COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0862 **Cir. Ct. No. 02SC002040**

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

RAUL J. WALTERS, D/B/A/ LAKE GENEVA CENTRE,

PLAINTIFF-RESPONDENT,

V.

NATIONAL PROPERTIES, LLC,

DEFENDANT-APPELLANT,

HORIZON PROPERTIES, INC., AND
HORIZON CONVENIENCE STORES, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 SNYDER, J.[1] National Properties, LLC (NPL), appeals from a judgment of eviction dated March 14, 2003. NPL contends that the lessor, Raul J. Walters, d/b/a Lake Geneva Centre (RJW), failed to provide lessee NPL with thirty days to correct the lease default as required by the default notice. We agree with the trial court that the lease agreement (Lease) controls the termination and eviction procedure, rather than the default notice, and affirm.

¶2 The relevant evidence was presented at a small claims trial on March 14, 2003. On December 23, 1993, NPL leased commercial real property in Walworth county from Horizon Properties, Inc. (HPI), for a ten-year period. On August 15, 1997, HPI assigned its interest in the Lease to RJW, but HPI remained liable for all of its obligations under the agreement.[2] The Lease required NPL to pay rent to RJW on the first day of each month. The Lease also required NPL to provide RJW with annual and monthly sales information[3] and to pay the real estate taxes. NPL failed to timely pay the rent due on September 1, 2002.

¶3 On September 13, 2002, RJW sent a thirty-day notice by certified mail to NPL requiring that it: (1) pay the overdue September 2002 rent, (2) provide the required monthly sales receipts, (3) provide the required annual statements on gas and store sales, and (4) pay the delinquent 2001 real estate taxes. NPL received the notice on September 16, 2002. On October 15, 2002, NPL

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] HPI was named as a defendant in this action but does not appeal from the judgment of eviction.

[3] The Lease provided that the monthly rent included a base amount plus a percentage amount of the monthly and annual sales of NPL. NPL was required to provide the sales information to RJW necessary to calculate the percentage portion of the monthly rent.

mailed the September 2002 rent payment to RJW. RJW received the check on October 17, 2002.

¶4 The relevant portions of the ten-year Lease agreement read:

> 18. DEFAULT AND BANKRUPTCY. If LESSEE should default in the payment of any rental or monies due hereunder, when due, or be in default of any covenant, agreement or condition herein provided for … then upon the occurrence of any one or more of such contingencies and after the LESSEE has been given notice by certified mail of such default, LESSEE has thirty (30) days after the date of such notice to correct such default or defaults. If no such corrections are made, this lease is canceled and all rights of the LESSEE are terminated….
>
> ….
>
> 22. NOTICE. All notices to be given to either party by the other shall be by Certified or Registered Mail, return receipt requested …. The time of any such notice shall begin to run with the date of the mailing of such notice.

¶5 The trial court concluded that the above Lease provisions are unambiguous and that RJW's default notice was effective on September 13, 2002, the date of mailing by RJW. Because more than thirty days had lapsed before NPL responded to the notice on October 15, 2002, the trial court granted the eviction judgment reflecting that the Lease was cancelled, that NPL's rights under the Lease were terminated, and that RJW was entitled to recover the leased property. NPL maintains, however, that the issue is controlled by the terminology in the September 13, 2002 default notice rather than the written Lease provisions.

¶6 The September 13, 2002 default notice reads in relevant part:

> YOU ARE HEREBY NOTIFIED that with respect to the premises situated in the City of Lake Geneva, County of Walworth … you are in Default under the lease dated December 23, 1993 ("the Lease") for the following matters:

> 1) Failure to pay the Landlord the sum of $3,421.42 for rent and $51.32 in late fees;
>
> 2) Failure to provide the Landlord on a monthly basis with copies of all receipts of your monthly sales as required by Section 4.1 of the Lease;
>
> 3) Failure to provide the Landlord with annual statements of the total number of gallons of gasoline sold and total inside sales prepared by your accountants as required by Section 4.3 of the Lease; and
>
> 4) Failure to pay real estate taxes as required by Section 8.1 of the Lease. Real estate taxes for 2001 remain unpaid. The amount owed through September 2002 is $8,671.10.
>
> YOU ARE FUTHER NOTIFIED that unless such defaults are resolved on or before the expiration of thirty (30) days after service of this Notice, Landlord will exercise its remedies under the Lease, including, but not limited to, the right to terminate your right to possession of the premises.
>
> Only FULL PAYMENT of the rent demanded in this Notice will waive the Landlord's right to terminate possession under this Notice, unless Landlord agrees in writing to continue possession in exchange for receiving partial payment.

¶7 NPL contends that because the default notice advised NLP that "unless such defaults are resolved on or before the expiration of thirty (30) days after *service of* this Notice" (emphasis added), the effective date of correcting the default was September 16, 2002.[4] In other words, the default notice amended, altered or otherwise changed the unambiguous Lease provisions by using the phrase "service of." NPL maintains, accordingly, that the October 15, 2002,

[4] RJW contends that NPL did not pay the delinquent property taxes in full until November 1, 2002, and that the delinquent tax failure alone supports the Lease termination and the eviction of NPL. However, RJW executive Leonard Cercone, Jr., testified that RJW received payment for the September rent default *and* the delinquent real estate taxes on October 17. The trial court did not address the delinquent property tax issue as presented in this appeal by RJW, and based upon Mr. Cercone's testimony we decline to address the issue further.

mailing of the September rent check was within the thirty-day correction period commencing on September 16, and that the trial court erred in granting the eviction judgment.

¶8 An enforceable lease agreement for more than one year must be in writing and contain certain mandatory requirements, *see* WIS. STAT. § 704.03. The agreement must also comply with the requirements of the statute of frauds, *see* WIS. STAT. § 706.02. NPL does not challenge the enforceability of the Lease or its compliance with those statutory requirements.

¶9 Whether a contract is ambiguous is a question of law which we review de novo. ***Erickson v. Gundersen***, 183 Wis. 2d 106, 115, 515 N.W.2d 293 (Ct. App. 1994). If the language of the contract is clear and unambiguous, we construe the contract as it stands. ***Kreinz v. NDII Sec. Corp.***, 138 Wis. 2d 204, 216, 406 N.W.2d 164 (Ct. App. 1987). However, if a contract is reasonably susceptible to one or more interpretations, it is ambiguous. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). When a contract is unambiguous, the language must be understood for what it clearly expresses. *See* ***Cernohorsky v. N. Liquid Gas Co.***, 268 Wis. 586, 592, 68 N.W.2d 429 (1955).

¶10 We conclude, as did the trial court, that the written, unambiguous contract provisions control the running of the correction period from the date of mailing of the default notice, September 13, 2002. The thirty-day period for correcting the default expired on October 13, 2002. NPL responded to the default notice on October 15, 2002, a date upon which, according to section 18 of the Lease, the "lease is canceled and all rights of [NPL] are terminated."

¶11 NPL concedes that the default notice language is contrary to the Lease provisions concerning the commencement of the thirty-day correction

period, but argues that the word "service" in the default notice trumps the Lease provisions. NPL cites to ***Hotel Hay Corp. v. Milner Hotels, Inc.,*** 255 Wis. 482, 39 N.W. 363 (1949), and ***Boeck v. State Highway Comm'n,*** 36 Wis. 2d 440, 153 N.W.2d 610 (1967), to support its position. We will address each in turn.

¶12 ***Hotel Hay Corp.*** involved a ten-year commercial lease with a provision that read, "in the event the lessee defaults in any terms or conditions of this lease, the lessor agrees to notify the lessee by registered mail at its principal office in Detroit, Michigan, and allow lessee twenty (20) days to correct such default." ***Hotel Hay Corp.***, 255 Wis. at 484. The landlord mailed the notice by registered mail on March 30, 1948, and the tenant received it on April 1, 1948. ***Id***. at 485. The ***Hotel Hay Corp.*** court held that under the lease provision the twenty-day corrective period did not expire until April 21, that the landlord's subsequent service of a three-day notice to vacate the premises on April 20 was inconsistent with the terms of the lease, and that the three-day notice could not be served until April 21. ***Id*** at 485-86.

¶13 ***Hotel Hay Corp.*** instructs us that "[i]n the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until the notice comes into the hands of the one to be served." ***Id.*** at 486 (citation omitted). ***Hotel Hay Corp***. states with certainty, however, that "the nature of notice required by contract depends, of course, upon the provisions of the contract." ***Id.*** (citation omitted). The contract provision here is that the default correction period begins with the mailing of the thirty-day default notice to NPL. ***Hotel Hay Corp.*** holds that the Lease controls and provides no relief to NPL's argument that the default notice alters, amends or otherwise changes the unambiguous provisions of the Lease.

¶14 ***Boeck*** is an easement case involving statutory notice of a jurisdictional offer. ***Boeck*** cites to ***Hotel Hay Corp.*** and reiterates the default notice law expressed in ***Hotel Hay Corp.*** We discern no support for NPL's argument that the use of the phrase "service of" in the RJW default notice altered the language in the Lease to allow a default correction more than thirty days after the mailing of the default notice by RJW.

¶15 NPL also suggests that WIS. STAT. § 704.17(3)(a) supports the default corrective period beginning on September 16 rather than on September 13, 2002. We cannot agree. Section 704.17(3)(a) says that upon a tenant's default, "the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay the rent … or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice, and if the tenant fails to comply with the notice." The Lease provides in section 18 that the tenant be "given notice by certified mail of such default," and section 22 provides that the notice "shall begin to run with the date of the mailing of the notice." The Lease language is not inconsistent with the subsec. (3)(a) requirement that the landlord "gives" the tenant notice. Even if inconsistent with the statute, the written provisions in a ten-year lease control. *See* § 704.17(5).[5]

¶16 The written, unambiguous Lease controls the running of the default correction period. Section 22 of the Lease provides that when "the LESSEE has been given notice by certified mail of such default, LESSEE has thirty (30) days

[5] WISCONSIN STAT. § 704.17 provides in relevant part:

> **(5)** CONTRARY PROVISIONS IN THE LEASE. Provisions in the lease … for termination contrary to this section are invalid except in leases for more than one year.

after the date of such notice to correct such default or defaults. If no such corrections are made, this lease is canceled and all rights of the LESSEE are terminated." The Lease at section 18 states that "[t]he time of any such notice shall begin to run with the date of the mailing of such notice."

¶17 RJW mailed the notice by certified mail on September 13, 2002. Therefore, under the applicable Lease provisions, NPL had until October 13, 2002, to correct the defaults. NPL did nothing until October 15, 2002, when it mailed the September 2002 rent check to RJW. The defaults were not timely corrected under the Lease provisions and the Lease terminated prior to NPL's corrective action.

¶18 We are satisfied that the use of the phrase "service of" in the default notice did not alter the Lease provisions controlling default and termination. Our supreme court has held that the purpose of contract construction is to ascertain the intention of the parties expressed by all the language contained in the contract rather than to put a trick interpretation or twist upon one word. ***Langer v. Stegerwald Lumber Co***., 259 Wis. 189, 192, 47 N.W.2d 734 (1951). Here, NPL relies upon the use of a word or phrase extraneous to the Lease itself to obtain relief from the written Lease. We conclude that the phrase "service of" in the default notice is legally insufficient to support the intent to abandon or change the Lease provisions.

By the Court.—Judgment affirmed.

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