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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HAROLD J. DUCKETT and
MARGARET F. DUCKETT,

Plaintiffs-Appellees,

vs.

WILLIAM R. WHORTON,

Defendant-Appellant.

Filed June 30, 1981

1-22
2-64924

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Defendant appeals from judgment for plaintiffs in their suit for damage to a building they rented to the defendant. AFFIRMED.

Maurice L. Nathanson, Cedar Rapids, for defendant-appellant.

Robert C. Nelson of Nelson, Fassler & Nelson, Cedar Rapids, for plaintiffs-appellees.

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

DONIELSON, J.

Defendant William Whorton appeals from a judgment for plaintiffs Harold and Margaret Duckett in their suit for damage to a building they rented to the defendant. We affirm the judgment of the trial court.

Our scope of review in this matter is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In approximately 1970, the plaintiffs, who owned a body shop, built a concrete paint booth onto the building at a cost of approximately \$4500. In 1973, plaintiffs rented the building to defendant, who continued to operate a body shop on the premises. At that time, defendant was allegedly informed by city officials that the paint booth did not comply with OSHA regulations promulgated subsequent to construction of the booth. Defendant maintains that he was further notified that his business would be shut down within a year if he failed to replace the concrete booth with one meeting OSHA standards. Defendant testified that he had obtained the plaintiffs' oral permission to remove the concrete booth and to replace it with a portable OSHA-approved paint booth; the lease, however, provided that no alterations could be made on the property without the written consent of the plaintiffs. Three years later, in 1976, the defendant proceeded to remove the original concrete structure and to replace it with a portable booth for which he paid between \$1800 and \$2000. Plaintiffs concede that they never complained to the defendant about this action until defendant vacated the building in May of 1979 and attempted to remove the portable paint booth from the premises. Plaintiffs then petitioned for \$5000 in damages (later amended to \$9560) caused by removal of the original concrete structure and requested in the alternative that the defendant be enjoined from removing the portable paint booth from the premises.

In February of 1980, the trial court found, on the basis of evidence presented by an expert witness for the plaintiffs, that the cost of replacing the concrete booth at the time the lease was terminated in May of 1979 was \$9560. The court also found that the concrete booth was removed without plaintiffs' permission and held that damages were to be measured by the cost of restoring the building to its former condition. It then awarded the plaintiffs \$9560 in damages and this appeal followed.

II.

Initially, the defendant raises three related contentions: 1) that actual value

rather than replacement cost should have been the measure of damages; 2) that even if the trial court was correct in using replacement cost, it should have been reduced to reflect the depreciated value of the old concrete painting booth; and 3) that damages should have been determined as of the date defendant tore the concrete booth down, not as of the date defendant vacated the premises. We reject all three contentions.

Unless the lease provides to the contrary, a tenant's removal or destruction of a permanent structure that constitutes part of the real estate is waste. 49 Am. Jur. 2d Landlord and Tenant § 250 (1970); see Finley v. Chain, 374 N.E.2d 67, 77 (Ind. Ct. App. 1978); Pleasure Time, Inc. v. Kuss, 78 Wis. 2d 373, 381, 254 N.W.2d 463, 467 (1977). See generally Restatement (Second) of Property § 12.2 (1977). Although we can find no Iowa caselaw on the question of damages for waste to real property, other jurisdictions have held that a landlord may recover damages measured by the cost of repairing or restoring the property to its former condition. Helton v. City of St. Joseph, 340 S.W.2d 198, 199 (Mo. Ct. App. 1960); Johnson v. Northwest Acceptance Corp., 259 Or. 1, 11-12, 485 P.2d 12, 16-17 (1971); Kastner v. Weber, 249 Wis. 450, 452, 24 N.W.2d 877, 878 (1946). See generally Dobbs, Handbook of the Law of Remedies § 5.1, at 318-21 (1973); Annot., 82 A.L.R.2d 1112-14 (1962). Since plaintiffs' property may be restored to its original value only by replacing the original permanent concrete paint booth, we hold that the measure of plaintiffs' damages is the cost of constructing another such paint booth on the premises. Moreover, that cost is to be determined at the time the defendant vacated the premises in 1979, since that is when the defendant was legally obligated by the lease to return the premises in the same condition as he found them. The trial court found that in 1979 it would have cost the plaintiffs \$9560 to replace the original concrete paint booth on the property and the court awarded damages in that amount. We affirm.

The defendant raises a number of other points, most of which have to do with the fact that because the original paint booth allegedly did not meet safety regulations and therefore was of very little value, the replacement value should be reduced to reflect this lesser value. In responding to this contention, we simply note our understanding that the amount of damages awarded the plaintiffs represents the cost of replacing the original structure with its original features.

AFFIRMED.