

Robert M. CHILDS III et ux v. Dwayne
GOODE, Jack HENDERSON, Tommy WATSON,
Jerry D. BELL, and G.H.W., Inc.

76-378

548 S.W. 2d 827

Opinion delivered April 4, 1977
(Division I)

1. LANDLORD & TENANT — LEASE, BREACH OF — CANCELLATION, RIGHT OF. — Where a lease entered into between lessor and lessees provided that lessees agreed to use the leased premises as a retail grocery outlet unless written consent was obtained from lessor the lessees breached the lease by discontinuing the use and occupancy of the building as a grocery store, even though they still paid the rent, and lessor was entitled to cancellation of the lease in view of the fact that if the building were allowed to remain vacant and unoccupied for 18 months it would lose its nonconforming use status under a city ordinance and could no longer be used as a grocery store.
2. LANDLORD & TENANT — RENT, ACCEPTANCE OF — EFFECT. — There is no merit to lessees' contention that by accepting the rent lessor consented to the closing of the store, where the lessees wanted out of the lease and were aware of the negotiations by lessor to sell the building.
3. REAL PROPERTY, SALE OF — RESTRICTIVE COVENANT, PURCHASE SUBJECT TO — CONTINUING BREACH, EFFECT OF. — The lessees' argument that the purchasers of property cannot complain of a breach of covenant which occurred before their purchase is without merit since the purchasers acquired the property subject to the restrictive covenant to operate a grocery store on the premises and the covenant was breached not only before but after the purchasers bought the property.

Appeal from Faulkner Chancery Court, *Richard Mobley*, Chancellor; affirmed.

George F. Hartje, of Hartje & Burton, for appellants.

Clark, McNeil & Watson, for appellee.

FRANK HOLT, Justice. Appellants sought an injunction to restrain appellees from interfering with their possession of leased property. The chancellor dismissed the suit and

ordered the lease cancelled, in view of a zoning ordinance, for failure of appellants to comply with the use and occupancy provision of the lease. For reversal appellants assert that the court erred in finding that the lease placed an affirmative duty upon the appellants to operate a grocery store in the leased premises. We cannot agree.

Appellee Bell leased his grocery store to appellants in October, 1974, for a five year term. In January, 1976, Mr. Childs closed the store and continued to pay rent after he moved his stock to a nearby location. In March, 1976, Bell deeded the property to appellee G.H.W., Inc., (Goode, Henderson and Watson). Shortly thereafter, G.H.W., Inc., removed from the closed grocery store certain fixtures and equipment left by Childs. This resulted in appellants bringing an action to enjoin appellees' interference and to compel the return of the removed articles. Appellees invoked Paragraph A-4 of the lease which provides:

To use and occupy the premises for retail grocery store outlet purposes only and for no other object or purpose without the written consent of the lessor. . . .

The property is located in a residential area and its nonconforming use as a grocery store was permitted by a grandfather clause inasmuch as it was used as a grocery store preceding the enactment of the zoning ordinance. The ordinance provides that the privileged status of the property would be lost if the "nonconforming building . . . becomes vacant" and "unoccupied" for a period of 18 months. There is a provision to toll this restriction if the vacant building is reoccupied within the 18 months' limitation. Thus, a continuation of the grocery business was necessary, as expressly recited in the lease, to meet the requirements of the ordinance. In other words a vacant building, even though appellants continued to pay the rent, was not in conformity with the intentions of the parties as expressed in the lease. See *Kahn v. Wilhelm*, 118 Ark. 239, 177 S.W. 403 (1915); and *Amon v. Cummings*, 67 Atl. 2d 687 (1949). Here the terms of the lease were clear and unambiguous.

In a subordinate argument, appellants assert that the closing of the store was consented to by the lessor Bell and,

therefore, the lessor is estopped from requiring continuous operation of the store since he accepted rent payments for two months after the closing of the store. Suffice it to say that Childs wanted out of the lease and was aware of the negotiations to sell the building to appellee purchasers pending successful resolution of their efforts for permission from the city to remove the building, rebuild and then continue the nonconforming use. This was accomplished within two months after appellants closed the building and moved their grocery business to another location.

Appellants next argue that the appellee purchasers cannot complain of a breach of covenant which occurred before their purchase. The purchasers acquired the property subject to the restrictive covenant in the lease. Therefore, a sufficient answer to appellants' contention is that the covenant by appellants to operate a grocery store was breached after appellee purchasers bought the property.

Affirmed.

We agree: HARRIS, C.J., and GEORGE ROSE SMITH and BYRD, JJ.
