

IN THE COURT OF APPEALS OF IOWA

No. 7-679 / 97-23

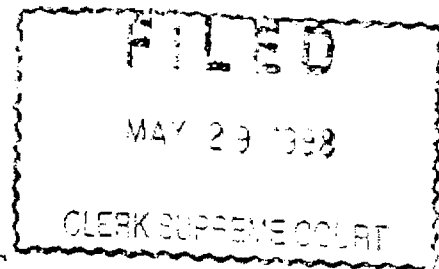
ED ROSS and SALLY ROSS,

Plaintiffs-Appellants,

vs.

**REO-CEDAR RIDGE, L.P., TPG FINANCIAL, INC.,
and THE PROVO GROUP, INC.,**

Defendants-Appellees.



Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

The plaintiffs appeal from the district court's ruling granting the defendants summary judgment on plaintiffs' claims for breach of contract and fraud.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR TRIAL.

Robert K. DuPuy of LaMarca & Landry, P.C., West Des Moines, for appellant.

Phillip W. Bledsoe of Shughart Thomson & Kilroy, P.C., Kansas City, Missouri, and Steven M. Augspurger of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Considered by Streit, P.J., Vogel, J., and Hayden, S.J.* Sackett, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HAYDEN, S.J.

The plaintiffs appeal from the district court's ruling granting the defendants summary judgment on plaintiffs' claims for breach of contract and fraud. The plaintiffs claim that the district court erred in construing the contract as requiring installment payments for the security deposit to be made at the commencement of the lease term, in determining the defendants' notices satisfied the lease notification requirements for termination, and in rejecting the plaintiffs' fraud claim as a matter of law. We reverse as to the plaintiffs' lease claim and remand this matter for trial.

In January 1992, after the plaintiffs, Ed and Sally Ross suffered a fire at their pet store, they entered into a lease to rent premises located in the Cedar Ridge Shopping Center in Urbandale, Iowa. The property is owned by the defendants, Reo-Cedar Ridge, L.P., and TPG Financial, Inc., and managed by the defendant, the Provo Group, Inc. The lease term covered five years and six months commencing on March 1, 1992. It provided that the base rent was abated for the first six months of the lease and that operating expenses to be paid by the Rosses were to begin in the third month of the lease term. The agreement further provided that a \$5000 security deposit was to be paid in equal monthly payments of \$500 during the first year of the lease. The agreement also provided that the Rosses would be considered in default if they failed to make any required lease payment more than ten days after written

notice of such a failure. The lease further provided that the owners may then give written notice of termination of the lease.

The Rosses claim that after they took possession of the property, the shopping center owners began to demand they make full payment of the security deposit. The Rosses claim that this demand forced them to default on the lease. The defendants dispute these allegations. The Rosses further claim they sent their first installment payment for the security deposit on April 21, 1992. The defendants never received the payment. On May 15, 1992, the defendants sent a written notice to the Rosses demanding that they vacate the premises on the basis that nonpayment of the security deposit rendered the lease voidable. The Rosses responded by claiming to have sent a payment for the deposit in April.

On May 29, 1992, the defendants sent a second letter to the Rosses requesting that they vacate the premises immediately due to the default of the payment of a security deposit. The Rosses vacated the premises and filed for bankruptcy.

In December 1993, the Rosses filed an action against the defendants asserting that they breached lease provisions regarding the payment of the security deposit and the notification requirement on default and termination. The Rosses further made a fraud claim asserting that the defendants made misrepresentations about the payment of the security deposit resulting in financial damages to the Rosses.

The Rosses filed a motion to adjudicate law points seeking interpretation of various lease provisions including the due date for the initial payment of the security deposit.

The district court entered a ruling on the motion determining the initial due date for the first payment on the security deposit was March 1, 1992, when the lease term commenced. The district court rested this interpretation in part on the fact that the lease provisions for payment of the security deposit did not include abatement language which had been used regarding the payment of rent and operating expenses.

The defendants filed a motion for summary judgment. The district court granted the motion, concluding the plaintiffs were in breach of the lease obligations when they failed to make the initial security deposit payment on March 1, 1992. The court further concluded the two notices sent by the defendants in May 1992 satisfied the lease notification requirement for termination. The court also granted the defendants' motion for summary judgment on the plaintiffs' fraud claim. The Rosses appeal.

Our review of a successful summary judgment motion is for correction of errors at law. *Amerus Bank v. Canova*, 566 N.W.2d 196, 196 (Iowa App. 1997); Iowa R.App.P. 4. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). In determining if there is a genuine issue of fact, we consider the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits. *Id.*; *Simpson v. United States Fidelity & Guar. Co.*, 562 N.W.2d 627, 629 (Iowa 1997). We afford the plaintiff, who opposes the motion, every reasonable inference the facts will bear. *McClendon v. Beck*, 569 N.W.2d 382, 384 (Iowa 1997).

The district court ruled on the plaintiffs' motion to adjudicate law points prior to the defendants' motion for summary judgment. As an interlocutory ruling, the plaintiffs were not required to appeal it before the final adjudication of the case. Iowa R. App. P. 1(b). Errors asserted in the district court's ruling on the motion may be raised on appeal of the final adjudication. *Id.* Our review of the trial court's legal conclusions in a ruling adjudicating law points is on error. *Lihs v. Lihs*, 504 N.W.2d 890, 892 (Iowa 1993). Some factual issues are uncontroverted. Other unresolved controverted facts cannot form a basis for the adjudication and on review must therefore be presumed in favor of the party against whom the adjudication was entered. *See Rasmussen v. Nebraska Nat'l Life Ins. Co.*, 170 N.W.2d 370, 373 (Iowa 1969).

This case revolves largely around issues of the meaning of the lease between the parties. If the lease is clear and unambiguous, it is not subject to judicial interpretation or construction. *See Vincent v. Kasser Const. Co.*, 125 N.W.2d 608, 610 (1963). If, after the application of pertinent rules of interpretation to the face of the lease, a genuine uncertainty exists concerning which of two reasonable constructions is proper, an ambiguity exists. *See Iowa Fuel & Minerals, Inc. v. Iowa*

State Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991). In its adjudication of law points the court determined the due date of the first security installment in paragraph 3.2 of the lease was unambiguous. The court also determined the notice requirements in paragraph 16(a) were unambiguous and a written notice of delinquency of “any other sum” was required before default occurs.

Ross claims the contract is ambiguous in the use of the following language requiring the payment of a \$5000 security deposit:

3.2 Security Deposit. Lessee shall deposit with Lessor the sum of \$5,000.00 in equal monthly installments of \$500.00 during year 1 of the Lease Term, as security deposit for the faithful performance and observance by Lessee of the terms, provisions and conditions of this Lease.

Ross contends because the deposit provisions did not expressly state when the payments were to commence, they could pay ten \$500 payments during any part of the first year of the lease. We disagree. The lease contains requirements for three different payments to the lessor: rent, operating expenses, and security deposit. The rent expressly is abated for the first six months of the lease. Payment of the operating expenses expressly did not begin until the third month of the lease. In contrast, payment of the security deposit is not expressly abated or delayed. We conclude the trial court did not err in its determination the language concerning the security deposit was unambiguous. It contained no provision for delay or abatement, and we will not imply one.

Even if Ross's interpretation allowing the lessee to not pay the deposit payments during the first two months of the lease (March and April) were correct, this interpretation would require a \$500 payment on May 1, 1992. The record does not establish such payment was actually made. The undisputed facts are sufficient to support a grant of summary judgment. We affirm the trial court on this issue.

The lease required the lessor to notify lessee of the failure to pay a required sum — ten days before any termination of the lease. This provision would allow a lessee to cure any default, such as a default arising out of a dispute as to whether a check had been mailed. On May 15, 1992, REO-Cedar Ridge sent a "Notice to Surrender Possession" to the lessees. On May 29, 1992, the lessor told the lessee to "vacate the premises immediately." It failed to send any other notice. Summary judgment would be inappropriate under these circumstances. We reverse the grant of summary judgment and remand this issue for trial.

The court also granted summary judgment against the plaintiffs on their claim of fraud. The elements of fraud are representation, falsity, materiality, scienter, intent to deceive, reliance, and damages. *Rosen v. Bd. of Medical Examiners*, 539 N.W.2d 345, 349 (Iowa 1995). The trial court determined the plaintiffs could not show reliance and could not show a special relationship in support of a claim of fraudulent concealment. From our review of the record before the trial court, we conclude the

court did not err in its grant of summary judgment on the fraud issue. We affirm the trial court on this issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR TRIAL.