COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0571

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

APOLLO TRAVEL SERVICES PARTNERSHIP,
A DELAWARE PARTNERSHIP,

PLAINTIFF-RESPONDENT,

V.

UNIVERSAL-HERITAGE TRAVEL,
A DIVISION OF UBS, LTD.,
A WISCONSIN CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Universal-Heritage Travel (UHT) appeals from a judgment in favor of Apollo Travel Services Partnership for damages for breach of a lease of computerized travel reservation and ticketing systems. We reject UHT's

claim that Apollo's demand for fees was based on enforcement of a federally prohibited minimum use clause. We affirm the judgment.

¶2 The contract under which the parties operate commenced July 1, 1990, for a term ending October 31, 1994.[1] It provides for UHT's utilization of Apollo's computerized system and the lease of related equipment such as "CRT Subscriber Sets," ticket printers and itinerary/invoice printers. The lease covered three UHT sites in Racine. For each location a fixed monthly charge was owed, but Apollo would apply a substantial credit to the fixed charge "for each month during which [UHT] has performed all of its obligations under this Agreement."[2] The contract provides: "[T]he monthly fixed charges under this Agreement have been established at a level which reflects the expectation that [UHT] will actively use Apollo Services in its operations to process Apollo Transactions."

¶3 In September 1993, UHT explored the cost of early termination of the lease. Although UHT never gave formal notice of termination, Apollo became aware that UHT was not actively using the Apollo system. By a letter dated October 1, 1993, Apollo indicated that if UHT retained equipment at its locations without actively using it, UHT would no longer be entitled to a discount for services and it would be billed the full monthly fixed charge for each location. On June 20, 1994, Apollo gave notice that UHT was $19,055.99 in arrears and demanded that the breach of the lease be cured within five days. UHT forwarded

[1] The contract provides that Illinois law governs. The parties have not suggested that there is any significant difference between Illinois and Wisconsin law as to the issues raised on appeal.

[2] For example, a $820 fixed monthly charge was subject to a $656 monthly credit resulting in a net monthly fixed charge of $164, and a $1235 fixed monthly charge was subject to a $988 monthly credit resulting in a net monthly fixed charge of $247.

payment of $3020.85 for the seven months due. UHT calculated the amount due by applying the monthly credit. Apollo terminated UHT's lease for nonpayment.

¶4 In the circuit court, both parties moved for summary judgment.[3] The only dispute between the parties is whether Apollo's calculation of the fees due—that is not applying the monthly credit—violates the federal regulation prohibiting minimum use clauses. The applicable regulation of the Department of Transportation provides:

> No system may directly or indirectly impede a subscriber from obtaining or using any other system. Among other things, no subscriber contract or contract offer may require the subscriber to use a system for a minimum volume of transactions, and no subscriber contract or contract offer may require the subscriber to lease a minimum number or ratio of system components based upon or related to: (1) the number of system components leased from another system vendor or (2) the volume of transactions conducted on any other system.

14 C.F.R. § 255.8(b) (1999).[4]

¶5 In adopting the regulation, the Department of Transportation specifically considered but did not prohibit "productivity pricing." "Productivity pricing differs from minimum use clauses because a subscriber's failure to meet the minimum booking requirement does not constitute a breach of the agreement making the agency liable for substantial damages. Instead, the agency must pay a higher rate for having access to the system." 57 Fed. Reg. 43,826 (1992).

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[3] When both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996).

[4] This regulation took effect on December 7, 1992.

¶6 The circuit court found, and we agree, that the pricing clause at issue here effectuates productivity pricing and is not a minimum use clause. The crucial element is that UHT's failure to actively use Apollo's system did not create a breach of contract and liability for liquidated damages but resulted only in higher, nondiscounted, monthly charges. The contract specifically set forth that the discounted fee was based on active use of the system. UHT does not dispute that it ceased active use of the system after installing another system in August 1993. Apollo was entitled to demand full payment based on the absence of active use. UHT's failure to pay the nondiscounted fees breached the contract.

¶7 UHT challenges the circuit court's calculation of damages. It argues that it is not responsible for damages related to its 5610 Durand location under a February 8, 1993 suspension agreement. The contract between the parties provides that upon the cessation of business at any one location, but not all, a "de-install" charge and all unpaid fees up to the day of business cessation would be due. If the cessation of business extends for a continuous period of one year, then UHT "will have no liability for the location other than stated in this Article." The suspension agreement executed when UHT ceased operations at the 5610 Durand location suspended UHT's contractual obligations unless "revived by a breach of the [subscriber] agreement" prior to its natural expiration. The suspension agreement amended the cessation provision in the subscriber agreement and became the controlling agreement with respect to the 5610 Durand location. The suspension agreement also provided that in the event of early termination of the subscriber agreement, liquidated damages were due for the discontinued location from the date on which access to Apollo services ceased.

¶8 A breach of the subscriber agreement occurred, albeit not with respect to the 5610 Durand location. Because of the breach, the obligations

previously suspended were revived and UHT was responsible for liquidated damages for the 5610 Durand location.

¶9 With respect to the other two UHT locations, UHT claims that Apollo's damages are limited to the fixed monthly fee for the four remaining months of the contract. By advancing only a single calculation, UHT's argument is underdeveloped. We need not consider issues which the appellant does not develop. *See* ***Bartley v. Thompson***, 198 Wis. 2d 323, 341 n.10, 542 N.W.2d 227 (Ct. App. 1995). If UHT implicitly argues that Apollo is not entitled to recover the monthly charges in arrears at the time the contract was terminated, we summarily reject that suggestion. We conclude that the circuit court correctly set the damages based on undisputed evidence of the monthly fees, past due amounts, deinstallation charges and taxes.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.