IN THE COURT OF APPEALS OF IOWA

FILED
AUG 26 1987
CLERK SUPREME COURT

KEN-JAN, INC.,

Plaintiff-Appellant,

vs.

SKATES OF WATERLOO, INC., QUINTON R. LANE, NORMAN E. GLAZEBROOK, RENAISSANCE SKATING CENTER, INC., and JAMES PERRY,

Defendants-Appellees.

Filed August 26, 1987

7-251
86-1655

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Appeal from the Iowa District Court for Black Hawk County (No. 65598) - William G. Klotzbach, Judge.

Plaintiff appeals and defendants cross-appeal from action on lease. **AFFIRMED IN PART AND MODIFIED.**

Hugh M. Field, of Beecher, Beecher, Holmes & Rathert, Waterloo, for plaintiff-appellant-cross appellee.

Joe Nutting of Martin, Nutting, Miller, Keith & Pedersen, Waterloo, for defendant-appellee-cross appellant Quinton R. Lane.

C. A. Frerichs of Fulton, Frerichs, Martin & Andes, Waterloo, for defendant-appellee Norman E. Glazebrook.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

The issues before us are (1) whether the trial court applied the proper measure of damages in a law action on a real estate lease, and (2) whether an order of forcible entry terminates a lessee obligation under a lease.

Plaintiff Ken-Jan, Inc.,[1] is the owner of certain improved real estate in Waterloo, Iowa. The property was leased to Defendants Skates of Waterloo, Inc., Quinton R. Lane and Norman E. Glazebrook for a term commencing in 1971 and ending July 15, 1986. On October 31, 1977, Defendants Skates, Inc., Lane and Glazebrook sublet the premises to Defendants Renaissance Skating Center, Inc., and James Perry.[2] In March, 1984, the defendants ceased to pay rent. At that time Renaissance and Perry were in possession and were operating the business as a skating rink. On March 13, 1984, an order of forcible entry and detainer issued ordering Renaissance and Perry to vacate the premises. Renaissance and Perry operated the skating rink until May 10, 1984, when they did vacate.

On August 13, 1984, plaintiff sued defendants for unpaid rents during the lease term and additionally sought repair costs they contended were due under the lease.

The matter was tried to the court which found defendants Skates, Inc., Lane and Glazebrook were liable for $12,889.81 in rents for the months of April, May, June, July and August, and part of March, 1984, and $4,233 in taxes. On the issue of repairs the trial court awarded plaintiff $5,000 for damage done to the building.

I. Repairs

Plaintiff appeals and defendants cross-appeal from the trial court's award of $5,000 damages. The lease in question provided defendants were to assume

[1] The lease was originally made with one Lockard who assigned to Plaintiff Ken-Jan, Inc.

[2] Though named, Defendants Renaissance and Perry were not served with an original notice of suit and did not appear in the action.

the repair costs during the lease term and defendants were to keep the premises in good order and condition at their own expense. The plaintiff contends this language subjects defendants to all repair costs. Plaintiff claims repair expenses of $61,915.47. Plaintiff contends there was insufficient evidence to support any damage award made.

This is a law action. Our scope of review on acts of law is on assigned error only. Iowa R. App. P. 4.

The plaintiff seems to claim because the lease provides defendants should assume all repairs and keep the premises in good order and condition at their own expense that plaintiff is entitled to recover against defendants for all repairs plaintiff made after taking possession of the premises. Plaintiff claims all the repairs should be paid because there was no evidence the repairs were not fair and reasonable nor necessary to bring the building into tenantable condition.

We do not determine, as plaintiff asks, that the language of the lease imposes any special obligation on defendants after the termination of the lease to be responsible for putting the premises in the same condition they were at the commencement of the term. See Lindsay Bros., Inc. v. Milwaukee Cold Storage, 207 N.W.2d 639 (Wis. 1973). See also Puget Investment Co. v. Wenck, 36 W.2d 817, 221 P.2d 459 (1950). The damages which a party should receive when a contract is breached should be either such as may be fair and reasonable, according to the usual course of things as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of a breach of it. Wood v. Chicago Milwaukee & St. Paul Ry. Co., 68 Iowa 491, 500, 27 N.W. 473, 477 (1886); Metropolitan Transfer Station, Inc., v. Design Structures, Inc., 328 N.W.2d 532, 535-36 (Iowa App. 1982).

The ordinary measure for injuries to realty if the property can be repaired or restored, is the reasonable cost of repair or restoration, not exceeding the

fair market or actual value of the improvement immediately prior to the damage. Duckett v. Wharton, 312 N.W.2d 561, 562 (Iowa 1981). Defendants claim because plaintiff made no showing as to the reasonable cost of repair or the deminution of the value of the building when it was damaged, no damages should have been awarded. In Wharton, the Iowa court entered judgment for defendant where it determined plaintiff failed to introduce evidence on the elements and the defendant had adequately raised the issue in the trial court. Id. at 562. The evidence clearly shows there were extensive repairs, and while there was no evidence as to the diminution of the building when it was damaged, it is clear from the evidence the building was damaged.

Damages should not be denied merely because the amount is difficult to ascertain so long as the fact some damages were sustained is evident. Palmer v. Albert, 310 N.W.2d 169, 174 (Iowa 1981); Metropolitan Transfer, 328 N.W.2d at 538. We reject both parties' argument and affirm the $5,000 damage award.

II.

The second issue involves defendants' contention their obligation for rent terminated when an order of forcible entry and detainer issued ordering the assignee to leave the premises. Plaintiff agrees eviction constitutes a termination of a lease. However, plaintiff contends only defendants' assignee not defendants were evicted. Plaintiff claims defendants in essence abandoned the premises and where there is an abandonment reentry and releasing is not an acceptance of the abandonment.

On March 6, 1984, the plaintiff filed for an action for forcible entry and detainer against defendants' assignee, Renaissance Skating Center. On March 14, 1984, a default judgment was entered in the matter. Defendants, Skates, Inc., Lane and Glazebrook, subsequently moved to set aside the default judgment. The motion was heard on March 28, and on March 29, 1984, the default judgment

ordering the eviction of the tenant was affirmed. Renaissance did not leave the premises until the night of May 10, 1984. The plaintiff then took possession and changed the locks on May 11, 1984.

In either late May or early June 1984, the new prospective tenants first saw the building and entered into the lease of the premises at $3,000 per month subject to certain repairs being completed. The new tenants took possession following completion of the required improvements on September 15, 1984. The trial court determined the defendants were liable for rent under the terms of the lease agreement for the balance due in March of $1,589.81, and the months of April, May, June, July, and August for a total $12,889.81.

Defendants contend when Renaissance was evicted their responsibility under the lease ceased. A tenant is evicted when he leaves the premises during the term in response to a notice to quit. Kueken v. Garrett, 243 Iowa 785, 793-94, 51 N.W.2d 149, 155 (1952). See Eggers v. Paustian, 190 Iowa 638, 180 N.W. 873 (1921). As a general rule termination of a lease which the lessor elects to assert does not terminate accrued liabilities including accrued rent but does terminate liabilities to accrue in the future. See Sacher v. Taco Grande of Iowa, Inc., 210 Neb. 122, 313 N.W.2d 257 (1981); 52 C.J.S. Landlord and Tenant §490 (1955).

In Becker v. Rute, 228 Iowa 533, 539, 293 N.W. 18, 23 (1940), the landlords forfeited a lease with forfeiture provisions and the tenant surrendered possession. The court held the landlords were entitled to rent matured prior to the forfeiture and tenants had no further rights under the lease provisions. Id. In Kean v. Ross, 146 Iowa 559, 562-63, 123 N.W. 754, 755-56 (1910), the landlord's agent told tenant's assignee to sell out and quit the business on the leased premises. The court held the assignee's tenant was released from future rents. Id.

Plaintiff does not disagree with this general rule but contends it is not applicable here because the person evicted was defendants' assignee not the defendants who executed the original lease. Plaintiff claims defendants' obligation to him remains irrespective of the fact plaintiff evicted the subtenant. We disagree. The assignee was operating a business in defendants stead. When the business was notified its possession was terminated and it left the premises, plaintiff terminated the entire lease.

We therefore modify the amount of rent awarded to plaintiff. We determine defendants owe rent for March of $1,589.81, for April of $2,260, and for 10 days in May of $753.33. Defendants have a credit against rent due in the amount of $2,260. The judgment in plaintiff's favor for rents due is modified to $2,343.13. The judgment of $5,000 for damages is affirmed.

Appellate costs are taxed one-half to each party.

AFFIRMED IN PART AND MODIFIED.