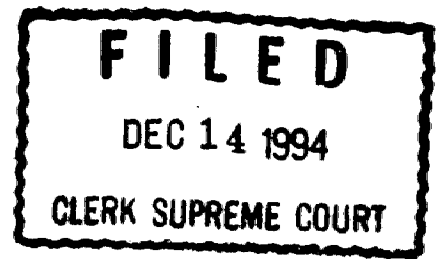


IN THE COURT OF APPEALS OF IOWA

No. 4-428 / 93-1562



DAVENPORT HEALTH ACQUISITIONS, INC. d/b/a DAVENPORT MEDICAL
CENTER,

Appellee,

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vs.

NAUTILUS HEALTH CENTERS, INC., and NAUTILUS OF MOLINE,
LTD.,

Appellants.

Appeal from the Iowa District Court for Scott County,
David J. Sohr, Judge.

Appeal from declaratory judgment actions to determine
termination date of leasehold. **REVERSED.**

Jerry A Soper, Davenport, for appellants.

David A. Millage of Wells, Gallagher, Roeder & Millage,
Bettendorf, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

This is an appeal from two declaratory judgment actions in which the district court found a lease terminated on September 24, 1992, and it ordered the tenant to vacate the premises. This matter was tried in equity and our review is de novo. Iowa R. App. P. 4. Based upon our de novo review of the record, we find the lease agreement was modified and reverse the district court's ruling.

Davenport Health Acquisitions, Inc. d/b/a Davenport Medical Center (hereinafter "landlord") owned a medical building with a vacant first floor. Nautilus Health Centers, Inc. (hereinafter "tenant") was interested in leasing the space for a fitness club. On March 24, 1987, the parties executed a written lease agreement wherein the tenant would lease the space for five years with two five-year renewal options. The tenant was not to pay rent for the first year, and rent was set at \$3.50 per square foot for the second and third years of the lease and \$5.50 per square foot for the fourth and fifth years.

The parties had envisioned considerable improvements would have to be done to the leased premises in order for the property to be used as a health spa and exercise center, and they agreed to share the costs. Evidence introduced at trial indicated the parties assumed the "build-out" period would take approximately six months to complete. Based on this assumption, the parties had agreed

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the five-year term of the lease would commence in the future and not when the lease was executed.

Paragraph two of the lease provides in relevant part:

The term of this Lease Agreement . . . shall be for a period of five (5) years, commencing on the date of occupation, or six months after execution of this Lease Agreement, whichever occurs first.

Paragraph 28 of the lease provides in relevant part:

This Leased [sic] Agreement shall not be amended, changed or extended, except by written instrument signed by both parties hereto.

Shortly after the lease was signed the parties learned the project was prohibited by current zoning. The landlord was not able to obtain a zoning variance until September 1987, and construction did not begin until October 1987.

The landlord's executive director, Jeff Burres, and the tenant's president and general manager, Scott Walker, had numerous conversations about the effect the zoning problems and delayed construction would have on the lease. Burres and Walker both testified they had agreed to modify the lease so it would commence April 1, 1988. In a letter Burres sent Walker on January 4, 1988, he stated --

I have been directed by the Corporate office to remind you that construction of this project is supposed to be accomplished within a six-month period of time. Since zoning was corrected and fully accomplished during the month of September, we anticipate that construction time should be considered effective October 1, 1987. The expected completion date should be April 1, 1988.

The tenant occupied the premises and opened for business on April 9, 1988. In the summer of 1988 Mr. Burres resigned as the landlord's executive director, and,

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on August 1, 1988, Mr. Glenn Sago was employed as its chief executive officer.

In the fall of 1988 the landlord's chief financial officer attempted to begin to collect rent from the tenant. Under the original terms of the lease the one-year lease period would have begun no later than September 24, 1987, and rent payments would have commenced in the fall of 1988. However, the tenant and Mr. Burres had agreed the lease would commence April 1, 1988, due to the zoning problems and construction delay. Mr. Walker approached Mr. Sago about this matter, and Mr. Sago deferred collection of the rent until April 1, 1989.

In December 1990 the landlord's chief financial officer (a different individual from the 1988 chief financial officer) requested increased rent from October 1, 1990. Once again, while the original terms of the lease would have required a rent increase to take effect no later than September 24, 1990, this was contrary to Walker and Burres's agreement to delay commencement of the lease until April 1, 1988. The tenant again objected and Sago directed the chief financial officer not to pursue collection of the increased rate of rent. The tenant began to pay the increased rate of rent in April 1991.

On September 23, 1992, the landlord sent the tenant a letter of notification of the termination of the lease agreement effective September 24, 1992. The tenant responded with a letter objecting to the termination and

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expressing its intent to renew the lease. Each party filed a petition seeking a declaratory judgment as to when the lease term commenced, whether it had expired and whether the tenant had exercised its option to renew. The district court concluded the lease commenced on September 24, 1987, and expired on September 24, 1992. The tenant was ordered to vacate the premises.

Contractual provisions prohibiting oral modification may be invalidated by the courts on theories of independent contract, modification, rescission, waiver and estoppel. See Humiston Grain Co. v. Rowley Interstate Transp. Co., 483 N.W.2d 832, 834 (Iowa 1992). Burres and Walker negotiated the lease and were the parties responsible for implementing it once the zoning and construction problems were discovered. They testified they agreed to modify the time for commencement of the lease to April 1, 1988. None of the landlord's other officials were able to provide firsthand evidence regarding the parties' discussions and compromises occurring after the zoning issue surfaced. Burres's testimony is credible and believable given the circumstances the parties faced. We find the parties agreed to modify the commencement date of the lease. Consideration for this modification is found in the fact the tenant could have walked away from the void or voidable lease which existed once it was discovered the landlord's property could not be used for the purpose for which it had

been leased. Instead, the tenant continued to be bound by the lease provided its commencement date was modified.

We further find the landlord is estopped from claiming the lease terminated on September 24, 1992. Promissory estoppel is applicable in this case. The elements of promissory estoppel are: 1) a clear and definite oral agreement; 2) proof the party urging application of the doctrine acted to its detriment in relying on the agreement; and 3) a finding that the equities support enforcement of the agreement. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342 (Iowa 1979).

The landlord, through Burres's statements and correspondence, orally agreed to make April 1, 1988, the date of the commencement of the lease. Through its subsequent conduct in deferring imposition of the rent payments and rent increases to April 1989 and April 1991, the landlord further induced the tenant to rely on the agreement. To its detriment the tenant had invested \$100,000 in improvements in the property. Furthermore, it was effectively limited to four and one-half years of occupancy because it relied on the modified date of commencement and was unable to exercise its option to renew before the landlord served it with a notice of termination.

The equities in this case favor enforcement of the agreement to defer commencement of the lease. The agreement was consistent with the parties' original intent

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that construction would take only six months and commencement of the lease would be deferred until that time. The evidence suggests the landlord's subsequent personnel did not wish to abide by the agreement because they wanted to use leased property for other purposes. Nevertheless, the landlord agreed to a deferral of commencement of the lease and equities favor enforcement of the agreement.

Finally, we find the equitable doctrines of waiver and estoppel by acquiescence apply to this case. "Waiver" is the intentional relinquishment of a known right. Matter of Property Seized from Sykes, 497 N.W.2d 829, 832 (Iowa 1993). Waiver can be express or implied and no consideration is needed. Folkers v. Britt, 457 N.W.2d 578, 582 (Iowa 1990). Through its conduct the landlord waived enforcement of the literal lease provisions and deferred the tenant's obligation to pay rent and the subsequent rent increases until the first and third anniversaries of its actual occupation of the property. This conduct is consistent with deferral of the commencement of the five-year lease until April 1, 1988.

Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. In re Marriage of Fields, 508 N.W.2d 730, 731 (Iowa 1993). The landlord's pattern of conduct in accepting rent payments consistent with a lease

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commencement date of April 1, 1988, is indicative of its waiver of its right to treat September 24, 1987, as the commencement date of the lease. Mr. Sago's contention he was merely forgiving the rent payments and there was no deferral of the commencement of the lease term is neither believable nor plausible given the circumstances of this case.

We reverse the district court's ruling and find the lease was orally modified and the landlord was estopped from claiming September 24, 1992, as the termination date of the lease. Under the modified lease April 1, 1993, was the termination date of the first five-year term. The tenant timely exercised its option to renew and may occupy the premises subject to the lease terms otherwise governing the renewal of the lease.

REVERSED.