

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

No. 00-0248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BUSINESS PARK DEVELOPMENT Co., LLC,

PLAINTIFF-RESPONDENT,

V.

MOLECULAR BIOLOGY RESOURCES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PAUL C. GARTZKE, Reserve Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

¶1 DYKMAN, J.¹ Molecular Biology Resources, Inc., appeals from a judgment of eviction resulting in a writ of restitution in favor of Business Park Development Co., LLC. The judgment also ordered Molecular Biology to refrain from removing any “improvements” it had made to the property. Molecular

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Biology asserts that: (1) the lease it entered with Business Park was invalid because it did not contain all required terms; (2) the trial court improperly concluded that the lease contained an option to renew and not an option to extend; (3) Business Park breached its covenant of good faith and fair dealing in the way that it handled charges for utilities and real estate taxes; and (4) the trial court improperly awarded all fixtures and improvements on the property to Business Park.

¶2 With regard to the first three issues, we affirm the decision of the trial court. However, because the record fails to reflect a specific determination as to what constitutes an “improvement” or an “alteration” to the property, we reverse and remand this issue with directions to determine which items are alterations and improvements to the property. We therefore affirm in part, and reverse in part.

BACKGROUND

¶3 In 1995, Molecular Biology and Business Park negotiated a lease for property owned and managed by Business Park in Madison. The parties exchanged drafts of the lease with proposed modifications. The three-year lease provided that rent for the property would be \$839.74 per month.² In addition, the lease provided that Molecular Biology would be responsible for a “proportionate share” of real estate taxes, and a “pro rata share” of utilities. The lease included an “option to extend” for an additional three years, but required Molecular Biology to notify Business Park of its intention to exercise the option in writing no less than

² Article III(a)(1) of the original lease states that the rent would be calculated at \$.39 per gross square foot, which totals \$839.74 a month.

sixty days before expiration of the original lease. The lease stated that during any extension, “the Lessee shall pay a monthly rent in an amount to be determined by the Lessee and the Lessor prior to the Lessee’s exercise of the option.”

¶4 The lease terminated on September 30, 1998.³ Although Business Park had written in June 1998 that it wanted to discuss terms for a new lease, no discussions were held and no agreement regarding new terms was made. In November 1998, Molecular Biology informed Business Park in writing that it wished to exercise its option to extend the lease. Molecular Biology continued to pay monthly rent to Business Park in the amount of \$839.74, which Business Park accepted.

¶5 From June 1998 through early 1999, Business Park sent invoices to Molecular Biology for real estate taxes and utilities. Although Molecular Biology paid portions of the utilities charges, it refused to pay the real estate taxes because Business Park had not provided them with satisfactory documentation supporting the amount. In January 1999, the invoice stated that Molecular Biology had ten days to either pay the invoiced charges or leave the property. The invoice also stated that the lease would be extended only if the balance of the charges was paid.

¶6 In March 1999, Business Park notified Molecular Biology that it was terminating Molecular Biology’s tenancy as of April 30, 1999. Business Park filed an action for eviction in August of 1999 when Molecular Biology did not vacate the premises.

³ Though Business Park originally contended that the lease began earlier, it later accepted September 1, 1995, as the effective date of the lease.

¶7 The trial court made several findings and conclusions regarding the lease and its terms. The court found that prior to expiration of the original lease, the parties had some discussions regarding new rental rates but never agreed on the precise figures. The court concluded that: (1) Molecular Biology failed to exercise the option to extend the lease for an additional three years in a timely fashion; (2) Business Park was entitled to possession of the property because the lease between the parties had expired, and no extension or renewal had occurred; (3) the parties never determined the rental rate for any extension of the lease; and (4) Business Park did not act in bad faith during or after the tenancy. The court granted Business Park restitution of the premises, and restrained Molecular Biology from removing any fixtures on the property. Molecular Biology appeals.

DECISION

A. Validity of the Original Lease

¶8 Molecular Biology first asserts that the original lease was not a valid contract. Further, because there was no valid lease, Molecular Biology contends both that a year-to-year tenancy was created under WIS. STAT. § 704.03(2), rather than a month-to-month tenancy, and that it was entitled to retain all the fixtures that it installed under WIS. STAT. § 704.05(4).

¶9 Molecular Biology did not assert either before or during trial that the lease was invalid because it lacked required terms. Rather, it asserted the exact opposite. In its posttrial brief, Molecular Biology argued that it believed the original lease was a valid contract. The brief stated that “[Molecular Biology] believes that the lease was valid Additionally, the lease contained all the required elements.” By failing to assert the lease’s invalidity, Molecular Biology waived its right to assert on appeal that the lease was invalid. An appellant must

articulate each of its arguments to the trial court as to preserve these issues if an appeal becomes necessary. See *State v. Rogers*, 196 Wis.2d 817, 828, 539 N.W.2d 897 (Ct. App. 1995). We will not consider Molecular Biology's assertion that the lease was invalid.

B. Interpretation of the Lease and the Option to Extend

¶10 The second issue is whether the trial court erred in finding that Molecular Biology failed to successfully exercise its option to extend the lease. Molecular Biology claims that: (1) the trial court converted an option to extend clause in the lease into an option to renew, and (2) the trial court's conclusion that Business Park is not estopped from contesting the notice of extension is based on a misinterpretation of the lease terms. Molecular Biology contends that an "option to extend" gives the lessee a unilateral option to extend the lease, as opposed to an "option to renew," which requires both parties to create a new lease for the extension period. Interpretation of a contract is a question of law that we review *de novo*. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990).

¶11 Article III(c) of the lease states that during any extension of the lease, "lessee shall pay monthly rent in an amount to be determined by the lessee and lessor prior to the lessee's exercise of the option." Molecular Biology contends that while the parties never agreed to a new rental rate for the extended period, the parties impliedly accepted the rental rate from the original lease as the rate to be applied to the extension. According to Molecular Biology, this implied acceptance occurred by the parties' failure to agree expressly on a new rental rate. The lease, however, requires that a rental rate be "determined" before the lessee may exercise its option. A rate is not determined by inaction. Therefore, because

no rate had been determined, Molecular Biology could not exercise its option to extend the lease for an additional three-year term.⁴

¶12 Molecular Biology insists that no agreement on a new rate was required because an option to extend allows for unilateral extension. In determining whether an option to extend or an option to renew the lease was created, the intent of the parties controls. In *Seefeldt v. Keske*, 14 Wis. 2d 438, 442-45, 111 N.W.2d 574 (1961), the Court adopted an approach to lease interpretation that looks to the intent of the parties, rather than simply relying on the language used. The Court construed that where there is an ambiguity, “there should be a practical interpretation of the option by the parties through their conduct.” *Id.* at 445. Through Article III(c), the parties demonstrated that it was their intent to require agreement on a new rental rate before Molecular Biology could exercise its option. We therefore do not consider the lease’s use of the word “extend” rather than “renew” to grant Molecular Biology a unilateral right to continue the lease.

¶13 Both parties cite *Whirlpool Corp. v. Ziebert*, 197 Wis. 2d 144, 154, 539 N.W.2d 883 (1995), for the proposition that a contract should be interpreted so that all parts are given meaning. We agree, which is why we decline to adopt Molecular Biology’s position. To allow Molecular Biology to exercise its option before it complied with Article III(c) would effectively nullify that provision of the lease. We therefore conclude that the trial court correctly interpreted the lease.

⁴ Molecular Biology challenges the trial court’s finding that there was a discussion between the parties regarding a new rental rate. However, regardless of whether any discussions were held, no rental rate was decided upon by the parties, thereby invalidating any extension.

¶14 Business Park asserts in the alternative that even if the lease were renewed, it had the right to evict Molecular Biology for failure to pay real estate taxes and other utilities. We need not address this assertion, because Molecular Biology became a month-to-month tenant after expiration of the original lease in September 1998. Business Park ended this tenancy when it gave written notice of its intentions in March 1999.

C. Covenant of Good Faith and Fair Dealing

¶15 Molecular Biology contends that Business Park breached its covenant of good faith and fair dealing when it “fabricated” charges billed to Molecular Biology, and used coercion to pressure Molecular Biology. Further, it suggests that because of this breach, Business Park is not entitled to enforce the lease. In every contract, an implied duty of good faith and fair dealing exists with respect to both parties to that contract. *See Chayka v. Santini*, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (1970). However, because we are concerned only with whether Business Park could evict Molecular Biology, we decline to consider whether Business Park’s handling of the invoiced charges breached its covenant of good faith and fair dealing.⁵

¶16 In this action, Business Park sought only to evict Molecular Biology. Business Park made no claim for the charges that were invoiced beginning in June 1998, and the trial court did not award these charges in its judgment. The only relevant question, therefore, is whether Business Park was entitled to evict

⁵ Molecular Biology asserts that the trial court erroneously found that Molecular Biology failed to pay any of the charges. While we agree with Molecular Biology that some of the charges were in fact paid, this is harmless error since it is not relevant to our ultimate conclusion that Business Park is entitled to evict Molecular Biology.

Molecular Biology. We have concluded that it was. Molecular Biology cites no authority that would prohibit Business Park from terminating a month-to-month lease based on a breach of the good faith covenant. We therefore need not address whether the invoice charges sent to Molecular Biology breached an implied covenant of good faith and fair dealing.

D. Judgment regarding improvements and fixtures

¶17 Molecular Biology asserts that the trial court improperly awarded all of its improvements and fixtures to Business Park. The trial court found that the lease required all improvements and alterations made by Molecular Biology to remain on the property after the expiration of the lease, unless Business Park gave prior authorization for their removal. The trial court concluded that Molecular Biology failed to show that Business Park had given prior authorization. It therefore restrained Molecular Biology from removing “plumbing, electrical outlets and fixtures, base cabinets, countertops, shelving and other fixtures.”

¶18 However, the trial court did not make specific findings as to what constituted an “improvement” on the property. In its findings, the trial court did not make clear which items were “alterations and improvements” and which were not. Molecular Biology asserts that it is entitled to fixtures that were not considered “improvements.” Whether an item is an “improvement” or an “alteration” or something else is a question of fact. We are not permitted to make findings of fact. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). We therefore reverse and remand this issue with directions to determine the alterations and improvements to the property, and award them to Business Park. No costs to either party.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

