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IN THE COURT OF APPEALS OF IOWA **CLERK SUPREME COURT**

U.S.E. CONTRACTS, INC.,
an Iowa Corporation,

Appellant,

v.

VILLAGE DEVELOPMENT
COMPANY, LTD., an
Iowa Corporation,

Appellee.

Filed May 20, 1977

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2-57368

Appeal from Scott District Court - M. L. Sutton, Judge.

Appeal from judgment for defendant in action for damages
based on wrongful termination of a lease. Affirmed.

Carlin and Darbyshire, of Davenport, for appellant.

Doerr, Rehling and Lindburg, of Davenport, and Newport,
Newport, Wine and Buzzell, of Davenport, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and
Carter, JJ.

CARTER, J.

This appeal involves an action for money damages for alleged wrongful termination of an agreement of lease between the plaintiff-lessee and defendant-lessor. Following the conclusion of plaintiff's evidence in a non-jury trial, the trial court sustained defendant's motion for directed verdict. We affirm.

The subject of the written lease was a store unit within a shopping center in which the tenant was operating a cocktail lounge. The initial term of the lease was ten years commencing on September 1, 1966. In addition, the lessee was granted an option to extend the lease for four additional intervals of five years each, thereby making a total term of 30 years available to the lessee. On December 28, 1970, the premises were damaged by fire. This circumstance caused the defendant to rely upon a lease provision which it deemed to authorize termination of the lease at lessor's option. Based upon such reliance a written notice of termination was served upon the plaintiff-lessee on January 22, 1971. This action was commenced on February 26, 1971.

I. The principal issue both in the trial court and on this appeal is whether, on the facts presented, the defendant-lessor was authorized to terminate the lease pursuant to paragraph 20 thereof. This lengthy clause is set forth in full as an appendix to this opinion. Before we reach the merits of this issue we first consider the significance of the procedural mode by which the case was decided in the trial court. The trial court's ruling and judgment, as entered on the record, is cast in the form of a ruling on a motion for directed verdict. If it is viewed solely in this fashion we are faced with determining whether the issues were properly adjudged against plaintiff as a matter of law.

With respect to issues of contract construction or interpretation it has been stated:

"Although we have frequently used the terms 'interpretation' and 'construction' interchangeably, they have a distinct technical significance which in jury cases affects whether a particular contract problem is an issue for the jury or for the court. Interpretation, the meaning of contractual words, is an issue for the court unless it depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. General Casualty Co. of Wis. v. Hines, 261 Iowa 738, 745, 156 N.W.2d 118, 122-123 (1968);"

Connie's Construction Co., Inc. v. Fireman's Fund Insurance Co., 227 N.W.2d 207, 210 (Iowa 1975). Application of these legal principles to the present factual situation would present an extremely close case as to whether or not the interpretation issue involves matters of fact as well as law. We do not deem it necessary to resolve that matter in order to decide this appeal.

Here the trial court had heard all the plaintiff's evidence prior to ruling against its claim. It is clear from the trial court's ruling that it considered all of such evidence, applied the provisions of the written agreement in light of such evidence, and came up with what it considered to be the correct result. We believe that under such circumstances if the trial court engaged in a fact finding process in choosing between permissible inferences we should uphold the judgment if sustained by the evidence. See *Batliner v. Sallee*, 254 Iowa 561, 118 N.W.2d 552 (1962).

II. Plaintiff's argument on the interpretation of the pertinent clause of the lease centers around the meaning to be accorded the words "wholly untenantable." The instrument provides that if the premises are made wholly untenantable by fire the lessor may elect (a) to terminate the lease as of the date of the fire or (b) to repair, restore or rehabilitate the building at

lessor's expense within a specified period of time. Plaintiff argues that the premises are not wholly untenable within the meaning of this provision unless the destruction is so complete that it cannot be restored to a fit condition by ordinary repairs made without unreasonable interruption of the lessee's use. It urges that its evidence showed such repairs to the leased premises could have been completed in six weeks time.

In construing this clause we note that the term "wholly untenable" was without established significance in the common law of landlord and tenant. Under the common law rule, injury to the leasehold, no matter how severe, did not relieve the tenant from his obligation to pay rent. *Osterling v. Sturgeon*, 261 Iowa 836, 156 N.W.2d 344 (1968). Nor was there any obligation on the part of the landlord to rebuild or repair under such circumstances *Woodbury Co. v. Williams Tackaberry Co.*, 166 Iowa 642, 148 N.W. 639 (1914). Terms such as "wholly untenable" have gained legal significance from the fact that the parties may and often do alter the common law rules pertaining to destruction or injury to the premises by specific lease provisions. *See, e.g.*, 49 Am.Jur.2d Landlord & Tenant §§ 600, 602, 607. They are of course free to do so.

As stated in 49 Am.Jur.2d Landlord & Tenant § 607:

"There is considerable authority for the view that an 'untenable' condition means such a condition as renders the premises unfit for the purpose for which they were leased, particularly where the lease expressly designates the use to be made of the premises."

We have no doubt that the extent of the fire related damage to the leased premises in the present case was such that said premises could not be used as a cocktail lounge until substantial repairs were completed. Plaintiff's own evidence reveals that the paneling on the walls and ceiling was charred down to the sheetrock,

the bar was destroyed, electrical fixtures were inoperable, the floor covering was severely damaged and the odor from the fire permeated the premises. Cost of repair was approximately \$38,000.

Nevertheless, we are urged to find that the extent of the damage or length of time required to repair are not of sufficient gravity to render the premises "wholly untenable." We believe this contention does violence to the plain meaning of the lease. The condition of untenability which gives rise to the election by the lessor is one which renders the premises unfit for the purposes for which they were leased. This is the test by which the severity of the damage must be judged. While time may well be an important factor in determining what rights and obligations the parties desire to flow from the existence of such condition this of course is governed by the provisions of the written lease. The lease clearly contemplates relatively short term repair of an "wholly untenable" condition. It provides that the maximum period of time within which such repair must be made by the lessor is approximately 90 days or the lessee may terminate the lease. Plaintiff is in effect asking us to infer that the lease also provides a minimum period for completion of repairs as a condition for the exercise of the option granted the lessor under the contract. This would require us to hold that the clause which we are interpreting has meaning only in situations where the time of repair is less than 90 but more than 42 days. We find no basis for placing such a narrow construction on the agreement in question.

There is another factor which supports the trial court's decision on the meaning of the lease. If the premises were not "wholly untenable" then the plaintiff would continue to be liable for the rent and the defendant would have had no obligation

to make the necessary repairs.¹ There is no indication in the record that plaintiff undertook or offered to repair at its own expense or tendered any rental payments subsequent to the fire. To the contrary, it is conceded in plaintiff's petition that it insisted that the lessor make the needed repairs. While this inconsistency in position is not by itself fatal to plaintiff's claim it serves to illustrate that the election which is granted to the lessor is no more than the quid pro quo for the concomitant provisions favorable to the lessee, i.e., the discharge of the obligation to continue payment of the base rental under the lease. Plaintiff should not be permitted to accept the benefits of the latter provision and deny defendant the benefits of that portion of the bargain favorable to the lessor. The trial court's interpretation of the lease was correct.

III. By cross appeal the defendant seeks to save the judgment below on the ground that the plaintiff's evidence on damages was insufficient as a matter of law to permit any recovery. Since this was one of the grounds of defendant's motion for directed verdict, we can, if the ground is good, sustain the judgment on this basis, even though the trial court chose a different ground. *Lattimer v. Frese*, 246 N.W.2d 255, 258 (Iowa 1976); *Adams v. R. S. Bacon Veneer Co.*, 162 N.W.2d 470, 474 (Iowa 1968).

We believe this ground of the motion was well taken. The ordinary measure of damages for wrongful eviction is the value,

1 Plaintiff's contrary assertion based upon the next to last sentence in paragraph 20 of the lease is not consistent with the language of the agreement. The language upon which plaintiff relies has reference to the situation where a portion of the premises is still usable by the lessee for the purposes contemplated by the lease. As such it has no applicability to the facts of the present case.

at time of eviction, of the unexpired term of the lease, less the rent reserved. 52 C.J.S, Landlord & Tenant § 461(4). There is no evidence in the record of the value of the unexpired term of the lease so damages could not have been awarded according to the usual measure.

Plaintiff instead sought to recover damages for lost profits from the operation of the cocktail lounge. It is true that in some circumstances prospective profits from an established business may be recovered as items of special damage in an action for wrongful eviction. Id. at § 461(3)(c). Such profits must be ascertainable with a reasonable degree of certainty. Ibid. cf. Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968); Benshoof v. Reese, 250 Iowa 868, 97 N.W.2d 297 (1959). Here the only evidence offered by the plaintiff was its federal income tax returns for the calendar years 1966-1970. The net profit of the cocktail lounge during this period varied from a loss of \$6157 in 1966 to a profit of \$37,968 in 1969. The average net profit for the period, as shown on the tax returns, was \$17,552.04. The lease was purportedly terminated on January 22, 1971. No financial data of the plaintiff corporation subsequent to 1970 was offered except that plaintiff testified the lounge was not operating in 1971.

An established business may provide data from which future profits can reasonably be projected. But we know of no case which has permitted recovery of lost profits based upon only the raw financial data contained in income tax returns for years prior to the alleged breach of contract. Such data may serve as a basis upon which knowledgeable witnesses may base projections of lost profits, but, absent any testimony of this type, we do not feel a jury issue is generated.

In reaching this conclusion we do not view evidence as to earnings or potential earnings subsequent to the lease termination as involving mitigation of damages so as to cast the burden of providing such evidence on the defendant in the first instance. It is more properly characterized as an essential element of plaintiff's case. Profits from a business involve gains from an investment of capital. *Shewry v. Heuer*, 255 Iowa 147, 121 N.W.2d 529 (1963). Personal performance of management services also is a contributing factor. In order to base loss of profits on the premature termination of the lease, we deem it incumbent that the plaintiff establish the extent to which the lease contributed to the profit picture of the business and how loss of this particular lease reduced the ability of the corporation to earn similar profits from similar capital investment and management in another business or the same business at another location.

Plaintiff's claim is not dissimilar from that which was rejected in a Texas case involving wrongful eviction. There the court stated:

"Appellee also takes the position. . . that since it could not have space in all respects as desirable as appellants' it would simply cease doing business in Sherman and let appellants replace all of the profits it might hope to have made if appellants had not breached the lease. We do not agree with this contention." *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 86 (Tex. Civ. App. 1971).

As stated in *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968):

"Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated."

We believe the failure of proof in the present case goes to both of the foregoing elements and precludes the recovery of damages based upon lost profits.

IV. Plaintiff also alleged damages based upon wrongful destruction of certain personal property. It offered no proof of any such damage and a verdict was properly directed on this portion of the claim.

We have considered all issues and conclude the judgment should be affirmed.

AFFIRMED.

ALLBEE, C.J., and SNELL, J., concur; DONIELSON, J., and OXBERGER, J., dissent.

APPENDIX

20. If the premises or the building are made wholly untenable by fire or other casualty, Lessor may elect (a) to terminate this lease as of the date of the fire or casualty by notice to Lessee within thirty (30) days after that date, or (b) to repair, restore or rehabilitate the building or the premises at Lessor's expense within ninety (90) days after Lessor is enabled to take possession of the injured premises and to undertake reconstruction or repairs, in which latter event the lease shall not terminate but rent shall be abated on a per diem basis while the premises are untenable. If Lessor elects so to repair, restore or rehabilitate the building or the premises and does not substantially complete the work within the ninety (90) day period, either party can terminate this lease as of the date of the fire or casualty by notice to the other party not later than One Hundred (100) days after Lessor is enabled to take possession of the injured premises and to undertake reconstruction or repairs. In event of termination of the lease pursuant to this clause, rent shall be apportioned on a per diem basis and be paid to the date of the fire or casualty. If the demised premises shall be partially damaged by fire or other casualty without the fault or neglect of Lessee, Lessee's servants, employees, agents, visitors or Licensees, the premises shall be repaired, restored or rehabilitated by and at the expense of Lessor, and rent until the damaged portion of the premises is ready for occupancy by Lessee, shall be apportioned according to the part of the demised premises which is usable by Lessee. In all cases, due allowance shall be made for reasonable delay which may be caused by adjustment of insurance, strikes, labor difficulties or any cause beyond Lessor's control.

DONIELSON, J. (dissenting)

I cannot support the majority's definition and interpretation of the essential term, "*wholly untenantable*" as used in the lease. The phrase denotes a permanent and substantial destruction of the premises where further occupancy is an impossibility. See *Scharbauer v. Cobean*, 42 N.M. 427, 80 P.2d 785 (1938). "*Wholly untenantable*" has been defined by a New York court when "*there is no way in which the premises could have lawfully, safely and practically been occupied or used by the tenant for any purpose whatsoever, much less for the purpose of conducting a retail business.*" *Old Line Company v. Getty Square Department Store, Inc.*, 66 Misc.2d 825, 322 N.Y.S.2d 149 (1971). This case carefully and precisely defines "*wholly untenantable*" and should be adopted as a reasonable standard definition by this court.

In the context of the 30-year lease in the instant case, the finding of "*wholly untenantable*" would require the impossibility of the lessee ever restoring the premises to condition prior to the fire within a reasonable time. *Presbyterian Distribution Service v. Chicago National Bank*, 28 Ill. App.2d 147, 171 N.E.2d 86 (1960). The length of the unexpired term of the lease, 30 years, is extremely relevant in determining whether the premises should be considered "*wholly untenantable*". *Mottman Mercantile Company v. Western Union Telephone Company*, 3 Wash.2d 62, 100 P.2d 16 (1940).

Testimony disclosed that the leased premises damaged could have been completely repaired within 42 days. Certainly, not an unreasonable interruption in light of a 30-year lease. The chief building inspector for the City of Davenport testified that he found nothing unsafe from a structural standpoint. There was testimony that 95% of the fire coated sheetrock

covering 90% or more of the interior of the building was not even smoke damaged. The building suffered no water damage because only the furniture burned and it was pulled from the building to extinguish it. It is clear from the evidence presented that the building could be restored by ordinary repairs. See *Luis v. Ade Lodge #3 Ind. Order of Odd Fellows*, 77 Idaho 392, 294 P.2d 1095 (1956).

In further support, the term "*wholly untenable*" contained in the lease is for the benefit and protection of the lessee and not the lessor. *Luis, supra*.

In the present case, the fact that the appellee-lessor wanted approximately two and one-half times more rent for the premises after the fire and repairs is very unsettling. Testimony indicates this new and increased rental agreement played a part in the decision whether the lease was to be terminated or the repairs made. An accidental fire should not serve as a means to enhance the financial welfare of the lessor nor serve as a means to renegotiate the rent amount of the lease. The landlord's decision to rebuild or not to rebuild is not beyond inquiry for the decision may be evaluated to determine the truth and reasonableness of the action. *Old Line Company v. Getty Square Department Store, Inc.*, 66 Misc.2d 825, 322 N.Y.S.2d 149, 153 (1971).

I disagree with the majority on the issue relating to the cross appeal but do not choose to write on that aspect because of my deeper concern on the fundamental issue of "*wholly untenable*."

Oxberger, J. joins in this dissent.