COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0136

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

WR JOINT VENTURE,

PLAINTIFF-APPELLANT-
CROSS RESPONDENT,

v.

RECORD TOWN, INC.,

DEFENDANT-RESPONDENT-
CROSS APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Wood County: DENNIS D. CONWAY, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. WR Joint Venture (WR) appeals from a judgment awarding it $9,919.48, including $7,988.67 in attorney fees, against Record Town, Inc. as a result of Record Town's default on a commercial lease.

WR argues that the trial court erred in limiting its damages to five-percent interest and the amount of rent due under paragraph 3 of the lease because the correct measure of damages is set forth in paragraph 15[1] of the lease, which also provides for eight percent on amounts past due. Record Town cross-appeals from that

[1] Paragraph 15 of the parties' lease entitled "Default by Tenant" provides:

> If Tenant defaults in the payment of minimum rent or other charges or in the performance of any other of Tenant's obligations hereunder, and fails to remedy such default within ten (10) days after written notice from Landlord … Landlord may enter upon the premises and terminate this lease. In the event of such termination, the obligations of Landlord hereunder shall cease without prejudice, however, to the right of Landlord to recover from Tenants any sums due Landlord for rent or otherwise to the date of such entry, and also liquidated damages equal to any deficiency between the then rental value of the Premises for the unexpired portion of the term and the rent provided for that portion of the term, discounted at four percent (4%) per annum to present net worth.
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> In addition, Landlord may enter upon the Premises without terminating this lease and may relet them in its own name for the account of Tenant for the remainder of the term at the highest rent then obtainable and immediately recover from Tenant any deficiency for the balance of the term between the amount for which the Premises were relet, less expense of reletting, including all necessary repairs and alternations and reasonable attorneys fees and the rent provided hereunder….
>
> If Tenant at any time fails to pay any taxes, assessments, or liens, to make any payment or perform any act required by this lease to be made or performed by it, Landlord, without waiving or releasing Tenant from any obligation or default under this lease, may (but shall be under no obligation to) at any time thereafter make such payment or perform such act for the account and at the expense of Tenant. All sums so paid by Landlord and all costs and expenses so incurred shall accrue interest at the rate of eight per cent (8%) from the date of payment or incurring thereof by Landlord and shall constitute additional rent payable by Tenant under this lease and shall be paid by Tenant to Landlord upon demand. All other sums payable by Tenant to Landlord under this lease if not paid within seven business days after due, shall accrue interest at the rate of eight per cent (8%) per annum from their due date until paid, said interest to be so much additional rent under this lease and shall be paid to Landlord by Tenant upon demand.

portion of the judgment that awarded WR attorney fees for prosecuting the action. Record Town argues that the lease provides for attorney fees only if they are incurred by WR in reletting the premises.

We conclude that paragraph 15 of the parties' lease applies to all of WR's damages, while paragraph 3(c) applies to the calculation for one component of those damages. We also conclude that paragraph 15 provides for attorney fees only if incurred in reletting the premises. We therefore reverse.

BACKGROUND

The facts of this case are not in dispute. Record Town entered into a commercial lease with WR for retail space in the Shopko Plaza in Wisconsin Rapids. The lease, dated May 28, 1987, was for a term of ten years. The lease provides that Record Town would pay WR $16,000 in minimum rent in installments of $1,340.83 monthly; percentage rent of four percent of gross sales in excess of $402, 250;[2] real estate taxes and assessments;[3] a monthly common area charge which included insurance;[4] and monthly merchant's association dues.[5]

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[2] Paragraph 3 of the parties' lease provides:

> (a) Minimum rent. Tenant shall pay to Landlord , at its office or such other place as the Landlord may from time to tome designate, as "Minimum Rent" for the premises during the term of this lease, without any deduction or setoff, the sum of Sixteen Thousand and Ninety and 00/100 Dollars ($16,090.00) per annum, in equal monthly installments of One Thousand Three Hundred Forty and 83/100 Dollars ($1, 340.83), in advance, on the first day of each calendar month.
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> (b) Percentage Rent. Tenant also shall pay to Landlord as "Percentage Rent" during each lease year, without any deduction or setoff, six per cent (6%) of Gross Sales" in excess of Three Hundred Twenty One Thousand Eight Hundred Dollars ($321,800.00)(the "minimum basis of sales")

(continued)

On April 1, 1996, Record Town did not pay its minimum rent or any other obligation under the lease. Record Town advised WR on or about April 15,

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> This section was amended on March 11, 1991, to provide that "Tenant shall pay to Landlord as Percentage Rent" during each lease year, without any deduction or setoff, four percent (sic) (4%) of "Gross Sales" in excess of Four Hundred Two Thousand Two Hundred Fifty Dollars ($402, 250.00) (the "minimum basis of sales"). (exhibit 1)
>
> (c) In the event Tenant shall fail to keep its Premises open for business during normal business hours, as hereinafter defined, Tenant shall pay to Landlord on and after the date of closing not only the minimum rent but also an amount per year equal to one-third (1/3) of the total percentage rent paid by Tenant for the last three (3) lease years immediately preceding such termination, and if less than three (3) lease years shall have elapsed, an amount per year equal to four (4) times the average quarterly percentage rental theretofore paid. In the event no percentage rental has been paid by Tenant, Tenant shall pay to Landlord the sum of Twenty Dollars ($20.00) per day in addition to the said minimum rent.

[3] Paragraph 4 of the parties' lease provides in relevant part:

> (a) Real Estate Taxes and Assessments. Tenants shall pay Tenant's proportionate share of all real estate taxes and assessments, both general and special, levied or assessed by any lawful authority, for each calendar year during the term hereof against the land, buildings and all other improvements within the Shopping Center or against any land or improvements which may be added thereto. . . .

[4] Paragraph 6 of the parties' lease provides in relevant part:

> (b) Common Area Charge. Tenant shall pay to Landlord as a "Common Area Charge" a proportionate share of all cost and expenses of every kind and nature paid or incurred by Landlord in operating and maintaining Common Areas.

[5] Paragraph 22 of the parties' lease provides in relevant part:

> Merchant's Association. Provided that ninety percent (90%) of the other tenants do likewise Tenant covenants and agrees to join and maintain membership in any business or merchant's association sponsored for the Shopping Center, and to pay its proportionate share of the cost of the activities conducted by such association.

1996, that it intended to close down the store. WR sent a letter on April 17, 1997, to Record Town notifying Record Town it was in default for failure to pay rent and referring to paragraph 15 of the lease, "Default by Tenant." Record Town closed its store and WR filed suit for money damages, injunctive relief and attorney fees. The trial court denied WR's motions for a temporary injunction and a permanent injunction directing that Record Town reopen for business.

After an evidentiary hearing, the court ordered the parties to brief two issues: (a) whether paragraph 3(c) or paragraph 15 was applicable to determine damages, and (b) the appropriate amount of attorney fees to which WR was entitled. WR, in its brief to the trial court, argued that both paragraph 15 and paragraph 3(c) applied: Paragraph 15 to determine all the remedies and obligations of the landlord and tenant upon default, and paragraph 3(c) to determine how to compute one of the tenant's obligations under paragraph 15 if the tenant closes its business. Record Town argued that only paragraph 3(c) applied because it was "liquidated damage" for the precise situation that occurred here—Record Town closing its business.

The trial court ruled that paragraph 3(c) was applicable, not paragraph 15, because the former was "specific as to this default and must not be treated as surplusage which it would be if Section 15 controlled." It awarded the minimum rent for August and September 1996, pursuant to paragraph 3(a) (Record Town had by this time paid the minimum rent for April through July) and awarded percentage rent for June through September as computed under paragraph 3(c), as well as interest on the late rent at five percent. The court also concluded that WR's actions in bringing the suit and the motions were reasonable efforts to enforce the lease, and that under the lease it was entitled to $7,988.67 in attorney fees for those proceedings.

DISCUSSION

Both the appeal and cross-appeal require the court to interpret the parties' lease. We review the application of a set of facts to the terms of a commercial lease and the determination of the parties' rights under that lease independently of the trial court's determination. *See* ***Bence v. Spinato***, 196 Wis.2d 398, 408, 538 N.W.2d 614, 617 (Ct. App. 1995). When the terms of the contract are plain and unambiguous, we interpret the contract as it stands. ***Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.,*** 166 Wis.2d 105, 114, 479 N.W.2d 557, 561 (Ct. App. 1991). We are to construe contracts so as to give a reasonable meaning to each provision and are to avoid constructions that render portions meaningless or surplus. *See* ***Goebel v. First Federal Savings and Loan Ass'n of Racine***, 83 Wis.2d 668, 679, 226 N.W.2d 353, 358 (1978).

Relationship of Paragraphs 3 and 15

WR contends that the lease is unambiguous regarding the application of paragraphs 3(c) and 15. According to WR, paragraph 3(c) is a "stipulated damage clause" that stipulates damages only for percentage rent in the event there are no gross sales from which to compute percentage rent under paragraph 3(b) because the tenant closed its business. It is not, WR contends, a stipulated damage clause for all damages that may be recovered by WR in the event of Record Town's default. Record Town responds that the trial court was correct, that WR's interpretation of the lease renders paragraph 3(c) meaningless or surplus.

We turn to an examination of the language of the lease. The lease provides that Record Town will make certain categories of payments, each described under separately headed paragraphs: Rent (consisting of minimum rent under paragraph 3(a) and percentage rent under 3(b)), taxes, common area

charges, and merchant's association fees.[6] Paragraph 15, entitled "Default by Tenant," sets forth the landlord's and tenant's remedies and obligations in the event the tenant "defaults in the payment of Minimum Rent or other charges or in the performance of any other of Tenant's obligations hereunder and fails to remedy such default within ten (10) days after written notice from Landlord…." In general terms, paragraph 15 provides WR, after the prescribed notice and failure to cure, with two options. It may enter the premises, terminate the lease and recover from Record Town "any sum due [WR] for rent or otherwise to the date of such entry," and also liquidated damages. The liquidated damages are calculated in a specified manner, which necessitate a computation of the rent due during the unexpired lease term. Alternatively, WR may enter the premises without terminating the lease and relet in its own name for the remainder of the term and recover any deficiency for the balance of the term, which again requires a computation of the rent provided for in the lease.

Paragraph 15 also specifically addresses the tenant's failure "to pay any taxes, assessments, or liens or make any payment … required by this lease…." The landlord may make those payments, in which case those sums plus costs incurred and interest at eight percent "constitute additional rent payable by the tenant…. All other sums payable by Tenant to Landlord under this lease" also accrue interest at eight percent from their due date. Finally, paragraph 15 provides that the rights and remedies of the landlord "herein enumerated shall be cumulative…."

[6] *See* footnotes 2 through 5.

While paragraph 15 addresses "Default by Tenant," paragraph 3, "Rent," by its plain terms addresses one component of the tenant's obligation—rent. Rent consists of minimum rent in a fixed monthly amount (paragraph 3(a)) and percentage rent based on a percentage of gross sales (paragraph (3)(b)). Paragraph 3(c) by its plain terms provides a formula to compute percentage rent "in the event that Record Town fails to keep its store open for business during normal business hours." Such a formula is needed because if the store is not open during normal business hours, percentage rent cannot be computed according to paragraph 3(b). There is no indication in the language of paragraph 3 that paragraph 3(c) provides anything other than a method of computing percentage rent under specified circumstances. In short, the lease provides for the parties' obligations and remedies in the event of the tenant's default in paragraph 15 and sets forth the mechanism to compute one obligation—rent—in paragraph 3(c).

We do not agree with Record Town that WR's interpretation of paragraphs 3(c) and 15 render 3(c) meaningless. Under either option in paragraph 15, the landlord, in the event of a default, may use paragraph 3(c) to calculate "percentage rent." If WR had chosen the first option in paragraph 15—termination of lease—the tenant would owe rent (and other sums due) to the date of entry. Since the date of entry will be after notice of default and after an additional ten (10) days, the premises may well have been closed for business for a period of time and the rent owed will then be determined under paragraphs 3(a) and 3(c). Under both options it is necessary to compute the "rent provided hereunder" for the balance of the lease term to determine the deficiency due WR. Although paragraph 3(c) comes into play when Record Town defaults by closing

its business,[7] it is not the exclusive remedy for that default but a method of computing percentage rent in order to apply the remedies for default under paragraph 15.

We conclude that there is no ambiguity when paragraphs 3 and 15 are read together. Paragraph 3(c) determines the percentage rent that is owed, in addition to minimum rent, since Record Town did not keep its business open as required by the lease. Paragraph 15 defines all WR's remedies in the event of a default. This interpretation gives a reasonable meaning to each paragraph of the contract, *see* ***Goebel v .First Federal Savings and Loan Ass'n of Racine***, 83 Wis.2d 668,679, 226 N.W.2d 352, 358 (1978), and does not render either paragraph superfluous.[8]

Record Town concedes that if paragraph 15 is applicable to measure WR's damages, the interest rate on the unpaid amounts is eight percent, not five percent. We accept this concession because that is the plain language of paragraph 15, which we have concluded is applicable.

[7] Paragraph 8 requires that "[t]enant shall continuously and uninterruptedly during the term of this lease conduct its usual and customary business activity … on all normal business days" during specified minimum hours.

[8] Record Town argues that WR repeatedly argued in its initial two briefs to the trial court and at two hearings before the trial court that paragraph 3(c) was the applicable paragraph to determine the correct measurement of WR's damages The portions of the record Record Town cites to shows testimony on how "damages" were to be computed under paragraph 3(c). While the use of the word "damages" may, at first glance, create some confusion, we are satisfied that this portion of the transcript cannot fairly be read as a concession by WR that paragraph 15 does not apply.

Attorney Fees

On Record Town's cross-appeal from the portion of the judgment awarding WR attorney fees, Record Town argues that paragraph 15 provides for attorney fees that have been incurred only in reletting the premises. We agree with Record Town.

In construing contract provisions concerning attorney fees, certain additional considerations apply. Like most states, Wisconsin follows the "American Rule" under which parties are generally responsible for their own attorney fees. ***Hunzinger Construction Co. v. Granite Resources***, 196 Wis.2d 327, 338, 538 N.W.2d 804, 809 (Ct. App. 1995). With very few exceptions not applicable here, attorney fees may not be awarded unless authorized by statute or by a contract between the parties. ***Id***. We will not construe a contract to obligate payment of attorney fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides. ***Id*** at 340, 538 N.W.2d at 809.

As previously indicated, paragraph 15 of the parties' lease affords the landlord two options when the tenant defaults: (a) enter the premises and terminate the lease, or (b) relet the premises without terminating the lease. If the landlord relets the premises, then the landlord may recover from the "tenants any deficiency for the balance of the term between the amount for which the premises were relet, less expense of reletting, including all necessary repairs and alterations and reasonable attorney's fees and the rent provided hereunder." When this quoted phrase is examined in isolation, it is arguably ambiguous because there is no comma separating the nouns following the word "including." If a comma were placed after "fees," it would be plain that "reasonable attorney fees" were included in "expense of reletting." Without any comma, it is arguably not clear whether

"reasonable attorney fees" are included in "expense of reletting," although it is still clear that the context for attorney fees is the landlord's relet of the premises.[9]

Ambiguities in contracts are interpreted against the drafter. ***Hunzinger Construction Co v.Granite Resources,*** 196 Wis.2d 327, 339, 538 N.W.2d 804, 809 (Ct. App. 1995). In addition, we do not construe contract terms in isolation but in context. ***Stradinger v. City of Whitewater***, 89 Wis.2d 19, 31, 277 N.W.2d 827, 831 (1979). Any default by the tenant may necessitate court action by the landlord to recover the damages provided under paragraph 15, whether or not the landlord chooses to relet the premises. However, the only reference to attorney fees in all of paragraph 15, which very specifically sets out all amounts due WR in the event of a default under a variety of circumstances, follows the reference to "reletting the premises."

WR does not explain its construction of the language in dispute other than to argue that the language entitles it to attorney fees. We do not know if WR means that attorney fees are available for any action to enforce any remedy under paragraph 15, or that they are available for any action to enforce any remedy if the landlord chooses not to terminate the lease and to relet. If WR means the former, we reject that because the placement and context of the reference to attorney fees does not make it reasonably susceptible to that broad interpretation. If WR means the latter, we can think of no reasonable explanation for allowing the landlord

[9] The entire sentence in which this phrase is located provides: In addition, Landlord may enter upon the Premises without terminating this lease and may relet them in its own name for the account of Tenant for the remainder of the term at the highest rent then obtainable and immediately recover from Tenant any deficiency for the balance of the term between the amount for which the Premises were relet, less expense of reletting, including all necessary repairs and alternations and reasonable attorneys fees and the rent provided hereunder.

attorney fees to file actions to collect rent and other sums owed only if the landlord chooses the option of not terminating the lease and reletting the premises. If WR wanted to recover attorney fees incurred in enforcing all remedies in the event of default, it could easily have provided for that. For example, the lease also provides for reasonable attorney fees in paragraph 13, again in a very specific context—those incurred in reviewing and preparing documents in connection with assigning and subletting.

We conclude that paragraph 15 entitles WR to reasonable attorney fees only if they are an expense of reletting the premises. The trial court therefore erred in awarding attorney fees for prosecuting this action.

WR asks for its attorney fees under paragraph 15 for this appeal. It follows from our interpretation of that paragraph that WR is not entitled to attorney fees for this appeal.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.