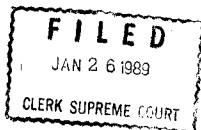


IN THE COURT OF APPEALS OF IOWA



HAWKEYE BANK & TRUST OF)
DES MOINES,)

Plaintiff-Appellee/)
Cross-Appellant,)

vs.)

ALLEN F. KENFIELD, a/k/a)
ALLEN A. KENFIELD, d/b/a)
VIDEO EXCHANGE,)

Defendant-Appellant/)
Cross-Appellee.)

8-488
87-1727

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Appeal from the Iowa District Court for Polk County
(No. CL 069-40663), Joel D. Novak, Judge.

Defendant appeals the district court's judgment
awarding the plaintiff \$17,000 plus interest in damages.
AFFIRMED.

Louis R. Hockenberg, David A. Bolte, and Kerry K.
Anderson of Wasker, Sullivan & Ward, Des Moines, for
defendant-appellant/cross-appellee.

James L. Sayre of Sayre & Gribble, Des Moines, for
plaintiff-appellee/cross-appellant.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant, Allen Kenfield, appeals the district court's judgment awarding the plaintiff, Hawkeye Bank & Trust of Des Moines, \$17,000 plus interest in damages.

The plaintiff sued the defendant for breach of a commercial lease. On appeal the defendant asserts 1) the plaintiff did not fully perform all the duties and conditions imposed upon it by the lease; 2) he was constructively evicted from the premises; 3) the plaintiff did not mitigate its damages; and, as a defense to Hawkeye's cross-appeal, 4) the plaintiff is not entitled to future damages. We affirm.

Kenfield leased commercial premises from Hawkeye Bank & Trust for a term commencing June 1, 1984, through March 31, 1989. Monthly rental was agreed upon at \$1,000. During the middle of December of 1985, the defendant moved its business to a new location. The defendant continued to pay rent through May 31, 1986.

Our review is on errors assigned. Iowa R. App. P. 4. We review the evidence in a light most favorable to the trial court's decision. Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977). Such findings are binding if they are supported by substantial evidence. Iowa R. App. P. 14(f)(2). As the court stated in Brichacek v. Hiskey, 401 N.W.2d 44, 47 (Iowa 1987):

In a matter tried to the court, the court's findings of fact have the force of a jury verdict and we view the evidence in the light most

favorable to those findings. If the findings are supported by substantial evidence, we are bound by them. Iowa R. App. P. 14(f)(1). The findings are broadly and liberally interpreted and in the case of ambiguity are construed to uphold the judgment.

Kenfield argues the plaintiff did not maintain the building as dictated by the lease. We disagree. There is substantial evidence in the record to support the trial court's findings that Hawkeye performed all of the terms and conditions required of it under the lease. In addition, there is substantial evidence that Hawkeye did maintain the building in accordance with the terms of Paragraph 6 of the lease. The trial court essentially found that the water damage incurred by the defendant was caused from gutters that were clogged with leaves and debris after a heavy rain; and that the plaintiff rectified the situation immediately upon notification. There is substantial evidence in the record to support this finding.

Next, the defendant asserts he was constructively evicted from the premises due to the water damage and that as a result he should not be held liable for damages to the landlord. There is substantial evidence that not only was the water damage minimal, but that the defendant moved for other business reasons, specifically, because more floor space was needed. Constructive eviction does not apply where removal is for a circumstance not caused by the landlord. 52 C.J.S. § 480(2), p. 391, 392, 393.

The question then arises whether Hawkeye Bank sufficiently mitigated its damages. This is a fact question that was resolved by the trial court in favor of Hawkeye. Those findings are broadly and liberally interpreted. The trial court's findings in this regard had the force of a jury verdict and we will not disturb them if supported by substantial evidence. When we couple the trial court's findings with the law as it relates to abandonment, we find substantial evidence to support the trial court's findings.

The case of Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968), has been directed to our attention as it relates to abandonment. In Vawter, the supreme court held "that when a tenant wrongfully abandons leased property, the landlord is under a duty to show reasonable diligence has been used to relet the property at the best obtainable rent and thereby obviate or reduce the resulting damages." Id. at 541.

Before the landlord incurs the duty to exercise reasonable diligence to relet the premises, there must be a showing that the tenant has abandoned the property. Harmen v. Dr. McDonald's Inc., 403 N.W.2d 48, 51 (Iowa App. 1987). "Abandonment as applied to leases involves an absolute relinquishment of premises by a tenant, and consists of acts or omissions and an intent to abandon." Vawter, 159 N.W.2d at 540.

The supreme court in Read v. Estate of Mincks, 176 N.W.2d 192, 194 (Iowa 1970), cited with approval the more comprehensive statement of abandonment from 51C C.J.S. Landlord & Tenant § 125(2), pp. 399-400:

In order to constitute an abandonment or surrender of the premises, which on acceptance by the landlord will constitute a surrender of the lease by operation of law, there must be an intent to abandon and conduct by which the intention is carried into effect, or such a relinquishment by the tenant as will justify an immediate resumption of possession by the landlord. Where there is such a relinquishment, there is a sufficient abandonment or surrender.

Although it has been said that the lessee of a term may abandon the lease by acts or by words or equivalent acts, and an abandonment occurs when the lessee vacates the premises with intent to relinquish all rights therein, a surrender cannot be implied by operation of law when the tenant retains possession, as tenant, of the leased premises, or any material portion of them, and abandonment cannot be inferred unless it can fairly be shown that nonuser by the lessee is coupled with an intent to relinquish all rights in the premises. A vacancy arises when the tenant ceases to exercise dominion over the subject premises.

In order to constitute an abandonment or surrender of the leased premises, there must be a real or symbolical delivery of the possession of the entire property.

The mere absence of physical possession is not determinative of a lack of possession which will allow the lessor to retake the premises of abandonment. This is true because use of the leasehold by the lessee cannot normally be restricted. Smith v. Hegg, 214 N.W.2d 789, 792 (S.D. 1974). The defendant moved from the building in question on December 13, 1985, and transferred their business to a

new location in the same vicinity. He continued to make rental payments until May 31, 1986. During this time, the defendant, through Donna Carviness, listed the property for subleasing purposes with Iowa Realty's commercial division. A large sign was placed on the premises by the defendant indicating the building was available. The defendant and the realty firm showed the premises to prospective tenants. They retained possession of the key.

There is substantial evidence that Donna Carviness informed the plaintiff that "they [defendants] were looking to subrent or sublease the building." In addition, there is substantial evidence that the plaintiff cooperated with the defendant in efforts to sublease the premises. Donna Carviness further testified that she had "spent the last six months in Des Moines working and I was in there [the leased premises] every month." There is further evidence that the defendant entered the premises from time to time after moving for cleaning purposes.

As stated, when we consider the law of abandonment with the findings of the trial court, we conclude there is substantial evidence to support those findings. Thus we affirm the trial court.

As it relates to appellee's cross-appeal, we find there is substantial evidence in the record to support the findings of the trial court relating to the subject of the cross-appeal and accordingly affirm the trial court.

AFFIRMED.