

IN THE COURT OF APPEALS OF IOWA

LEON HERBST d/b/a)
HERBST MANUFACTURING COMPANY,)

Plaintiff-Appellant,)

vs.)

CITY OF MERRILL, IOWA,)

Defendant-Appellee.)

FILED

MAR 31 1986

CLERK SUPREME COURT

Filed March 31, 1986

5-713
85-599

104

Appeal from the Iowa District Court for Plymouth County (No. 25225)

Dewie J. Gaul, Judge.

Plaintiff appeals from summary judgment granted in favor of defendant in a lessee's action for damages against a lessor. **REVERSED AND REMANDED.**

Daniel C. Galvin, of O'Brien, Galvin, Kuehl & Mullin, Sioux City, Iowa for plaintiff-appellant.

Gregg E. Williams, of Gleysteen, Harper, Eidsmore, Heidman & Redmond, Sioux City, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

This appeal from grant of motion for summary judgment involves the interpretation of a lease agreement between the parties. We find that genuine issues of material fact exist, and that they should be determined by a fact-finder. We reverse the trial court.

The plaintiff lessee brought an action for damages against the lessor City based upon claims of breach of implied warranty of fitness of a leased commercial building and for breach of the contract to lease. Plaintiff claimed property damages were sustained at the leased premise because of a defective and leaky roof. He sought damages for loss of profits and good will, clean up expense, impairment of credit, reasonable cost of repairing merchandise, and loss of inventory or supplies.

Defendant filed a motion for summary judgment on two grounds. The first was that a section of the lease barred plaintiff from asserting his claims. The pertinent lease section reads:

Lessor shall not be liable for liability or damage claims for injury to persons or property from any cause relating to the occupancy of the premises by Lessee, including those arising out of damages or losses occurring on sidewalks and other areas adjacent to the leased premises during the term of this lease or any extension thereof. Lessee shall indemnify Lessor from all liability, loss, or other damage claims or other obligations resulting from any injuries or losses of this nature. (Emphasis supplied.)

Defendant's second contention was that plaintiff was precluded in his claim because he failed to give notice of the claim as required by section 613A.5 of the Code.

In support of its motion, defendant filed a statement setting out facts which it believed were not in dispute, along with an affidavit of the City Clerk of Merrill and an affidavit of the mayor of Merrill. The mayor's affidavit indicated the original monthly rental was merely \$50 per month because the premise was rented "as is" with plaintiff assuming all responsibility for maintenance and upkeep.

The plaintiff filed a resistance and affidavit. In the affidavit, plaintiff asserted that defendant had received actual notice of the damages and that the defendant participated in repair of the roof by providing materials and workmen.

Summary judgment is proper when there is no genuine issue of any material fact and the moving party shows that he is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984). The burden is upon the movant to make the proper showing of proof. *Id.* Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences and conclusions from those facts. Knapp v. Simmons, 345 N.W.2d 228, 12 (Iowa 1984).

The court interpreting a contract is determining the meaning of the words used in the contract. Pathology Consultants v. Gratton, 343 N.W.2d 428, 433 (Iowa 1984). We are to interpret the contract as a whole, giving meaning to the language of the entire contract. Kinney v. Capitol-Strauss, Inc., 207 N.W.2d 516-77 (Iowa 1973). A contract is ambiguous when it is reasonably susceptible of more than one interpretation. Champale, Inc. v. Joseph S. Pickett & Sons, Inc., 599 F.2d 857, 859 (applying Iowa law) appeal after remand 671 F.2d 289 (8th Cir. 1979). Ambiguity occurs when while interpreting the contract using the words on the face of the instrument, an uncertainty results. Gendler Stone Products Co. v. Laub, 179 N.W.2d 628, 631 (Iowa 1970). Only when the meaning is ambiguous is extrinsic evidence allowed to determine the intent of the parties. *Id.* If the evidence is so clear that a reasonable man could reach but one conclusion regarding the meaning of the words in the contract, then it involves a question of law; otherwise it is a question of fact. Rector v. Alcorn, 241 N.W.2d 196, 202 (Iowa 1976).

The defendant asserts the meaning of the words in the contract "... lessee shall indemnify lessor from all liability... resulting from any injuries or losses

of this nature." is clear and unambiguous and can only be interpreted to bar plaintiff from recovery. The plaintiff argues that the section, read as a whole, appears to apply only to third-party claims which could be brought against the landlord, and not necessarily to the tenant himself. Reading the entire paragraph we agree, it appears it may be referring to third-party claims, and not claims between the landlord and tenant. The lease was silent as to who was to perform repairs. We find that the section of the lease cited by defendant is susceptible of differing interpretations.

The extrinsic evidence presented by defendant was the mayor's assertion that the lease was made with the property "as is." The trial court permitted summary judgment, finding that if there is a fact question regarding the meaning of the section of the contract, the plaintiff failed to respond to defendant's statement by the mayor that the lease was made "as is." We find, however, that this is disputed by plaintiff's contrary assertion in his affidavit that the city took part in repair of the roof. According to the affidavit, personnel and materials were provided by the City in correcting the damage. This would tend to support plaintiff's contention that it was the City's breach of its duty that caused damage to his property. The course of conduct of the parties can indicate what was their intent. Ralph's Distributing Co. v. AMF, Inc., 667 F.2d 670,673 (8th Cir. 1981); Kroblin v. RDR Motets, Inc., 347 N.W.2d 430, 433 (Iowa 1984). We find that a fact question exists regarding the meaning of the section of the contract which appears to deal with defendant's liability. Since there is a genuine issue of material fact, summary judgment is not warranted on this ground.

The trial court did not reach the question of whether the plaintiff is barred for failing to provide notice to the City, as is required to be given to municipalities pursuant to section 613A.5 of the Code. Therefore, we do not address this issue.

REVERSED AND REMANDED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.