COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1327 **Cir. Ct. No. 2003CV1865**

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

WISCONSIN MALL PROPERTIES, LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CITY OF GREEN BAY AND CITY OF GREEN BAY REDEVELOPMENT AUTHORITY,

INTERVENORS-CO-APPELLANTS-CROSS-RESPONDENTS,

PARISIAN, INC., SAKS, INC. AND YOUNKERS, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: GORDON MYSE, Reserve Judge. *Judgment affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. In 2003, the City of Green Bay condemned a department store in downtown Green Bay. The store was owned by Wisconsin Mall Properties, LLC and leased to Saks, Inc. Saks and the City claimed the condemnation extinguished Saks' obligations under the lease. A prior appeal in this case established that Saks' obligations under the lease continued, despite the condemnation. On remand, the circuit court held that Saks had breached the lease. Now Saks, related corporate entities, and the City appeal the judgment granting damages for the breach to Wisconsin Mall. They claim the court: (1) erroneously imported information from the condemnation proceeding, (2) improperly granted attorney fees to Wisconsin Mall, and (3) incorrectly applied postjudgment interest. We agree the court incorrectly applied postjudgment interest, but we disagree with the first two arguments. Wisconsin Mall cross-appeals the judgment setting the prejudgment interest rate. We agree with Wisconsin Mall. We therefore affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 Wisconsin Mall's predecessor leased a number of department stores to Younkers. The lease contained a "hell or high water" clause; so called because it requires performance no matter what. As relevant here, the clause provided that neither the lease nor the lessee's obligations under the lease would terminate "by reason of … the taking of the demised premises by condemnation or otherwise." The lease also forbade the lessee from taking any action to terminate, rescind, or avoid the lease.

¶3 One of the stores covered by the lease was a Younkers store in downtown Green Bay. In 2001, Saks, Inc.—with which Younkers had since merged[1]—and the City of Green Bay began discussing a possible condemnation of this property. In April 2003, they entered into an agreement by which the City would condemn Wisconsin Mall's interest in the property, terminate the lease, and indemnify Saks. In turn, Saks would convey certain property to the City, contribute $2.75 million toward the cost of acquiring the Younkers property, and enter into a new lease with the City. Wisconsin Mall believed Saks' actions constituted a breach of the lease, and notified Saks accordingly in August 2003. Wisconsin Mall contended Saks improperly colluded with the City to avoid the lease, and that Saks' arrangement with the City purported to abrogate the lease's hell-or-high-water clause.

¶4 In October 2003, the City served Wisconsin Mall with a $5.7 million condemnation jurisdictional offer. The offer itemized $2.6 million for "[l]oss of land including improvements and fixtures," and $3.1 million for the "present value of Lessor's interest in Lease." Wisconsin Mall initially contested the constitutionality of the taking of its interest in the lease. When Wisconsin Mall clarified it was not challenging the City's right to condemn the land, the court released the $2.6 million itemized for the land. Wisconsin Mall later agreed to dismiss the case so that it could receive the remaining $3.1 million, although maintaining the amount was inadequate to compensate it for the loss of its lease income stream.

[1] For the sake of simplicity, for the remainder of this opinion we refer to Saks, Inc. Younkers, Inc., and Parisian, Inc., as "Saks."

¶5 Wisconsin Mall then sued Saks for breach of contract. The City intervened as co-defendant due to its indemnification agreement with Saks. The circuit court granted summary judgment in favor of the City and Saks, ruling that Wisconsin Mall's contract claims did not survive the condemnation proceedings. Wisconsin Mall appealed and we affirmed. ***Wisconsin Mall Props., LLC v. Younkers, Inc.***, 2005 WI App 261, 288 Wis. 2d 463, 707 N.W.2d 886. Our supreme court reversed, holding that the condemnation proceedings did not necessarily preclude Wisconsin Mall's breach of contract action. ***Wisconsin Mall Props., LLC v. Younkers, Inc.***, 2006 WI 95, 293 Wis. 2d 573, 717 N.W.2d 703.

¶6 On remand, the circuit court granted summary judgment in favor of Wisconsin Mall, holding that Saks breached section 5.1(b) of the lease—the hell-or-high-water clause. It denied summary judgment with respect to the allegation that Saks improperly colluded with the City.

¶7 The court then proceeded to determine damages. The parties agreed Wisconsin Mall's damages should be offset by the amount it received as compensation for lost rent through the condemnation, but they disagreed about what that amount was. Wisconsin Mall asserted it was $3.1 million, the amount offered in the City's jurisdictional offer for Wisconsin Mall's interest in the lease. The City and Saks countered that the City mistakenly overvalued the land and building in the jurisdictional offer. They submitted a number of appraisals valuing the land between roughly $200,000 and $700,000. Thus, they contended the balance of the condemnation award—between $5 million and $5.5 million—was what Wisconsin Mall received for its interest in the lease.

¶8 The court agreed with Wisconsin Mall, concluding that the parties could not relitigate the jurisdictional offer in this suit. It therefore offset

Wisconsin Mall's damages for Saks' failure to pay rent—which the parties stipulated was $6,553,964.00—by $3.1 million. It applied the 1% penalty provided by the lease to the resulting $3,453,964.00 and added prejudgment interest at the legal rate of 5% per year. The court further concluded that all of Wisconsin Mall's attorney fees arose from Saks' breach of the lease, and granted Wisconsin Mall 100% of its attorney fees based on a fee-shifting provision in the lease.

¶9 The City then asked the circuit court to stay enforcement of the judgment pending appeal, and offered to deposit the amount of the judgment with the clerk's office to toll postjudgment interest. The court held that while it would stay execution, postjudgment interest would continue to accrue at the rate of 12% per year. The City nevertheless later deposited a check with the clerk of courts for the amount of the judgment along with a letter explaining it was depositing the check for the express purpose of tolling postjudgment interest. The court rejected the City's explanation, concluding that the payment to the clerk's office "doesn't modify my discretion nor does it in fact toll the statute until the court says it does."

¶10 The City and Saks raise three issues on appeal. First, they challenge the court's conclusion that the offset should be the amount offered for Wisconsin Mall's interest in the lease. Second, they assert the court lacked authority to award Wisconsin Mall 100% of its attorney fees. Third, they contest the court's ruling requiring postjudgment interest to continue accruing after the City posted payment with the clerk. Wisconsin Mall raises a fourth issue in its cross-appeal. It argues the court erroneously used the legal default interest rate—rather than the rate provided by the lease—to calculate prejudgment interest on the damages.

STANDARD OF REVIEW

¶11 The first issue concerns the amount Wisconsin Mall's damages should be offset by compensation it received in the condemnation proceedings. The amount Wisconsin Mall received is a question of fact, which we will uphold unless clearly erroneous. WIS. STAT. § 805.17(2).[2] However, we independently review the court's conclusion that the parties could not relitigate the jurisdictional offer in this suit. The remaining issues present questions of contract and statutory interpretation.[3] These are questions of law subject to our independent review. ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769; ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

DISCUSSION

1. Offset Amount

¶12 The circuit court determined Wisconsin Mall's damages against Saks should be offset by $3.1 million because this was the amount the jurisdictional offer itemized for Wisconsin Mall's interest in the lease. Saks argues the City made a mistake, and the amount Wisconsin Mall actually received for this interest was much higher. The court rejected this argument for three reasons. First, it concluded the jurisdictional offer established the amount

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Wisconsin Mall suggests we should review the circuit court's decision to apply postjudgment interest after the City posted payment with the clerk of courts deferentially, because the decision to grant postjudgment relief is discretionary. As we explain below, however, the tolling of postjudgment interest after a judgment has been paid is governed by statute.

Wisconsin Mall was offered, and subsequently received, for its interest in the lease. Second, it observed any mistake was the City's, not Wisconsin Mall's. Third, it held Saks and the City were estopped from challenging the itemization because they failed to argue the itemization was wrong in previous proceedings.

a. The jurisdictional offer

¶13 The circuit court concluded the parties could not relitigate the values itemized in the condemnation jurisdictional offer. It stated that the order dismissing the condemnation case settled the issue and this contract suit was not the proper forum to revisit the matter. Thus, it held the parties were bound by the City's designation of $3.1 million to Wisconsin Mall's interest in the lease.

¶14 The City and Saks insist they are not trying to relitigate the values in the jurisdictional offer. Rather, they argue that the condemnation case concerned the City's authority to take the property, not the adequacy of the compensation award. They assert that the adequacy of the award can only be determined by an appeal of the award. They contend that the offer of compensation would have no evidentiary value in such an appeal, and therefore cannot have any effect here either.

¶15 This argument misses the point. This is not a condemnation proceeding. The issue before the circuit court was how much Wisconsin Mall was entitled to receive under contract law—not condemnation law—for breach of the lease. As part of that decision, the court had to determine how much the City had already paid for the lease income. The adequacy of the compensation award and the rules of a condemnation award appeal were irrelevant.

¶16 The City and Saks baldly assert the City was not required to itemize the compensation offered in the jurisdictional offer. However, it most assuredly was required to do so. WISCONSIN STAT. § 32.05(3)(b) requires the jurisdictional offer to describe the property and the interest to be taken and § 32.05(3)(d) requires the compensation to be itemized.[4] This is indeed the practice in Wisconsin. *See* WISCONSIN PLEADING AND PRACTICE § 67:8 (4th ed. 2008) ("Under the statute, the condemnor must send to the owner … an itemized statement of the amount of compensation offered." Footnote omitted.).

¶17 But whether required by statute or not, the critical fact is that the City did itemize its jurisdictional offer. The offer specified it was condemning two interests: "(a) All of the Lessor's rights, title, benefits and obligations in [the] parcels and a Lease … dated June 23, 1993…" and "(b) Fee title to the property … subject to the Lessee's leasehold in the Lease…." It then stated the compensation for each interest. It is inescapable that the City identified two specific interests it sought to condemn, stated the compensation for each, and paid Wisconsin Mall accordingly.

¶18 The City's argument is founded on the premise that it made a mistake in its allocation. In other words, what the City is really arguing is that it did not mean to pay only $3.1 million for the lease interest. But the fact remains that it did pay that amount, whether it meant to or not.

[4] All of the documents in this case and all of the parties' briefs refer to WIS. STAT. § 32.05, rather than § 32.06. Section 32.05 governs condemnation of things such as sewers and transportation facilities. Section 32.06 governs condemnation of all other matters. It appears to us that § 32.06 is the applicable statute. However, it also appears that the statutes are similar in all respects that relate to this case. Therefore, we also will refer to § 32.05.

¶19 Despite the City's and Saks' attempts to complicate it, this issue is quite simple. The City stated the amount of compensation in its jurisdictional offer for each interest to be condemned. Of the total $5.7 million, it identified $3.1 million for the lease interest. That amount was paid to Wisconsin Mall. Mistake or not, adequate or not, the $3.1 million is the amount Wisconsin Mall has received for the lease interest and that is definitively the amount of the offset here.

b. The City's mistake

¶20 We also reject the argument that the circuit court was obligated to correct the City's purported error overvaluing Wisconsin Mall's reversionary interest in the land and building. Even if the court had revisited the jurisdictional offer, we would agree with the court that "the … claim that the allocation was done erroneously, is a claim that they made a unilateral error in the jurisdictional award…." Wisconsin Mall need not bear the burden of the City's mistake.

¶21 Saks contends it should not bear the burden either because it was not a party in the condemnation case. Saks' protestations are unavailing. Although section 6.2(a) of the lease entitled Saks "to participate in any [condemnation] proceeding, action, negotiation, prosecution or adjustment," Saks chose not to participate. Saks asserts it had no incentive to challenge the award itemization because under the lease any condemnation award belonged to Wisconsin Mall. But the conclusion that it had no incentive to challenge the award itemization depended on the assumption that the hell-or-high-water clause would not survive condemnation. This was precisely the issue that was the subject of the earlier proceedings in this case. Saks cannot now claim it was unaware that the award itemization would be an issue in this suit.

c. Estoppel

¶22 We also agree that the court properly held Saks and the City were barred from challenging the itemization of $3.1 million to Wisconsin Mall's interest in the lease. Wisconsin Mall contends a number of equitable doctrines support this holding. We conclude judicial estoppel is the most applicable.[5]

¶23 Judicial estoppel "is intended 'to protect against a litigant from playing fast and loose with the courts….'" ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (citations omitted). Thus, it is appropriate when (1) a litigant assumes a position that is clearly inconsistent with a position it assumed in an earlier legal proceeding; (2) the facts at issue are the same in both cases; and (3) the party to be estopped has convinced the first court to adopt its position. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

¶24 Saks and the City have consistently represented in various legal proceedings that Wisconsin Mall was compensated $3.1 million for its interest in the lease. In its June 2004 brief in support of its motion for summary judgment, Saks argued:

> Here [Wisconsin Mall's] request for, and receipt of, the $3.1 million portion of the Award allocated as the present value of the future rent stream constitutes a waiver of its claim for future rent under the First Lease Agreement.

[5] The court concluded "the City is estopped, has waived, and is otherwise barred from its belated attempt to change the numbers contained in the Jurisdictional Offer." It then "adopt[ed] the arguments in the Plaintiff's brief listing the various legal reasons as to why both Saks and the City should be so barred." The doctrines listed in the plaintiff's brief were (1) claim and/or issue preclusion, (2) waiver and/or laches, (3) judicial estoppel, (4) judicial admission, and (5) equitable estoppel. Because we conclude judicial estoppel is appropriate, we do not discuss the other bases for barring the City and Saks from challenging the numbers in the award itemization.

> ….
>
> [Wisconsin Mall] asserts that, despite receiving the $3.1 million, Defendants are obligated under the Lease to continue with rent payments until January, 2014….

It is difficult to interpret these statements as anything but a representation that the amount Wisconsin Mall received as compensation for lost rent in the condemnation proceeding was $3.1 million. Saks' and the City's belated claim that the City's itemization was incorrect is thus clearly contradicted by their previous position. The itemization now challenged has been repeated in the record and prior court decisions for several years. *See, e.g*, ***Wisconsin Mall Props.***, 293 Wis. 2d 573, ¶11. Yet until recently, Saks and the City failed to claim the City was mistaken. The court therefore properly estopped them from raising this challenge now.

¶25 Because Wisconsin Mall received $3.1 million for its interest in the lease, we conclude the circuit court properly held this was the correct amount of the offset.[6] We also conclude the court appropriately determined it need not rectify the City's unilateral mistake, and properly exercised its discretion by estopping the City and Saks from continuing to challenge the amount itemized for Wisconsin Mall's interest in the lease by the City's jurisdictional offer.

[6] The City and Saks create a diversion by erroneously using the terms "mitigate" and "setoff" interchangeably, contending that Wisconsin Mall had a duty to mitigate the damages from Saks' breach. The duty to mitigate has nothing to do with the issue of an offset as the court noted during the damages hearing: "$3.1 million is an offset. … We are talking truly about offset, not mitigation. It is an offset for the money they received."

2. Attorney Fees

¶26 Saks and the City concede Saks breached the lease and must—under the fee-shifting provision of the lease—pay attorney fees arising from the breach. They claim, however, that the only breach the circuit court found was Saks' postcondemnation failure to pay rent. This contention is not supported by the record.

¶27 The City and Saks argue the court found Saks "breached its lease with [Wisconsin Mall] by failing to pay rent on December 1, 2003. This finding was memorialized in the November 18, 2007, order granting summary judgment." What the order actually says is:

> The Plaintiff's motion for summary judgment as to liability against the Defendants for breach of Section 5.1(b) of the Lease is hereby granted.
>
> The Plaintiff's motion for summary judgment as to liability against the Defendants for breach of Section 5.1(c) of the Lease is hereby denied without prejudice as issues of material fact exist which preclude granting summary judgment.

Thus, the circuit court simply granted summary judgment with respect to Wisconsin Mall's claim that Saks breached section 5.1(b) of the lease, the hell-or-high-water clause.[7] This included Saks' nonpayment of rent, but it also included Saks' pre-December 2003 announcements to Wisconsin Mall that it intended to abrogate the hell-or-high-water clause. The court noted this in its findings of fact:

[7] The court's denial of summary judgment with respect to section 5.1(c) of the lease concerned Wisconsin Mall's allegation Saks improperly colluded with the City to condemn the property. Section 5.1(c) prohibited the lessee from taking any action to terminate, rescind, or avoid the lease.

> This Court granted summary judgment as to liability on … Saks' failure to pay rent *and the anticipatory breach relating to Saks' announced intention not to pay rent*…. (Emphasis added.)[8]

¶28 The City and Saks virtually ignore this finding, even though it directly contradicts their assertion that the only breach the court found was the nonpayment of rent. The only reference to the finding in their opening brief is a footnote stating, "In the findings of fact and conclusions of law entered after the trial on damages, Judge Myse apparently attempted to modify [the November 18, 2003] decision by finding an anticipatory breach." As discussed above, however, this decision did not specify section 5.1(b) was only breached once Saks actually failed to remit a rent payment to Wisconsin Mall.

¶29 The court considered Saks' violation of section 5.1(b) to include precondemnation conduct. In a hearing less than a month after the order, the court stated:

> I was under the impression that there was an anticipatory breach because both the City and Saks were claiming that the condemnation terminated the lease and no further lease payments would be required if the condemnation were completed. Is that not so?

In response, Saks' counsel suggested the court's summary judgment ruling had not encompassed Saks' pre-December 2003 conduct. The court replied by asking whether "Saks indicated in advance of the condemnation that the condemnation would terminate their obligation to make rental payments." Saks' counsel

[8] The court explained its anticipatory breach finding while discussing the findings of fact and conclusions of law to the parties. It stated, "In addition to the first sentence involving failure to pay rent, I wish to add, 'And the anticipatory breach relating to Saks' announced intention not to pay rent,' so it's both the non-payment and the anticipatory breach which is covered as the basis for the summary judgment granted."

indicated it had, and the court responded, "That's right, and that position was assumed prior to the condemnation." The court also clarified this in its findings of fact:

> I conclude that Saks' statements regarding a refusal to pay rent to [Wisconsin Mall] in the event of a condemnation constitute an anticipatory breach of the Lease even though at the time the Original Complaint was filed, Saks had not yet failed to pay rent to [Wisconsin Mall].
>
> I further conclude that [Wisconsin Mall] alleged an anticipatory breach in its Original Complaint and that Saks' understanding that such allegation was being made is reflected in the affirmative defenses alleged in its Original Answer filed in January 2004.

¶30 The City's and Saks' only real challenge to the court's finding of anticipatory breach is in their reply brief. They assert—without addressing the findings of fact and conclusions of law to the contrary—that the trial court did not make a substantive finding of anticipatory breach. They then claim that Wisconsin Mall raised this issue for the first time in the damages hearing, the anticipatory breach issue was never litigated or pled, and that it was not included in the summary judgment order.

¶31 These arguments are without merit. The original complaint, filed *prior* to Saks' ceasing rent payments, alleged breaches of *both* sections 5.1(b) and 5.1(c), and it was the operation of section 5.1(b) (which Saks claims implicates only postcondemnation conduct) that was the subject of the supreme court case. Further, to the extent the City and Saks intended to challenge the court's finding, the issue needed to be raised in their opening brief. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). The City and Saks knew the court made a finding of anticipatory breach, and they knew the court understood its November 2003 summary judgment encompassed Saks'

precondemnation conduct. They did not challenge this. They merely asserted the court meant something the record demonstrates it did not. They then raised—in their reply—novel arguments, unsupported by the record. These arguments are insufficient and too late.

3. Postjudgment Interest

¶32 The City argues the circuit court erred when it determined interest would accrue after the City posted payment to the clerk's office. The City contends WIS. STAT. § 815.05(8) permits postjudgment interest only until the judgment is paid. We agree.

¶33 A court has "broad discretion to stay execution of a judgment and to condition a stay upon terms it deems appropriate." ***Weber v. White***, 2004 WI 63, ¶34, 272 Wis. 2d 121, 681 N.W.2d 137. But it does not have discretion to impose postjudgment interest after the judgment has been paid. Although courts may condition relief under WIS. STAT. § 808.07 upon certain requirements, *see* ***Matteson v. Matteson***, 2008 WI 48, 309 Wis. 2d 311, 749 N.W.2d 557, the statute does not authorize courts to impose additional postjudgment obligations.[9]

¶34 Here, the circuit court did just that. The court analyzed this issue within the context of WIS. STAT. § 808.07. Thus, it applied the four factors

[9] The circuit court's imposition of postjudgment interest here is distinguishable from the security deposit approved in ***Matteson v. Matteson***, 2008 WI 48, 309 Wis. 2d 311, 749 N.W.2d 557. In ***Matteson***, the circuit court granted a stay of execution, but conditioned the stay upon Matteson's payment of the judgment plus the equivalent of one year of interest in advance at the rate of 12% as security. Matteson argued the court could not require him to pay advance interest, because interest tolls once the judgment is paid. Our supreme court concluded this was within the court's discretion because the court's order made it clear that the conditional interest payment plus any additional accrued interest would be returned to Matteson. ***Id.***, ¶82.

articulated in ***Scullion*** for determining whether postjudgement relief is merited. ***Weber***, 272 Wis. 2d 121, ¶35 (citing ***Scullion v. Wisconsin Power & Light Co.***, 2000 WI App 120, ¶¶18-22, 237 Wis. 2d 498, 614 N.W.2d 565). While the court appropriately considered the ***Scullion*** factors when determining whether to grant Saks postjudgment relief, it erred by applying the factors to the question of whether postjudgment interest should accrue after Saks paid the judgment. "Whether a stay of execution may be granted is an exercise of discretion subject to the four-factor test of [***Scullion***], but once a stay [has been] granted, the determination of whether payment of a judgment tolls interest remains governed by the rule of law correctly articulated by ***Downey***." ***Matteson***, 309 Wis. 2d 311, ¶79 (footnote omitted).[10]

¶35 The law articulated in ***Downey*** is that postjudgment interest is tolled when a party pays the judgment in full to the clerk's office. *See* ***Downey, Inc. v. Bradley Ctr. Corp.***, 188 Wis. 2d 435, 524 N.W.2d 915 (Ct. App. 1994). In ***Downey***, we recognized that "one purpose of the post-judgment interest statute [is]

[10] The parties argue at length about the application of ***Scullion*** and ***Weber***. ***Scullion v. Wisconsin Power & Light Co.***, 2000 WI App 120, 237 Wis. 2d 498, 614 N.W.2d 565; ***Weber v. White***, 2004 WI 63, 272 Wis. 2d 121, 681 N.W.2d 137. These cases, however, deal with a court's discretion to grant postjudgment relief. Here, the court stayed execution of the judgment as Saks requested, but it did not couch this stay within the context of granting Saks relief pending appeal. To the contrary, the court's determination that interest should continue to accrue was based on its conclusion that it was unfair for Wisconsin Mall to bear the burden of Saks' decision to pursue an appeal the court characterized as having "precious little likelihood of [success]."

In ***Scullion*** we addressed the factors the court should consider when determining whether to grant a stay of a money judgment. ***Scullion***, 237 Wis. 2d 498, ¶¶18-24. The issue in ***Weber*** was whether the circuit court properly exercised its discretion by denying the appellant's request to toll postjudgment interest if she paid only a portion of the judgment to the clerk of courts. ***Weber***, 272 Wis. 2d 121, ¶32. Both of these cases dealt with a court's discretion to toll postjudgment interest prior to the judgment being paid in full. This is inapposite to the present situation in which the court determined the postjudgment interest would accrue even if Saks paid the judgment in full.

to motivate the debtor to pay [the judgment]." ***Id.*** at 449 (citation omitted). Therefore, "Once the money has been paid into the court, the payor has surrendered the funds and no longer has the use of the money." ***Id.*** The court did not have the authority to require postjudgment interest to continue to run after the City paid the judgment.

¶36 Wisconsin Mall's assertion that it was entitled to receive 12% interest because it did not have use of the funds is without merit. ***Downey*** squarely rejected this rationale:

> Downey argues that interest should continue to accrue so long as Downey has not received the use of the money. We disagree. The statute does not state that interest will continue to accrue until the judgment *is paid to the prevailing party*, but simply indicates accrual ceases at the time the judgment is paid.

Id., at 449.

4. Prejudgment Interest

¶37 Wisconsin Mall argues in its cross-appeal that the circuit court erred by concluding that prejudgment damages should accrue at the rate of 5%, because the parties expressly agreed on another rate in the lease. We agree.

¶38 Section 7.3(e) of the lease provides that if the lessee fails to pay rent when due, the lessor is entitled to collect the rent plus interest. The lease specifies the interest rate

> shall be the lesser of (i) that per annum rate of interest which exceeds by two (2) percentage points the base rate most recently announced by Citibank, N.A., New York, New York, as its Base Rate or (ii) the maximum rate permitted by applicable law.

Wisconsin Mall contends, then, that the parties agreed interest would be prime plus two, unless applicable law made that amount usurious.

¶39 The court concluded the meaning of the phrase "maximum rate permitted by applicable law," was the legal rate of interest. It identified the legal rate of interest as 5%, the amount provided in WIS. STAT. § 138.04. This statute provides:

> The rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in ss. 138.041 to 138.056, 138.09 to 138.12, 218.0101 to 28.0163, or 422.201, in which case such rate shall be clearly expressed in writing.

The court concluded that because 5% is less than prime plus two, the lease mandated that prejudgment interest accrue at 5%.

¶40 The legal rate, however, is not the same as the maximum rate permitted by law. The legal rate in WIS. STAT. § 138.04 applies when the parties have not contracted in writing for a different rate. ***Severson Agri-Serv., Inc. v. Lander***, 172 Wis. 2d 269, 271, 493 N.W.2d 230 (Ct. App. 1992). However, parties are free to contract for a higher rate than the legal rate. *See* ***Murray v. Holliday Rambler, Inc.***, 83 Wis. 2d 406, 438-39, 265 N.W.2d 513 (1978) (prejudgment interest is calculated at the legal rate, absent specific contractual agreement otherwise). Because parties are free to contract for a higher rate, it follows that the legal rate of 5% is not the maximum rate permitted by law.

¶41 Here, the parties did contract for a specific rate: the lesser of (1) prime plus two or (2) the maximum rate permitted by law. We conclude this means the parties agreed the rate of interest would be prime plus two unless there

is a maximum rate set by law that says otherwise. There is no statute providing that prime plus two is an illegal rate to impose on unpaid rent. Therefore, because the parties contracted for a specific rate, the rate contained in WIS. STAT. § 138.04 does not apply.

¶42 The order granting setoff in the amount of $3.1 million is affirmed. The order granting Wisconsin Mall 100% of its attorney fees—including fees related to this appeal—is also affirmed. However, we reverse the circuit court's determinations of the proper rate to apply to prejudgment and postjudgment interest. We therefore remand for the court to recalculate prejudgment and postjudgment interest, and determine additional attorney fees for this appeal.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded for further proceedings.

Not recommended for publication in the official reports.