IN THE COURT OF APPEALS OF IOWA

No. 6-397 / 95-1373

000139

GRAND AM DEVELOPMENT,

Plaintiff-Appellee,

vs.

MICKEY R. CHUMBLEY, LINDA L. CHUMBLEY, JEFFREY B. SHAVER, KIMBERLY A. SHAVER, and ANIMAL HOUSE DAY CARE AND PRESCHOOL, INC.,

Defendants-Appellants.

FILED
FEB 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Defendants appeal a district court ruling awarding plaintiff damages for past and future rents and taxes based on defendants' alleged breach of a lease agreement.

AFFIRMED AND REMANDED WITH DIRECTIONS.

Thomas T. Tarbox and Stacey Bell of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellants.

Roger J. Kuhle and John O. Haraldson of Law Office of Roger J. Kuhle, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Habhab, C.J., and Vogel, J., but decided en banc.

HABHAB, C.J.

Grand Am Development is a partnership formed for purposes of developing and managing real estate at 4111 Hubbell Avenue in Des Moines. The property consists of 1.1 acres on which there is a 12,000 square foot building. Grand Am Development entered into a lease with the defendants, Mickey and Linda Chumbley, and Jeffrey and Kimberly Shaver. Defendants formed a company known as Animal House Day Care and Preschool, Inc. The term of the lease was for five years commencing June 1, 1991 and ending May 31, 1996. The rent was $6000 per month. The tenants were obligated to pay all maintenance, taxes, and insurance.

As the lease progressed, defendants had difficulty making rent payments. In the spring of 1993, all defendants executed a promissory note covering rent for the months of March and April 1993. With the payment of the two months' rent by promissory note, defendants were current with rent as of the close of 1993. However, defendants again were delinquent in their monthly rental and tax payments, and on May 2, 1994, Grand Am initiated a forcible entry and detainer action (FED).[1] Judgment was entered on May 12, 1994, granting Grand Am possession of the premises.

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[1] This action is designated Polk County Small Claims No. 243592. The judgment entry in the small claims court granted plaintiff's possession of the property. However, the writ of removal and possession was withheld until May 20, 1994. The record does not disclose that the writ was ever issued.

On May 3, 1994, Grand Am filed this action seeking damages along with a writ of attachment.[2] On November 14, 1994, it amended its petition by seeking recovery for past and future rent, damages, and taxes. The company also sought recovery on the promissory note in the amount of $12,000. At trial, Lamberts and Kading, partners in Grand Am, testified defendants paid them $900 per month towards the real estate taxes. This amount was agreed to during lease negotiations. It is clear this amount is insufficient, although the partners admitted defendants were not told more was needed. Defendants introduced pictures of the property and the various repairs Grand Am failed to complete. They maintained they did not inflict any damage to the property other than normal wear and tear.

Following submission of the case, Grand Am filed a notice of mitigation of damages,[3] indicating the premises had been leased at a rate of $4158.35 per month, plus taxes. The effective date of the mitigation lease was June 1, 1995. The district court entered judgment in the amount of $107,899.80 for rent and taxes due, and $12,000 on the promissory note. The court additionally ordered defendants to pay $1000 toward Grand Am's attorney fees. Defendants have appealed.

Defendants contend the district court erred in ruling they were liable for rent after the forcible entry and detainer, arguing such action terminated the lease. They

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[2] There is no indication in the record that the writ ever issued.

[3] We are not asked to decide the appropriateness or timeliness of the filing of this notice for it was not challenged in the trial court nor is it raised as an issue on appeal.

claim they cannot be liable for future rent and taxes when they were not in possession of the premises. Defendants further assert that when a landlord initiates an FED and does not by contract retain to itself the right to sue for future rents, the lease is a nullity and future rents do not accrue. Defendants next argue the court erred in finding they were liable for damages to the building. Finally, defendants argue the court erred in finding they were liable for taxes. They allege Grand Am never informed them the $900 per month was insufficient to cover the taxes on the property.

I. Grand Am's Claim to Future Rent. Our review is for correction of errors at law. Iowa R. App. P. 4.

(A) It is settled law in this state that FED is a summary remedy allowable to secure possession of real estate. *Missildine v. Brightman*, 234 Iowa 1339, 14 N.W.2d 700 (1944). In addition, it has long been the law of this state that the remedy of an FED action is cumulative, not exclusive, and that such action does not supersede any common law remedy of the landlord. *Denecke v. Henry S. Miller & Son*, 142 Iowa 486, 119 N.W. 380 (1909); *Wernet v. Jurgensen*, 43 N.W.2d 194 (Iowa 1950) (a forcible entry and detainer proceeding is not exclusive, but is cumulative of any other remedy the party may have).

We acknowledge there is law to the effect that "forfeiture[4] insofar as it concerns the landlord is an election to terminate the lease and to rely no longer on

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[4] We believe that the use of the word "forfeiture" in this context makes reference to the exercise of forfeiture under the terms and provisions of an existing lease.

remedies against the tenant predicated on the continuance of the tenancy." 49 Am. Jur. 2d *Landlord & Tenant* § 319 (1995). In addition, there is authority to the effect "that any liability other than for accrued rent, after the termination of the lease by a forfeiture, is for damages, and not for rent." *Id.*

But there is the additional provision in the American Jurisprudence Second citation that a tenant is not relieved of liability for subsequently accruing rent if there is a provision in the lease that continues the liability of the tenant after forfeiture. 49 Am. Jur. 2d *Landlord & Tenant* § 320. In this respect, and at section 321 of American Jurisprudence Second, the following appears:

> A lease may provide for the performance of certain obligations or impose certain liabilities after forfeiture. For example, the lessor may be given the right to re-enter and resume possession of the leased premises upon the lessee's breach of his covenants in the lease, such as nonpayment of rent, and still hold the lessee liable for the subsequently accruing rents.

With those principles in mind, defendants argue that an FED action brings about a forfeiture and when plaintiff prevailed in that action, the lease was terminated and thus plaintiff was barred from suing for future rent and future taxes. Defendants do not contend they are not liable for the unpaid rent that accrued prior to the completion of the FED action.

To counter defendants' argument, plaintiff contends the FED action did not terminate the lease nor did it bar plaintiff from recovering future rent. Plaintiff further reasons that the FED action is cumulative and not exclusive and under Iowa

law it is brought only to gain possession of real estate and does not constitute a forfeiture or termination of the lease.

Under the facts of this case, we need not decide whether the FED action forfeited or terminated the lease and thus barred plaintiff from recovering future rent and taxes. Although we have not been directed to any Iowa cases[5] that resolve that question, it is now the established law in this state that if there are provisions in the lease allowing the landlord to recover future rent in the event of forfeiture, the landlord may proceed to do so. Plaintiff argues that when the lease is read in its entirety such right does exist.

In the recent case of *Aurora Business Park Assoc. v. Michael Albert, Inc.*, 548 N.W.2d 153 (Iowa 1996), our supreme court, after an abandonment by the tenant, allowed the landlord to recover future rent under an acceleration clause in the parties' lease. The clause permitted the landlord to recover the balance of the rent "in the

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[5] Defendants cite us to *Becker v. Rute*, 228 Iowa 533, 539, 293 N.W 18, 21 (1940) and urge that it stands for the authority that "the notice of forfeiture . terminated the lease." Indeed there is language in *Becker* that tends to support this assertion. However, *Becker* did not involve an FED action. Rather, the forfeiture notice that was served on the tenant was in accordance with rights granted the landlord under the lease. In this respect, the supreme court in *Becker*, while noting that the landlord had sued only for past due rent, stated the "[landlord] had the right, which they did not exercise, to declare all the rent due, and in addition, had a right to forfeit the contract and recover the accrued rent." *Id.* at 20. The dissent in *Becker* also noted:

> The effect of the majority opinion is to hold that where rent is payable in advance, and by reason thereof becomes due before it is earned, the landlord can recover possession of the premises for nonpayment of the rent and can also recover the rent that has not been earned.

Becker, 228 Iowa at 540, 293 N.W at 20.

event of the termination of this lease by reason of a violation of its terms by the lessee." *Id.* at 154. The lessee in *Aurora* took possession of the property but later vacated the premises. The lessee failed to pay the rent due and notice of default was given. Shortly thereafter, the landlord served a notice to quit and retook possession of the property. The landlord recovered the future rent, even though it had served the lessee with a notice to quit and had retaken possession of the premises.[6]

The supreme court in *Aurora* stated:

> A landlord is entitled to recover from a tenant the damages sustained as a result of the tenant's abandonment and nonpayment of rent. Restatement (2d) of Property, Landlord and Tenant § 12.1 cmt. i; *see also* Iowa Code § 562A.32 (Under the Uniform Residential Landlord and Tenant Law, "[i]f the rental agreement is terminated, the landlord may have a claim for possession and for rent and a separate claim for actual damages for breach of the rental agreement.").[7]
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> In general, the purpose behind the allowance of damages for breach of a contract "is to place the injured party in the position he or she would have occupied if the contract had been performed." *Macall v. Stinson*, 468 N.W.2d 34, 36 (Iowa 1991).

Id. at 157.

We recognize in *Aurora* there was an abandonment of the property by the tenant. In addition, there was a provision in the lease that permitted recovery for

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[6] The lessee, like in the case at bar, argued that to allow Aurora to recover future rent along with possession of the premises violates the general principles of law against double recovery.

[7] Under Iowa Code chapter 562A, if the rental agreement is terminated, the landlord not only has a claim for possession and for rent, but in a separate claim the landlord can seek actual damages for breach of the rental agreement. This chapter makes reference to residential units, and thus we are reluctant to cite it as authority in the case at bar.

future rent after termination of the lease. In the case at bar, although the landlord took possession by virtue of the FED action, we believe the result reached in this case is further bolstered by the terms and provisions of the lease agreement. Thus, we turn to the lease.

Under the provisions of the lease, the tenant agreed to pay monthly rent for a period of five years. If the monthly rentals were delinquent, the landlord was granted certain options under paragraph 15 of the lease. That paragraph, insofar as it is pertinent to this decision, provides:

> 15. TERMINATION OF LEASE AND DEFAULTS OF TENANT. (a) TERMINATION UPON EXPIRATION OR UPON NOTICE OF DEFAULTS. This lease shall terminate upon expiration of the demised term . . . . Upon default in payment of rental herein or upon any other default by Tenant in accordance with the terms and provisions of this lease, this lease may at the option of the Landlord be cancelled and forfeited, PROVIDED, HOWEVER, before any such cancellation and forfeiture except as provided in 15(b) below, Landlord shall give Tenant a written notice specifying the default, or defaults, and stating that this lease will be cancelled and forfeited ten (10) days after the giving of such notice, unless such default, or defaults, are remedied within such grace period. [See paragraph 22, below.] As an additional optional procedure or as an alternative to the foregoing (and neither exclusive of the other) Landlord may proceed as in paragraph 21, below, provided.

It is clear the landlord had the option under paragraph 15 if nonpayment of the rent occurred, and after giving proper written notice, to cancel and forfeit the lease. It is not disputed the landlord did not exercise that option or any of the other options available to it under paragraph 15. Instead, the landlord proceeded under the

alternative provisions of paragraph 15 by bringing suit under paragraph 21 of the lease. That paragraph provides:

> 21. RIGHTS CUMULATIVE. The various rights, powers, options, elections and remedies of either party, provided in this lease, shall be construed as cumulative and no one of them as exclusive of the others, or exclusive of any rights, remedies or priorities allowed either party by law, and shall in no way effect or impair the right of either party to pursue any other equitable or legal remedy to which either party may be entitled as long as any default remains in any way unremedied, unsatisfied or undischarged.

At this juncture it is important to note the sharp contrast between the provisions of paragraphs 15 and 21. Paragraph 15 specifically provides for the method to forfeit and cancel the lease. Paragraph 21, on the other hand, is equally as specific when it provides that the various rights of the parties under the lease are cumulative and not exclusive of any other rights allowed the parties, and those rights are not to "impair the right of either party to pursue any other equitable or legal remedy to which either party may be entitled as long as any default remains. . . ."

There are other detailed rights given the landlord upon the occurrence of certain events. For instance, the landlord was contractually granted a number of options to forfeit and cancel the lease, such as bankruptcy (if tenant adjudicated a bankrupt, landlord at his option could terminate the lease), and under paragraph 19 (relating to "landlord lien and security interest") landlord "may proceed . . . with any remedy provided by law or this lease for the recovery of rent or for termination of this lease because of tenant's default in its performance." There is also the additional

provision that provides the "acceptance of keys, advertising and re-renting by the landlord upon tenant's default shall be construed only as an effort to mitigate damages by the landlord and not as an agreement to terminate this lease."

It is an undeniable fact that the tenants failed to pay the monthly rent due under the lease. This failure to perform constituted a material breach of the lease. The tenants' continual failure to perform under the provisions of the lease amounted to an abandonment of the lease itself. As noted earlier, the landlord had the right under paragraph 21 of the lease to sue for breach of contract.

We recognize that the landlord did take possession of the property through the FED action. It is conceded that the landlord re-rented the property to a third party; but in doing so, the landlord was mitigating damages as required under the law.

When the lease provisions are considered together, we conclude that the landlord under paragraph 21 of the lease had the right to proceed to recover delinquent and future[8] monthly rent and delinquent and future real estate taxes. Although the landlord had the right to cancel the lease under paragraph 15, it did not exercise that option. Rather, the landlord proceeded under paragraph 21 to exercise those rights given under that paragraph.

For us to hold otherwise would create a strange anomaly, for a non-rent paying tenant could retain possession of the leased premises for an indefinite period of time.

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[8] The question of acceleration was neither challenged nor argued as a separate issue either before the trial court or on appeal.

The non-rent paying tenant could continue to refuse to relinquish possession with the thought in mind of forcing the landlord to bring an FED action. If we followed the tenants' argument, the landlord would be precluded from suing under the lease for future rent because he was forced to bring an FED action to gain possession. We think this result would be completely undesirable.

(B) Our supreme court in *Aurora* determined a landlord was entitled to future rent as provided in the acceleration clause of the lease. In so holding, the court stated, "[a] landlord is entitled to damages equal to the amount of rent reserved in the lease, plus any other consequential damages, less amounts received in reletting the property." *Id.* at 157.

In general, the purpose behind the allowance of damages for breach of a contract "is to place the injured party in the position he or she would have occupied if the contract had been performed." *Id.* (citing *Macall v. Stinson*, 468 N.W.2d 34, 36 (Iowa 1991)). The amount of actual damages sustained by Grand Am was certain and reasonable. *See id.* We affirm the trial court's award of damages.[9] *See id.* However, we remand to the district court for the purpose of reducing the future rent to its present value. We do not retain jurisdiction.

II. Taxes and Damages to the Premises. The lease entered into by the parties states the following:

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[9] Neither party at trial or on appeal challenged as a separate issue acceleration

> 10. (a) ALL REAL ESTATE TAXES, except as may be otherwise expressly provided in this paragraph ten, levied or assessed by lawful authority (but reasonably preserving Landlord's rights of appeal) against said real property shall be timely paid by the parties in the following proportions: by Landlord 0%; by Tenant 100%.
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> (b) Increase in such taxes, except as in the next paragraph provided, above the amount paid during the base year of 1990 . . . shall be paid by Landlord 0%; by Tenant 100%.
>
> (c) Increase in such taxes caused by improvements of Tenant shall be paid by Landlord 0%; by Tenant 100%.
>
> (d) 1/12 of the yearly tax shall be deposited by automatic bank transfer/credit to an account designated by the landlord on the 20th of each month.

At trial, Lamberts and Kading testified defendants paid them $900 per month for taxes and this amount had been agreed upon initiation of the lease. They maintained this amount was insufficient, although they admitted they had not told defendants more was needed.

The trial court found defendants owed $8041.93 in delinquent and unpaid real estate taxes, as well as future accruing[10] real estate taxes in the amount of $13,800, plus interest. In the construction of written contracts, the cardinal principle is that the intent of the parties must control and, except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14); *Harmsen v. Dr. MacDonald's, Inc.*, 403 N.W.2d 48, 50 (Iowa App. 1987). When interpreting the contractual terms chosen by the parties, our object is to ascertain the meaning and intention of the parties as expressed by the language used. *Harmsen*, 403 N.W.2d at

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[10] We again note that neither party at trial or on appeal challenged as a separate issue acceleration

50. The trial court found the terms and conditions of the lease were not modified by the parties. As the terms of the contract clearly and unambiguously provide defendants are responsible for payment of one hundred percent of the property taxes, we affirm the trial court's finding in this regard.

Finally, we affirm the trial court's award of damages to Grand Am for the damage to the building as it is supported by substantial evidence. *See* Iowa R. App. P. 14(f)(1).

AFFIRMED AND REMANDED WITH DIRECTIONS.

All judges concur, except Sackett, P.J., who concurs in part and dissents in part.

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SACKETT, P.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority except as to its conclusion the landlord should recover rents and taxes that would have accrued after the landlord placed itself in possession through the summary action of the forcible entry and detainer action.

This case presents the issue of whether a landlord, who takes possession of a premise after petitioning for and obtaining an order in forcible entry and detainer putting the landlord in possession, can then sue for rents due for periods when the landlord has put itself in possession. I agree with the majority there is authority that says forfeiture by a landlord is an election to terminate the lease and to rely no longer on remedies against the tenant predicated on the continuance of the lease, but if a lease provides for continued liability on the part of the tenant after forfeiture, there are cases where this may be enforced.

As I understand the majority opinion, they are saying the lease provided for continued liability after the forcible entry and detainer. I do not find the lease provides for continued liability. We should not strain to find that it does.

Forcible entry was an affirmative election by the landlord. This distinguishes this case from *Aurora Business Park Assocs. v. Michael Albert Inc.*, 548 N.W.2d 153 (Iowa 1996), where the tenant had vacated the premises. This is not a question of a landlord collecting rents for the period the tenant was in possession before the forcible entry and detainer. This distinguishes this case from *Becker v. Rute*, 228

Iowa 533, 537, 293 N.W. 18, 20 (1940). There the court found the landlord who declared a forfeiture for nonpayment of rent pursuant to a lease provision was entitled to judgment for rent matured prior to the forfeiture.

In this case the landlord by summary action has elected to deprive the tenant of possession. The landlord who has taken the property from the tenant by legal action now wishes the tenant to pay for the period the landlord is in possession, though the tenant receives no benefit from the lease. Taking the leased premises deprived the tenant of the ability to generate income to pay the lease terms.