

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2008

David R. Schanker
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.

**Appeal No. 2008AP77
STATE OF WISCONSIN**

Cir. Ct. No. 2005CV2768

**IN COURT OF APPEALS
DISTRICT IV**

RALPH KALAL D/B/A KALAL & ASSOCIATES,

PLAINTIFF-APPELLANT,

V.

DANE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Ralph Kalal appeals an order granting summary judgment in favor of Dane County in his action seeking compensation under WIS. STAT. ch. 32 (2005-06)¹ for the taking of his property in a condemnation

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

proceeding. He asserts claims for replacement of business expenses under WIS. STAT. § 32.19(4m)(b), for loss of personal property under § 32.19(3)(a), for net rental loss under WIS. STAT. § 32.195, and for the value of his leasehold under WIS. STAT. § 32.09. We reject each of his claims and therefore affirm.

BACKGROUND

¶2 The following facts are taken from the pleadings and the parties' summary judgment submissions, and are not disputed. This case arises out of Dane County's condemnation of an office building located at 217 South Hamilton Street in Madison for the purpose of demolishing the building and replacing it with a new Dane County justice center. The County acquired the property on January 30, 2002.

¶3 Kalal does business as Kalal & Associates, a sole proprietorship law firm. Kalal signed a long term lease beginning in July 1994 for tenancy at 217 South Hamilton. Under the terms of the lease, Kalal paid \$16,278.00 per month for his office space and parking. Between 1995 and 1998, Kalal spent over \$242,000 to remodel the Hamilton Street space. Kalal's square footage in the Hamilton Street space was 7,780. Kalal asserts that he began in May 2000 to try to find a tenant to sublet 5,353 square feet of the space in his office, but claims that he was unable to do so because of the County's interest in the building.

¶4 As a result of the condemnation, Kalal moved his law practice to a location on Monona Drive in Madison during May 2002. His new office on Monona Drive is 2,427 square feet, and Kalal pays a lower rent for the new space. Kalal concedes that the new office on Monona Drive is adequate for the needs of his business.

¶5 Kalal submitted a claim to the County for compensation under WIS. STAT. ch. 32, the eminent domain statutes, for a portion of his moving and relocation expenses. The County paid Kalal \$8,137.20 on this claim. Thereafter, Kalal submitted another claim requesting additional compensation in the amount of \$316,887.38 for a total of five categories of expenses under chapter 32. The claim was denied, and Kalal commenced this action seeking judgment in the amount of \$527,709.95, plus interest and costs.

¶6 Kalal moved for partial summary judgment with respect to two categories of claims: actual moving expenses and reestablishment expenses. The circuit court ruled that Kalal had made a prima facie case for partial summary judgment for those claimed expenses, but that the County had successfully established that Kalal owed the County back rent for the Hamilton Street office that was greater than the amount of Kalal's moving and reestablishment expenses. Thus, the court granted partial summary judgment to the County. Following this ruling, there remained three outstanding categories of claims: (1) replacement business expenses; (2) loss of personal property, and (3) net rental loss. The County moved for summary judgment on these remaining claims. In his brief in opposition to the motion for summary judgment, Kalal asserted a new claim for the value of his leasehold under WIS. STAT. § 32.09. The circuit court granted summary judgment in favor of the County. It is from this second summary judgment ruling that Kalal appeals. We reference additional facts as needed in the discussion below.

STANDARD OF REVIEW

¶7 Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS.

STAT. § 802.08(2). The first step in summary judgment methodology is to determine whether the pleadings set forth a claim for relief. *Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶32, 261 Wis. 2d 333, 661 N.W.2d 789. If so, the court then examines the moving party's submissions to determine if a prima facie case for summary judgment has been made. *See id.* In order to make a prima facie case, the defendant must "show a defense which would defeat the claim." *Methodist Manor Health Ctr., Inc. v. Py*, 2008 WI App 31, ¶9, 307 Wis. 2d 501, 746 N.W.2d 824 (citation omitted). If the moving party has made a prima facie case for summary judgment, the court then examines the affidavits and other proofs of the opposing party to determine whether there are disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial. *Id.* Our review of a circuit court's grant of summary judgment is de novo, applying the same methodology as did the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987).

DISCUSSION

¶8 With this background in mind, we first examine the pleadings to determine whether a claim has been stated. Kalal's complaint alleges that the County failed to reimburse him for expenses authorized by WIS. STAT. §§ 32.19 and 32.195, and claimed pursuant to WIS. STAT. § 32.20. Read together, these provisions permit reimbursement to a claimant upon submission of a claim to the condemnor (§ 32.20) for replacement business expenses (§ 32.19(4m)(b)), for loss of personal property (§32.19(3)(a)), and for reasonable net rental losses (§ 32.195(6)). Accordingly, we conclude that Kalal has stated a claim for each of the three remaining categories of reimbursement he seeks.

¶9 Next, we examine the County's proofs to determine whether it has made a prima facie case for summary judgment which would defeat Kalal's claims. As to Kalal's claim for replacement business expenses, the County argues that, as a matter of law, Kalal's new office on Monona Drive is a comparable replacement business within the meaning of WIS. STAT. § 32.19(2)(c), and that because the new office is less costly than his old office on Hamilton Street, Kalal is not entitled to compensation. As to Kalal's claim for loss of personal property, the County argues that Kalal is not entitled to compensation because he is attempting to recover the money he spent for remodeling, which is not tangible property as required by § 32.19(3)(a). It also argues that Kalal has failed to provide adequate evidentiary support for his claim under this provision. As to Kalal's claim for net rental loss, the County argues that Kalal is not entitled to compensation because Kalal was a tenant and not an owner as is required by WIS. STAT. § 32.195, and that Kalal has not provided evidentiary support for his claim that he experienced a rental loss. As to Kalal's claim for the value of his leasehold asserted in his summary judgment brief, the County argues that Kalal's claim was not timely raised. We conclude that, as to each of these claims, the County has made a prima facie case for summary judgment.

¶10 We now turn to whether Kalal has rebutted the County's prima facie case as to each claim. We take each claim in order.

REPLACEMENT BUSINESS EXPENSES

¶11 WISCONSIN STAT. § 32.19(4m)(b) addresses payments to business owners who rent and are displaced if the business owner either rents or purchases a comparable replacement business within two years after vacating the acquired property. The condemnor must compensate the owner of the displaced business

based on a formula that compares the monthly rent paid for the acquired property to the monthly rent of a comparable replacement business in an amount not to exceed \$30,000.² Kalal claimed entitlement to \$30,000, the statutory maximum allowable for these expenses.

¶12 WISCONSIN STAT. § 32.19(2)(c) defines a “comparable replacement business” as:

[A] replacement business which, when compared with the business premises being acquired by the condemnor, is adequate for the needs of the business, is reasonably similar in all major characteristics, is functionally equivalent with

² WISCONSIN STAT. § 32.19(4m)(b) provides in full:

(b) *Tenant-occupied business or farm operation.* In addition to amounts otherwise authorized by this subchapter, the condemnor shall make a payment to any tenant displaced person who has owned and occupied the business operation, or owned the farm operation, for not less than one year prior to initiation of negotiations for the acquisition of the real property on which the business or farm operation lies or, if displacement is not a direct result of acquisition, such other event as determined by the department of commerce, and who actually rents or purchases a comparable replacement business or farm operation for the displaced business or farm operation within 2 years after the date the person vacates the acquired property. At the option of the tenant displaced person, such payment shall be either:

1. The amount, not to exceed \$30,000, which is necessary to lease or rent a comparable replacement business or farm operation for a period of 4 years. The payment shall be computed by determining the average monthly rent paid for the property from which the person was displaced for the 12 months prior to the initiation of negotiations or, if displacement is not a direct result of acquisition, such other event as determined by the department of commerce and the monthly rent of a comparable replacement business or farm operation, and multiplying the difference by 48; or

2. If the tenant displaced person elects to purchase a comparable replacement business or farm operation, the amount determined under subd. 1. plus expenses under par. (a)3.

respect to condition, state of repair, land area, building square footage required, access to transportation, utilities and public service, is available on the market, meets all applicable federal, state or local codes required of the particular business being conducted, is within reasonable proximity of the business acquired and is suited for the same type of business conducted by the acquired business at the time of acquisition.

¶13 Kalal contends that the smaller space in his new office on Monona Drive is not a comparable replacement business because, unlike his space on Hamilton Street, it does not contain the additional 5,353 square feet available for him to sublet. He claims that the inquiry into whether the Monona Drive space constitutes a comparable replacement business under § 32.19(2)(c) raises a disputed issue of material fact sufficient to defeat the County's prima facie case for summary judgment on this issue. We disagree.

¶14 The construction of statutes and their application to a particular set of facts is a question of law, not of fact. See *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App 62, ¶7, 242 Wis. 2d 301, 625 N.W.2d 613. We therefore turn to the meaning of WIS. STAT. § 32.19(2)(c) and its application to the facts of this case. The inquiry centers on whether the Monona Drive space is “adequate for the needs of the business” and is “functionally equivalent with respect to ... building square footage required” within the meaning of the statute. Kalal concedes that the office on Monona Drive is adequate for the needs of his business and that the space on Hamilton Street was 5,353 square feet too big for his needs. He argues, however, that the new space is not functionally equivalent in terms of square footage because it does not include the same amount of additional space available for purposes of subletting.

¶15 We reject Kalal's argument. “[S]tatutory interpretation ‘begins with the language of the statute. If the meaning of the statute is plain, we ordinarily

stop the inquiry.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. By its plain meaning, WIS. STAT. § 32.19(2)(c) requires that the new business be “suited for the same type of business conducted by the acquired business at the time of acquisition.” (Emphasis added.) The type of business conducted at the Hamilton Street space at the time of acquisition was a law office. Although Kalal may have been interested in subletting a portion of that space, he did not do so. Thus, even assuming for the sake of argument that the subletting of the space would qualify as a “business” under § 32.19(2)(c), no such sublet occurred here.

¶16 In addition, a comparable replacement business does not have to be identical to the displaced business. *See City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶33, 302 Wis. 2d 599, 734 N.W.2d 428. Nothing in WIS. STAT. § 32.19(2)(c) required that Kalal’s new office contain extra space suitable for subletting. We conclude that, although it is smaller and less expensive than his former office, the Monona Drive office is a comparable replacement business within the meaning of the statute. As noted above, the methodology for computing Kalal’s replacement business expenses is the difference between the rental of the space for his law office on Hamilton Street and the rental of the space for his law office on Monona Drive. Because the rent on Monona Drive is less, Kalal is not entitled to reimbursement under the replacement business provision.

LOSS OF PERSONAL PROPERTY

¶17 Under certain circumstances, displaced tenants are entitled to compensation for personal property losses associated with a condemnation. WISCONSIN STAT. § 32.19(3)(a) provides in relevant part that a displaced person may be compensated for “the actual and reasonable expenses of moving the

displaced person and his ... business ... including personal property; actual direct losses of tangible personal property as a result of moving or discontinuing a business ... but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property” Thus, with respect to loss of personal property in the moving process, the loss must be actual, and the amount of compensation is to be calculated by comparing the actual loss to the reasonable expense involved in relocating the property.

¶18 Kalal sought \$125,000 for loss of his personal property under this provision. This figure apparently represents a substantial portion of the amount that he spent on remodeling his offices between 1995 and 1998. According to the County, the only proof of loss that Kalal provided to the County in support of his claim related to Kalal’s remodeling expenses such as carpentry, painting, wallpapering, cabinet installations, and phone connections, and an assertion by Kalal that he was unable to remove unspecified fixtures “such as the chandelier” from the building. The County contends that the remodeling expenses are not “tangible personal property” as required by WIS. STAT. § 32.19(3)(a). It also argues that Kalal has provided no evidence that specifies the items he removed from the Hamilton Street office, the items he did not remove, and the cost associated with any item that he claims as tangible personal property.

¶19 With respect to the remodeling expenses, Kalal refers to a document which the County asserts forms the basis for Kalal’s claim under WIS. STAT. § 32.19(3)(a). The document is a letter from Kalal’s attorney to the County in which the attorney provided information requested by the County in support of

Kalal's claim.³ Kalal argues that the correspondence simply summarizes his claim and "do[es] not set forth enough detail to decide what personal property has been involved." Thus, he argues, the "County has not supported its grounds for summary judgment and the motion should be denied."

¶20 Kalal's argument fails to acknowledge that he bears the responsibility of refuting the County's legal argument and of making a sufficient showing to establish the elements of his case. Under summary judgment methodology, once the moving party has made a prima facie case, as the County has done, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). Kalal has advanced no legal argument nor offered any submissions to counter the County's contention

³ In particular, the letter purports to respond to the County's request for additional information in support of Kalal's relocation claim, and under the heading "Personal Property Loss" contains the following passage:

Prior to the taking, Mr. Kalal had extensively remodeled his space at 217 South Hamilton. The first remodeling was in 1995-96 and the second was in 1997-98. With the taking of the property, Mr. Kalal lost the value of the personal property added to his space through these remodelings.

Attached under Exhibit E is an itemization for the most recent remodeling. Mr. Kalal was billed \$170,487.49 by his contractor for the work. In addition, he paid Woodworth Communications additional sums for the establishment of telephone service bringing the total to \$177,661.59.

In 1995-96, Mr. Kalal invested \$64,425.45 in personal property added to his space. The invoices associated with this work are included under Exhibit F, which contains a summary of expenditures.

The total for personal property expenditures is \$242,087.04.

that Kalal's remodeling expenses form the basis for his claim under WIS. STAT. § 32.19(3)(a) and do not constitute "tangible personal property" within the meaning of § 32.19(3)(a). We conclude that Kalal has failed to either present a legal theory that counters the County's argument that remodeling expenses do not constitute tangible personal property or present evidence of tangible personal property loss.

¶21 With respect to the chandelier, Kalal refers to a letter from his attorney to the County which contains the following statement: "With reference to the loss of personal property, you must be aware that Kalal had made significant improvements to its leased space prior to the condemnation. Kalal was never paid anything for its trade fixtures." In addition, Kalal relies on the following response to the County's interrogatory:

INTERROGATORY NO. 6: Describe in detail your attempts to remove fixtures from the property at Hamilton Place that you were entitled to remove under your lease.

RESPONSE: I requested permission from Judy Susmilch to remove certain fixtures and was, in fact, able to remove some fixtures, including bookshelves, door hardware, wood French doors, a dishwasher, and several cabinets. I requested permission to remove other fixtures, such as the chandelier, but was not able to do so.

¶22 This letter and Kalal's response to the interrogatory are insufficient to overcome the County's prima facie case for summary judgment. Even assuming for the sake of argument that the chandelier is personal property, rather than a fixture of real estate, Kalal has not provided any information regarding why the chandelier could not be removed nor what the reasonable cost of replacing it would be. The generalized reference to his inability to remove a chandelier from the Hamilton Street office does not provide a sufficient evidentiary basis to raise a

genuine issue of fact with respect to this item. In sum, we reject Kalal's claim under WIS. STAT. § 32.19(3)(a) for remodeling expenses as a matter of law, and further reject his claim regarding the chandelier due to a lack of evidentiary support.

NET RENTAL LOSS

¶23 WISCONSIN STAT. § 32.195 provides as follows:

In addition to amounts otherwise authorized by this subchapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:

....

(6) Reasonable net rental losses when all of the following are true:

(a) The losses are directly attributable to the public improvement project.

(b) The losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.

¶24 Kalal sought \$260,000 for net rental loss under this provision. The loss he claims is the loss of rental monies he asserts he would have secured had he been able to rent the 5,353 square feet of office space discussed above. However, Kalal's lease, as well as the first and second amendments to the lease, all of which Kalal signed, identify him as a tenant. WISCONSIN STAT. § 32.195(6) provides for reimbursement of net rental losses to the *owner* of the condemned property. Under the plain meaning of § 32.195(6), this provision does not apply to Kalal because he was not the owner.

¶25 Kalal responds by citing *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 388, 288 N.W.2d 794 (1980), in support of his argument that

long-term leasehold interests constitute ownership of land entitling lessees to just compensation when their land is taken for public use. Kalal's reliance on *Maxey* is misplaced. In *Maxey*, the supreme court referenced the fact that someone with a long-term leasehold interest has some of the same rights as an owner for purposes of WIS. STAT. § 32.10, which relates to inverse condemnation proceedings. Kalal points to no authority in which this reasoning has been applied in the context of a party seeking relocation expenses under WIS. STAT. § 32.195(6). Although related, the condemnation and relocation assistance provisions are separate and have different applications. *City of Racine v. Bassinger*, 163 Wis. 2d 1029, 1037 n.6, 473 N.W.2d 526 (Ct. App. 1991).

¶26 Further, even if *Maxey* did apply, Kalal has not demonstrated that he has experienced an actual net rental loss. As discussed above, Kalal had not sublet the Hamilton Street space at the time of the condemnation and he merely concludes in his responses to the County's interrogatories that it was because of the impending condemnation that he was unable to sublet the space on Hamilton Street.⁴ Kalal has offered no specific evidence from which one could reasonably

⁴ Kalal's claim is based on the following response to the County's interrogatory:

INTERROGATORY NO. 3: State the specific facts and identify all documents supporting your claim for net rental loss pursuant to WIS. STAT. § 32.195(6), including the names of individuals or organizations that were interested in renting the property, the amount of square footage that they would have leased, the dates when they would have potentially been interested in renting the space, the amount of rent that they were willing to pay, and any other facts necessary for a full and complete understanding of the claim.

(continued)

infer that Kalal's goal of subletting the property was a realistic one, how long it would have taken him to find a tenant, what a reasonable rent would have been, or what the vacancy rate in the area was. In short, even if he were entitled to compensation under WIS. STAT. § 32.195(6), his claimed damages are purely speculative.

CLAIM UNDER WIS. STAT. § 32.09

¶27 Kalal also asserts a claim for the "value of [his] leasehold" under WIS. STAT. § 32.09(5), which sets out the methodology for computing loss in the event of a total taking of property through condemnation. It provides as follows:

32.09 Rules governing determination of just compensation. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

....

(5)(a) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(b) Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property.

RESPONSE: Judy Susmilch contacted several prospective tenants, including an architectural firm, and had several showings of the Hamilton Place space for a possible sublease. Interest in the property from prospective tenants disappeared as soon as the County announced its intention to condemn the building for the construction of the Dane County Justice Center.

This response contains none of the specific information discussed above.

Kalal argues that under this provision, he is entitled to compensation for the full measure of the investments he made to the Hamilton Street office with respect to remodeling, rewiring and redecorating.

¶28 The County responds that Kalal did not include a claim for the “value of [his] leasehold” as part of his June 2004 claim to the County.⁵ It asserts that the first time Kalal asserted such a claim was in his response brief in opposition to the County’s second summary judgment motion. The County contends that, as a result, Kalal’s claim under WIS. STAT. § 32.09 is time barred because it was not filed before the running of the statute of limitations. We agree. Claims for compensation for expenses resulting from condemnation proceedings are governed by WIS. STAT. § 32.20, which sets out a two-year statute of limitations for filing such claims. Kalal does not dispute the County’s assertion that he did not timely raise his claim under § 32.09(5).

¶29 Even if Kalal’s claim were not time barred, Kalal could not recover under WIS. STAT. § 32.09(5) because he was not the owner of the property on Hamilton Street which he wished to sublet, and he provides no authority other than *Maxey* for the proposition that as a renter, he would be entitled to compensation for a total taking. As discussed above, *Maxey* is inapposite to this case.

⁵ Kalal did not assert in his original complaint filed in August 2005 that he was entitled to compensation under WIS. STAT. § 32.09. In a proposed amended complaint that he attempted to file with the court in April 2006, he alleged only that the County violated the provisions of a different statute, WIS. STAT. § 32.05(7). Kalal does not argue in the present appeal that § 32.05(7) applies.

CONCLUSION

¶30 Kalal's claim for replacement business expenses under WIS. STAT. § 32.19(4)(m) fails because the Monona Drive office is a comparable replacement business within the meaning of that statute. Kalal's claim for loss of personal property under § 32.19(3)(a) fails because he has not demonstrated that the remodeling expenses for which he claims compensation constitute tangible personal property within the meaning of that statute. His claim under this provision for compensation related to a chandelier fails for lack of evidentiary support. Kalal's claim for net rental loss under WIS. STAT. § 32.195(6) fails because he was not the owner of the Hamilton Street property as required by that statute. This claim fails for lack of evidentiary support as well. Finally, Kalal's claim for the value of his leasehold under WIS. STAT. § 32.09(5) fails because it was not timely raised. Even if it were timely, it fails because Kalal was not the owner of the Hamilton Street property. The circuit court's judgment and order granting summary judgment to the County is affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

