IN THE COURT OF APPEALS OF IOWA

No. 2-1195 / 12-0926
Filed June 12, 2013

SCS PROPERTY MANAGEMENT, LLC,
Plaintiff-Appellant/Cross-Appellee,

vs.

CINDY VOKES and WESTSIDE KIDS, INC.,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

SCS Property Management, LLC appeals, and Cindy Vokes and West Side Kids cross-appeal, from the district court's judgment ruling on the parties' breach of contract claims. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ENTRY OF REVISED JUDGMENT ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Bridget R. Penick and Allison M. Lindner of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Matthew J. Hemphill of Bergkamp, Hemphill, Ogle & McClure, P.C., Adel, for appellees.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

SCS Property Management, LLC, run by Cindy Jones, leased space to a day care center known as West Side Kids, run by one of its owners, Cindy Vokes. When the five-year lease spanning 2005 to 2010 expired, West Side Kids vacated the premises, taking certain items with it. SCS sued West Side Kids and Vokes for breach of the lease agreement. West Side Kids counterclaimed for breach of the same agreement. Following a bench trial, the district court concluded both sides breached the lease. After offsetting their damage awards, the court entered judgment of $12,971.74 in favor of West Side Kids.

On appeal and cross-appeal, the parties challenge several aspects of the district court's findings and conclusions. Our review of the court's fact findings is for substantial evidence and our review of the law is on error. Iowa R. App. P. 6.907; *NevadaCare*, *Inc*. *v*. *Dep't of Human Servs*., 783 N.W.2d 459, 465 (Iowa 2010).

I. SCS's Appeal

SCS contends the district court erred in rejecting its breach-of-contract claims based on West Side Kids' (A) removal of fixtures from the premises, (B) damage to the concrete outside the building, (C) "waste" of the premises and (D) failure to pay adequate "common area maintenance" (CAM) fees. SCS also appeals the district court's denial of its claim for attorney fees.

A. Removal of Fixtures

When West Side Kids vacated the leased premises, it took playground equipment, playground turf, concrete barriers surrounding the playground,

fencing above the concrete barriers, children's toilets and sinks, and attached soap and paper towel dispensers. At trial, SCS did not dispute West Side Kids' entitlement to the playground equipment and turf but argued the balance of the items were "fixtures" that should have remained with the property.

The district court agreed with SCS that the soap and paper towel dispensers were "fixtures" and awarded SCS $290.06 in damages for the removal of those items. The court concluded the toilets, sinks, concrete barriers and fencing were needed in the daycare business, were, accordingly, "trade fixtures" rather than "fixtures," and were appropriately removed by West Side Kids.

On appeal, SCS contends the district court got it wrong. It reiterates that the contested items were "fixtures" that should have remained with the real estate because they were "affixed to its real estate." *Compare* 35A Am.Jur.2d *Fixtures* § 3, at 840 (2001) (stating a fixture is "real property because it is incorporated in or attached to realty"), *with Winnike v. Heyman*, 169 N.W. 631, 633 (Iowa 1918) ("'Trade fixtures' is a term usually employed to describe property which a tenant has placed on rented real estate to advance the business for which it is leased and which may, as against the lessor, be removed at the end of the tenant's term.").

Courts have applied a factual test to determine whether contested items are "fixtures" or "trade fixtures." *Young v. Iowa Dep't of Transp.*, 490 N.W.2d 554, 556 (Iowa 1992) (stating personal property becomes a fixture when (1) it is actually annexed to the realty, or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making

the annexation intends to make permanent accession to the freehold); *Marty v*. *Champlin Refining Co*., 36 N.W.2d 360, 365 (Iowa 1949) (same, with respect to trade fixtures). We find it unnecessary to apply this test because it is clear from the terms of the lease and our precedent that a predicate to consideration of this issue was not satisfied: the *tenant's* placement of the disputed items on the property. *See Interior Energy Corp*. *v*. *Alaska Statebank*, 771 P.2d 1352, 1353-54 (1989) ("The threshold issue in trade fixture cases is who purchased and installed the disputed fixtures. If it was not the tenant who installed them . . . he or she has no right to remove them.").

We begin with the lease. The document does not define the terms "trade fixtures" or "fixtures" but its "surrender of premises" provision consistently characterizes "trade fixtures" as items brought to the property by the lessee:

> Lessee shall . . . remove all of *its trade fixtures* and equipment from the Premises . . . . Lessee shall reimburse Lessor for any expenses incurred by Lessor . . . with respect to repair of the Building as a result of Lessee's removal of *Lessee's trade fixtures* and equipment and with respect to restoring said Premises to good order, condition and repair.
>
> All alterations, additions, *fixtures*, paneling, partitions, railings and like installations, *other than Lessee's trade fixtures* and equipment, which have been made or installed by either Lessor or Lessee upon the Premises shall remain the Lessor's property and shall be surrendered with the Premises as a part thereof.

It is undisputed that West Side Kids did not bring the contested items to the property.[1] Those items were added to the daycare site as part of SCS's pre-move-in "build-out." While West Side Kids, by agreement, paid $75,000 towards the total $233,000 build-out cost, the lease unambiguously characterized the

[1] The disputed items can be distinguished from the playground equipment and outdoor turf West Side removed; those items were purchased and installed by West Side Kids.

build-out as a lessor-completed improvement, and assigned that type of improvement to the lessor. As a result, it made no difference whether the $75,000 West Side Kids paid toward the build-out was used to purchase the disputed items. Even if it was,[2] the items were part of SCS's improvements and West Side Kids had no right to remove them.

Our conclusion that West Side Kids was not entitled to the disputed items because it did not furnish and install those items finds support in our case law. *See Leslie Pontiac*, *Inc*. *v*. *Novak*, 202 N.W.2d 114, 117 (Iowa 1972) (finding steel building placed on the premises by tenant did not become part of the realty and was removable by tenant as a trade fixture); *Marty*, 36 N.W.2d at 363-65 (affirming district court's conclusion that air compressor and air lift installed by tenant were trade fixtures as a matter of law); *see generally* William M. Howard, *What Constitutes Trade Fixtures—Modern Cases*, 107 A.L.R.5th 311 (2003) ("Trade fixtures can generally be defined as articles of personal property brought on the leasehold by a tenant that are necessary to conduct a trade or business to which the premises will be devoted."). While that precedent does not characterize a tenant's purchase of items as a condition precedent to a finding of a trade fixture, it is clear from the facts that only tenant-provided items are denominated trade fixtures.

Because the disputed items were not trade fixtures as a matter of law, we conclude SCS is entitled to damages of $7480.29[3] for West Side Kids' removal of

[2] The document listing the improvements was not attached to the lease but there was substantial evidence that West Side Kids' payment covered the costs of structural improvements rather than the purchase and installation of the disputed items.

[3] The breakdown for this amount is as follows:

those items. We reverse the district court's ruling on this issue and remand for entry of judgment in favor of West Side Kids in the reduced amount of $5491.45 ($12,971.74-$7480.29).

B. Concrete

To create its outdoor playground area, West Side Kids glued outdoor turf onto a concrete parking lot surface and installed playground equipment it purchased. West Side Kids removed these items when it vacated the property, leaving a hole in the cement that, according to the owner of SCS, Cindy Jones, "was supposed to be repaired and brought back to the . . . state that it was before it was destroyed." West Side Kids attempted a fix that, according to Jones, resulted in a partially filled, more granular surface than the original surface. Jones characterized the subsequent repair as "an eyesore." She also noted that glue residue from the outdoor turf remained on the cement.

Vokes responded that she found three holes in the cement after removing the playground equipment and she had them patched, filled, and smoothed out. She testified that she cleaned the turf as best she could, but all the adhesive did not "come up." She characterized the problem as "cosmetic."

- $2496.49 for small toilets and small sinks ($2786.55 - $290.06 awarded by district court for soap and paper towel dispensers
- $500.00 for plumber to install small toilets and small sinks
- $200.00 for forklift for concrete barricades
- $2363.80 for concrete barricades
- $1920.00 for fence

In arriving at this figure, we have considered a pre-move out letter drafted by SCS in which SCS stated West Side Kids could remove the small toilets. This letter was part of an attempt to work out differences with West Side Kids, an attempt that both parties conceded was not successful. Because no agreement was reached, we decline to exclude the toilets from the damage award.

With respect to the holes, the district court found "[t]here is insufficient evidence to support th[e] allegation" that the holes were not "restored in quality and class equal to the original work." With respect to the glue residue, the court acknowledged that West Side Kids failed to restore the concrete to a quality and class equal to the original, but stated SCS did not present evidence of repair, as opposed to replacement costs.

On appeal, SCS takes issue with these findings. We are convinced they are supported by substantial evidence in the form of Vokes's testimony, which the court found "more credible" than Jones's. Indeed, the court adopted Vokes's characterization of the glue residue damage as "cosmetic" rather than structural. It follows that the court was not persuaded by SCS's damage estimate, which was nominally titled "Repairs," but which only included a replacement cost estimate, with the explanation that the company "[t]ypically" stayed away from "grinding and trying to cover up someone else's mistakes." The court acted well within its purview in rejecting SCS's evidence that replacement of the concrete was the only viable option. Because SCS presented no evidence of the cost of grinding down the area covered with glue residue, the court did not err in declining to award SCS damages on this claim.

C. Waste

SCS contends the district court erred in rejecting its waste claim against West Side Kids, "which should have entitled SCS to treble damages incurred as a result of West Side Kids's actions while vacating the property." SCS's waste claim is premised on Iowa Code chapter 658 (2011), which "provides a statutory action that may be brought by remaindermen and or reversioners for waste by a

life tenant." David M. Erickson and Christopher Talcott, *Iowa Practice Series*, *Estates in Land—Life estate* § 16:5 (2012); *accord Hamilton v*. *Mercantile Bank of Cedar Rapids*, 621 N.W.2d 401, 409 (Iowa 2001) (defining a waste claim as "an action at law brought by a remainderman against a tenant in lawful possession of land—usually a life tenant or tenant for a term of years—who is allegedly using the land in such a way as to diminish its value"); *Offermann v*. *Dickinson*, 175 N.W.2d 423, 425 (Iowa 1970) ("We recognize the general rule that a life tenant must at his own expense make such repairs as are necessary to preserve the improvements and to prevent waste due to their getting into a state of dilapidation, but that the life tenant is not bound to make extraordinary repairs which involve the substitution of new structures for old, or parts thereof for old."). SCS specifically relies on section 658.1A, which states: "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commit waste thereon, that person is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor."[4]

SCS did not offer evidence that West Side Kids or Cindy Vokes was a "guardian, tenant for life or years, joint tenant, or tenant in common," to whom this statutory provision would apply. *See Hamilton*, 621 N.W.2d at 410 (finding no life tenant to whom a waste claim could attach). For that reason, we affirm the district court's denial of the waste claim.

[4] "A term or estate 'for years' is also a particular estate, where the portion of the fee conveyed is measured by a defined number of years rather than a person's life. While little Iowa case law exists on this estate, it is likely that many of the same principles would apply as those governing life estates." *Iowa Practice Series* § 16:5 n.1 (citing *Anderson v. Anderson*, 286 N.W. 446, 450 (Iowa 1939).

D. CAM Fees

SCS asserts the district court erred in interpreting the lease's CAM fee provisions in favor of West Side Kids. The company takes issue with two aspects of the court's ruling.

1. *Management Fee*. Under the lease, SCS was authorized to charge "additional rent for operating expenses." "Annual operating expenses" included "any management fee, not to exceed 6 percent of the gross annual base rent, paid to a third-party manager or management firm." In 2005 and 2006, Scott Jones, husband of Cindy Jones, managed the property for SCS. SCS did not assess a management fee. In 2007, following Scott's divorce from Cindy Jones, the district court found that "Cindy Jones became sole owner and manager of SCS." At that time, she began assessing a 6% management fee; West Side Kids paid her $3,892.02 per year in 2007, 2008, and 2009, and $1,621.67 in 2010. At trial, Jones's accountant stated "Cindy Jones always took the check out of SCS Property," "[f]or the work [she] puts into managing the property." The district court determined, "[T]he parties, at the time they entered into the lease, never intended the owners of SCS to personally qualify as third-party managers for the purpose of collecting a management fee." The court concluded SCS breached the lease by charging the 6% management fees for Jones's services.

On appeal, SCS notes that Cindy Jones did not sign the lease agreement in her personal capacity, and Jones, "in her personal capacity acting as the manager of the property, qualifies as a third-party manager under this Lease." SCS cites a provision of the Revised Uniform Limited Liability Company Act for that proposition.

SCS is correct that "[a] limited liability company is an entity distinct from its members." Iowa Code § 489.104(1). But this principle does not assist SCS.

Under the terms of the lease agreement, the management fee was part of the "additional rent" assessed by SCS. That "additional rent" was paid to SCS for services performed by Cindy Jones, the sole member of SCS at the time of this litigation. Nothing in the lease stated that a member could serve as a third-party manager. *See generally* Iowa Code §§ 489.409(2)(a) (setting forth members' duty of loyalty to "account to the company and to hold" funds "as trustee"); 489.407(6) (prohibiting member remuneration for services performed for" limited liability company). Accordingly, the district court did not err in concluding SCS breached the lease agreement by collecting a third-party management fee.

2. *Formula for Calculation of CAM fees*. The "additional rent provision of the lease states, "Lessee agrees to pay Lessor, . . . as additional rent, Lessee's proportionate share of the annual operating expenses that Lessor incurs with respect to the operation, maintenance and repair of the Common Areas." "Lessee's proportionate share" is defined as "the percentage determined by dividing the total square feet of rentable area in the Building (12,840 square feet) into the square feet of rented area in the Premises (5897 square feet), or 45.93 percent." After the lease was executed, SCS added a second 7,828 square foot building. Without notice to West Side Kids, SCS began to calculate "Lessee's proportionate share" by using the total square footage for both buildings rather than the square footage for the building specified in the lease. This new formula resulted in increases to West Side Kids' CAM fees.

The district court found that SCS "clearly violated the terms of the lease" by changing the formula. Using an exhibit offered by Cindy Vokes, the court recalculated the CAM fees and determined West Side Kids overpaid $20,277.32 for 2007 through 2010.[5]

On appeal, SCS (1) contends the lease allowed it to incorporate the square footage of the second building, (2) disagrees with the district court's method of recalculating the CAM fees, and (3) argues its method of calculating the proportionate share of the additional rent "is more in line with assessing a 'proportionate share' than West Side Kids' method."

The lease is unambiguous; it specifies the "total square feet of rentable area in the Building," and the "square feet of rented area in the Premises." It makes no mention of a second building and it was never amended to add the square footage of the second building, once that building was constructed. As for the recalculation formula adopted by the district court, Vokes furnished a detailed summary of what she was assessed, what she should have been assessed, the difference, and the amount of her overpayment. That summary was prepared using documents furnished by SCS. While SCS quibbles with the formula Vokes used to back out expenses associated with the second building, the district court acted well within its purview in choosing to accept her method of dividing the expenses over SCS's formula.

[5] The district court also assessed overpayments of $3386.25 for 2005 and $3473.50 for 2006. SCS's accountant admitted to these overpayments but contended they could be used to offset an underpayment in 2007. The district court declined to credit these overpayments against a claimed underpayment in 2007, finding no such underpayment. This finding is supported by substantial evidence.

The district did not err in concluding that SCS breached the lease by revising the CAM fee formula and in assessing damages against SCS for CAM fee overpayments resulting from that revision.

E. Attorney Fees

The lease authorizes the lessor to recover "reasonable attorney fees and expenses" incurred by SCS in the event of "any breach or default by Lessee in Lessee's obligations." The district court concluded that, after the offset of West Side Kids' damages against SCS's damages, SCS was "not entitled to a judgment, and, therefore, attorney fees should not be allowed."

On appeal, SCS does not take issue with the court's offset of the damage award prior to consideration of the attorney fee question. It simply argues "several of the District Court's legal conclusions were erroneous" and "if this Court reverses the District Court's decision and mandates judgment in favor of SCS, then SCS should be awarded reasonable attorney fees."

Our reversal of the district court's conclusion on "trade fixtures" still leaves a judgment in favor of West Side Kids, albeit in a reduced amount. Accordingly, we decline SCS's attorney-fee request.

II. West Side Kids' Cross-Appeal

West Side Kids appeals the district court's (A) assessment of damages for the condition of the carpet inside the daycare center and (B) assessment of damages for June 2010 rent and late fees.

A. Carpet

At trial, SCS contended West Side Kids damaged the carpet in the day care center beyond reasonable wear and tear. The district court essentially

agreed, concluding that the carpet was "most likely damaged beyond normal wear and tear as a result of Defendant's moving out of the premises based upon Vokes understanding, whether justified or not, that it was going to be replaced regardless of its condition." The court accepted SCS's credit card statement of $7821.92 as the cost of replacing the carpet in three of the five rooms of the day care center.

On appeal, West Side Kids takes issue with the court's finding concerning wear and tear and SCS's failure to furnish the invoice reflecting the carpet replacement costs. Jones, her accountant, and a new tenant testified to the condition of the carpet, and Jones explained the basis for the credit card charge. That testimony amounts to substantial evidence in support of the district court's findings.

B. June 2010 Rent and Late Fees

West Side Kids vacated the premises at the end of June 2010. Vokes asked SCS to retain its security deposit (equal to one month base rent) in lieu of a base rent payment for the final month of its lease.[6] SCS retained the security deposit, but not in lieu of June 2010 rent. The district court assessed the base rent of $5405 as damages and added late fees of $5679.02.

On appeal, West Side Kids contends a reversal on the carpet issue would have left enough of the security deposit money to cover most of the June 2010 unpaid rent, requiring a reduction of SCS's damage award. Because we have not reversed the award of damages on the carpet, we decline West Side Kids' invitation to reduce these rent and late fee damages.

[6] West Side Kids paid the CAM fees for June 2010.

III. Disposition

We affirm in part and reverse in part on SCS's appeal. We remand for entry of a revised judgment of $5491.45 in favor of West Side Kids. We affirm on West Side Kids' cross-appeal. Costs are taxed equally to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ENTRY OF REVISED JUDGMENT ON APPEAL; AFFIRMED ON CROSS-APPEAL.