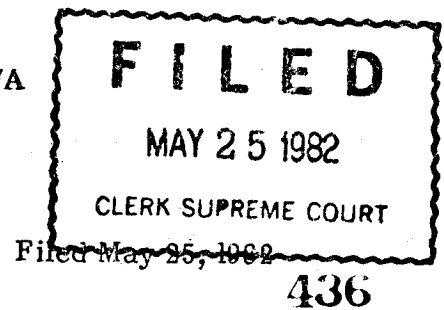


IN THE COURT OF APPEALS OF IOWA

YOUNKERS, INC.,)
Plaintiff-Appellant,)
vs.)
NORTHWESTERN SECURITIES COMPANY,)
Defendant-Appellee.)



2-06
2-66056

Appeal from Woodbury District Court - Lawrence W. McCormick, Judge.

Plaintiff-lessee appeals from an adverse judgment in this action against defendant-lessor for recovery of costs incurred in removing a warehouse loading dock which encroached on a public right-of-way, asserting trial court erred: (1) in concluding that plaintiff-lessee was obligated to pay for removal of the loading dock pursuant to the "repair and improvement" provisions of the parties' warehouse lease; and (2) in failing to conclude that defendant breached its covenants of "quiet enjoyment." REVERSED AND REMANDED.

Brent B. Green and William W. Graham of Gamble, Riepe, Burt, Webster & Davis, Des Moines, Iowa, for plaintiff-appellant.

Robert E. Beebe and Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland & Killinger, Sioux City, Iowa, for defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiff-lessee, Younkers, Inc., appeals from an adverse judgment in this action against defendant-lessor, Northwestern Securities Company, for recovery of \$21,239.70 for costs incurred in removing a warehouse loading dock which encroached on a public right-of-way. On appeal, plaintiff asserts trial court erred: (1) in concluding that plaintiff-lessee was obligated to pay for removal of the loading dock pursuant to the "repair and improvement" provisions of the parties' warehouse lease; and (2) in failing to conclude that defendant breached its covenants of "quiet enjoyment." We reverse and remand for entry of judgment in favor of plaintiff.

Pursuant to a lease agreement dated October 6, 1959, plaintiff leased a warehouse located at 3rd Street and Douglas Street, Sioux City, Iowa, from Cohen Realty Company. Defendant is the current lessor by virtue of its succession in interest to Cohen Realty Company. The initial lease period was for ten years, with an option to renew for an additional forty years, in ten year increments. In addition, plaintiff had a purchase option for the entire fifty year period at the fixed price of \$175,000. A loading dock, which generated this law suit, was attached to the warehouse and, apparently, had been there since the early 1900's. In April, 1977, the city notified both plaintiff and defendant that the loading dock encroached upon the city-owned Third Street right-of-way, and must be removed. The parties subsequently had one meeting at which they apparently disputed which was responsible for removal of the dock pursuant to the terms of the lease. Without resolving this dispute, plaintiff subsequently engaged a private contractor and paid \$21,239.70 for removal of the dock. Plaintiff thereafter made a request for reimbursement from defendant, which defendant refused. Thereupon, plaintiff filed a petition seeking recovery of \$21,239.70 on the grounds: (1) that defendant had breached its covenant of quiet enjoyment causing plaintiff to be damaged by the cost of the loading dock removal; (2) that the lease implies a contractual

obligation on the part of defendant to bear the expense of removal of such an encroachment; and (3) that unless plaintiff is reimbursed for its expense in removing the encroachment, defendant will be unjustly enriched. Defendant answered, asserting that it was not obligated to reimburse plaintiff for removal of the loading dock, that the loading dock was not part of the leased premises, and that the repair, improvement, and disclaimer of liability provisions of the lease obligated plaintiff to pay for removal of the loading dock.

Upon defendant's request, a jury trial commenced, but after both parties had presented their evidence, they filed a stipulation requesting that the jury be discharged and the matter submitted to the court on grounds that there were no disputed issues of facts for the jury. Trial court filed its findings, conclusions, and judgment dismissing plaintiff's petition on the ground that defendant had not breached the lease. Trial court concluded that the loading dock was part of the leased premises as an attachment and appurtenance, even though it was outside the legal description of the warehouse contained in the lease. However, the court ruled that the repair, improvement, and disclaimer of liability provisions of the lease placed the burden of paying for removal on plaintiff, not defendant.

Plaintiff filed a timely motion to enlarge and amend trial court's findings and conclusions. Trial court denied this motion, whereupon plaintiff appealed.

I. Scope of Review. Plaintiff's petition was captioned in law and was comprised of three divisions. Divisions I and II alleged breach of contract and prayed for damages; division III alleged, as an alternative cause of action, unjust enrichment of defendant, and prayed for appropriate just and equitable relief. While a jury was originally convened to try issues of fact, it was dismissed upon the parties' conclusion that there were no material facts in dispute. The case was, thus, tried before the court which considered only the allocation of costs according to the specific terms of the lease. Plaintiff specifically requested trial court's consideration of its equitable claim, however, trial court denied this

request. We thus believe plaintiff adequately requested trial court's consideration of its equitable claim to permit our review but, since trial court made no findings or conclusions as to this issue, we will make our own evaluation of the record to determine plaintiff's entitlement to relief. Miller v. American Wonderlands, Inc., 275 N.W.2d 399, 402 (Iowa 1979).

II. Trial Court's Conclusions. Where there is an express contract covering subject matter in dispute, a party may not recover on the basis of unjust enrichment for a quasi contract. Smith v. Stowell, 256 Iowa 165, 174, 125 N.W.2d 795, 800 (1964). Trial court determined that expenditure for removal of the loading dock was specifically covered by the lease and, accordingly, concluded that plaintiff was solely responsible for all costs incurred. The court relied on sections 11(A), 11(C), and 16 of the lease in support of its conclusion. The lease, in pertinent part, provides:

Section 11. The leased premises shall be repaired and maintained and may be altered as follows:

(A) Tenant, at its expense, shall keep and maintain in good repair the building and improvements located on the leased premises, both inside and out, whether of a structural nature or otherwise and whether now or at any time hereafter forming a part of the leased premises. Landlord shall have no obligation to make any repairs or improvements of any nature during the term except as may be specified herein with respect to the construction or damage by fire or other casualty, or by condemnation.

* * *

(C) Landlord gives to tenant the right to make such improvements, changes, alterations or additions to the leased premises as tenant may deem desirable or necessary in the use and maintenance of the leased premises provided any improvements, changes, alterations or additions made by tenant shall be in accordance with requirements of law and valid local regulations

Section 16. Throughout the term tenant shall keep and save landlord harmless from any expense, loss or liability as a result of . . . use or occupancy of the leased premises by tenant

Trial court determined that 1) removal of the loading dock was an expense incurred as a result of an alteration "deemed desirable or necessary in the use of the premises" for which plaintiff was explicitly responsible and 2) the terms of the entire lease ". . . [are] indicative of an intent of the parties from the words used to require the tenant to be responsible" We find trial court's conclusion to be erroneous.

We first focus on section 11(A)'s obligations for repair and improvements and reject its applicability to the facts of this case. Repair means "to mend, add to or make over, restore to a sound condition after decay, waste, injury or partial destruction." Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 646, 148 N.W. 639, 641 (1914). "The word repair contemplates an existing structure or thing which has become imperfect, and means to supply in the original existing structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed as near as may be." Stowe v. Wood, 199 N.W.2d 323, 326-27 (Iowa 1972), quoting Black's Law Dictionary 1462 (rev. 4th ed. 1968).

We further can find no basis on which to conclude that removal of the loading dock, which was encroaching on the city's property, was an improvement of the leased premises. An improvement is an addition made to property which increases the value of the property. Builders Land Co. v. Martens, 255 Iowa 231, 234, 122 N.W.2d 189, 190 (1963).

In addition to its assertion that the "repair and improvements" provisions of the lease should establish plaintiff's liability for the costs, defendant also contends that, regardless of the allocation of the financial burden under the lease, plaintiff's removal of the dock was entirely gratuitous. We believe defendant is

essentially arguing that removal of the dock was an alteration to the leased premises apparently brought about because plaintiff decided it was "desirable or necessary in the use . . . of the leased premises," as set forth in section 11(C) of the lease. (emphasis supplied). In this regard, trial court found that the city's notice to defendant to remove the encroaching dock, a copy of which was sent to plaintiff, had an advisory tenor only and that "the city did not by the letter . . . or otherwise demand that Younkers remove the encroachment." In its brief, defendant contends that "[t]here is absolutely no evidence of any kind that the City was putting any pressure whatsoever on Younkers for the removal of the dock[,] " that "[t]here was absolutely no evidence that the removal of the dock would cause any hardship on Younkers[,] and that "[i]t is thus a great mystery why Younkers gratuitously elected to remove the dock and incur the expense, and then later try and collect from Defendant."

We believe both trial court and defendant have failed to discern the proper legal significance of the circumstances of this case. The record reflects that defendant made the following responses to plaintiff's request for admissions:

Request for Admission No. 2.

"The City of Sioux City, Iowa, had full legal right and authority on April 15, 1977, to require defendant to remove the encroachment referred to in Exhibit "B" of plaintiff's petition.

Answer:

It is denied that the City of Sioux City had full legal right and authority to require defendant to remove the encroachment since it was not defendant's property and was not a portion of the property which was leased to the plaintiff. It was not used by the defendant but had been used by the plaintiff.

Since defendant's contention is that it is not the owner of the encroachment, we conclude that the fact of encroachment and the city's attendant right to require removal was admitted by defendant. Further, the city's letter was a clear demand

for its removal. We agree with trial court's finding that the dock and areaway passed as appurtenances to the leased premises to which defendant admits ownership. See Gitlitz v. Plankington, 228 Wis. 334, 339, 280 N.W. 415, 418 (1938).

From the above, we therefore conclude that removal of the dock was not an alteration to the leased premises deemed by plaintiff to be desirable or necessary of its own volition, but rather resulted from the assertion of a property owner's right (city) to require another property owner (defendant) to remove an encroachment. We find nothing in the lease which shifts defendant's basic ownership liability to plaintiff and thus conclude the costs here incurred by plaintiff were not covered by the terms of the lease. We thus consider plaintiff's contention that defendant's liability rests on the equitable remedy of restitution rather than contract.

III. Unjust Enrichment. Recovery based on quasi contracts "rests upon the equitable principle that one shall not be permitted to unjustly enrich himself at expense of another or to receive property or benefits without making compensation therefore." Guldberg v. Greenfield, 259 Iowa 873, 878, 146 N.W.2d 298, 301 (1966). Defendant asserts that plaintiff is the virtual owner of the property involved. The apparent implication is that plaintiff would be unjustly enriched if defendant was required to pay for the cost of removal of the loading dock. We find such an argument without merit. It is generally for the parties to exercise their own discretion as to the adequacy of consideration in their contracts; and if the agreement is bona fide, the relative benefits or detriment to the parties is insignificant to the court. See Blake v. Blake, 7 Iowa (Clarke) 46, 51 (1858). We note, however, that the remuneration paid by plaintiff to defendant for rent of the premises is not insignificant, nor was the purchase price of the property. Defendant is the record owner of the real estate and the encroachment is of a nature which affects the owner's claim to this realty. There is no basis in the

lease or surrounding circumstances which would indicate that this incidence of ownership is plaintiff's responsibility. On the contrary, the covenant of quiet enjoyment indicates that proper placement of the building and its appurtenances is defendant's responsibility¹ and that denial of plaintiff's claim would result in defendant's unjust enrichment at plaintiff's expense.

Summarized, the operative facts are as follows: Defendant is the owner of the warehouse; an appurtenance to the warehouse encroached on city-owned land; the lease does not shift liability for the encroachment to plaintiff; defendant's covenant of quiet enjoyment warranted undisturbed possession for plaintiff. We conclude that since defendant did not own the land upon which the appurtenance rested and the city required its removal, plaintiff's possession was disturbed and the covenant of quiet enjoyment was thereby breached.

As a result, we find that defendant was enriched by receiving a benefit, the cost for which it was liable as owner of the premises. In light of the fact that defendant had a long term lease with plaintiff which warranted against dispossession, we believe retention of the benefit by defendant would be unjust.

We thus conclude trial court erred in determining plaintiff was responsible

¹ Section 20 provides:

Landlord covenants and warrants as follows:

(A) That Landlord is the lawful owner of the leased premises.

* * *

(E) That Tenant upon paying the rent and upon performing agreements by Tenant hereunder shall have and enjoy quiet and undisturbed possession of the leased premises beginning January 1, 1962 and thereafter during the original term stated herein and as the term may be extended under the option periods hereinbefore provided.

for removal of the loading dock and remand this case for entry of judgment in favor of plaintiff.

REVERSED AND REMANDED.