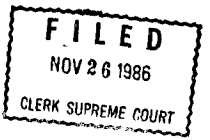
IN THE COURT OF APPEALS OF IOWA



183

JOSEPH Z. MARKS, JOSEPH L. MARKS, and **TED E. MARKS,** Plaintiffs/ Cross-Appellants, vs. **JAMES D. THOMPSON, WILLIAM S. KALSEIM,** and **RICHARD C. BJORLO,** Defendants/ Cross-Appellants.	)	Filed November 26, 1986
JAMES D. THOMPSON, WILLIAM S. KALSEIM, and **RICHARD C. BJORLO,** Cross-Petitioners/ Cross-Appellants, vs. **GARDINER & CO., P.C., DAN GARDINER** and **DONALD N. POCHTER,** Third-Party Defendants to Cross-Petition/Appellants.	)	6-330 85-1718

Appeal from the Iowa District Court for Polk County (No. CL59-34650) - A. M. Critelli, Judge.

All parties appeal and cross-appeal from the judgment in an action seeking enforcement of a lease term. Third-party defendants assert that the evidence was insufficient to support a finding that any or all of them become assignees of the lease and that cross-petition plaintiffs should not have been permitted, on the day trial commenced, to amend their pleadings to allege assignment of the lease. Defendants/cross-petitioners assert that the evidence was sufficient to establish that their obligations under the lease were released and that the

trial court erroneously determined the applicable tax year for purposes of the lease term upon which plaintiffs' claim was based. Plaintiffs assert that the evidence was insufficient to support a finding of laches and that the rate of interest to which they were entitled therefore should not have been reduced on that ground. **AFFIRMED AS MODIFIED.**

Paul E. Huscher, Des Moines, for appellants.

Lynne Wallin and Robert M. Holliday of Erickson, Miller & Lytle, P.C., West Des Moines, for cross-appellants Thompson et al.

Robert A. Carber, Des Moines, for cross-appellants Marks.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

SNELL, P.J.

In 1978, the plaintiff in this action, Marks, entered into a written agreement with the defendants, Thompson, leasing certain rental property to Thompson through December 1983. The lease agreement provided, among other particulars, for monthly rent in the amount of $1,354.17 and for the tenant to pay any increase in real estate taxes "... above the amount paid during the base year of fiscal year 1978-79." Prior to November 1, 1981, Thompson was contacted by cross-petition defendant Pochter concerning an agreement whereby Pochter and Gardiner, another cross-petition defendant, would assume occupation of the leased premises. Pochter and Gardiner, later incorporated as Gardiner & Co., occupied the premises from November 1, 1981, until the expiration of the lease term, at which time a new lease was executed between the cross-petition defendants and the plaintiff.

On November 20, 1984, Marks brought an action against Thompson to collect increases in real estate taxes pursuant to the aforementioned lease provision. Thereafter, Thompson filed a cross-petition against Gardiner seeking indemnification for the taxes and alleging that Gardiner took possession of the premises subject to all the terms and conditions of the lease agreement. On the date of trial, May 29, 1985, Thompson was granted leave to amend the cross-petition to allege an assignment to Gardiner of the lease.

Following trial to the court, the cross-petitioners were held jointly and severally liable to the plaintiffs for taxes in the amount of $14,640.36 plus interest at a rate of 10 percent per annum. In addition, cross-petition defendants were held liable to cross-petitioners in the amount of $8,530.62, also with interest at 10 percent per annum. These appeals and cross-appeals followed.

For purposes of simplicity and clarity, we refer to the plaintiffs, appellees, and cross-appellants as Marks; the defendants, appellees, and cross-appellants

as Thompson; and the cross-petition defendants, appellants, and cross-appellees as Gardiner.

Gardiner first argues that the district court erred in allowing Thompson to amend his pleadings on the day of trial so as to allege an assignment of the real estate lease. The allowance or disallowance of amendments to pleadings under Iowa R. Civ. P. 88 is a matter for the exercise of the trial court's discretion. Chao v. City of Waterloo, 346 N.W.2d 822, 825 (Iowa 1984). This discretion is broad and will not be interfered with on appeal unless the discretion is abused. Kellar v. Peoples Natural Gas Co., a Div. of InterNorth Inc., 352 N.W.2d 688, 692 (Iowa Ct. App. 1984). Although the allowance of amendment to pleadings is the rule and denial the exception, amendment is not permissible if it will substantially change the issues. Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 225 (Iowa Ct. App. 1984). Amendments to pleadings should not be allowed on the eve of trial or later if they substantially change the defense. Parker v. Tuttle, 260 N.W.2d 843, 846 (Iowa 1977).

In the present case, we believe the trial court did not abuse its discretion when it allowed amendment of the cross-petition. Thompson alleged in the original cross-petition that Gardiner, pursuant to an oral agreement, took possession of the premises under all the terms and conditions of the lease. This was the contested issue as between Thompson and Gardiner at trial, as well as at all stages of the pretrial proceedings. The cross-petition also placed Gardiner on notice that, as a result of the alleged oral agreement, Thompson was seeking indemnification from Gardiner for any liability to Marks. We think that denominating the alleged oral agreement an assignment rather than an assumption of obligations pursuant to a sublease does not so change the issues at trial to amount to an abuse of the district court's discretion. Additionally, Gardiner failed to seek a continuance in order to prepare for trial of what he

now claims to be a new theory of recovery. Such failure weighs against Gardiner's argument on appeal. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). The district court did not err in allowing the amendment.

Gardiner's next contention is that there was insufficient evidence presented at the trial for the court to have found an assignment of the lease from Thompson as opposed to a mere subletting of the premises. As this case was tried to the court at law, the district court's findings of fact have the effect of a special verdict. Iowa R. App. P. 4. The court's findings are therefore binding on us if they are supported by substantial evidence. Brown Township Mutual Insurance Association v. Kress, 330 N.W.2d 291, 293 (Iowa 1983). A finding of fact is supported by substantial evidence if the finding may be reasonably referred from the evidence even though we would have decided the case differently. Id. In evaluating the sufficiency of evidence, we view it in the light most favorable to sustaining the district court's judgment. Id. We need only consider evidence favorable to the judgment, whether or not the evidence is contradicted. Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975). We are not bound, however, by the trial court's conclusions and applications of the law. Miller v. Berkoski, 297 N.W.2d 334, 337-38 (Iowa 1980).

The Iowa Supreme Court delineated the basic framework of the law of assignments in Broyles v. Iowa Department of Social Services, 305 N.W.2d 718 (Iowa 1981). In Broyles, the court stated that:

> An assignment is a contract between the assignor and assignee. Rules of construction applicable to contracts thus apply to assignments. The basic rule in construing a written contract is that the intent of the parties controls. Iowa R. App. P. 14(f)(14). See also 6A C.J.S. Assignments § 43: "The creation and existence of an assignment is to be determined according to the intention of the parties and that intention is derived not only from the instruments executed by them, if any, but from the surrounding circumstances."

Broyles, 305 N.W.2d at 721. When a party accepts the assignment of a lease he not only has the benefits of the lease, but the burdens as well. Berg v. Ridgeway, 258 Iowa 640, 644, 140 N.W.2d 95, 99 (1966). An assignee's acceptance of the obligations under the lease need not be expressly stated. Central State Bank v. Herrick, 214 Iowa 379, 387, 240 N.W. 242, 246 (1932). Such acceptance may be written, oral, or inferred from the acts and conduct of the parties. Id. In Berg, our supreme court described the distinction between an assignment of a lease and a sublease in the following manner: "An assignment of a lease transfers the lessee's entire interest without retaining a reversionary interest. A sublease reserves a reversionary interest in the lease." Berg, 258 Iowa at 646, 140 N.W.2d at 100 (citing 51 C.J.S. Landlord and Tenant § 37a, page 553, § 37b page 555).

We think in the present case there is substantial record evidence in support of a finding by the district court that the lease at question here was assigned to and accepted by Gardiner. Although the district court did not expressly use the term "assignment" in its findings and conclusions on this issue, we think that legal result is implicit in its findings that "there was an agreement that Gardiner would assume and take over the full responsibilities of the lease . . . ." Independent claims not addressed in the findings but inconsistent with the judgment are considered to have been decided adversely to the losing party, and review is merely to determine whether the evidence is adequate to support the findings that the trial court is thus deemed to have made. F.S. Credit Corporation v. Shear Elevator, Inc., 377 N.W.2d 227, 232-33 (Iowa 1985).

The record demonstrates that prior to the change in occupancy, Thompson met with Don Pochter and discussed Thompson's desire to get out from under the obligations of the lease. Thompson testified he informed Pochter that this was his main concern in the transaction. Additionally, the record shows that

Pochter was given a copy of the lease, which fully set forth its obligations, prior to October 1, 1981. Moreover, prior to the change in occupancy, Pochter and Gardiner discussed the move with Marks and their attorney mailed a proposed lease assignment to Marks. Marks testified he had no objection to the occupancy change "as long as [Gardner] complied with our lease." Gardiner occupied the premises for the duration of the lease term.

We think this evidence is sufficient to support the district court's finding that an assignment of the lease occurred from Thompson to Pochter. That Gardiner was a co-assignee is evident from the fact that he signed two rent checks for the property which were introduced into evidence and from the fact that the proposed written lease agreement bore his name as a partner in Gardiner & Co. In addition, we believe Gardiner & Co., a professional corporation, was also properly held liable. Although at the time of the assignment Gardiner & Co. was apparently only a partnership, we think the incorporation was merely a continuation of the partnership and that the corporation was therefore liable for the debts of the partnership. Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 391-93 (Iowa 1975). Also it is evident that the original partnership was a co-assignee because the rental checks bore its name, the proposed written lease assignment referred to "Gardiner & Co., A Partnership," and Pochter told Thompson the premises were "what he thought their firm was interested in." We find no error in the district court's findings on the assignment issue.

Thompson argues on appeal that the district court erred in holding that Marks did not release Thompson of all liability under the lease. In Seeburger v. Cohen, 215 Iowa 1088, 247 N.W. 292 (1932), the Iowa Supreme Court stated that

> [t]he discharge of the lessee's obligation to pay rent and perform convenants of the lease, and the assumption of such covenants by an assignee, cannot be inferred

> merely from the lessor's knowledge of an assignment of the lease by the lessee and the acceptance of rent from the assignee. Before the lessee will be discharged under such circumstances, and the assignee held liable for such obligation, the lessor must expressly or by implication accept the assignee in lieu of the lessee, and the assignee, must expressly or by implication assume the lease and the obligation therein contained.

Seeburger, 215 Iowa at 1092, 247 N.W. at 294. In the present case, we find no evidence in support of Thompson's contention that Marks accepted, by implication, Gardiner as sole obligator under the lease. Quite to the contrary, Marks testified that he did not discharge Thompson from the lease obligations and was opposed to doing so. The district court was not in error in deciding this issue adversely to Thompson.

Thompson next claims the district court erred in determining that the base year for purposes of calculating tax increases payable under the lease by the tenant was 1978-79. The lease provides for the payment of real estate taxes in paragraph 10(b) as follows: "Increase in such taxes . . . above the amount paid during the base year of fiscal year 1978-79 . . . shall be paid by Landlord, 0%; by Tenant 100%." Thompson contends that this language contains a latent ambiguity. This ambiguity occurs, Thompson argues, because the taxes paid during 1978-79 were based upon a 1977 assessment when the units at issue here were not in existence. Therefore, the 1978-79 taxes were paid merely upon the assessed value of raw ground. Given this background, Thompson claims the above-cited language was intended to refer to tax increases above those paid on the property's 1978-79 assessed value, not those actually paid in 1978-79.

We find nothing ambiguous, latently or otherwise, in the lease's language on this issue. The lease clearly defines the benchmark as taxes "paid during the base year of fiscal year 1978-79 . . . ." (emphasis added). Where the language is clear and unambiguous, the intention expressed in the agreement prevails

over the intent or interpretation of a party. Mopper v. Circle Key Life Insurance Co., 172 N.W.2d 118, 124 (Iowa 1969). The district court did not err in this regard.

Finally, Marks argues that the district court erred in failing to award Marks ten and one-half percent interest on the judgment from the date of the filing of the petition. Iowa Code section 535.3 (1985) provides that:

> Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

The lease in this case provides for ten and one-half percent interest thus superseding, in this respect, section 535.3. The district court, however, found that laches had resulted when Marks failed to claim reimbursement for the tax increases until six months after the lease with Thompson expired. As a result, the district court reduced the applicable interest rate to ten percent and postponed the accrual date to the date of the decree.

Mere delay in enforcing a right is not in itself sufficient to support a finding of laches when the delay is for a period less than that fixed by the statute of limitations. Chadek v. Alberhasky, 111 N.W.2d 297, 301 (Iowa 1961). There must be a showing that the defendant has suffered injury or prejudice thereby or some change in conditions making enforcement of the plaintiff's right inequitable. Id. We find no evidence in the record that the delay in bringing this action caused any party prejudice or injury. We think the district court erred in finding the doctrine of laches applicable to the present case. Accordingly, we modify

that court's award of interest so that the contractual ten and one-half percent rate applies, accruing from the filing of the petition.

AFFIRMED AS MODIFIED.