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1999 OK 50

**OSPREY L.L.C., a limited liability
company, Plaintiff/Appellant,**
v.
**KELLY-MOORE PAINT CO. INC., a
California corporation,
Defendant/Appellee.**

No. 90,206.

Supreme Court of Oklahoma.

May 25, 1999.

Anton J. Rupert, Oklahoma City, for
Plaintiff/Appellant.

Darian B. Anderson, Edmond, for
Defendant/Appellee.

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¶ 1 KAUGER, J.:

¶ 2 The first impression question presented is whether a faxed or facsimile delivery of a written notice renewing a commercial lease is sufficient to exercise timely the renewal option of the lease. Under the facts presented, we hold that it is.

¶ 3 FACTS

¶ 4 The appellant, Osprey, an Oklahoma limited liability company (Osprey), owns commercial property in Edmond, Oklahoma. On March 18, 1977, the appellee, Kelly-Moore Paint Company (Kelly-Moore), a California corporation, negotiated a fifteen-year lease for its Edmond, Oklahoma, store with Osprey's predecessors James and Victoria Fulmer.¹ The lease contained two five-year renewal options which required that the lessee give notice of its intent to renew the lease at least six months prior to its expiration date. The lease also provided that all notices "shall be given in writing and may be delivered either personally or by depositing the same in

United States mail, first class postage prepaid, registered or certified mail, return receipt requested."

¶ 5 It is undisputed that after the first fifteen years, Kelly-Moore timely informed Osprey's predecessors by certified letter of its intent to extend the lease an additional five years. The first five-year extension was due to expire on August 31, 1997. According to the property manager of Kelly-Moore, she telephoned one of the owners of Osprey in January of 1997, to inform him that Kelly-Moore

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intended to extend its lease for the remaining five-year period. On Friday, February 28, 1997, the last day of the six-month notification deadline, Kelly-Moore faxed a letter of renewal notice to Osprey's office at 5:28 p.m., Oklahoma time. Kelly-Moore also sent a copy of the faxed renewal notice letter by Federal Express the same day.

¶ 6 Although the fax activity report and telephone company records confirm that the fax was transmitted successfully and that it was sent to Osprey's correct facsimile number, Osprey denies ever receiving the fax. The Federal Express copy of the notice was scheduled for delivery on Saturday, March 1, 1997. However, Osprey actually received it on Monday, March 3, 1997. In a letter dated March 6, 1997, Osprey acknowledged that it had received Kelly-Moore's Federal Express notice; denied that the notice was timely according to the terms of the lease; and it rejected the notice as untimely. In July of 1997, Osprey wrote Kelly-Moore reminding it to vacate the premises by August 31, 1997. Kelly-Moore refused to vacate, insisting that it had effectively extended the lease term for the remaining five years.

¶ 7 On September 2, 1997, Osprey filed an action for [eviction] in the district court of Oklahoma County. . . . Kelly-Moore argued that it was entitled to possession of the property because of its timely renewal of the lease. After a trial on

the merits, the trial court granted judgment in favor of Kelly-Moore, finding that the faxed notice was effective. Osprey appealed. The Court of Civil Appeals reversed, determining that the plain language of the lease required that it be renewed for an additional term by delivering notice either personally or by mail, and that Kelly-Moore had done neither. We granted certiorari on April 13, 1999, to address the question of first impression.

* * *

¶ 9 The precise issue of whether a faxed or facsimile delivery of a written notice to renew a commercial lease is sufficient to exercise timely the renewal option of the lease is one of first impression in Oklahoma. Neither party has cited to a case from another jurisdiction which has decided this question, or to any case which has specifically defined "personal delivery" as including facsimile delivery.

¶ 10 The contested portions of the lease provide in pertinent part:

". . . 20. OPTION TO RENEW
The Lessee must, in order to exercise each such renewal option give to the Lessor at least six (6) months prior to the expiration of the term hereof or the extended term, written notice of the Lessee's intention to renew this lease as by this paragraph provided. . . .

...

26. NOTICES. All notices required to be given hereunder by Lessee or Lessor *shall* be given in writing and *may* be delivered either personally or by depositing the same in the United States mail, first class postage prepaid, registered or certified mail, return receipt requested, addressed to the party to receive the same at that party's address . . .

...

29. TIME. Time is hereby expressly declared to be the essence of this lease and of all the covenants, agreements, terms, conditions, restrictions and obligations herein contained." (Emphasis supplied)

¶ 11 Osprey argues that: 1) the lease specifically prescribed limited means of acceptance of the option, and it required that the notice of renewal be delivered either personally or sent by United States mail, registered or certified; 2) Kelly-Moore failed to follow the contractual requirements of the lease when it delivered its notice by fax; and

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3) because the terms for extending the lease specified in the contract were not met, the notice was invalid and the lease expired on August 31, 1997. Kelly-Moore counters that: 1) the lease by the use of the word "shall" mandates that the notice be written, but the use of the word "may" is permissive; and 2) although the notice provision of the lease permits delivery personally or by United States mail, it does not exclude other modes of delivery or transmission which would include delivery by facsimile. Kelly-Moore also asserts that the lease specified that time was of the essence and that faxing the notice was the functional equivalent of personal delivery because it provided virtually instantaneous communication.

¶ 12 Although the question tendered is novel in Oklahoma, the sufficiency of the notice given when exercising an option contract or an option to renew or extend a lease has been considered by several jurisdictions.² A few have found that delivery of notice by means other than hand delivery or by certified or registered mail was insufficient if the terms of the contract specifically referred to the method of delivery.³ However, the majority have reached the opposite conclusion.⁴

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These courts generally recognize that, despite the contention that there must be strict compliance with the notice terms of a lease option agreement, use of an alternative method does not render the notice defective if the substituted method performed the same function or served the same purpose as the authorized method.⁵

* * *

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¶ 14 . . . The lease does not appear to be ambiguous. "Shall" is ordinarily construed as mandatory and "may" is ordinarily construed as permissive.¹² The contract clearly requires that notice "shall" be in writing. The provision for delivery, either personally or by certified or registered mail, uses the permissive "may" and it does not bar other modes of transmission which are just as effective.

¶ 15 The purpose of providing notice by personal delivery or registered mail is to insure the delivery of the notice, and to settle any dispute which might arise between the parties concerning whether the notice was received.¹³ A substituted method of notice which performs the same function and serves the same purpose as an authorized method of notice is not defective.¹⁴ Here, the contract provided that time was of the essence.¹⁵ Although Osprey denies that it ever received the fax, the fax activity report and telephone company records confirm that the fax was transmitted successfully, and that it was sent to Osprey's correct facsimile number on the last day of the deadline to extend the lease. The fax provided immediate written communication similar to personal delivery and, like a telegram, would be timely if it were properly transmitted before the expiration of the deadline to renew.¹⁶

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Kelly-Moore's use of the fax served the same function and the same purpose as the two methods suggested by the lease and it was transmitted before the expiration of the deadline to renew. Under these facts, we hold that the

faxed or facsimile delivery of the written notice to renew the commercial lease was sufficient to exercise timely the renewal option of the lease.

¶ 16 CONCLUSION

¶ 17 Use of an alternative method of notification of the exercise of a lease option does not render the notice defective if the substituted notice performed the same function or served the same purpose as the authorized method.¹⁷ Here, the lease provision concerned uses the permissive "may" rather than the mandatory "shall" and refers to personal delivery or registered or certified mail, but it does not require these methods of delivery, to the exclusion of other modes of transmission which serve the same purpose.