COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2440 **Cir. Ct. No. 2016CV1688**

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

MENZEL ENTERPRISES, INC.,

PLAINTIFF-RESPONDENT,

V.

ROSE INVESTMENTS, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: VALERIE L. BAILEY-RIHN, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Landlord Rose Investments, LLC, and tenant Menzel Enterprises, Inc., dispute the proper interpretation of their commercial real estate lease, including the interpretation of provisions of the lease related to Menzel's option to purchase from Rose the leased property and a contiguous property. Rose appeals a grant of summary judgment to Menzel, and an order requiring Rose to accept Menzel's request to exercise its option to purchase the property at a price below that established in the lease on the ground that the lower price is required because a small portion of the real estate was taken by a state agency through eminent domain before Menzel sought to exercise its option to purchase.

¶2 We conclude that the lease, by its plain terms, contemplates the scenario that occurred here. That is, the lease contemplates an eminent domain taking and provides that if such a taking occurs before Menzel exercises its option to purchase then Menzel is not entitled to the proceeds of that taking. The lease further contemplates that the physical parameters of the property at issue when the option to purchase is exercised might not be the same as they were when the parties executed the agreement. It follows, as we explain below, that the lease requires Menzel to pay the purchase price established in the option to purchase provision for the property that remains after the partial taking, not to pay a price reduced by the amount of the eminent domain proceeds received by Rose. Accordingly, we reverse the decision and order of the circuit court and remand with directions that the circuit court enter judgment in favor of Rose and declare that Menzel must pay the purchase price in the lease if it wishes to exercise the option to purchase.

BACKGROUND

¶3 The following facts are undisputed. Rose and Menzel entered into a lease agreement regarding improved real estate owned by Rose. We quote and discuss pertinent lease provisions in the discussion section below. For background purposes, it is sufficient to know the following about the lease terms.

¶4 The lease gives Menzel the right to use real estate and structures owned by Rose and described in the lease for Menzel's auto repair and towing business. In what we will call the option to purchase provision, the lease also gives Menzel an option to purchase from Rose "the entire property," meaning the leased property and the contiguous property, upon timely and proper notice to Rose, at the set price of $875,000.

¶5 In what we will call the eminent domain provision, the lease contemplates a potential taking by eminent domain of part of the property. The eminent domain provision states that: the "lease will not become void if any part of the leased premises" is "taken by eminent domain"; in the event of a taking, Rose "has the right to receive and keep any amount of money paid by the agency taking the property by eminent domain"; and "[n]either party shall have any right to any award to the other [that is made] by any condemning authority."

¶6 During the term of the lease, the Wisconsin Department of Transportation exercised its eminent domain authority to take a small part of the leased property in exchange for $122,400 paid to Rose. Neither the precise size and configuration of the property taken, nor any details regarding the taking aside from its timing, matter to any arguments made by the parties on appeal.

¶7 Three months after the taking, Menzel gave Rose notice that it was exercising its option to purchase the property described in the lease. However, the notice stated that the purchase price of $875,000 established in the lease had to be reduced by the $122,400 that the department had paid Rose as compensation for the taking. Rose rejected Menzel's attempt to exercise the option with the price reduction that Menzel demanded. Based on its interpretation of the option to purchase and eminent domain provisions, Rose took the position that, by including the demand for a reduced price, Menzel was merely making a "counter-offer" that Rose was free to accept or reject.

¶8 Menzel filed this action, seeking a declaration that the option to purchase provision entitled Menzel to purchase the remaining property owned by Rose with the reduced price, that is, at the purchase price set in the lease of $875,000, minus the $122,400 paid by the department to Rose, for a net payment by Menzel to Rose of $752,600. The parties filed cross-motions for summary judgment.

¶9 The circuit court granted Menzel's motion, denied Rose's motion, and exercised its equitable authority to fill in a perceived gap in the lease terms, ordering specific performance and requiring Rose to convey to Menzel the property that remains after the taking in exchange for the reduced $752,600 amount, rather than the $875,000 price specified in the lease. The court concluded that ordering specific performance with the reduced price was necessary to fill in a contractual gap left by a failure of the parties to specify a purchase price in the event Menzel exercised its option to purchase after an eminent domain taking. The court decided that this resolution was appropriate both because it left Rose, in total, with the $875,000 specified in the option to purchase provision and because "Rose can no longer sell all of the property" subject to the option. Rose appeals.

DISCUSSION

¶10 The parties do not dispute facts that matter for purposes of the arguments raised on appeal. For example, the parties agree that Menzel sought to exercise its option to purchase during the term of the lease, but after the taking had occurred, and that the lease entitles Menzel to exercise its option to purchase the property that Rose still owns after the taking, upon proper notice by Menzel. The sole dispute involves Menzel's assertion that it was entitled to an equitable court order allowing Menzel to purchase the remaining property at a price reduced by the amount of the eminent domain proceeds paid to Rose.[1]

¶11 As we discuss in more detail below, we conclude that the unambiguous pertinent provisions in the lease clearly contemplate the circumstance in which Menzel exercises the option after a taking and that when this occurs the purchase price remains $875,000. As a result, we conclude that the circuit court erred by exercising its equitable authority to add a term to the lease agreement and then order specific performance on that court-revised lease. As we explain below, the approach advocated by Menzel would render portions of the eminent domain provision meaningless and would effectively rewrite the lease.

¶12 We now provide the pertinent legal standards, then summarize the pertinent lease provisions, explain our analysis in more detail, and end by addressing the contrary arguments by Menzel.

[1] Rose points to the fact that it appealed from the compensation award it received from the department on the ground that the award was insufficient, and argues that uncertainty regarding the amount of compensation is an additional reason to question Menzel's argument in favor of an interpretation of the lease allowing a reduction in the purchase price that is pegged to the amount of the compensation award. However, our interpretation of the lease is not affected by any uncertainty as to the amount of the award as finally established.

Pertinent Legal Standards

¶13 As the parties acknowledge, we review the court's summary judgment decision de novo. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶18, 319 Wis. 2d 274, 767 N.W.2d 898.

¶14 The parties present different interpretations of the lease. Leases are contracts, the interpretation of which presents issues of law that we review independently of the circuit court. ***Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein, Ltd.***, 116 Wis. 2d 679, 681, 343 N.W.2d 126 (Ct. App. 1983).

¶15 Turning to the substance of contract interpretation, where the terms of a contract are clear and unambiguous, we construe the contract according to its plain language. ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶23, 326 Wis. 2d 300, 786 N.W.2d 15. Put differently, courts "'presume the parties' intent is evidenced by the words they chose, if those words are unambiguous.'" ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶26, 348 Wis. 2d 631, 833 N.W.2d 586 (quoted source omitted).

¶16 Individual provisions in a contract are not construed in isolation, but in the context of related provisions in the contract. "When possible, contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.'" ***Maryland Arms***, 326 Wis. 2d 300, ¶45 (quoted source omitted).

The Pertinent Lease Provisions And The Parties' Arguments

¶17 The primary dispute between the parties involves the construction of two provisions in the lease, which we now quote in pertinent part: the eminent domain provision and the option to purchase provision.

> **20. Eminent Domain**
>
> This lease will not become void if any part of the leased premises or the building in which the leased premises are located are taken by eminent domain. [Rose] has the right to receive and keep any amount of money paid by the agency taking the property by eminent domain. Any award to [Menzel] for loss of business or personal property shall belong to [Menzel]. Neither party shall have any right to any award to the other [that is made] by any condemning authority.
>
> ….
>
> **22. Option to Purchase …**
>
> [Rose] grants to [Menzel] the option to purchase the entire property owned by [Rose] consisting of the property described in Paragraph 2[2] and the contiguous property located at 2733 County Highway N, Cottage Grove, WI 53527 currently rented by Trans Wood, Inc. [The] [o]ption may be exercised at any time during the lease term by [Menzel] providing a 90 day written notice to [Rose] at the

[2] Paragraph 2 of the lease provides:

> **2. Property Being Leased**
>
> [Rose] is leasing to [Menzel], and [Menzel] is leasing from [Rose], the following property:
>
> 2727 County Highway N
> Cottage Grove, Wisconsin 53527
> Tax Parcel Number: .0611-093-8330-9
> Includes: East Building together with the improvements, fixtures and all other property located thereon, approximately 2 acres of land and Driveway Easement. Total number of pieces of equipment on the property, both inside and out, is limited to thirty-one (31).

> address noted above. The purchase price is $875,000 and [Rose] shall be responsible for and pay normal selling expenses ….

¶18 Rose argues that these provisions clearly specify that, if Menzel wants to exercise its option to purchase, then the purchase price is $875,000, regardless of whether Menzel exercises the option before or after any taking. More specifically, Rose argues that Menzel has an option to purchase "the entire property owned by" Rose (quoting the option to purchase provision) for $875,000; that the lease description of "the entire property owned by" Rose is only a general description by tax parcel number and address, both of which remain unchanged after a taking; and that Menzel does not have "any right" (quoting the eminent domain provision) to the eminent domain award received by Rose (here, the $122,400). As a result, Rose argues, Menzel's attempt to exercise the option to purchase at the contract price reduced by the eminent domain award is inconsistent with the lease agreement and therefore Rose is not obligated to transfer the property at that price. Under Rose's analysis, the circuit court had no reason to consider the use of its equitable authority and erred by adding new and conflicting language to the contract.

¶19 In contrast, Menzel argues that the option to purchase provision entitles Menzel to purchase the entire property that existed when the option was granted, *before the taking*, as opposed to the entire property that existed when Menzel attempted to exercise the option, *after the taking*. Menzel contends that the lease agreement does not fully address what happens if Menzel exercises its option to purchase after a taking and, therefore, this failure to account for a post-taking exercise of the option creates a gap in the option to purchase provision that needs to be filled in. Menzel argues that the circuit court properly exercised its

equitable authority to fill in this alleged gap by ordering specific performance at a price reduced by the proceeds of the eminent domain taking.

Interpretation Of The Pertinent Contract Provisions

¶20 Whether the parties intended to enter into an enforceable contract "is judged by an objective standard, looking to the express words the parties used in the contract.... the key is 'not necessarily what [the parties] intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use.'" ***Management Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178-79, 557 N.W.2d 67 (1996) (alteration in original) (citation omitted). Applying this standard, we conclude that the option to purchase is enforceable because its terms are unambiguous. When construing related provisions together, it is clear that the parties reached an express agreement that, upon Menzel's exercise of the option, the purchase price for "the entire property," *as it is described in the lease*, is $875,000 and that Menzel has no right to any proceeds that Rose receives for any taking.

¶21 First, the lease does not give Menzel an option to purchase the property as it exists at the time of contracting. It gives Menzel the right to purchase the property as it is described in the option to purchase provision, which includes both the leased property and a contiguous property, and the lease contemplates that property described in the option to purchase provision might be smaller at the time the option is exercised. Critical to our analysis is the way in which the lease provisions define the property that is subject to the option, which sheds light on the phrase, "the entire property owned by" Rose, in the option to purchase provision. As reflected in the lease language that we have quoted, the property subject to the option consists of two parcels: one of which is

"approximately two acres," and is described exclusively by a street address and a tax parcel number; the other of which is described exclusively by address, with no approximation of size. There are no other descriptions in the lease for any of this real estate, such as metes and bounds descriptions.

¶22 Given these generalized descriptions of the property to be sold upon exercise of the option, "the entire property owned by" Rose, as stated in the option to purchase provision, is whatever property Rose in fact owns at the time Menzel exercises the option—the property description is the same, even after the property at issue shrinks in size as a result of a taking. That is, the lease defines the property at issue in the same way both pre- and post-taking, which supports the interpretation that the lease establishes a set purchase price for a post-taking purchase, regardless of how much property is taken. Accordingly, we reject Menzel's argument that we must construe the phrase "the entire property owned by" Rose as meaning all property at the time the option was granted (*i.e.*, when the lease was executed), rather than all property at the time that Menzel sought to exercise the option.

¶23 Second, it is clear from the express terms of the lease that Menzel is not entitled to any amount Rose receives through eminent domain proceedings. However, that would be the result if Menzel's contractual purchase price is reduced by the eminent domain payment.

¶24 Menzel argues that it is entitled to the reduction in the purchase price because the option to purchase provision *itself* does not contain language addressing what happens following an eminent domain taking. According to Menzel, this matters because we must interpret the option to purchase in isolation, without reference to any other provisions in the lease. Menzel contends that this

approach is dictated by ***Harmann v. French***, 74 Wis. 2d 668, 247 N.W.2d 707 (1976). Menzel's argument on this point depends almost entirely on one sentence in ***Harmann*** in which the court refers to a lease agreement and the option to purchase as "separate agreements," despite the fact that the lease and the option were contained in the same document. *See* ***id.*** at 672 ("The lease and option were separate agreements, although incorporated into a single document."). However, the court did not hold as a matter of law that a lease and an option to purchase contained within a lease must be construed separately. Instead, the court noted that the lease and option were, in fact, interrelated, but that it was construing them as independent agreements because the tenant there attempted to exercise the option to purchase only after the lease had expired. ***Id.*** In contrast, the lease here was still in effect when Menzel attempted to exercise the option to purchase. Therefore, the situation here is easily distinguishable from that in ***Harmann***.

¶25 Moreover, as stated above, we are to construe the provisions of the lease together, giving meaning to each of the provisions so as not to render any meaningless if that is possible. If we were to adopt Menzel's view that the option to purchase provision must be construed in isolation, entirely independent of other lease provisions, some portions of the eminent domain provision would be superfluous.

¶26 In sum, taking into account the generalized property descriptions, if one gives meaning to both the eminent domain provision (Menzel is not entitled to Rose eminent domain proceeds) and to the option to purchase provision (purchase price $875,000) the lease does not allow for the price reduction that Menzel seeks. There is no gap in the lease language that needs to be filled in.

¶27 Menzel broadly asserts that the circuit court's decision represents a "common sense conclusion." However, the parties did not agree in any lease provisions to be bound by a common sense determination. Instead, as we have explained, they agreed to specific terms that contemplated the obligations at issue here which would arise following a taking. Giving Menzel a price reduction in the amount provided to Rose for the taking would rewrite the contract, something we may not do. *See* ***Levy v. Levy***, 130 Wis. 2d 523, 533, 388 N.W.2d 170 (1986) ("In the guise of construing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties.").

¶28 In what apparently amounts to a mere re-casting of arguments that we have already rejected, Menzel argues that Rose is contractually bound to accept Menzel's exercise of the option with the price reduction because Menzel "properly exercised" its option. Whatever Menzel precisely intends to argue in this regard, as we have explained, Menzel's attempt to exercise the option to purchase included a term that contradicts the plain import of the lease terms and therefore was in the nature of a "counter-offer," which Rose had the right to either accept or reject. *See* ***Harmann***, 74 Wis. 2d at 671-72 (holding that tenant's attempt to "offset" the purchase price by an amount needed for structural maintenance constituted a "counter-offer" rather than an unconditional exercise of the agreed-upon terms of the option to purchase and explaining that "[a]n acceptance of an option must be unconditional and must be according to the terms set forth in the option.").

¶29 Menzel argues that we "can affirm" the circuit court on the alternative ground of breach of contract. According to Menzel, the option to purchase provision "required Rose to convey the 'entire property' owned by Rose at the time the [o]ption was granted" and, because the department of transportation

owned a portion of this property at the time Menzel attempted to exercise the option, Rose is in breach of contract because it cannot deliver "the entire property owned by" Rose. We reject this argument for multiple reasons. Menzel did not plead breach of contract in its complaint and did not argue a theory of breach of contract to the circuit court. In addition, we have effectively rejected Menzel's theory of breach above.

CONCLUSION

¶30 For these reasons, we reverse the decision and order of the circuit court and remand to the circuit court with directions to enter judgment in favor of Rose, declaring that if Menzel wishes to exercise the option to purchase the leased property, the purchase price is $875,000.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).