IN THE COURT OF APPEALS OF IOWA

No. 7-379 / 96-1872

000209

MIDLAND MUTUAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

MERCY CLINICS, INC., f/k/a MERCY HEALTH AND HUMAN SERVICES CENTER,

Defendant-Appellant.

FILED
DEC 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Defendant appeals from judgment entered in plaintiff's favor following a jury trial. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.**

Steven L. Nelson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

Steven J. Woolley of Polack, Woolley & Troia, P.C., Omaha, Nebraska, and Michael J. Cunningham of Adams & Howe, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

In 1983 West Roads, Ltd. ("West Roads"), as landlord, and Mercy Clinics, Inc. ("Mercy"), as tenant, entered into a ten-year Lease Agreement for the lease of space at West Roads Shopping Center ("the shopping center"). The term commenced on February 1, 1984, and ended on January 31, 1994. Mercy and West Roads also entered into contemporaneous agreements related to the lease. These agreements were titled the Finish Agreement and the Expansion Agreement. The Finish Agreement required Mercy to pay West Roads monthly payments to reimburse West Roads for the cost of constructing improvements to the demised premises. The Expansion Agreement required West Roads to construct an addition to the shopping center to provide additional space for Mercy. If West Roads did not begin construction within twenty-four months from the signing of the Expansion Agreement, it agreed to pay the negative cash flow on a building in Indianola known as the Kline building. West Roads did not construct the addition and became obligated to make the monthly payments.

The lease required Mercy to pay a fixed minimum rent *payable monthly in advance* on the first day of each month. It also required Mercy to pay a proportionate share of the taxes. The landlord was obligated to promptly notify Mercy of the taxes *when due* and Mercy was then obligated to promptly reimburse West Roads for their payment. Further, Mercy agreed to pay *monthly in advance* a common area

maintenance ("CAM") charge. West Roads was required to provide an annual statement covering all CAM costs and expenditures. Last, Mercy agreed to pay West Roads *at the first of each month* its proportionate share of all fire and extended coverage insurances as determined by West Roads to be required in connection with the shopping center. West Roads retained an unqualified right to assign the lease. Mercy also agreed upon sale, transfer, or assignment of West Road's interest in the shopping center or part thereof to attorn to and recognize such transferee, purchaser, ground or underlying lessor or mortgagee as landlord under the lease.

On January 10, 1990, Future Development Corporation ("FDC") borrowed $1,385,000 from Midland Mutual ("Midland") to purchase the shopping center from West Roads. FDC signed a Promissory Note, along with a Mortgage and Security Agreement, and an Assignment of Rent and Leases. The rental assignment:

> [S]ets over to [Midland] all of [FDC's] estate, rights, title and interest in . . . all rents, revenues, profits and income from the Mortgaged Estate, including those now due, past due or to become due. [FDC] irrevocably appoints [Midland] its true and lawful attorney-in-fact, at the option of [Midland] at any time and from time to time, to take possession and control of the Mortgaged Estate, pursuant to [FDC's] rights as lessor under the Leases, and to demand, receive and enforce payment, to give receipts, releases and satisfaction and to sue, in the name of [FDC] or [Midland], for all of the rents, revenues, profits and income thereof. It is intended by [FDC] and [Midland] that this Assignment constitutes an absolute assignment and not merely an assignment for additional security.
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> Notwithstanding the foregoing, however, so long as no Event of Default has occurred, [FDC] shall have a revocable license to possess and control the Mortgaged Estate and collect and receive all rents, revenues, profits and income. Upon the occurrence of an Event of Default, such license shall be automatically revoked by [Midland].

In the Assignment of Rents and Leases, FDC also agreed:

> (b) [FDC] *shall not* terminate any Lease (except pursuant to the terms of such Lease upon a default by the tenant thereunder), or grant concessions *or modify or amend any such lease in any manner whatsoever, without the prior written consent of [Midland]*;
>
> (c) [FDC] *shall not collect any rent more than one (1) month in advance* of the date on which it becomes due under the terms of each lease.

If FDC violated these statements, it would be in default under the Assignment of Rents and Leases. The Assignment of Rents and Leases also states it was an *absolute and unconditional assignment of rights only, and not a delegation of duties*. Exhibit B to the Assignment of Rents and Leases specifically excluded the Finish Agreement obligating Mercy to pay West Roads for improvements because it was assigned to People's Trust and Savings Bank of Indianola ("People's Trust").

On January 18, 1990, Mercy signed an Estoppel Certificate as a condition precedent to Midland making the loan to FDC. In the Estoppel Certificate Mercy certified, among other things: (1) the minimum rent; (2) it had not entered into any agreements for free rent, rent concessions, or providing for discounting or offsetting of rents, and no rent had been paid for more than one installment in advance; and (3) Mercy had an agreement for expansion and finish with the landlord for additional space which remained in full force and effect. Mercy recognized Midland's option to demand all rents be paid to Midland upon FDC's failure to perform and observe the terms of the Mortgage.

> [I]f there is a default by [FDC] in the performance and observance of the terms of the Mortgage, you may, at your option but are not required to, demand that all rents due under the Lease be paid directly to you or your account. Upon notification from you to that effect, the undersigned will remit any payments due under the Lease to your order. However, until written notification to that effect from you, the undersigned will continue to make the Lease payments to [FDC] as required under the Lease.

Mercy agreed not to pay rent under the lease more than thirty days in advance of its due date. Last, Mercy agreed *neither Midland nor any purchaser pursuant to a foreclosure proceeding would be bound by any prepayment of more than one month's installment of rent or other change or modification of the Lease* made subsequent to the date of the Estoppel Certificate *without Midland's written consent.*

During 1991, FDC became delinquent on its loan payments to Midland. In July 1991, Mercy moved its clinic out of the shopping center while continuing to pay rent. On May 5, 1992, Mercy and FDC entered into a written Termination Agreement terminating the lease. Under the Termination Agreement, Mercy paid FDC installments totaling $166,986, including an initial payment of $83,493 upon execution of the Termination Agreement, which represented the present value of all the payments owed by Mercy and FDC to each other under the lease, Finish Agreement, and Expansion Agreement. Mercy made the $83,493 payment on May 22, 1992. Neither Mercy nor FDC notified Midland of the Termination Agreement. Midland did not learn of the possible existence of the Termination Agreement until March 1993.

On May 6, 1992, FDC and Midland agreed to a settlement proposal to modify the initial Note and Mortgage of January 10, 1990, to cure the delinquency then existing. On July 28, 1992 Midland and FDC entered into a Mortgage Loan Modification Agreement ("Modification Agreement") whereby the Initial Note and Mortgage and Rent Assignment were amended. Under the Modification Agreement, FDC made a lump sum payment of $75,644 and executed and delivered a $101,140.14 Accrued Interest Promissory Note whereby the accrued and unpaid interest under the Initial Note was capitalized and payment of the Initial Note was restructured. On May 6, 1992, FDC made a payment of $82,673, including the $75,644 lump sum payment, to Daisley Ruff, Midland's servicing agent. This check was not deposited by Daisley Ruff until May 27, 1992.

From May 1992 until July 1993, FDC made the payments due to Midland under the Modification Agreement. However, the August payment was not made by FDC until October 28, 1993 and no other payments were made. On August 25, 1993, Midland notified the remaining tenants they should pay future rents to Midland. Mercy was not notified. Ultimately, Midland commenced a foreclosure action against FDC and obtained a judgment and decree of foreclosure on March 21, 1994. Midland purchased the property at the sheriff's sale, resulting in a $900,000 loss.

Midland has filed this action in an attempt to recover the rent and other sums that would have been due under the lease if Mercy and FDC had not signed the Termination Agreement. The parties stipulated the maximum amount of damages to

be $154,150.71. Of that amount, rent was $137,525.25. CAM charges were $6865.59, real estate taxes were $8845.71, and insurance was $914.16.

I. DENIAL OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. We review the district court's denial of a motion for judgment notwithstanding the verdict for correction of errors at law. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). Our only inquiry in assessing such a motion is to determine whether there is sufficient evidence to justify submitting the case to the jury. *Id.* In making this assessment we view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. *Id.* The motion should be denied if there is substantial evidence to support each element of the plaintiff's claims. *Id.*

Mercy alleges the court should have entered judgment notwithstanding the verdict because Midland failed to prove Mercy caused damage by entering into the Termination Agreement without notice to Midland.

In Iowa when a contract has been breached, the non-breaching party is generally entitled to be placed in a position it would have occupied had there been performance. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). These "benefit-of-the-bargain" damages are intended to provide a sum of money that will put the non-breaching party in the position it would have

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been if the contract had not been breached. *Id.* The focus in Iowa law is foreseeability of the type of damages. *Id*; *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994). Damages which a reasonable person would expect to follow from breach of a contract are direct and thus should be awarded. *Id.* The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996).

We find plaintiff failed to provide substantial evidence it was damaged to the full extent of the $154,150.71. We find the trial court should have granted Mercy's motion for JNOV and credited Mercy with FDC's $82,673 payment to Midland. The evidence clearly showed the money for the payment came from Mercy. Further, as Mercy contends, Midland would not have received the $82,673 if it had instead received the $154,150.71 from Mercy. Thus, $82,673 must be subtracted from the maximum damage amount of $154,150.71. This modifies the maximum amount of damages Midland could have suffered to $71,477.71. If we did not credit Mercy with this amount, Midland would be placed in a better position than if Mercy had given the required notice.

Mercy also made several other claims in its motion. First, Mercy contends the monthly installments it made to FDC pursuant to the terms of the Termination Agreement preclude a claim of prepayment of rent because it did make payments during this period. Next, Mercy contends prepayment of the CAM charges, insurance, and taxes was not prohibited by the Estoppel Certificate as a matter of law

because they were not rent. Also, Mercy contends if it is liable for damages, the damage amount must be reduced by the amount of payments owed under the Expansion Agreement. Mercy claims it could have claimed this as a defense against FDC, so it can now claim this defense against Midland as an assignee. Last, Mercy was not required to make rental payments to Midland until it received notice from Midland. Midland did not give this notice until August 1993. Therefore, Mercy contends Midland could not possibly have suffered damage until this time, if it suffered damages at all. We find these additional claims to be without merit. The trial court correctly overruled Mercy's motion as to these claims.

II. FAILURE TO INSTRUCT. Mercy next contends the trial court erred in refusing to instruct the jury about the rights between assignees and obligors. We review this claim for correction of errors at law. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994); Iowa R. App. P. 4. Failure to give a requested instruction is reviewed for an abuse of discretion. *State v. Holtz*, 548 N.W.2d 162, 168 (Iowa App. 1996). The district court has a duty to instruct fully and fairly on the law regarding the issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994). As discussed above, Mercy was not entitled to a credit for the amount of the payments due from FDC under the Expansion Agreement. Thus, we also find the court did not

err in refusing to give the requested instruction. If the trial court had given the requested instruction, it would have misstated the applicable law.

III. REFUSAL TO ALLOW ADMISSION OF EVIDENCE. Mercy contends the trial court erred in refusing to allow it to enter alleged admissions by Midland and the contents of an affidavit by Tracy Frerichs. We review rulings by the trial court on the admissibility of evidence for an abuse of discretion. *Roberts v. Newville*, 554 N.W.2d 298, 299 (Iowa App. 1996). A ruling on the admission of evidence by the trial court will not be disturbed on appeal unless the discretion has been abused and a substantial right of a party has been affected. *Id.* We agree with Midland and find the evidence Mercy sought to introduce was available to the jury through other exhibits. Mercy had ample opportunity to ask the witnesses on the stand questions developing these same types of statements. We find the trial court did not abuse its discretion.

IV. NEW TRIAL. We review the granting or denial of a motion for new trial for abuse of discretion. *Magnusson Agency*, 560 N.W.2d at 30. If the jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Id.* We find there is no need to discusss this issue because we have granted part of Mercy's motion for JNOV such that the verdict does effectuate substantial justice.

V. CONCLUSION. We have carefully reviewed all of the claims and find the matter should be affirmed in part and reversed in part. We reverse the decision of the trial court as to the credit for the $82,673 payment made pursuant to the modification agreement. We affirm as to all other claims. We therefore remand with instructions to enter judgment for Plaintiff, Midland Mutual Life Insurance Company, in the sum of $71,477.71.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.