county court and demanding again that they be cured within fifteen days. (Def.'s Ex. 2; R2:212:1-4.) Fifteen days later, the Tenant attempted to exercise the Agreement's option to purchase the Premises for $175,000 by tendering a $5,000 down payment and delivering to the Landlord an executed sales contract. (R1:59, Article XIV(2); R2:196:17 to 197:9; R2:200:15-24; R2:279:13-17.) The Landlord, however, refused to convey the Premises to the Tenant, claiming that each of the three "defaults" cited in his previous letters was a prior material breach of the Agreement that excused him from selling the Premises pursuant to the Agreement's purchase option. (R1:53-54, ¶¶10-12; R1:62-63, ¶¶10-12; R1:65-67, ¶¶ 4, 5, 8, 16; R2:196:21 to 197:12; R2:205:13-20; R2:275:21-25; Pl.'s Ex. 3.)

V. The Circuit Court Refused to Enforce the Purchase Option, Finding that Tenant Previously Breached the Agreement by Purportedly Failing to Have Insurance.

After the Landlord refused to convey the Premises, the Tenant initiated an action in the circuit court and claimed that the Landlord's refusal to convey was a breach of the Agreement.[2] (R1:53-55 (App. 2)). The Tenant sought specific

[2] After the Tenant filed his action in the circuit court, the county court deferred ruling on the Landlord's motion for rehearing in the eviction action and ordered that the eviction action be transferred to the circuit court and consolidated with the action filed by the Tenant there. (R1:50-52.)

performance and declaratory relief to require the Landlord to convey the Premises and to declare that the Tenant was entitled to any insurance proceeds from the fire. (R1:53-54 (App. 2)). Alternatively, the Tenant sought monetary damages for the Landlord's failure to convey the Premises and requested the insurance proceeds under an unjust enrichment count. (R1:54-55 (App. 2)).

The Landlord filed affirmative defenses and a counterclaim, each of which relied on the same three alleged defaults (alleged failures to obtain fire insurance, maintain the Premises, and repair the Premises) as the bases for evicting the Tenant and for not honoring the purchase option. (R1:64-67 (App. 3).) The Landlord conceded that fire insurance covered the Tenant's interest in the Premises. (R2:159:10-15.) Nevertheless, the Landlord claimed that the "most serious, damaging and objectionable" default was the Tenant's failure to name the Landlord as an insured in the Premises' fire insurance policy; the Landlord claimed that this breach not only precluded the Tenant from exercising the purchase option but also entitled the Landlord to $400,000 in damages as compensation for the value of the building destroyed by the fire. (R1:112-14.) Though claiming that he should be compensated for the loss of the building, the Landlord also claimed that it was the Tenant's duty – even after the fire – to repair the Premises, including to repair the building damaged by the fire. (R1:112.)

After a one-day bench trial, the circuit court issued its Final Judgment. (R1:128-29 (App. 4).) Therein, it neither addressed nor adopted the Landlord's claims that the Tenant had defaulted in his duties to maintain and repair the Premises. (R1:128-29 (App. 4).) But the circuit court did adopt the Landlord's claim that the Tenant had defaulted in his duty to maintain fire insurance. (R1:128-29 (App. 4).) As result, the circuit court's Final Judgment: (1) evicted the Tenant and transferred possession of the Premises to the Landlord, (2) declared that the purchase option was invalid and could not be exercised by the Tenant, and (3) awarded the Landlord $400,000 in money damages due to the fire damage to the building and the purported lack of fire insurance covering that damage. (R1:128-29 (App. 4).) On this appeal, the Tenant contends each of these rulings in the Final Judgment was erroneous.

The Final Judgment also determined that Tenant was entitled to all proceeds from the insurance policy covering his losses from the fire. (R1:128 (App. 4).) On this appeal, the Tenant does not challenge this ruling, and the Landlord has not cross-appealed this ruling.

In their initial pleadings, both parties claimed attorney's fees pursuant to provisions in the Agreement obligating the defaulting party to pay the prevailing party's attorney's fees and expenses. (R1:54, 55, 58, 60, 64, 66, 67.) Consequently, the circuit court ordered the Tenant to pay the Landlord's

attorney's fees and costs in the amount of $16,453.75. (R1: 58, 60 (App. 1); R1:149-50.) On this appeal, the Tenant challenges this award of attorney's fees on the ground that the Landlord, not the Tenant, was the defaulting party, and thus, the Tenant should have been the prevailing party and should have been awarded his reasonable attorney's fees and costs.

SUMMARY OF ARGUMENT

The Landlord concedes that the Tenant had a fire insurance covering the Premises. But the Landlord claims (and the circuit court agreed) that the Agreement was materially breached, and thus invalidated, because the Tenant failed to name the Landlord as an insured in the fire insurance policy. As a result, the Landlord says (and the circuit court agreed) that the Tenant forfeited his right to exercise his option to purchase the Premises, must be evicted from the Premises, and must pay the Landlord $400,000, in lieu of the fire insurance proceeds, for the value of the building severely damaged by the fire.

The Landlord's argument and the circuit court's Final Judgment have no support in the plain language of the Agreement. Due to a photocopying error, the complete text of the Agreement's insurance provision, Article III, is unavailable, and no one knows what the missing parts stated. The available parts of Article III lack any of the normal buzzwords – such as "shall" or "must" – that would impose an obligation on the Tenant to maintain insurance. Nor is there any language

stating that the Tenant had to maintain insurance in the name of or for the benefit of the Landlord. Instead, Article III merely states that, if the Tenant failed to maintain fire insurance, then the Landlord would be "permitted" to obtain his own fire insurance, and if the Landlord did so, then the Tenant would be obligated to pay for the costs of the premiums. The Landlord never procured his own fire insurance policy, despite having received copies of the Tenant's past fire insurance policies. Thus, the Tenant was not obligated to pay for any fire insurance premiums, much less maintain fire insurance with the Landlord as a named insured.

Besides the Agreement's plain language, the Landlord's claim of a material breach is foreclosed by reason and equity. Courts are charged with construing contracts in accordance with logic and reason and the practical aspects of the transaction. Courts are also charged to disfavor and to strictly construe contract provisions that result in a forfeiture.

As a matter of common sense and practicality, the fire insurance should cover the party who bore the risks of the fire – that is, the party responsible for constructing, maintaining, repairing, and restoring the building and other improvements on the Premises. Under the Agreement, the Landlord bore none of these responsibilities, and the Landlord never expended one penny on the building severely damaged by the fire or on an any other improvement. Rather, the Tenant

had the contractual right to improve the Premises "at his sole expense", and over the lease's seventeen years, the Tenant expended more than $426,000 improving the Premises and transforming the building from a dilapidated, unusable condition to a usable, nice office space. Moreover, according to the Landlord, the Agreement obligated the Tenant to restore the building after it was damaged by the fire.

Given these facts, it is clear that the Tenant bore the risks of any fire. Thus, based on reason and practical common sense, the Tenant had no obligation to name the Landlord as an insured absent clear language in the Agreement to the contrary. And, it would be inequitable to imply such an obligation into the Agreement because it would result in the Tenant forfeiting his substantial investment in the Premises.

Despite the lack of any supporting language in the Agreement, the Landlord claims that the Agreement obligated the Tenant to name him as an insured because of the principle that an insured must have an insurable interest. The Landlord, however, concedes that the Tenant did have an insurable interest in the lease's unexpired term and in the $426,000 of leasehold improvements. Nevertheless, the Landlord faults the Tenant for not insuring the Landlord's "ownership interest" in the Premises. However, considering the practical aspects of the transaction (as detailed above), it is hard to fathom what risk of loss the Landlord needed insured.

The Landlord spent nothing on the building or other improvements, and according to the Landlord, the Tenant was contractually obligated to restore the building after the fire. Given this context, if the Landlord wanted the Agreement to require that he be named as an insured, the Landlord should have clearly written such an obligation in the Agreement. But he did not, and this Court should not allow him to re-write the Agreement by inserting such an obligation via judicial interpretation.

Even if this Court determines that the Agreement obligated the Tenant to name the Landlord as an insured, it should still reverse. The Tenant's failure to name the Landlord as an insured was, at most, a non-material breach. Moreover, considering the more than $426,000 in leasehold improvements made by Tenant, it was inequitable for the circuit court to order the Tenant to forfeit his option to purchase and the $400,000 in fire insurance proceeds. The circuit court's award of $400,000 as compensation for the value of the building was an unjust windfall to the Landlord who did not spend any funds to increase the value of the building.

In summary, this Court should reverse the circuit court's Final Judgment insofar as it: (1) declined to enforce the Tenant's option to purchase the Premises; (2) evicted the Tenant; and (3) awarded the Landlord $400,000 in damages. Additionally, this Court should reverse the Amendment to Final Judgment that awarded attorney's fees and costs to the Landlord.

ARGUMENT

Issue No. 1: WHETHER THE AGREEMENT OBLIGATED THE TENANT TO NAME THE LANDLORD AS AN INSURED ON THE FIRE INSURANCE POLICY.

Standard of Review

This is an issue of contract interpretation, and thus it is an issue of law to be reviewed *de novo*. *E.g., Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 630 (Fla. 1st DCA 1999).

Argument on the Merits

I. THE AGREEMENT DID NOT OBLIGATE THE TENANT TO NAME THE LANDLORD AS AN INSURED ON THE FIRE INSURANCE POLICY.

As the party claiming a breach of the Agreement, the Landlord bore the burden of proving that the Tenant breached a contractual duty. *Carpenters Contractors of Am., Inc. v. Fastener Corp. of Am., Inc.*, 611 So. 2d 564, 565 (Fla. 4th DCA 1992). In the proceedings below, the Landlord argued, and the circuit court agreed, that the Agreement obligated the Tenant to name the Landlord as an insured on the fire insurance policy and the Tenant's failure to do so was a breach of the Agreement. (R1:112-13, 128-29.) The flaw in the Landlord's argument is that no such obligation can be found in the plain language of the Agreement. *Infra* Argument 1.A. Moreover, no such obligation exists if the Agreement is construed practically and in accordance with reason and equity. *Infra* Argument I.B.

Because the Agreement did not obligate the Tenant to name the Landlord as an insured, the Tenant did not breach the Agreement, and thus, the circuit court erred when it evicted the Tenant, awarded the Landlord $400,000 in damages, and refused to order the Landlord to convey the Premises pursuant to the purchase option. The circuit court also erred in awarding attorney's fees and costs to the Landlord, as the Tenant did not default under the Agreement and should have been the prevailing party.

A. The Plain Language of the Agreement Did Not Obligate the Tenant to Name the Landlord as an Insured or Even Maintain Any Fire Insurance.

It is elementary that the intentions of the parties to a contract govern the contract's construction, and the plain language of a contract is the best evidence of their intent.[3] *E.g., Whitley v. Royal Trails Prop. Owners' Ass'n*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005); *Royal Oak Landings Homeowners Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993). In this case, the "plain language" relied upon by Landlord is not complete, as parts of Article III of the Agreement are no longer available due to a photocopying error. The available language states in pertinent part:

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[3] The Landlord submitted no evidence of pre-Agreement negotiations to support his interpretation of the Agreement. In fact, the Landlord did not negotiate the Agreement, knew nothing about the pre-Agreement negotiations, and successfully objected to the circuit court's consideration of any pre-Agreement negotiations. (R2:178-81, 205:23 to 206:1, 270:18-20.)

> . . . and maintain during the entire term of this Lease, the following insurance coverage:
>
> . . . .
>
> (3) Fire and extended coverage in an amount not less than 100% of the value of the leased property and other improvements on the leased premises, provided that insurance in that percentage can be obtained and, if not, then to the highest percentage that can be obtained.
>
> . . . .
>
> If [Tenant], at any time during the term hereof, fail [sic] to secure or maintain the foregoing insurance, the [Landlord] shall be permitted to obtain such insurance and shall be compensated by the [Tenant] for the cost of the insurance premiums.

(R1:56-57, Article III (App. 1).)

Nowhere does the Agreement state that the Tenant was **obligated** or **required** to name the Landlord as an insured under the fire insurance policy or even have any fire insurance at all. *Cf. Apfol v. Shaw*, 647 So. 2d 139, 140 (Fla. 1st DCA 1994) (finding tenant had duty to name the landlord as an insured where the lease agreement expressly said so); *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661, 664-65 (Fla. 5th DCA 1987) (same). Instead, it merely states that, if Tenant failed to maintain fire insurance, then the Landlord would be "permitted" to obtain his own fire insurance, and if the Landlord did so, then the Tenant would be obligated to pay for the costs of the premiums. In the parlance of contract law, the Tenant's failure to obtain insurance **and** the Landlord's procurement of his own insurance were conditions, and if both of these conditions had occurred, the Tenant would have been obligated to pay the fire insurance premiums. *See Restatement*

(Second) of Contracts §§ 224 (1981) (defining a condition as "an event, not certain to occur, which must occur . . . before performance under a contract becomes due"); *id.* § 226 & cmt. a (noting that the term "if" is often used to create a condition). The Landlord never procured his own fire insurance policy, although he received copies of the Tenant's past fire insurance policies. (R2:287:7 to 288:3.) Thus, the Tenant was not obligated to pay any fire insurance premiums, nor was he obligated to maintain fire insurance with the Landlord as a named insured.

The Landlord incorrectly assumes that the language missing due to the photocopying error necessarily would have said that the Tenant "shall" or "must" maintain insurance (or used other similarly mandatory language). However, just as Article III elsewhere says the Landlord is "permitted" to obtain insurance, the missing language might have said the Tenant "may" or "is permitted to" maintain insurance (or used other similarly permissive language). If so, then the Tenant, like the Landlord, would have been "permitted", not obligated, to maintain fire insurance. *See Am. Boxing & Athletic Ass'n, Inc. v. Adoreable Promotions, Inc.*, 911 So. 2d 862, 865 (Fla. 2d DCA 2005) (noting the language "shall" or "must" is generally considered mandatory while language short of that is generally considered permissive).

Even if one could infer that the missing language did plainly say that the Tenant "must" or "shall" maintain fire insurance, it would not necessarily follow

that the Tenant "must" or "shall" name the Landlord an insured. All Article III says is that the fire insurance is to be "in an amount not less than 100% of the value of the leased property and other improvements on the leased premises." (R1:57, Article III (App. 1).) Assuming this provision is mandatory, the Tenant complied with it because he had over $646,000 of fire insurance – more than enough to cover the $400,000 value of the building and the $175,000 purchase price under the option. Nowhere does Article III say that the fire insurance had to be in the name, or for the benefit, of the Landlord. The Landlord is attempting to re-write Article III and to insert words that effectively say the fire insurance policy "shall name the Landlord as an insured" or "be for the benefit of the Landlord." *Cf. Apfol*, 647 So. 2d at 140, 141 (holding that tenant had to name landlord as an insured where contract stated the policy "shall name [the landlord] as an additional insured").

Looking at its plain language, Article III's purpose was merely to shift the risk of any fire loss to the insurance company. *See Hous. Inv. Corp. of Fla. v. Carris*, 389 So. 2d 689, 689-90 (Fla. 5th DCA 1980) (holding that, where contract between owner and contractor required owner to carry insurance but did not require owner to name contractor as insured, the purpose of contract was to shift risk to the insurer). The practical aspect of the lease was that the Tenant alone would bear the risk of a fire in the absence of a fire insurance policy. *Infra*

Argument I.B. Thus, to effectuate the purpose of shifting the risk to the insurer, reason and logic dictate that the Tenant needed only to name himself as an insured and was not required to name the Landlord as an insured. *Id.*

B. The Agreement, When Interpreted Practically and Equitably, Did Not Obligate the Tenant to Name the Landlord as an Insured.

1. Considering the Tenant Bore the Risk of any Fire, the Agreement Cannot Be Reasonably Construed to Obligate the Tenant to Name the Landlord as an Insured.

To the extent this Court needs to look beyond the plain language of the Agreement, its interpretation should be consistent with "logic and reason" and "the practical aspect of the transaction between the parties." *E.g., Whitley v. Royal Trails Prop. Owners' Ass'n*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005); *Royal Oak Landings Homeowners Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993). The practical aspect in this case is that the Tenant bore the risk of any fire. Over the course of the lease, the Tenant – without one penny from the Landlord – invested more than $426,000 in leasehold improvements and transformed the "dilapidated", unusable building into a usable building worth $400,000. (R2:182-85, 202.) The Landlord conceded below that that the Tenant, in his own name, could insure the leasehold improvements to the Premises, as well as the value of the unexpired lease term. (R1:113); *see also Traveler's Indem. Co. v. Duffy's Little Tavern, Inc.*, 478 So. 2d 1095, 1096 (Fla. 5th DCA 1985) (holding a tenant's insurable interests include the unexpired lease term and leasehold improvements).

Moreover, according to the Landlord, Article VI of the Agreement required the Tenant to repair and restore the building on the Premises damaged by the fire, thereby effectively relieving the Landlord of any responsibility or costs to restore the building. (R1:112.)

Accepting the Landlord's own concessions and argument, the Tenant had an insurable interest in the Premises and bore the risk of loss from any fire. If the Tenant was obligated to restore the Premises after the fire (as the Landlord contended below), what risk of loss did the Landlord bear and what costs or expenses would the Landlord incur due to the fire? What costs or expenses did the Landlord bear in improving the building to make it usable? The answer to these questions is absolutely nothing.

Thus, there was no practical or logical reason for the Tenant to name the Landlord as an insured. *Cf. Barsue Corp. v. Charwend*, 367 So. 2d 1063, 1064 (Fla. 3d DCA 1979) (holding that, because landlord had no insurable personal property on the premises, it was not entitled to insurance proceeds even though, unlike here, lease had expressly required tenant to purchase insurance policy in the landlord's name). Accordingly, if the Landlord wanted to be named as an insured on the fire insurance policy, he should have put express language in the Agreement saying so. But he did not, and this Court should not allow the Landlord to re-write

the Agreement to impose on the Tenant an obligation not specified in the Agreement that results in the Tenant forfeiting his option to purchase the Premises.

2. If Construed Equitably, the Agreement Does Not Obligate the Tenant to Name the Landlord as an Insured.

Equity demands that contract provisions requiring forfeitures be viewed with disfavor and should be "strictly construed against the party seeking to invoke them." *Smith v. Winn Dixie Stores, Inc.*, 448 So. 2d 62, 63 (Fla. 2d DCA 1984); *accord Grover v. Jacksonville Golfair, Inc.*, 914 So. 2d 995, 996 (Fla. 1st DCA 2005) (Thomas, J. concurring). The conclusion that the Tenant bore the risk of the fire makes this case similar to the line of equity cases holding that a purchaser of property is generally entitled to receive the fire insurance proceeds even though, at the time of the fire, the seller retained legal title to the property. *E.g., O'Neal v. Commercial Assurance Co. of Am.*, 263 So. 2d 246, 247 (Fla. 3d DCA 1972). Relying on this line of cases, the Florida Supreme Court has held that a tenant who holds a purchase option is entitled to the fire insurance proceeds even where, as here, the tenant/option holder did not have legal title to the premises at the time of the fire. *Nelson Props., Inc. v. Denham*, 167 So. 35, 36-37 (Fla. 1936). The rationale for this line of cases is that, pursuant to the purchase and sale agreement, the purchaser is required to pay for the property and also to incur the loss from the fire, and thus equity demands that the purchaser, not the seller, receive the insurance proceeds. *Ins. Co. of N. Am. V. Erickson*, 39 So. 495, 498 (Fla. 1905).

Similarly, here, pursuant to the Agreement, the Tenant incurred all of the expenses for improving the building and, according to the Landlord, was required to restore any improvement damaged by a fire. If the Agreement was also interpreted as requiring the Landlord to be a named insured, the Landlord would receive an unjust windfall contrary to the principles of equity. *See Grover v. Jacksonville Golfair, Inc.*, 914 So. 2d 995, 996 (Fla. 1st DCA 2005) (Thomas, J. concurring) (noting that "courts will act to prevent a windfall to a [landlord] where the [landlord] has not been damaged"). The windfall would be that the Landlord effectively would be compensated twice for the fire; he could have demanded both that, as an insured, he receive the insurance proceeds **and** that, pursuant to the Agreement, the Tenant restore the building to its pre-fire condition (a condition that the Tenant created with over $426,000 of expenditures). *See Nelson,* 167 So. at 37 (disapproving of possibility that a landlord could get paid twice for fire to buildings). Therefore, under principles of equity, the Agreement should not be construed to obligate the Tenant to name the Landlord as an insured.

3. The Landlord's Argument Based on "Insurable Interests" is Misplaced, and in any event, the Tenant Did Have an "Insurable Interest."

Before an insured can receive benefits under an insurance policy, he must show an "insurable interest" in the property covered. § 627.405(1), Fla. Stat. (2005); *Overton v. Progressive Ins. Co.*, 585 So. 2d 445, 448 (Fla. 4th DCA 1991).

In the circuit court, the Landlord argued that the Tenant had to name the Landlord as an insured under the fire insurance policy because the Tenant's option to purchase the Premises was not an "insurable interest" pursuant to Section 627.405, Florida Statutes (2005). (R1:113 *citing Traveler's Indem. Co. v. Duffy's Little Tavern, Inc.*, 478 So. 2d 1095 (Fla. 5th DCA 1985).) This argument is misplaced. This is not a coverage dispute between the insurer and insured; this is a dispute between two parties (the Tenant and Landlord) who entered into a contract (the Agreement). The critical issue is what were the terms of the Agreement between the Landlord and the Tenant. As argued above, the plain, available language of the Agreement, by itself or when construed reasonably and equitably, does not show any term obligating the Tenant to name the Landlord as an insured or to even maintain fire insurance. *Supra* Arguments I.A, I.B.1&2.

Regardless, the Tenant indisputably did have an insurable interests in the Premises. (R1:113.) An insurable interest is determined, not by the concept of title, but rather by "whether the insured has a substantial economic interest in the property." *Aetna Ins. Co. v. King*, 265 So. 2d 716, 718 (Fla. 1st DCA 1972). An insured may have an insurable interest in property even if he does not have equitable or legal title because an "insurable interest" is "any actual, lawful, and substantial interest" to safeguard or preserve the property from damage or destruction. *Overton*, 558 So. 2d at 448 (quoting § 627.405(2), Fla. Stat. (2005));

see also Aetna, 265 So. 2d at 718 (holding that non-owner of property had an "insurable" and "substantial economic interest" in property because the owner deposited all rent proceeds from the property in a special account for the non-owner); *Sun State Roofing Co. v. Cotton States Mut. Ins. Co.*, 400 So. 2d 842, 844 (Fla. 2d DCA 1981) (holding gratuitous, rent-free use of property could be an "insurable interest").

The Landlord below conceded that the Tenant had an insurable interest in unexpired term of the lease and in the leasehold improvements. (R1:113.); *see also Traveler's*, 478 So. 2d at 1096 (holding tenant had insurable interest in leasehold improvements and unexpired lease term). As detailed above, the Tenant's leasehold improvements were substantial, costing more than $426,000. *Supra* Statement of Case and Facts Part II. The Tenant also had sufficient insurance to cover the $175,000 option to purchase the premises from the Landlord. *See Nelson Props., Inc. v. Denham*, 167 So. 35, 36-37 (Fla. 1936) (holding that holder of option to purchase had equitable interest in fire insurance proceeds even if the option had not been exercised at the time of fire). *But see Traveler's*, 478 So. 2d at 1096 (holding that unexercised option to purchase was not an insurable interest). The Landlord, however, complained that the Tenant did not insure his "ownership interest", without saying what that might be in light of the fact that Tenant bore the

risk of any fire. (R1:112-113.) If the Landlord wanted to obligate the Tenant to insure his "ownership interest," he should have expressly said so in the Agreement.

C. Conclusion for Issue No. 1.

The Agreement's plain language, by itself or when construed practically, reasonably, and equitably, did not obligate the Tenant to name the Landlord as an insured on the fire insurance policy. Because the Tenant was not so obligated, the Tenant did not breach the Agreement, and the circuit court erred when it evicted the Tenant, awarded the Landlord $400,000 in damages, and refused to order the Landlord to convey the Premises pursuant to the Tenant's option to purchase the Premises. It also erred in awarding attorney's fees and costs to Landlord because the Tenant, not the Landlord, should have been the prevailing party.

Issue No. 2: WHETHER THE CIRCUIT COURT ERRED BECAUSE THE PURPORTED BREACH WAS NON-MATERIAL AND THE FORFEITURE OF THE OPTION AND THE INSURANCE PROCEEDS WAS INEQUITABLE.

Standard of Review

Whether a breach is material or non-material is an issue of contract interpretation subject to *de novo* review. *See Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 49, 54 (Fla. 1st DCA 2005) (applying *de novo* review to issue of whether breach was material or non-material). The decision to grant or deny relief based on the doctrine of inequitable forfeiture is reviewed for an abuse of discretion. *Stolz v. Watson*, 940 So. 2d 521 (Fla. 1st DCA 2006).

Argument on the Merits

II. THE TENANT'S PURPORTED BREACH WAS NON-MATERIAL AND DID NOT WARRANT FORFEITURE OF THE TENANT'S OPTION TO PURCHASE OR THE INSURANCE PROCEEDS.

This Court should reverse the Final Judgment, even if it determines that the Agreement required the Landlord to be named as an insured, because any breach of this purported obligation was non-material and the forfeiture of the Tenant's purchase option and insurance proceeds was inequitable and disproportionate to the breach.[4] The concepts of material breach and inequitable forfeiture are intertwined. A non-breaching party may terminate a contact only upon a showing of a "material breach." *Arquettte Dev. Corp. v. Hodges*, 934 So. 2d 556, 559 (Fla. 1st DCA 2006) (citing *Colucci v. Kar Kare Auto. Group, Inc.*, 918 So. 2d 431, 441 (Fla. 4th DCA 2006)). In a similar vein, a court will not allow extreme or harsh forfeitures for a breach of contract unless the breach is "material." *See Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 54 (Fla. 1st DCA 2005) (citing *Restatement (Second) of Contracts* § 229 (1981)); *id.* at 56 (Ervin, J. dissenting) (citing *Restatement (First) of Contracts* § 302 (1932); *Am. Fire Cas. Co. v. Collura*, 163 So. 2d 784 (Fla. 2d DCA 1964)); *Roschman Partners v. S.K. Partner I., Ltd.*, 627 So. 2, 4 (Fla. 4th DCA 1993).

Subpart A argues that the Tenant's purported breach was non-material under Section 241 of the Restatement (Second) of Contracts, and thus it could not be grounds for terminating the Agreement. Subpart B argues that the forfeiture of the Tenant's option to purchase and insurance proceeds was inequitable in light of the Tenant's expenditures of more than $426,000 in improvements to the Premises.

A. The Tenant's Purported Breach Was Non-Material and Did Not Merit Termination of the Agreement.

For a party to terminate a contract based on the other party's breach, the breach must be "material." *Arquettte*, 934 So. 2d at 559. Whether a breach is material turns on several factors, including: (1) the extent to which the non-breaching party will be deprived of a benefit which he reasonably expected; (2) the extent to which the non-breaching party can be adequately compensated for any benefit of which he will be deprived; (3) the extent to which the breaching party will suffer a forfeiture; (4) the likelihood that the breaching party will cure his failure; and (5) the extent to which the breaching party's behavior comports with good faith and fair dealing. *Restatement (Second) of Contracts* § 241 (1981) (cited with approval at *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 54 (Fla. 1st DCA 2005)).

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[4] The circuit court technically did not award the insurance proceeds to the Tenant. But, by ordering the Tenant to pay $400,000 as the reasonable value of the building at the time of the fire, the circuit court effectively awarded the Landlord the insurance proceeds covering the building.

All these factors favor a conclusion that the Tenant's failure to name the Landlord as an insured was, at most, a non-material breach.

First, at the time the Agreement was formed, the Landlord never could have reasonably expected to have received any insurance proceeds, much less $400,000, for the value of the building on the Premises. As detailed above, when the Agreement was entered into, the building was dilapidated and unusable and leased "as is" with no duty by the Landlord to make the building usable. *Supra* Statement of Case and Facts, Part II. The Tenant (not the Landlord) spent seventeen years and more than $426,000 improving the Premises; consequently, at the time of the fire, the building was, usable as an office, and valued at $400,000. *Id.* The Landlord could never have reasonably expected such a benefit.

Second, the option to purchase the Premises, coupled with seventeen years of rent payments, adequately compensates the Landlord. The $175,000 purchase price in the option, plus the over $200,000 of rent payments, is what the parties expressly bargained would be adequate and fair compensation for the Premises. The Landlord is plainly using the fire to circumvent the Agreement and obtain more than he had bargained for to sell the Premises.

Third, the forfeiture suffered by the Tenant is substantial, as explained more fully below. *Infra* Argument II.B. In short, the Tenant stands to lose not only the

right to purchase the Premises but also $400,000 for damages, which are the sole result of the Tenant's expenditure of more than $426,000 to improve the Premises.

Fourth, the Tenant has cured any failure on his part by offering to purchase the Premises for $175,000, the fair price agreed to by the parties in the Agreement.

Fifth and finally, the Tenant's behavior has comported with good faith and fair dealing. The "good faith and fair dealing" factor often depends on whether the breaching party committed a "willful" breach. *Restatement (Second) of Contracts* § 241 cmt. f (1981). In this case, the Tenant's breach obviously was not "willful." The Tenant named the Landlord as an additional insured on the liability insurance policy, and the Tenant (mistakenly) thought the Landlord was also named as an insured on the fire insurance policy, as he instructed the insurance company to name the Landlord and to pay the Landlord $175,000 in the event a casualty to the Premises. (R2: 210, 216-17.)

Considering all these factors, the Tenant's failure to name the Landlord as an insured in the fire insurance policy was non-material. Because the Landlord failed to show a material breach, he was not entitled to terminate the Agreement, *Arquettte*, 934 So. 2d at 559, and thus the Tenant should have been allowed to exercise his option to purchase. Once the Tenant is allowed to exercise his option to purchase, the Landlord's claim for $400,000 in damages also fails because it hinges on the mistaken premise that Landlord, as an owner, was entitled to

$400,000 for the building on the Premises; in fact, under the Agreement, the Landlord's compensation for the entire Premises was the $175,000 option purchase price (plus the over $200,000 in rent payments that he already has received). In addition, the Landlord's claim to evict the Tenant obviously becomes moot once the Tenant purchases the Premises pursuant to the option.

B. The Forfeiture of the Option to Purchase and the Insurance Proceeds is Inequitable.

Where, as here, a tenant makes substantial improvements to a landlord's property, the doctrine of inequitable forfeiture has been repeatedly invoked so that technical or non-material breaches do not terminate lease agreements or give landlords unjust windfalls. *Grover v. Jacksonville Golfair, Inc.*, 914 So. 2d 995, 996 (Fla. 1st DCA 2005) (Thomas, J. concurring) (citing *Horatio Enters., Inc. v. Rabin*, 614 So. 2d 555 (Fla. 3d DCA 1993)); *Fowler v. Resash Corp.*, 469 So. 2d 153, 154-55 (Fla. 3d DCA 1985). The doctrine has also been invoked to prevent the forfeiture of an option to purchase real property, despite the option holder's default, because the option holder substantially increased the value of the property by expending considerable sums of money to rezone the property and put improvements thereon. *Roschman Partners v. S.K. Partner I., Ltd.*, 627 So. 2, 3-5 (Fla. 4th DCA 1993).

Fowler is perhaps most apropos. There, the jury found that the tenants breached the lease's covenant to repair and returned a verdict of $400,000 in

damages; if upheld, the jury's verdict would have terminated the lease and evicted the tenant. *Id.* at 154-55. Invoking the doctrine of inequitable forfeiture, the court overturned the eviction and the damages award by entering a judgment for the tenant notwithstanding the jury's verdict. *Id.* Because the tenants had made over $200,000 worth of improvements to the premises, the court held that termination of the lease would result in the landlords becoming "inequitably and unjustly enriched at the expenses of the [tenants]." *Id.*

The undisputed facts here demonstrate that, as a matter of law, it was inequitable for the circuit court to forfeit the Tenant's option to purchase the Premises and his insurance proceeds that covered the value of the building. The Tenant paid all rent due for seventeen-plus years for a total of over $200,000, paid all insurance premiums, and substantially improved the value of the Premises at his sole expense. *Supra* Statement of Case and Facts, Part II. Specifically, the Tenant spent more than $426,000 in improvements, resulting in a building valued at $400,000. *Id.* It is also undisputed that the Landlord did not spend one penny for the improvements or contribute in any way to the increased value of the building. *Id.* Nevertheless, when the building was severally damaged by the fire, the circuit court determined that the Landlord, not the Tenant, was the injured party who was entitled to be compensated for the loss of the building. Additionally, the circuit court invalidated the Agreement and precluded the Tenant from exercising his

option to purchase the Premises. These acts by the circuit court were inequitable forfeitures that this Court should reverse.

C. Conclusion for Issue No. 2.

If the Tenant was obligated to name the Landlord as an insured, his failure to do so was not a material breach, and it was inequitable for the circuit court to order the forfeiture of the Tenant's option to purchase the Premises and the $400,000 in insurance proceeds. As a result, this Court should reverse the Final Judgment and Amendment to the Final Judgment, as stated in the Conclusion immediately below.

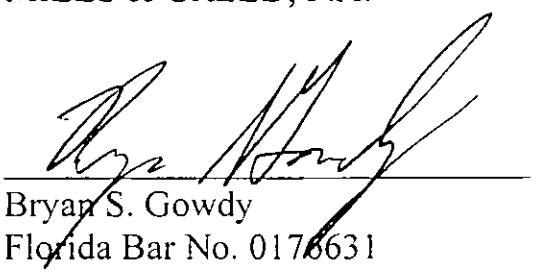
CONCLUSION

Based on the foregoing, this Court should reverse the Final Judgment (R1:128-29 (App. 4)) insofar as it: (1) declined to enforce the Appellant-Tenant's option to purchase the Premises from the Appellee-Landlord for $175,000; (2) evicted the Appellant-Tenant and transferred possession of the Premises to the Appellee-Landlord; and (3) awarded the Appellee-Landlord $400,000 in damages. This Court also should declare that the Agreement's option to purchase the Premises is valid and order the Appellee-Landlord to convey the Premises to the Appellant-Tenant in accordance with the Agreement. Additionally, this Court should reverse the Amendment to Final Judgment (R1:149-50) that awarded attorney's fees and costs to the Appellee-Landlord, and it should order the Landlord to pay the Tenant's reasonable attorney's fees, costs, and expenses

incurred in the trial court and this Court, with the amount of such fees, costs, and expenses to be determined by the circuit court upon remand.

Respectfully Submitted,

MILLS & CREED, P.A.



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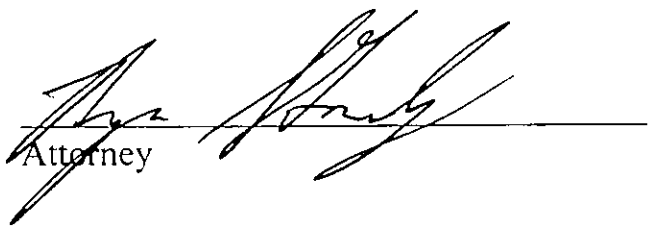
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to **George J. Little, Esq.**, 4442 Lafayette Street, Post Office Box 1612, Marianna, FL 32447-5612, trial counsel for Appellant; and **Bill R. Hutto, Esq.**, 620 McKenzie Avenue, Post Office Box 2528, Panama City, FL 32402, counsel for Appellee, by U.S. mail on this 5th day of January, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



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