COURT OF APPEALS
DECISION
DATED AND RELEASED

June 4, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2273

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

MAIN STREET PARTNERS, A WISCONSIN GENERAL PARTNERSHIP,

PLAINTIFF-RESPONDENT,

V.

KATHLEEN KAMINSKI AND PATRICIA WALES,

DEFENDANTS-APPELLANTS.

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

Before Brown, Nettesheim and Anderson, JJ.

NETTESHEIM, J. Patricia Wales and Kathleen Kaminski (Appellants) appeal from a judgment awarding Main Street Partners damages relating to a lease agreement. They contend that the trial court erred: (1) in determining that they were liable in their personal, rather than in their corporate, capacity; (2) by admitting parol evidence; (3) by rejecting their defense based on

novation and equitable estoppel; and (4) by awarding certain categories of damages. We reject each of the Appellants' arguments and affirm the judgment

FACTS

In December 1991, the Appellants entered into a five-year lease agreement by which they leased a premises located at 755 Main Street in Lake Geneva from Dennis Dawiedczyk and Mike Williams. The site of the leased premises was near the Appellants' shoe business which they operated as a corporation known as Tootsies, Ltd. The Appellants never intended to, nor did they, occupy the leased premises. Instead, they leased this site so that any business activity conducted thereon would not negatively impact their nearby shoe business. The typed introductory paragraph of the lease recites that the Appellants are the lessees. However, penned into the margin after the Appellants' names is the notation "D/B/A TOOTSIES, LTD." The signature page of the lease bears the signatures of the Appellants with no references or notations to Tootsies, Ltd.

In February 1992, the Appellants subleased the premises to Scott Temple (d/b/a Yikes, Inc.) for the period between April 1992 and March 1993. For the convenience of all the parties, Temple paid the rent due the Appellants under the sublease directly to Dawiedczyk and Williams. In August 1992, Dawiedczyk and Williams sold the leased premises to the respondent, Main Street Partners. Under the terms of this sale, the Appellants' lease with Dawiedczyk and Williams was assigned to Main Street Partners.

Approximately six months later, the Appellants closed Tootsies, Ltd. At this time, Temple was not current in his rental payments under the sublease with the Appellants. Since these payments were to be paid directly to Main Street Partners, the Appellants were in similar default under their direct lease with Main

Street Partners. When Temple learned that the Appellants would not continue to lease the subleased premises, he contacted Main Street Partners hoping to negotiate a direct lease of the premises. Main Street Partners agreed to enter into a direct lease with Temple conditioned upon his satisfaction of all the rent due under the sublease. Temple never paid the rent due under his sublease. Temple later closed his business and vacated the subleased premises on October 31, 1993. The direct lease was never finalized.

Following Temple's vacation of the subleased property, Main Street Partners commenced this action against the Appellants personally to recover the unpaid rent and other damages under the terms of the lease. The matter proceeded to a bench trial. On a threshold basis, the Appellants argued that they were not personally liable because the lease was between Main Street Partners as the successor lessor and Tootsies, Ltd. as the lessee. Over the Appellants' objection, the trial court allowed the testimony of Williams, one of the original lessors, who testified that the Appellants were the tenants under the lease and that he and Dawiedczyk entered into the lease with the Appellants individually as well as with Tootsies, Ltd.

In a memorandum decision, the trial court ruled in favor of Main Street Partners. The court wrote, "If there is ambiguity in the original lease, it is certainly clear by the testimony of the former owner, Michael Williams, that the intended tenants were Kaminski and Wales only. The interlineation provided another entity that would be liable for the rents and was not a substitution of parties liable." The court additionally rejected the Appellants' "novation" argument that the lease negotiations between Temple and Main Street Partners negated their lease. The trial court awarded damages to Main Street Partners for past rent, interest, taxes, utilities and upgrades. This appeal followed.

DECISION

Construction of the Lease and Parol Evidence

The typed introductory paragraph of the lease agreement provides:

> This lease agreement, made and entered into … by and between Dennis Dawiedczyk and Michael Williams [] (hereinafter called "LESSOR"), and Kathleen Kaminski and Patricia Wales (hereinafter called "LESSEE").

A handwritten notation in the margin of this paragraph was inserted following "Patricia Wales" which reads "D/B/A TOOTSIES, LTD." Based on this annotation, the Appellants argued that the terms of the lease bound Tootsies, Ltd., not them as individuals.

The threshold question in this case is who are the tenants under the terms of the lease. Both parties argue that the lease is unambiguous and should be interpreted in their favor. The Appellants contend that the language of the lease unambiguously indicates that their corporation, Tootsies, Ltd., is the tenant. Thus, they are not individually liable for any damages. Main Street Partners argues that the lease unambiguously names the Appellants, individually, as tenants. We hold that the lease unambiguously names the Appellants, individually, as tenants.

Whether a written contract is ambiguous is a question of law which we review independently of the trial court. *See* ***Erickson v. Gundersen***, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994). If the language of the contract is clear and unambiguous, we construe the contract as it stands. *See* ***Kreinz v. NDII Sec. Corp.***, 138 Wis.2d 204, 216, 406 N.W.2d 164, 169 (Ct. App. 1987). However, if a contract is reasonably and fairly susceptible to one or more interpretations, it is ambiguous. *See* ***Jones v. Jenkins***, 88 Wis.2d 712, 722, 277 N.W.2d 815, 819 (1979).

The preamble to the lease provides that Kaminski and Wales are parties to the lease. While the margin notation "D/B/A TOOTSIES, LTD." describes the capacity in which the Appellants were doing business, it does not recite or govern the capacity in which the Appellants were entering into the lease agreement. Even if we are incorrect in this holding, this margin entry does not indicate that Tootsies, Ltd. *is the sole lessee party to the lease*. At best, the annotation provides that Tootsies, Ltd. is an additional party to the lease and does not operate to eliminate Kaminski and Wales as lessees.

In addition, we deem it significant that the signature lines on the final page of the lease bear the individual signatures of the Appellants as the lessees under the agreement. Here there is no annotation or any other entry indicating that Tootsies, Ltd. is a party to the lease or that the Appellants affixed their signatures in any representative capacity for Tootsies, Ltd., much less that Tootsies, Ltd. was the sole responsible party. Had the Appellants intended such, surely they would have indicated as much in this critical portion of the lease.

Considering the entire lease, we conclude that the handwritten annotation to the preamble of the lease does not raise doubt as to the Appellants' personal obligation, and it cannot reasonably be construed to replace them as responsible parties under the agreement. We therefore conclude that the lease unambiguously names and obligates the Appellants, individually, as parties to the lease. *See* ***Kreinz***, 138 Wis.2d at 216, 406 N.W.2d at 169.

The Appellants also contend that the trial court erred by admitting parol evidence. We disagree. "The parole evidence rule only applies if the writing is intended by both parties to be the final and complete expression of their agreement and only bars evidence intended to vary such expression." ***Kramer v.***

Alpine Valley Resort, Inc., 108 Wis.2d 417, 426, 321 N.W.2d 293, 297 (1982). The Appellants contend that the lease was intended by both parties to contain the entire written agreement. Main Street Partners does not argue to the contrary. However, Main Street Partners contends, and we agree, that Williams' testimony did not vary or modify the terms of the written lease.

The trial court admitted the testimony of Michael Williams, one of the original lessors, in order to clarify any ambiguity in the lease. Williams' testimony was limited to his understanding of who the parties to the lease were. The Appellants objected at trial to the admission of Williams' testimony because of their contention that the document unambiguously revealed that they did not personally enter into the lease. In considering Williams' testimony, the trial court stated: "*If* there is ambiguity in the original lease, it is certainly clear by the testimony of the former owner [Williams], that the intended tenants were Kaminski and Wales only. The interlineation provided another entity that would be liable for rents and was not a substitution of parties liable." (Emphasis added.)

Parol evidence is admissible to explain latent ambiguities; however, it cannot establish an understanding in variance with the terms of the written document. *See* ***Marshall & Ilsley Bank v. Milwaukee Gear Co.***, 62 Wis.2d 768, 777, 216 N.W.2d 1, 6 (1974). We have already held that the lease agreement is unambiguous as to the Appellants' individual capacity in executing the lease. Since Williams' testimony did not vary this interpretation, the testimony did not violate the parol evidence rule. If we are in error and the lease is ambiguous on this question, then Williams' testimony was properly received under the parol evidence rule to clarify the ambiguity. The trial court's ruling would constitute error under only one scenario—that the lease unambiguously establishes that

Tootsies, Ltd. is the sole responsible lessee. No reasonable construction of the lease permits that interpretation.

In sum, the Appellants' arguments on this issue fail in every respect. We hold that the lease unambiguously names the Appellants, individually, as tenants to the lease. Thus, the admission of Williams' testimony was not error. If we were to conclude that the lease is ambiguous, the parol evidence admitted by the trial court clarifies the ambiguity and we would uphold the trial court's ruling in this instance as well.

Tenancy Relationship and Novation

The Appellants contend that even if they are personally bound to the obligations of the lease contract, they were "relieved of any obligation when the original lease was terminated by operation of law …." The Appellants contend that the termination of their direct lease with Main Street Partners occurred when a landlord/tenant relationship was created between Main Street Partners and Temple. In support of this argument, the Appellants first contend that Temple held a "periodic tenancy" or a "tenancy at will"[1] with Main Street Partners after the term of the sublease with the Appellants expired. We disagree.

Temple occupied the premises under a sublease agreement with the Appellants. After the expiration of his sublease, Temple remained as a sublessor, holding over under the terms of his sublease with the Appellants. We are not persuaded differently simply because Temple continued to make direct payments

[1] A tenant who holds possession without a valid lease and pays rent on a periodic basis is a periodic tenant. *See* § 704.01(2), STATS. A tenant at will holds possession with permission of the landlord without a valid lease and under circumstances not involving periodic payment of rent. *See* § 704.01(5).

to Main Street Partners. As we have explained, this payment plan was arranged as a convenience to the parties, including the Appellants. It did not serve to change the legal relationship of the parties when made; nor did it do so after the Appellants fell into default under their direct lease with Main Street Partners. Although the sublease between Temple and the Appellants had expired, the fact remains that the direct lease between the Appellants and Main Street Partners was still in effect. If Temple's holdover established a periodic tenancy or a tenancy at will with anyone, it was with the Appellants, not Main Street Partners.

The Appellants next contend that Main Street Partners and Temple entered into a new lease, or novation, thereby negating the lease between the Appellants and Main Street Partners. At the end of the sublease term, Temple contacted Main Street Partners with the hope of negotiating a direct lease. However, the lease was never signed by Main Street Partners. The Appellants argue that because Main Street Partners accepted Temple's security deposit and permitted Temple to occupy the premises, there was a "novation of the former lease substituting Scott Temple and his corporation as lessee."

In ***Brooks v. Hayes***, 133 Wis.2d 228, 244-45, 395 N.W.2d 167, 174 (1986), the supreme court defined a novation as:

> an agreement between the obligor, obligee and a third party by which the third party agrees to be substituted for the obligor and the obligee assents thereto, the obligor is released from liability and the third person takes the place of the obligor.

In considering whether a novation has been achieved, the court must determine: (1) whether the evidence clearly showed consent by all parties and (2) whether there was sufficient consideration to show a new obligation. *See* ***Siva Truck Leasing, Inc. v. Kurman Distribs.***., 166 Wis.2d 58, 68, 479 N.W.2d 542,

546 (Ct. App. 1991). "Acceptance of the terms of novation may be implied from the facts and conduct of the parties in relation thereto." ***Id***. Whether the parties' actions constituted a novation is a mixed question of fact and law. *See* ***id.*** at 68, 479 N.W.2d at 546-47. Thus, we give weight to the trial court's decision; however, it is not controlling. *See* ***id***. at 68, 479 N.W.2d at 547.

The trial court concluded that "[t]here is simply not the necessary meeting of the minds here nor a new consideration sufficient to require a discharge of the prior obligation."[2] We agree. Both Roger Wolff of Main Street Partners and Temple testified that there was no new lease agreement. Wolff testified that he never signed the proposed lease agreement between Temple and Main Street Partners because Temple was not current on his rent payments. Additionally, Wolff testified that prior to any signing of a new lease, "I would have had to receive a mutual release and cancellation so I didn't have an obligation to two parties. In other words, that I had two leases … we were a far ways off from being able to consider signing this lease." Temple confirmed Wolff's testimony that Main Street Partners never signed a new lease.

Appellants concede that the lease was never signed. Nonetheless, they argue that Main Street Partners consented to the new lease. But this argument is contrary to the testimony of Main Street Partners and Temple, the

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[2] In its memorandum decision, the trial court refers to a portion of the Wisconsin jury instruction on novation which provides:

> Consideration and a meeting of the minds of all parties to the new contract are required before discharge of the original contract can be found. However, it is not required that the agreement to discharge the original contract be shown by express words, for it may be implied from the circumstances of the relationship and the conduct of the parties.

WIS J I—Civil 3034.

very parties involved in the lease negotiations. It strikes us that those parties were more reliable and credible sources as to whether a new agreement was reached than the Appellants who were strangers to those negotiations. The new lease was never signed because a condition for its execution—that Temple become current in his delinquent payment under the sublease with the Appellants—was never satisfied. We conclude that a novation did not occur in this case.

Estoppel

Appellants argue that Main Street Partners should be estopped from asserting a breach of the lease because it accepted and retained a new written lease signed by Temple.[3] The Appellants argue that they relied upon the new "leasehold relationship" and to allow Main Street Partners to deny its existence "would be most inequitable." We reject the Appellants' argument.

In order to invoke equitable estoppel, the Appellants must show that the action or inaction of Main Street Partners induced reasonable and justifiable reliance by the Appellants to their detriment. *See* ***State v. City of Green Bay***, 96 Wis.2d 195, 202-03, 291 N.W.2d 508, 511 (1980). The Appellants have failed to make the requisite showing.

First, the Appellants' argument for equitable estoppel hinges on our acceptance of their contention that the negotiations which occurred between Temple and Main Street Partners resulted in a new lease agreement. We have already rejected that argument. Therefore, we likewise decline to accept that the

[3] The trial court's decision does not expressly address this defense. However, the Appellants did raise this issue in the trial court, and both parties have substantively addressed the issue on appeal. We therefore address the issue on its merits.

Appellants' reliance on the new "leasehold relationship" between Temple and Main Street Partners was reasonable.

Second, the Appellants' argument in support of estoppel is based in part upon unsupported conclusions regarding the actions and intentions of Temple and Main Street Partners. For example, the Appellants state that Temple occupied the premises "believing that he had a right to that possession under that new lease …." This is contrary to the position of Temple himself who acknowledged that he was fully aware that the proposed new lease was never finalized. Moreover, Wolff testified that he would not enter into a lease without first terminating Main Street Partners' lease with Appellants. Such termination never took place. We reject the Appellants' estoppel argument.

Damages

Besides unpaid rent, the trial court awarded Main Street Partners $12,486 for upgrades to the building. The Appellants contend that this award was error because Main Street Partners failed to present any credible evidence in support of its claim for damages for "upgrades" of the premises. The Appellants argue that Main Street Partners "has the burden to come forward with proof concerning not only the need for the upgrade, but also the nature and extent of the 'upgrades' and the costs incurred for those 'upgrades.'" In response, Main Street Partners argues that the "expenditures were incurred in order to attract and accommodate a new tenant."

A trial court's findings of fact will not be overturned unless clearly erroneous. *See* § 805.17, STATS. Based on our review of the relevant evidence and the applicable law, we see no error in the trial court's award of damages.

At trial, Main Street Partners submitted a damages statement indicating that it spent $6886 on improvements to the front of the building and $5600 on roofing expenses. The roofing expenses are covered in the terms of the lease which provides: "LESSEE shall be responsible for the care, maintenance and repair of the roof …."

Main Street Partners additionally made improvements to the front of the building with the intention of attracting a new tenant. Our supreme court has held that "a landlord is entitled to recover reasonable remodeling or alteration expenses which are actually incurred in mitigating the damages which result when a tenant abandons his lease." ***Ross v. Smigelski***, 42 Wis.2d 185, 197, 166 N.W.2d 243, 249 (1969). Under this law, we hold that the trial court properly awarded Main Street Partners damages for this expense.

We also note that the question of damages in this case received little prominence in the trial court. The major issue in that forum was the lead issue on this appeal—whether the Appellants were personally responsible under the lease. Main Street Partners' itemization of damages, including the upgrades, was not challenged during the evidentiary phase of the trial. In their posttrial brief, the Appellants questioned this item of damages, but the argument was linked to a clause in the lease relating to damages for lost rent. This is a matter we discuss next. Otherwise, the Appellants merely complained that Main Street Partners' brief had not argued in support of the damages. But the Appellants never argued that the evidence did not support the damages. In light of the oblique challenge to this item of damages, we do not find it surprising that the trial court chose to accept Main Street Partners' itemization of damages and to award damages accordingly. We affirm the award of these damages.

The Appellants additionally challenge the trial court's award of damages on the basis that the recoverable damages were limited under the terms of the lease. In support of their position, the Appellants point to the following language of the lease: "If LESSOR is then successful in subletting the premises to another tenant he will only hold LESSEE responsible for the amount of rent received that is less than the amount of rent that should be received under the terms of this lease." Since Main Street Partners later sublet the premises to a third party, the Appellants argue that this clause of the lease governs Main Street Partners' entire damage claim.

We observe that this language speaks only to damages for loss of rent. There is nothing in this language, or any other language of the lease, indicating that this limitation on rental loss precludes recovery for other categories of damage resulting from the breach of the lease. To the contrary, the lease also states, in the same paragraph, "In the event LESSOR successfully brings any legal action under this Lease, LESSEE shall pay upon demand all of LESSOR'S costs, charges and expenses, including attorneys' fees." We uphold the trial court's award of damages.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.