COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1519 **Cir. Ct. No. 2014SC271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SHARON LOGAN AND JACK LOGAN,

PLAINTIFFS-APPELLANTS,

V.

DAVID S. SCHULTZ, D&S VENTURES, INC., JAIMIE BROCK, JACOB BROCK AND J&B WISCONSIN VENTURES, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: DAVID J. WAMBACH, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.[1] Sharon and Jack Logan argue on appeal that the circuit court erred in dismissing their complaint concerning a commercial lease

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

agreement between the Logans as landlord and David S. Schultz d/b/a D&S Ventures, Inc. as tenant. The circuit court dismissed the complaint because the Logans failed to provide Schultz written notice of the breaches of the lease agreement alleged in the complaint before filing the complaint, as required by the lease agreement, and because Schultz did not commit the alleged breaches or violate the implied duty of good faith. As explained below, the Logans fail to demonstrate that the circuit court erred, and, therefore, I affirm.

BACKGROUND

¶2 The following facts are undisputed. For some number of years prior to 2010, the Logans leased the Blackhawk Tavern space to Schultz. On May 1, 2010, the Logans and Schultz entered into a new five-year lease agreement.

¶3 In September 2012, Schultz entered into a management agreement relating to the Blackhawk Tavern with Jaimie and Jacob Brock.

¶4 Some time prior to 2010, Schultz caused a commercial kitchen exhaust system to be installed at the Blackhawk Tavern. In the summer of 2013, the Logans discovered issues with the exhaust system. Over the course of approximately nine months, the Logans, through their son, exchanged emails and letters with Schultz, demanding that Schultz replace the existing exhaust system with one that was code compliant.

¶5 The Logans' attorney sent Schultz a letter dated February 4, 2014, stating that Schultz had been "provided with 30 day notice to correct the breach of [the] lease; in this instance, to bring the kitchen's exhaust and ducting into compliance with current health and safety codes." The letter indicated that the lease agreement was being terminated "[b]ased upon [Schultz's] failure to cure

this default ...." The letter further stated that if Schultz "ha[s] not vacated the premises by February 15, 2014, [the Logans would] commence an action against [Schultz] for all … legal remedies, including eviction and acceleration of rent." Schultz did not vacate the premises.

¶6 On March 18, 2014, the Logans commenced an eviction action by filing a complaint alleging several breaches of the lease agreement and violation of the implied duty of good faith, and demanding "restitution of the Black Hawk Tavern premises" along with other relief.[2] The alleged breaches relevant to this appeal related to assignment of the lease, provision of insurance, and failure to fix the exhaust system.

¶7 The matter was tried to the circuit court. After the Logans presented their case, Schultz moved to dismiss the complaint based on the Logans' failure to provide written notice of breach as required under the lease agreement.

¶8 The circuit court determined that the Logans failed to provide written notice of their claims of breach before filing the eviction action, as required by the lease agreement. The court also determined that the Logans failed to prove any of the alleged breaches, and that Schultz did not violate his implied duty of good faith. Accordingly, the circuit court granted Schultz's motion to dismiss the complaint.

[2] The Logans subsequently filed an amended complaint. I refer to the amended complaint as the complaint in the remainder of this opinion.

DISCUSSION

¶9 The Logans argue that the circuit court erred in several respects. I start with their argument that the circuit court erred in dismissing the complaint based on its determination that the lease agreement required that they provide written notice of breach to Schultz before commencing this action for eviction against Schultz.[3] I then address their argument that the circuit court erred in dismissing one of their claims of breach, for which they assert they did provide actual notice, based on the court's determination that the Logans had no basis for claiming that breach. Because these issues are dispositive, I do not address the Logans' remaining arguments. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (WI App 2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive."). As explained below, I conclude that the circuit court did not err in its findings, and, therefore, I affirm the circuit court's dismissal of the complaint.

A. Standard of Review

¶10 Where the circuit court is the ultimate finder of fact, and plaintiff has rested his or her case, "a ruling granting the motion to dismiss should constitute a disposition of the case on its merits." ***Household Utils., Inc. v. Andrews Co., Inc.***, 71 Wis. 2d 17, 25, 236 N.W.2d 663 (1976). Thus, the factual findings of the "[circuit] court sitting without a jury will not be set aside on appeal unless they are contrary to the great weight and clear preponderance of the evidence." ***Id.***

[3] As noted below, the Logans do not dispute that they had not provided written notice of the breaches alleged in the complaint.

¶11 The circuit court's application of the law to the facts presents a question of law that this court reviews independently. ***Joseph Hirschberg Revocable Living Trust v. City of Milwaukee***, 2014 WI App 91, ¶11, 356 Wis. 2d 730, 855 N.W.2d 699. Similarly, the "'application of a set of facts to the terms of a commercial lease and the determination of the parties' rights under that lease present questions of law that we review independently of the [circuit] court's determination.'" ***Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.***, 2002 WI App 230, ¶12, 257 Wis. 2d 789, 652 N.W.2d 819 (quoted source omitted).

B. Failure to Give Written Notice Under the Lease Agreement

¶12 The Logans do not challenge the circuit court's finding that they did not provide written notice for any of the claims of breach alleged in their complaint. Rather, they challenge the circuit court's conclusion that the lease agreement required that they provide such notice before filing the complaint. Specifically, the Logans contend that the lease agreement did not impose such a requirement as to the complaint that they filed. As I explain, the plain language of both the lease agreement and the complaint negates their argument.[4]

¶13 The notice of breach provision provided, "Lessor shall give Tenant written notice of such breach, delivered to Tenant personally or mailed by certified

[4] The Logans also argue that failure to give notice is an affirmative defense, and that Schultz waived this defense by not including it in his responsive pleadings. However, the Logans failed to make this argument in the circuit court and fails to develop it here with citation to relevant legal authorities, and therefore I do not consider it further. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) ("We normally will not review an issue raised for the first time on appeal."); *see also* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)).

mail." Certain words appear to have been omitted from the second half of the provision, as the sentence is grammatically disjointed:

> If Tenant fails within thirty (30) days after said notice to correct said breach, all rents pursuant to this Lease Agreement and institute action to expel Tenant from the Premises ….

Nevertheless, "[w]e interpret the language [of a contract] 'consistent with what a reasonable person would understand the words to mean under the circumstances.'" ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶22, 326 Wis. 2d 300, 786 N.W.2d 15 (quoted source omitted). Given the structure of the sentence, a reasonable person would understand the provision to mean that if written notice of breach was provided and Schultz failed to cure such breach within thirty days, then the Logans would have a right to institute an action to expel Schultz from the premises. In other words, the Logans' right to institute an action for eviction did not arise until the conditions—written notice of breach provided and opportunity to cure expired—were satisfied.

¶14 The Logans appear to agree with this understanding of the lease agreement, because they state in their initial brief that this notice of breach provision should have read:

> If Tenant fails within thirty (30) days after said notice to correct said breach, all rents pursuant to this Lease Agreement <u>shall be immediately due and payable and Lessors may declare this Lease Agreement terminated and</u> institute action to expel Tenant from the Premises ….

The words inserted by the Logans come from an unsigned version of the lease agreement, which was not received into evidence by the circuit court, and the Logans do not argue on appeal that the circuit court erred in excluding this evidence. But even if the parties did in fact intend the notice of breach provision

to be written as indicated by the Logans, the rewritten provision would only further support the conclusion that the notice of breach provision prevented the Logans from instituting an action for eviction without first providing written notice of breach and a thirty-day opportunity to cure.

¶15 The Logans argue that, nevertheless, this requirement did not apply here because they were "suing to remedy a breach" rather than to evict. The record indicates to the contrary. The Logans' complaint plainly indicated that they were seeking to evict Schultz from the premises, and their counsel stated before the circuit court, "This is an eviction action." Thus, the notice of breach provision applied, and the circuit court did not err in finding that that provision required the Logans to provide written notice of breach prior to instituting this eviction action against Schultz.[5]

C. No Basis for Alleged Breach Regarding Failure to Fix Exhaust System

¶16 The Logans concede that they did not provide any notice at all as to their claims of breach related to assignment and insurance.[6] However, they contend that they did provide actual notice as to their claim of breach related to the failure to fix the exhaust system. Assuming without deciding that there was such

[5] The Logans note that the landlord-tenant statutes that require written notice and opportunity to cure do not apply because this a commercial lease of longer than one year's duration. But, the circuit court did not rely on those statutes, and neither do I. Rather, like the circuit court, I rely solely on the language of the lease agreement to conclude that the Logans were required to provide written notice of breach before filing this eviction action against Schultz.

[6] The Logans did suggest before the circuit court that they provided notice by filing and serving the complaint. They do not pursue that argument on appeal, and therefore I do not address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned").

actual notice, the circuit court nonetheless did not err in dismissing this claim, because the Logans had no basis for claiming that Schultz breached the lease agreement for failure to fix the exhaust system.

¶17 "The primary goal in contract interpretation is to give effect to the parties' intentions. We ascertain the parties' intentions by looking to the language of the contract itself." ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426 (citations omitted). "Contracts are interpreted to give effect to the parties' intent, as expressed in the contractual language. Such language is to be interpreted consistent with what a reasonable person would understand the words to mean under the circumstances." ***Id.*** (citations omitted).

¶18 The provision that the Logans contend gave rise to Schultz's responsibility to fix the exhaust system states in pertinent part:

> **6. Fixtures and Equipment**. Tenant may use all existing fixtures and equipment. Tenant is responsible for maintaining in good condition all existing fixtures and equipment subject to normal wear and tear. Existing fixtures and equipment includes all bar equipment, (i.e. ice cream freezer, refrigeration units, dish washers, cash register, glassware, etc.), tables and chairs, stools, TV, steel shelves, etc. [T]enant may, at its own expense, replace, furnish and install such additional business and trade fixtures, equipment and signs in and on the Premises as may be necessary or desirable for Tenant's business.

The Logans argue that the exhaust system was a "trade fixture" under this provision of the lease, and, therefore, Schultz as the tenant was responsible for maintaining it.

¶19 The circuit court instead found that the exhaust system fell under the "ventilating ... equipment" category in a different provision of the lease agreement, which stated:

> **5. Maintenance and Repair by Tenant.** Lessors shall, at their own cost and expense, keep, maintain and repair the Premises, including all buildings and improvements of every kind which mayb e [sic] a part thereof …; all heating, electrical, air conditioning, ventilating and plumbing equipment therein; … and shall repair, restore and replace any such improvement s [sic] which may become inoperable or be dest royed [sic] or damaged by fire, casualty or any other cause. Tenant shall, at its own expense, keep the Premises in sanitary, clean and neat order. **Tenant shall keep the sidewalk free of ice and snow.**

(Emphasis in original.)

¶20 Upon independent review of the lease agreement, I conclude that the lease agreement is unambiguous and plainly required the Logans as the lessors, not Schultz as the tenant, to maintain and repair *all* ventilating equipment in the premises. *See* ***Algrem v. Nowlan***, 37 Wis. 2d 70, 79, 154 N.W.2d 217 (1967) ("'The language of a contract must be understood to mean what it clearly expresses. A court may not depart from the plain meaning of a contract where it is free from ambiguity.'" (quoted sources omitted)).

¶21 I further conclude that the circuit court did not err in finding that "ventilating ... equipment" included the kitchen exhaust system in this case. "[B]ased on the evidence presented," the circuit court found that the exhaust system operated to "capture vapors, air that has grease in it and then move that out of the building," and that constituted "ventilation." The Logans do not explain why that finding is clearly erroneous. Moreover, this finding is further supported by dictionary definitions. The dictionary defines "ventilate" as, "to pass or

circulate through so as to freshen and to dissipate vitiated or contaminated air." WEBSTER'S NEW INT'L DICTIONARY 2541 (3rd ed. 1993). The function of the kitchen exhaust system in this case, which was to move air from the kitchen to the outside, fell squarely within this dictionary definition.

¶22 Based on the unambiguous language in the lease agreement, I conclude that the circuit court did not err in finding that the kitchen exhaust system was ventilating equipment under provision five of the lease agreement, and that the burden of maintaining and repairing the exhaust system fell upon the Logans and not Schultz. Thus, even if the Logans had in fact provided actual notice of breach for failure to repair the exhaust system, Schultz did not breach the lease agreement, and the claim as to the exhaust system would still fail.

¶23 In sum, the Logans concede that they failed to provide written notice of any of the breaches alleged in the complaint before they filed the complaint, and the circuit court correctly concluded both that the complaint was an eviction action and that the lease agreement required such written notice before the Logans commenced the action against Schultz. And, even if the Logans provided actual notice of the breach as to the exhaust system, Schultz's failure to repair the exhaust system was not a breach of the lease agreement. Thus, the circuit court did not err in dismissing the complaint.[7]

[7] The Logans additionally assert that the circuit court erred in dismissing their implied duty of good faith claim, arguing that the duty of good faith includes a duty of candor and honesty, which required Schultz to tell the Logans the terms of the management agreement between Schultz and the Brocks. However, the Logans fail to develop their argument with citation to relevant legal authority. As stated above, "[a]rguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." ***Industrial Risk Insurers***, 318 Wis. 2d 148, ¶25 (citations omitted).

CONCLUSION

¶24 For the reasons set forth above, I conclude that the circuit court did not err in finding that the Logans failed to give Schultz written notice of breach as required by the lease agreement before filing this eviction action against Schultz. I also conclude that even if the Logans provided Schultz with actual notice of breach as to the exhaust system, Schultz's failure to repair that system was nonetheless not a breach under the terms of the lease agreement. Therefore, I affirm the order dismissing the complaint.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.